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FTC Meeting Opens the Door to a Period of Greater Uncertainty

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Last week the Federal Trade Commission (FTC or Commission) held its first open Commission meeting in over 20 years. Chair Lina Khan led the meeting and promised future open meetings of the Commission on a "regular" basis. Commissioners Phillips and Wilson, however, expressed concerns with the format, complaining about short notice, failure to circulate final versions of relevant proposals, lack of opportunity to ask questions to staffers, and lack of discussion among commissioners. Commissioner Wilson summarized her concerns as "when we have chaos instead of thoughtful process, it is the American consumer who will suffer."

The FTC voted on four items, two of which will directly affect agency antitrust enforcement. In a 3-2 decision along party lines, the Commission withdrew its 2015 *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (2015 Statement).[1] The FTC issued the 2015 Statement in response to repeated pleas from the legal and business community for greater clarity on the meaning of Section 5's "unfair methods of competition" language. The guidance sought to provide companies the ability to design and implement lawful programs and practices that can often provide benefits to consumers, even though such practices also might have the effect of making it more difficult for other firms to compete. The 2015 Statement announced that in deciding whether to challenge an act or practice under Section 5, the Commission would apply a framework, and the Commission would exercise its "standalone" Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act. For example, it provided that the consumer welfare standard would guide FTC prosecution decisions.

Speaking in favor of withdrawal of the 2015 Statement, Chair Khan described the statement as "doubl[ing] down on the agency's long-standing failure to investigate and pursue unfair methods of competition." According to Chair Khan, the 2015 Statement contravened congressional intent because it made the FTC's broader authority under Section 5 largely coterminous with the Sherman Act and constrains the expert FTC to liability standards made by generalist judges in treble damages cases. Khan went on to say the 2015 Statement largely made standalone Section 5 authority a dead letter because it required the Commission to prove "likely" anticompetitive effects. "Importing the rule of reason's likelihood requirement would prevent the Commission from combatting incipient wrongdoing *before* it becomes likely to harm competition." Although the FTC based its claims against Facebook on Section 2, some commenters have cited the recent dismissal of that complaint as evidence of the too stringent standards employed to antitrust claims by "generalist judges." *See* U.S. District Court Dismisses Government Actions Against Facebook.

The FTC offered no replacement guidance for the withdrawn 2015 Statement, but Chair Khan stated that in the coming months, the Commission will consider whether to issue new guidance or to propose rules regarding

actions that warrant scrutiny under Section 5. Commissioner Wilson spoke against the rescission of the 2015 Statement, noting that it was issued during the Obama administration with broad consensus that reflects judicial precedence and the input of scholars. Commissioner Noah Phillips also opposed the motion, stating that withdrawal of the 2015 Statement could lead to unchecked powers in the FTC.

The FTC also voted 3-2 in favor of seven omnibus resolutions, permitting only a single Commissioner to compel production of documents, information, and testimony in certain investigations. These resolutions will be in effect for 10 years unless rescinded at an earlier date by a future Commission. The resolutions authorize compulsory process in investigations in certain concentrated industries, such as technology platforms, health care, and pharmaceuticals; cases that target workers and operators in small businesses; investigations of infractions of statutes related to COVID-19; investigations of mergers; and greater use of compulsory process when investigating repeat offenders. This last resolution would permit requests from third parties and adjacent acts involving repeat offenders. Commissioners Wilson and Phillips raised concerns that these resolutions would remove oversight and accountability over the FTC in some of the biggest and most expensive investigations.

The tenor of the meeting and the actions taken send a clear message to businesses, particularly those of a significant size. Although it is too early to know exactly how the FTC will apply its enhanced enforcement tools, how broadly it will interpret Section 5's prohibition of unfair methods of competition, or the extent or type of harm, if any, it will deem worthy of challenge, in light of the withdrawal of the consumer welfare standard, there are a number of initial action items companies should consider or for which they should be prepared.

- Compliance programs should be updated to shift focus from only or primarily customers/consumers to include competitors.

- Given calls to abandon proof of a relevant product market, companies that have previously relied on a broad market definition when assessing the lawfulness of their actions should reexamine such actions to determine how their actions have affected their competitors.

- Existing or contemplated discount, rebate, pricing, or other promotional allowance programs that cover 30% or more of the total U.S. market, particularly those that go back to dollar zero, apply retroactively, or allow for the claw back of credits already awarded, should be reassessed.

- Agreements or programs that require or strongly encourage exclusive or bundled purchases should be reviewed.

- Practices or programs that have generated multiple or significant complaints of foreclosure from customers or critical inputs should be examined.

- Agreements or policies affecting employee freedom of movement should be assessed for less restrictive alternatives and focused as narrowly as possible to accomplish procompetitive objectives.

[1] https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

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