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FTC Issues New Section 5 Policy Statement Previewing Increased Enforcement Intent

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Key Takeaways

- On November 10, 2022, a divided Federal Trade Commission (FTC or Commission) issued a Policy Statement addressing what it believes to be its authority under Section 5 of the FTC Act, and outlining its intentions for enforcing its "unfair methods of competition" (UMC) authority. Commissioner Wilson (Republican appointee) issued a pointed dissenting statement.
- The Policy Statement does not have any inherent legal force, but rather is a statement of the FTC's enforcement intentions.
- As such, it portends an expansion of the FTC's use of Section 5 to investigate conduct and to file lawsuits, particularly where the FTC believes consumers may be harmed but it is unable to meet the requirements of other antitrust laws.
- The near-term impact will likely be limited to the opening and prolonging of investigations that might otherwise have been declined or closed faster, and to a finite number of "test" cases, particularly where the conduct otherwise does not amount to an antitrust violation.
- Longer-term, the FTC will likely face significant challenges in convincing the courts to adopt its agenda.

Introduction

To date, the Commission has primarily used Section 5's UMC authority to challenge conduct that also violates other antitrust laws, including the Sherman, Clayton and Robinson Patman Acts. "Standalone" UMC cases — meaning cases challenging conduct that does not meet the standards applicable to other antitrust laws — have

been rare. This has resulted in a relative lack of case law or other precedent defining the outer bounds of the FTC's UMC authority.

The latest guidance builds on an unusual prior track record of Commission Policy Statements in this area. The Obama Commission first issued a Policy Statement of Enforcement Principles in 2015. This guidance remained on the books during the Trump Administration, but was withdrawn by the Biden Commission in 2021, because, in the current Commission's view, it "contravene[d] the text, structure, and history of Section 5."[1]

2022 Section 5 Policy Statement

The newly issued 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition asserts "that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions."[2]

The Policy Statement provides two criteria for evaluating whether a firm's conduct constitutes an unfair method of competition: (1) **indicia of unfairness**, such as conduct that is "coercive, exploitive, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature;"[3] and (2) **conduct that *tends* to negatively affect competitive conditions**, e.g., to tend to "foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."[4]

The FTC will weigh these two criteria on a **sliding scale**, e.g., if indicia of unfairness are "clear," the Policy Statement suggests less may be necessary to show a tendency to negatively affect competitive conditions.[5] Importantly, the size and power of the respondent and the current and potential future effects of the conduct may — or may not — be relevant. Indeed, the Policy Statement indicates that, to establish a violation of Section 5, the FTC believes it is not required to demonstrate (or quantify) actual harm. Instead, it contends that it must show only that the conduct has a ***tendency*** to harm competitive conditions.

The Statement further states that respondents may assert affirmative defenses, but establishes a bar that may prove insurmountable. The Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis"[6] and "the more facially unfair or injurious the harm, the less likely it is to be overcome by" any justifications.[7] The Statement requires that justifications result in benefits in the same market where

the harm occurs and be narrowly tailored to limit any impact on competitive conditions. Moreover, the Statement places the burden on respondents to demonstrate both that the asserted benefits outweigh the harm (notwithstanding the FTC position that it has no burden to quantify harm in its *prima facie* case) and that courts have recognized the asserted benefits as cognizable in standalone Section 5 cases. This latter requirement is likely to prove particularly troublesome, as so little Section 5 case law exists.

The Policy Statement provides a non-exhaustive laundry list of examples drawn from (often very old) past decisions and consent decrees based in whole or in part on Section 5, focusing on incipient violations of the antitrust laws or violations of the spirit of those laws, including:[8]

1. individual mergers, acquisitions or joint ventures that have the **tendency to ripen into violations** of the antitrust laws;
2. a **series of mergers, acquisitions or joint ventures** that tend to bring about harms that the antitrust laws were designed to prevent, even if individual transactions were not unlawful;
3. mergers or acquisitions of a **potential or nascent competitor** that may tend to lessen current or future competition;
4. interlocking directors and officers of competing firms **not covered by the *literal* language of the Clayton Act**;
5. **invitations** to collude;
6. practices that facilitate **tacit collusion**;
7. **parallel exclusionary conduct** that may cause aggregate harm;
8. conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market;
9. **fraudulent and inequitable** practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications;
10. **price discrimination** claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act;
11. de facto **tying, bundling, exclusive dealing or loyalty rebates** that use market power in one market to entrench that power or impede competition in the same or a related market, or that otherwise have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry;

12. **leveraging market power** to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets;
13. conduct resulting in **direct evidence of harm**, or likely harm to competition, ***not*** relying upon market definition;
14. **commercial bribery and corporate espionage** that tends to create or maintain market power;
15. **false or deceptive advertising or marketing** which tends to create or maintain market power; and
16. **discriminatory refusals to deal** which tend to create or maintain market power.

Commissioner Wilson's Dissent

Commissioner Wilson — the Commission's lone current Republican member — issued a pointed dissenting statement that, at 20 pages, exceeds the length of the 16-page Policy Statement. This Dissent underscores the absence of bipartisan consensus with regard to the Statement and will undoubtedly play a role in the weight or deference courts ultimately give to the Policy Statement.

Commissioner Wilson's overall views can be summarized in these passages: "Unfortunately, instead of providing meaningful guidance to businesses, the Policy Statement announces that the Commission has the **authority summarily to condemn *essentially any business conduct* it finds distasteful**. . . . . [It] rejects longstanding antitrust policies and legal precedent, instead embracing an unstructured **"I Know It When I See It"** approach . . . premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning."[9]

The Statement's Impact

The Statement signals that the current Commission intends to expand its use of Section 5 to investigate conduct and to file lawsuits.

That said, the Commission faces substantial hurdles to successfully prosecute cases based on the standards espoused in the Statement. Critically, **the Policy Statement does not have any inherent legal force**. Neither the FTC administrative courts nor federal courts are obligated to give the Policy Statement any deference. Rather, the

courts will continue to rely on the statutes, precedent and legislative history — none of which, the Dissent argues, support a dramatic expansion of Section 5 liability. And the issuance, withdrawal and reissuance of multiple Section 5 Policy Statements in relatively short succession will likely cut against courts giving weight to the Statement.

We expect any change to come slowly and incrementally, with most changes initially observed in a **marginal increase in the number of investigations opened and in the average length of investigations**. But the FTC will likely want to make its first standalone Section 5 "test" cases as strong as possible to increase the likelihood that the courts — both an FTC administrative court and a federal court hearing an appeal from the administrative court — will adopt the FTC's positions. Parties are likely to see the Commission making use of the Policy Statement as another tool in its arsenal to extract further remedies or to encourage parties to abandon more deals. But with the influence of the Policy Statement in federal court very much uncertain, it will likely be years before any meaningful clarity as to its importance emerges.

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1. July 1, 2021 Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 1. ↩

2. November 10, 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, at 1. ↩

3. *Id.* at 9. ↩

4. *Id.* at 9-10. ↩

5. *Id.* ↩

6. *Id.* at 11. ↩

7. *Id.* (citing to FOGA, 312 U.S. at 467-68). ↩

8. The entire list can be found between pages 12 and 16 of the November 10, 2022 Policy Statement. ↩

9. November 10, 2022 Dissenting Statement of Commissioner Christine S. Wilson at 1-2. ↩

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- 09 November 2022 Press Release Kirkland Advises Providence Equity Partners on Investment in A2MAC1
- 04 November 2022 Press Release Kirkland Represents Sycamore Partners on Acquisition of Canadian Retail Business of Lowe's Companies, Inc.

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