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FTC Redefines "Unfair Methods of Competition" Under Section 5 of the FTC Act

New Policy Statement Condemns all "Facially Unfair" Anticompetitive Behavior

On November 10, 2022, the Federal Trade Commission, by a 3-to-1 vote, issued a new "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (the "Policy Statement") (available here). The Policy Statement replaces the previous 2015 statement on unfair methods of competition under Section 5 of the FTC Act, which was rescinded in 2021.

Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" and directs and empowers the FTC to "prevent persons, partnerships, or corporations, except banks [and certain other entities] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[1] The FTC has had the authority to enforce Section 5 since it was created by Congress in 1914. Although the antitrust provision in Section 5 has long been viewed as prohibiting some conduct that is not also prohibited by the Sherman Act or other antitrust laws,[2] its precise parameters are uncertain.

The FTC had previously articulated a fairly limited conception of Section 5 in its 2015 policy statement, invoking "the promotion of consumer welfare" and other recognized standards under the antitrust laws, and suggesting that it would be reluctant to rely on its powers under Section 5 if "enforcement of the Sherman or Clayton Act is sufficient."

The current Policy Statement is a potentially significant departure from the FTC's prior practice and reflects the FTC's expanded view of its statutory mandate and scope of authority under Chair Khan's leadership, signaling that a wider range of conduct may now be at risk of FTC scrutiny. Although the Policy Statement provides a "non-exclusive set of examples of conduct" to illustrate the FTC's new conception of its Section

5 enforcement authority, the precise parameters of potential liability are uncertain under the new guidance, and, according to Commissioner Wilson's dissent (the "Dissent"), is susceptible to being interpreted as an "I know it when I see it approach" subject to the political whims of the sitting Commissioners.[3] The ultimate impact of the Policy Statement, however, remains hypothetical, and will depend upon the cases that the FTC ultimately brings and the traction the FTC can get in federal court.

Section 5 as the FTC Catch-All Enforcement Provision. According to the Policy Statement, the FTC may now use Section 5 to fill what it views as "gap[s]" in the antitrust laws when the FTC cannot otherwise make a case under the antitrust laws. For example, if the FTC reviews a merger or opens a civil non-merger investigation, it could invoke Section 5 in place of either the Clayton or the Sherman Act. Similarly, the Policy Statement points to "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act" as "[c]onduct that violates the spirit of the antitrust laws" subject to potential enforcement under Section 5.[4] Section 8 of the Clayton Act prohibits a person from simultaneously serving as an officer or on the boards of directors of competing corporations, with limited exceptions.[5] The DOJ has announced that it is conducting a review of potentially unlawful interlocking directorates, and the Policy Statement may signal that the FTC intends to focus on interlocking directorates that may not be technically covered by Section 8 (such as an interlock between a corporation and a competing LLC).

The FTC Is Moving Away from the Existing Analytical Framework. In defining unfair methods of competition, the Policy Statement clarifies that unfairness under Section 5 is not limited to traditional concepts of illegal conduct under the antitrust laws, explaining instead that the "standard of 'unfairness' under the FTC Act" also "encompasses…practices that the Commission determines are against public policy for other reasons." The Policy Statement then explains that a violation of Section 5 requires conduct that (1) involves a "method of competition," meaning conduct "undertaken by an actor in the marketplace" that "implicates competition," whether directly or indirectly, and (2) is "unfair," meaning the conduct "goes beyond competition on the merits." Conduct may go "beyond competition on the merits" when it (a) involves a misuse of economic power or is exclusionary or restrictive and (b) adversely affects "competitive conditions," such as, for example, reducing competition, limiting choice, or otherwise harming consumers. The Policy Statement adds that these two principles of unfairness will be assessed on a "sliding scale." Conduct that is "facially unfair" will be deemed illegal, as will conduct that, even if not "facially unfair," may "negatively affect competitive conditions."

It has long been axiomatic that the antitrust laws were enacted for "the protection of competition not competitors,"[6] but the Policy Statement appears to put greater emphasis on harm to competition instead of a traditional consumer welfare standard. Furthermore, the FTC has explicitly signaled that when evaluating whether conduct is unfair, it "will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act,"[7] potentially lowering the bar for what the FTC must allege to prove a violation. In addition, the FTC's expanded view of Section 5 liability has the potential to influence state unfair competition statutes

over the longer term. The FTC pointed to the lack of a "private right of action under Section 5" as an illustration of congressional balance against the "broader range of anticompetitive conduct" prohibited by Section 5.[8] But some similar state laws already provide a private right of action, creating a potential path for private plaintiffs to invoke the FTC's new standards.

Examples of Violations of the Letter and Spirit of the Antitrust Laws. In an effort to allay due process concerns, the Policy Statement lists examples of conduct that constitutes an incipient violation or violates the "spirit" of the antitrust laws, *i.e.*, conduct that "tends to cause potential harm similar to an antitrust violation" but may not be explicitly prohibited:

- Mergers or other combinations "that have the tendency to ripen into violations of the antitrust laws";
- A series of mergers or other combinations "that tend to bring about" anticompetitive harms "but individually may not have violated the antitrust laws";
- Mergers with nascent competitors that "may tend to lessen current or future competition";
- Conduct that, in the aggregate, "may tend to undermine competitive conditions in the market";
- "[D]e facto tying, bundling, exclusive dealing, or loyalty rebates" that leverage market power in one market "to entrench that power or impede competition in the same or a related market";
- Leveraging market power in one market to achieve a competitive advantage in another market, such as "utilizing technological incompatibilities to negatively impact competition in adjacent markets";
- "Interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act"; and
- "[F]alse or deceptive advertising or marketing" that tends to create or maintain market power.

Importantly, the Policy Statement implies that whether courts have previously rejected some of these theories of liability is irrelevant because those actions were brought under the antitrust laws, not Section 5.[9]

Observations. The Policy Statement marks a potentially significant reinterpretation of how the FTC defines its role and congressional mandate. There is a possibility that, if used as a basis for expanded enforcement, the Policy Statement will be subject to legal challenges, such as for lack of due process, because this Policy Statement was not subject to public comment, represents a substantial departure from prior practice, and may not sufficiently put corporations and individuals on notice as to what conduct could be prohibited under this new approach to Section 5.[10] But the uncertainty as to how successful the FTC may be in enforcing its new standards reinforces the need for companies to ensure that their employees participate in regular trainings on antitrust enforcement and understand the importance of developing and implementing rigorous compliance tools. In the case of mergers, companies on both sides of the transaction should carefully consider and consult with counsel about whether the transaction could result in the FTC's use of Section 5 as a tool in its review.

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ENDNOTES

[1] FTC Act § 5, 15 U.S.C.A. § 45(a)(1)-(2).

[2] *See Fed. Trade Comm'n* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws."); *Fed. Trade Comm'n* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (holding that "unfair competitive practices" were not limited to those within the ambit of the antitrust laws).

[3] Dissenting Statement of Commissioner Christine S. Wilson, *Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the [FTC] Act,"* Comm. File No. P221202 (Nov. 10, 2022) (available here) at 5-9.

[4] Policy Statement at 13-14.

[5] *See* Sullivan & Cromwell LLP, *Section 8 of the Clayton Antitrust Act: Illegal Interlocking Directorates*, Oct. 28, 2022, https://www.sullcrom.com/section-8-of-the-clayton-antitrust-act-illegal-interlocking-directorates.

[6] *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, 319 (1962).

[7] Policy Statement at 10.

[8] Policy Statement at 5.

[9] Policy Statement at 13.

[10] Dissent at 3-4.

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