

NEW FTC SECTION 5 POLICY STATEMENT TARGETING UNFAIR METHODS OF COMPETITION RELATED TO MERGERS AND CONDUCT SIGNALS SIGNIFICANT POLICY CHANGE

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On November 10, the Federal Trade Commission (“FTC”), making a significant departure from prior practice, issued a new policy statement¹ (the “2022 Statement”) expanding the scope of the types of conduct that will be subject to enforcement as “unfair methods of competition” under Section 5 of the FTC Act. Historically, the FTC has enforced Section 5 within the standards applied to other antitrust statutes—namely, the rule of reason analysis used to analyze violations of the Sherman and Clayton Acts—a practice that was memorialized in a 2015 policy statement. The 2015 policy statement was rescinded by the FTC in July 2021. In the press release announcing the release of the 2022 Statement, Chair Khan stated that the “policy statement reactivates Section 5 and puts us on track to faithfully enforce the law as Congress designed.”²

The 2022 Statement takes the position that Section 5 “reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.” The 2022 Statement also identifies guidelines and principles describing the kinds of conduct that will now be subject to enforcement under Section 5—and these guidelines and principles reflect that the FTC may now seek to limit a wide range of activities not previously subject to enforcement.

For example, the 2022 Statement indicates that the FTC might seek to punish pricing practices that the FTC deems “unfair” even if there is no showing that the pricing practices result in harm to competition or the competitive process. The 2022 Statement also specifically highlights (1) successive acquisitions that pose no problems individually but could be deemed “unfair” in the aggregate and (2) acquisitions of nascent competitors that could “tend” to lessen current or future competition as practices that could potentially be the subject of enforcement under Section 5. Both kinds of acquisitions have been the topic of many recent agency statements, including in statements condemning private equity “roll-ups” and “Big Tech” acquisitions of smaller startups.

In addition to being a major policy shift, this approach to Section 5 enforcement is inconsistent with how the FTC and courts have historically interpreted Section 5. As such policy statements are not legally binding, however, it remains to be seen whether and to what extent any of the guidance provided in the 2022 Statement will be accepted by the courts. The 2022 Statement is in line with the Biden Administration's broader push to expand antitrust enforcement and invoke a "whole-of-government" approach in doing so.

In a joint statement, Chair Khan and her democratic colleagues stated that the 2022 Statement is intended to reinvigorate the FTC's authority under the statute that has laid "dormant" in recent decades. In her dissent, Commissioner Wilson noted that it instead gives the FTC essentially limitless ability "to condemn [as anticompetitive] any business conduct it finds distasteful."

Prior Enforcement of FTC Act Section 5

Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce," and the FTC alone is authorized to enforce its terms.³ Historically, with one notable exception, both courts and the FTC generally read this prohibition as being coterminous with the prohibitions contained in Sections 1 and 2 of the Sherman Act, which prohibit unreasonable restraints of trade and monopolistic conduct, respectively. The one recognized exception was that Section 5 also prohibited "invitations to collude." Because they comprise unilateral conduct rather than "agreements," "invitations to collude" are not subject to Section 1 of the Sherman Act (though they can be found to violate Sherman Act Section 2 as a form of attempted monopolization). Cases brought by the FTC regarding invitations to collude under Section 5 generally have involved unilateral invitations to fix prices, divide markets, or cease soliciting competitors' customers, even if the invitation was not accepted.⁴

Aside from invitations to collude, courts and the FTC have focused on cases where the conduct in ques-

tion also violated the Sherman Act.⁵ In these cases, courts evaluated whether the unfair method of competition violated Section 5 by applying an analysis similar to the "rule of reason" approach applied in most Sherman Act Section 1 cases, which requires identifying the harm, or likely harm, to competition while balancing cognizable efficiencies and business justifications.

As noted above, this interpretation of the appropriate scope of Section 5 was endorsed in a 2015 FTC policy statement that was subsequently rescinded in 2021.

Future Enforcement of FTC Act Section 5

In the 2022 Statement, the FTC has stated its intent to prosecute a wider range of conduct, outlining two general principles to determine whether conduct is an unfair method of competition under Section 5.

1. The conduct must be a method of competition, *i.e.*, conduct undertaken by an actor in the marketplace—as opposed to merely an existing market condition, such as high concentration or barriers to entry. The 2022 Statement gives as an example the misuse of regulatory processes that can create or exploit barriers to competition, such as licensing, patents, or standard setting.⁶
2. The conduct must be unfair, *i.e.*, goes beyond competition on the merits, such as offering superior products or services, investment in research and development that leads to innovation, or attracting employees through better employment terms. The FTC will determine unfairness by weighing two principles on a sliding scale:
 - i. **Is the conduct "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature"?** While certain of these terms—such as "abusive," "collusive," and "predatory"—are used by courts in Sherman Act cases, others of these are not. Thus,

terms such as “exploitative” and “deceptive” have historically not been used in the antitrust context, signaling the FTC’s intent to capture broader categories of conduct than those traditionally thought to be subject to the antitrust laws.

