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The Federal Trade Commission's controversial complaint against Intel Corporation contains much that will keep antitrust experts busy litigating, writing law review articles, and conducting conferences for many years to come. Beyond the fine points of antitrust law, however, the FTC's action has three important aspects that will likely have equally significant implications for consumer protection law and which may affect any business subject to the FTC's broad jurisdiction over commercial conduct. The FTC's expansive interpretation of Section 5 of the FTC Act coupled with the proposed strengthening of the FTC's remedial authority currently pending in Congress; the corrective advertising remedy it appears to seek; and the truncated process it followed in bringing the complaint all signal extraordinary changes in the FTC's approach that may have far-reaching effects for American business. The *Washington Post* neatly summarized these concerns in a recent editorial that observed "the agency's actions are aggressive and potentially worrisome" and its proposed remedies are "disconcertingly intrusive."²

The joint statement by FTC Chairman Jon Leibowitz and Commissioner Thomas Rosch that accompanied the agency's complaint against Intel makes much of the fact that even though the courts have rejected under antitrust law the types of claims that the Commission is pursuing against the company, the FTC can proceed under its broader Section 5 authority to reach conduct that the antitrust laws cannot. They assert that, in giving the FTC broad authority over unfair methods of competition and unfair or deceptive acts or practices, Congress "balanced that broad authority by limiting the remedies available to the Commission."

What the joint statement fails to mention is that the FTC is busy trying to remove limits on its remedial powers through legislation in Congress, legislation that has already passed the House of Representatives. That legislation, the Consumer Financial Protection Agency Act of 2009 ("CFPA Act"),³ would greatly expand the FTC's ability to undertake enforcement action and impose civil penalties in competition and consumer protection matters, except where the FTC's authority is specifically limited, such as the common carrier exemption (another limitation that the FTC has repeatedly asked Congress to repeal).

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² Editorial, *Competition Cops: The Federal Trade Commission Targets Intel*, WASH. POST at A22 (Dec. 27, 2009).

³ On December 11, 2009, the House of Representatives passed H.R. 4173, which included the Consumer Financial Protection Agency Act of 2009 provisions. The U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, and Insurance held hearings in February and March 2010 on whether to grant the FTC these expanded powers.

Currently, the FTC may only bring civil penalty actions for violations of promulgated rules or adjudicated orders in its competition and consumer protection enforcement activities. This means the Commission first has to provide clear guidance to business about what it considers a transgression before it imposes any penalties. The changes contained in the CFPA Act, however, would allow the FTC to penalize business activities without first clearly defining through an administrative adjudication or a rulemaking what conduct violates the FTC Act's broad prohibitions.

Notably, in testimony on the CFPA Act, FTC Commissioner (and recent Chairman) William Kovacic objected to this expansion of the Commission's power on the ground that the Commission's authority is uniquely broad in the types of conduct and industries it covers.⁴In his view, the Commission's currently limited authority and its more deliberative process for developing new legal doctrine are better suited to the FTC's broad statute. Unfortunately, Commissioner Kovacic is recused in the Intel matter so we do not have the benefit of his views on how the Commission's assertion of expansive authority in the Intel complaint, purportedly based on its limited remedies, comports with the FTC's push for even greater remedial power through the CFPA Act.

The joint statement of Chairman Leibowitz and Commissioner Rosch also asserts that courts have limited the reach of the antitrust laws because of concerns about treble damage awards, among other things. Because the FTC has limited remedial authority and private plaintiffs cannot seek treble damages under Section 5, the argument goes, the Commission should have greater latitude in prohibiting anticompetitive conduct than the courts have previously allowed.

It is certainly true that the FTC's authority to obtain monetary remedies is currently limited to some degree, but the Commission can obtain disgorgement of profits in unfair competition cases and monetary redress or restitution in consumer protection cases. Also, although the CFPA Act would give the Commission civil penalty authority, it does preserve the statutory per violation limit on such penalties, which is currently pegged at \$16,000 for violations of Section 5 of the FTC Act. This limit would be illusory, however, because, as any lawyer ever involved in an FTC consumer protection enforcement action knows, the FTC may deem each individual transaction or false statement a separate violation. Civil penalties would not be limited solely to consumer protection cases either; the FTC can and has included allegations of unfair and deceptive conduct in antitrust cases, the Intel complaint being the most recent example. Thus, multiplying by \$16,000 a company's statements to individual customers, general advertisements, or business dealings over the course of several years could yield huge civil penalties. It is therefore questionable how limited the remedies available to the Commission are and will remain.

