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FTC Policy Statement Seeks to Expand US Antitrust Enforcement

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On November 10, the Federal Trade Commission (FTC) issued a "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Policy Statement). The Policy Statement was released more than a year after the FTC withdrew previous guidance issued during the Obama administration in 2015 that sought to align enforcement of the Federal Trade Commission Act (FTCA) with existing enforcement under the Sherman and Clayton Acts.

The Policy Statement was adopted along strict party lines and provides an expansive view of the FTC's "standalone" power under Section 5 of the FTCA to take action against "unfair methods of competition" that are not prohibited by the Sherman Act or Clayton Acts.

Significantly, the FTC will no longer use a rule-of-reason type analysis in Section 5 cases or focus solely on "consumer welfare." The FTC will now also consider the impact on other market actors, such as competitors or employees. While the FTC may issue regulations and bring cases to support its vision of robust Section 5 power, the courts may ultimately limit the FTC's efforts.

FTCA Section 5

Section 5 of the FTCA prohibits "unfair methods of competition." The FTC previously successfully used Section 5 to reach incipient conduct that did not presently harm competition, such as invitations to collude or an early-stage group boycott that had not yet adversely affected competition. However, during the 1980s, U.S. circuit courts in *Official Airline Guides v. FTC*, *Boise Cascade v. FTC* and *E.I. du Pont de Nemours v. FTC* held that the FTC's invocation of broad Section 5 power was improper. In 2015, the FTC issued on a bipartisan basis its now-withdrawn policy statement, which aligned Section 5 with the rule-of-reason framework long used in Sherman Act cases.

The New Policy Statement

The Policy Statement provides the FTC with very broad discretion. It begins by laying out the history of the FTC Act, which the majority three FTC commissioners believe was enacted with a broad mandate.

The Policy Statement sets forth a two-pronged framework: (1) There must be affirmative conduct or a "method of competition," as opposed to merely a structural market condition, (2) that is "beyond competition on the merits," *i.e.,* "coercive, exploitive, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power

of a similar nature," or "otherwise restrictive or exclusionary" that "tend[s] to negatively affect competitive conditions" by "affecting consumers, workers or other market participants."

The two criteria will be weighted using a "sliding-scale" approach. Where "indicia of unfairness" are clear, the FTC will give less consideration to the effect on competitive conditions. The FTC will view procompetitive justifications with skepticism and not credit quantitative tests.

The Policy Statement groups three categories of "unfair methods of competition": (1) conduct that also violates the Sherman or Clayton Acts; (2) incipient violations like invitations to collude or mergers that may "ripen" into adversely affecting the marketplace; and (3) conduct that violates the "spirit of the antitrust laws" but may not technically meet existing statutory language.

The FTC provides examples of Item 3 conduct that courts have previously found lawful under the Sherman and/or Clayton Acts, including:

- "[P]arallel exclusionary conduct that may cause aggregate harm;"
- "[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 laws;"
- "[U]sing 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"; and
- "[I]nterlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."

The Dissent

The lone FTC Republican-appointed commissioner, Christine Wilson, issued a lengthy dissenting statement, criticizing the Policy Statement for abandoning the consumer welfare standard and weighing market impacts in exchange for the "authority summarily to condemn essentially any business conduct it finds distasteful."

Takeaways

The new Policy Statement is a dramatic assertion of regulatory power. The FTC has made clear that Section 5 may be used to expand antitrust enforcement for conduct previously not found anticompetitive by courts. Among other things, we would not be surprised if the following types of commercial conduct may be subject to FTC scrutiny:

- "Roll-up" acquisitions that in isolation would not raise concentration concerns;
- Supply chains — particularly in concentrated industries — that rely on exclusivity, loyalty discounts, rebates, or similar benefits;

- Below-cost pricing absent a threat of recoupment; and

- Exchanges of nonpublic, competitively sensitive information, either algorithmically or through direct exchanges, which may facilitate price coordination or stabilization.

Attorneys in Troutman Pepper's Antitrust Group are available to advise businesses on the effects of this new development on their current policies and practices. Please contact us for more information.

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