- ii. **Does the conduct “negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants”?** The 2022 Statement notes that the conduct needs only to have a “tendency to generate negative consequences,” rather than to cause actual harm, given Section 5’s focus on “incipient threats to competitive conditions.” The 2022 Statement frames harm in concepts like higher prices; reduced output, choice, or innovation; lower quality; impairing other market participants; or reducing the likelihood of potential or nascent competition.

Notably, according to the 2022 Statement, demonstrating a negative effect on competitive conditions does not require a separate showing of market power or market definition. Conduct may instead be evaluated in the aggregate with other actors engaging in similar conduct or as part of the cumulative effect of a variety of practices by a given actor. The 2022 Statement explicitly notes that determination of negative effect will not focus on the traditional rule of reason inquiries, “but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.”

The 2022 Statement goes on to state that parties may assert—and the FTC may consider—cognizable justifications for conduct satisfying the conditions above. To be credited, the justification must be legally cognizable, non-pretextual, narrowly tailored to limit any harm to competition, and the benefits must occur in the same market as the alleged harm. The 2022 Statement provides no details on how these justifications will be applied in any given case, but notes that a net efficiencies

test or numerical cost-benefit analysis will not be applied.

The 2022 Statement also provides a non-exhaustive list of activities—both merger- and conduct-related—that are indicative of the types of conduct that could now be subject to enforcement under Section 5. As noted above, serial acquisitions and acquisitions of nascent competitors are specifically called out. Additionally, the list includes other vaguely worded “catchall” provisions designed to allow for maximum discretion—see, for example, “conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market.”

Examples of conduct that could be subject to enforcement under Section 5 include:

Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act. This is consistent with past practice, particularly in cases since the 1980s.

Conduct deemed to be an incipient violation of the antitrust laws. Notably, violations may occur where the respondent does not have market or monopoly power. Examples include:

Merger-related

- mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws; and
- a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws.

Conduct-related

- invitations to collude; and
- loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to

ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.

Conduct that violates the spirit of the antitrust laws. This conduct may cause harm similar to a violation of other antitrust laws, but may or may not be covered by the literal language of these laws or may fall into a "gap" in these laws. Examples include:

Merger-related

- a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws⁷;
- mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition; and
- interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act.⁸

Conduct-related

- practices that facilitate tacit coordination;
- parallel exclusionary conduct that may cause aggregate harm;
- conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market;
- fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications;
- price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act;

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

The non-exhaustive list above is wide-ranging, and often vague, highlighting the broad discretion the FTC intends to assert when determining if conduct has violated Section 5.

Conclusion

The 2022 Statement represents a significant departure from past FTC practice and runs contrary to the narrow interpretation courts have applied over the past 40 years. It does, however, represent one of several steps the FTC has taken as part of the Biden Administration's expanded enforcement agenda. While some of the language used in the 2022 Statement is familiar to antitrust practitioners, the 2022 Statement also describes conduct that has not traditionally been subject to the antitrust laws, and thus signals the FTC's intent to expand its authority to prohibit a wide array of conduct it deems to be unfair. Given the 2022 Statement's often vague guidelines, it injects a significant amount of uncertainty into what kinds of conduct could

be prohibited or where the FTC intends to focus its enforcement efforts in the near term.

Links to the press release and full policy statement are below.

Press Release: <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

Policy Statement: https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

ENDNOTES:

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

² <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

³Procedurally, to enforce Section 5, the FTC may initiate an administrative adjudication before an administrative law judge (“ALJ”) in a trial-type proceeding, file an action directly in federal court, or both. The FTC may exercise its authority both prophylactically (e.g., to enjoin a proposed merger or type of conduct) or retrospectively (e.g., to unwind a consummated merger).

⁴*See, e.g., In the Matter of Valassis Communications, Inc., a corporation*, 2006 WL 1367833 (F.T.C. 2006); *In the Matter of Drug Testing Compliance Group, LLC a corporation.*, 2015 WL 9254822 (F.T.C. 2015).

⁵*See, e.g., Federal Trade Commission v. Motion Picture Advertising Service Co.*, 49 F.T.C. 1730, 344 U.S. 392, 395, 73 S. Ct. 361, 97 L. Ed. 426 (1953)(conduct fell “within the prohibitions of the Sherman Act and is therefore an unfair method of competition within the meaning of s. 5(a)”).

⁶The 2022 Statement acknowledges that violations of generally applicable laws, such as tax laws, that merely confer a cost advantage are unlikely to be considered a method of competition.

⁷The FTC’s recent lawsuit challenging Meta’s (previously Facebook) acquisitions of WhatsApp and Instagram is a standalone Section 5 lawsuit, indicating at least some precedent for the use of Section 5 as a tool to reverse consummated mergers that were origi-

nally cleared but were later deemed to have allegedly harmed competition. *See Federal Trade Commission v. Facebook, Inc.*, 581 F. Supp. 3d 34, 2022-1 Trade Cas. (CCH) ¶ 81937 (D.D.C. 2022).

⁸In recent months, the Department of Justice (“DOJ”) has also announced its intent to increase enforcement of illegal interlocking directorates under the Clayton Act. As part of this initiative, DOJ announced on October 19, 2022 the resignations of seven directors from the boards of directors of multiple corporations. Several other investigations remain ongoing.