Remedies also underlie another aggressive stance by the FTC in the Intel complaint, one that has so far escaped many commentators' attention. In the enumeration of contemplated

⁴ See Prepared Statement of the FTC on Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission (July 8, 2009) before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, at 11, *available at* <http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf>. Commissioner Kovacic recently repeated these concerns. See Statement of FTC Commissioner William E. Kovacic before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance (Mar. 17, 2010).

relief, the FTC's complaint seeks to require Intel to correct the deceptive or misleading statements and omissions it has made in the past, in addition to requiring Intel to stop making deceptive or misleading statements or omissions in the future, which suggests that the FTC may be seeking corrective advertising. Requiring a company to engage in corrective advertising is a burdensome remedy that the Commission has previously used sparingly and in unique circumstances, circumstances that are not present in the Intel matter.

The Commission has held that corrective advertising is an appropriate remedy only if the challenged representations have substantially created or reinforced a false belief and the false belief is likely to linger into the future.⁵As former FTC Chairman Robert Pitofsky has stated, to support a corrective advertising remedy, the false belief created by the representations must be likely to continue to influence purchasing decisions for a substantial segment of potential purchasers even after the allegedly false statements are no longer disseminated.⁶Accordingly, the FTC has used corrective advertising only when there has been a long-term public advertising campaign (close to 100 years in the *Listerine* case and, in the *Doan's Pills* case, a focused eight-year advertising campaign) that used deceptive or misleading statements to sell products to the general population.

The Intel matter has several important differences from the circumstances surrounding previous cases with corrective advertising remedies. First, there is no allegation in the FTC complaint that Intel's alleged misrepresentations were an integral part of a long-term public advertising campaign directed to the general population whose effects will linger and influence purchasers long after the allegedly misleading statements and omissions cease. Second, it appears that the Intel statements challenged by the FTC were primarily made to original equipment manufacturers and other knowledgeable members of the computer industry, not to the general public. As the FTC's own deception policy statement says, when representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group.⁷

To support a corrective advertising remedy against Intel, therefore, the FTC would have to demonstrate that Intel's misrepresentations were so effective that their effects will continue to influence the decisions of knowledgeable members of the computer industry for years to come, even after the alleged misrepresentations cease. The weak allegations in the complaint seem unlikely to support such a strong remedy.⁸

Finally, the FTC's process in bringing the complaint against Intel raises serious questions of procedural fairness. Sources say that Intel received its first subpoena requesting information about graphics processing units ("GPUs") on December 8, 2009, a mere eight days before the FTC filed the complaint alleging that Intel's conduct was designed to create a monopoly in GPUs. It is extremely troubling that the FTC did not even wait to get Intel's response with key

⁵ See *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

⁶ See R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 697 (1977).

⁷ Deception Policy Statement, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

⁸ My focus on corrective advertising is not meant to suggest that I believe the other proposed remedies are not problematic. Indeed, these "intrusive" remedies include controlling what Intel may charge for its chips, oversight of Intel's product design to ensure compatibility with competitors' products, and requirements that Intel share intellectual property under terms set by the FTC.

factual information before charging the company with serious antitrust violations in the GPU market.

As Christine Varney, Assistant Attorney General for the Antitrust Division of the Department of Justice, stated in a recent speech: “The ability to present one’s case and have a fair hearing *before* the decision to bring an action ensures that the government decision maker knows all the arguments against action, while simultaneously providing the party with the confidence that all relevant arguments have been considered.”⁹ Unfortunately, Intel can enjoy no such confidence in the FTC case. Here, the Commission rushed to vote out the complaint before Intel could fully present all relevant arguments about its conduct regarding GPUs. This unnecessary haste undermines any confidence that government decision makers considered “all the arguments against action” *before* the agency brought its complaint.

These three aspects of the FTC’s complaint against Intel raise serious concerns about the agency’s highly aggressive posture in any future competition or consumer protection enforcement action. Under this new approach to Section 5, the Commission would have the power to sock business with expansive remedies for conduct that the courts have been reluctant to declare violations of the law and for which even the FTC itself has not clearly delineated the boundaries of legality. Combined with the Commission’s bid to enlarge its enforcement and remedial powers and its failure to ensure procedural fairness, the Intel complaint paints a picture of an agency anxious to expand its power and tighten its grip over American business.

⁹ Christine Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Procedural Fairness, Speech before the 13th Annual Competition Conference of the International Bar Association (Sept. 12, 2009), available at <http://www.justice.gov/atr/public/speeches/249974.htm> (emphasis added).