

## ANTITRUST TRADE AND PRACTICE

## Expert Analysis

# FTC Defines Its Expanded View of 'Unfair Methods of Competition'

On Nov. 10, 2022, the Federal Trade Commission (FTC) defined how it intends to determine whether particular conduct constitutes an unfair method of competition under Section 5 of the FTC Act. FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) (2022 Statement). And, as expected, in announcing that definition, the 2022 Statement set forth a more aggressive enforcement policy for the FTC under the Biden Administration than the agency's enforcement policy under President Biden's predecessors.

**The Obama Administration's More Restrictive View of 'Unfair Methods of Competition'.** Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce." 15 U.S.C. §45(a)(1). In August 2015, the FTC released a policy statement



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that circumscribed the FTC's definition of the phrase "unfair methods of competition" to render it coextensive with the federal antitrust law. FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) (2015 Statement). In laying out its enforcement guidance, the Obama-era FTC focused on Congress' decision not to define "the specific acts and practices that constitute unfair methods of competition in violation of Section 5" because the "application of the statute would need to evolve with changing markets and business practices." *Id.* Instead, Congress "left the development of Section 5 to the Federal Trade Commission as an expert administrative body, which would apply the statute on a flexible

case-by-case basis, subject to judicial review." *Id.* With that background, the 2015 Statement explained that the FTC would follow the consumer welfare standard, evaluate acts under a "framework similar to the rule of reason," and harmonize Section 5 enforcement authority with the scope of the Sherman and Clayton Acts by providing that the Commission would be less likely to challenge an act or practice on a standalone basis if Sherman or Clayton Act enforcement were sufficient. *Id.*

**The Biden Administration's Rejection of the More Restrictive View.** In July 2021, the Biden Administration rejected the 2015 Statement as too restrictive of the FTC's enforcement authority under Section 5. FTC, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021) (2021 Statement). According to the 2021 Statement, "the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out

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of existence. In [the FTC's] view, the 2015 Statement abrogates the commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute." *Id.* at 1.

By "confining Section 5 to the framework that presently governs the Sherman and Clayton Acts," the 2021 Statement asserted, the 2015 Statement "willfully surrender[ed] the Commission's key institutional advantages as an administrative agency with the power to adjudicate cases, issue rules and industry guidance, and conduct detailed marketplace studies." *Id.* at 5.

The 2021 Statement explained that Section 5 reflects "a clear legislative mandate broader than the Sherman and Clayton Acts." *Id.* at 2. Congress, wrote the FTC, enacted the FTC Act in 1914 "to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust law." *Id.* at 2-3 (citing Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the FTC Act*, 21 B.C. L. Rev. 227, 229-40 (1980)). By proscribing conduct using a new phrase—"unfair methods of competition"—instead of familiar text or interpretations of the Sherman Act, "the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law." *Id.* at 3. The Biden Administration concluded that the legislative debate around the FTC Act, in which lawmakers left it to the Commission to determine which practices constitute "unfair methods

of competition" rather than defining the various prohibited practices, supported a more expansive view of what might be deemed unfair under the statute. *Id.* (citing S. Rep. No. 597, 63rd Cong., 2d Sess., 13 (1914).) The Biden Administration also explained its view that the more limited Section 5 remedies—Section 5 provides no private right of action and cannot be enforced criminally—further distinguishes Section 5 from the Sherman and Clayton Acts.

As a practical matter, the 2021 Statement observed that the more restrictive view espoused by the

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Obama Administration's FTC had led to what the Commission viewed as a lack of Section 5 enforcement. In the five years since it had adopted the 2015 Policy Statement, the agency had pursued just one standalone Section 5 violation. *Id.* at 2.

While the 2021 Statement made it clear that Section 5's "unfair methods of competition" were more expansive than the conduct prohibited by the Sherman and Clayton Acts, it did not specifically explain how the FTC would henceforth determine whether particular conduct constitutes an unfair method of competition. That explanation would have to await this month's issuance of the 2022 Statement.

**The Biden Administration's Redefinition of 'Unfair Methods of Competition'.** To determine whether specific conduct is "unfair," the 2022 Statement explains that the FTC will look at two key criteria, each of which will be weighed on a sliding scale, such that where evidence of one criterion is clear, less evidence of the other criterion will be required. 2022 Statement at 9. First, the FTC will consider whether the conduct tends to be "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature." *Id.* Second, the agency will consider whether the conduct "tend[s] to negatively affect competitive conditions," such as, for example, by "tend[ing] to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice or otherwise harm consumers." *Id.* Because, in the FTC's current view, "the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn on whether the conduct directly caused *actual* harm." *Id.* at 9-10 (footnote omitted; emphasis in original). In a clear rebuff of the 2015 Statement, the 2022 Statement asserts: "Given the distinctive goals of Section 5, the inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions. *Id.* at 10.

In addition, the 2022 Statement casts doubt on certain affirmative defenses to unfair competition, including efficiency justifications. According to the FTC, “it would be contrary to the text, meaning, and case law of Section 5 to justify facially unfair conduct on the grounds that the conduct provides the respondent with some pecuniary benefit.” *Id.* at 11. If the parties assert a justification, “the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis” because “[t]he unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well.” *Id.* Moreover, it “is the party’s burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions.” *Id.* at 11-12.

To illustrate its definition of “unfair methods of competition,” the 2022 Statement provides a “non-exclusive” list of examples of conduct, drawn from past Section 5 decisions and consent decrees, that might violate Section 5. This list includes: (i) acts, such as invitations to collude, that have the tendency to ripen into antitrust violations; (ii) mergers, acquisitions, or joint ventures that similarly have the tendency to ripen into violations

of the antitrust laws; (iii) 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; (iv) loyalty rebates, tying, bundling and exclusive dealing arrangements that could ripen into antitrust violations by virtue of

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industry conditions and the participant’s position within the industry; (v) mergers with, or acquisitions of, a potential or nascent competitor; and (vi) other acts, such as practices that facilitate collusion or parallel exclusionary conduct that may cause aggregate harm, that “violate[] the spirit of the antitrust laws.” *Id.* at 12-16.

The FTC’s broad approach led Commissioner Christine Wilson, the lone Republican, to issue a lengthy dissent. See 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). In the dissent, Commissioner Wilson criticized the FTC’s embracement of

historically rejected theories, scolding the majority for claiming “the authority summarily to condemn essentially any business conduct it finds distasteful.” *Id.* at 2. Commissioner Wilson also expressed concern that rejecting the rule of reason could create an insurmountable standard for any conduct deemed to be “facially unfair.” *Id.* at 5-7. In her view, the majority’s new interpretation amounts to an “I know it when I see it” approach. *Id.* at 17.

## Conclusion

With the 2022 Statement, practitioners now have a somewhat clearer view of how the FTC will determine whether specific conduct is challengeable as an unfair method of competition under Section 5. But the 2022 Statement, standing alone, lacks the force of law and its impact remains to be seen. And, while the statement constitutes the latest in the Biden Administration’s efforts to pursue more aggressive and novel antitrust enforcement, the administration’s antitrust success in court has been mixed. It may be some time, therefore, before practitioners see a noticeable change in the FTC’s Section 5 enforcement.