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## FTC Intends To Expand Scope of Section 5 of the FTC Act

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On November 10, 2022, the Federal Trade Commission (“FTC”) voted 3-1 to issue a new Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (the “2022 Policy Statement”), outlining a far more expansive view of its authority to challenge “unfair methods of competition” under Section 5 of the FTC Act, 15 U.S.C. § 45.<sup>1</sup> Although the 2022 Policy Statement is not law, it sets forth the FTC’s enforcement agenda for Section 5 and provides guidelines on when the FTC will likely investigate and challenge conduct under Section 5, including conduct that would not violate other antitrust laws.

Two key takeaways from the 2022 Policy Statement are:

- The Commission has signaled it will prosecute antitrust matters under Section 5 that may not violate the Sherman or Clayton Acts. The 2022 Policy Statement identifies certain types of behavior the FTC will likely investigate and challenge in the future, including a non-exhaustive list of examples that the Commission contends constitute unfair methods of competition. In addition to conduct that violates other antitrust laws, the Commission identifies conduct that is an “incipient violation of the antitrust laws” and that violates “the spirit of the antitrust laws”.
- The Commission abandoned the “rule of reason” analysis for Section 5 cases and adopted a new two-part “sliding scale” approach focused on “stopping unfair methods of competition in their incipency based on their tendency to harm competitive conditions”.<sup>2</sup>

The FTC will likely begin implementing the 2022 Policy Statement immediately to further its stated agenda to expand antitrust law beyond the consumer welfare standard and reverse the agency’s Chicago School-style enforcement approach. While it remains to be seen exactly how the FTC will invoke its new approach, what is clear is that the 2022 Policy Statement marks a sharp turn away from the agency’s prior position on Section 5. The 2022 Policy Statement reflects the FTC’s aggressive antitrust enforcement agenda under the Biden Administration. Other changes expected in the coming months include the FTC and Department of Justice’s (“DOJ”) revised merger guidelines, which will likely alter the agencies’ approach to reviewing and challenging future transactions.<sup>3</sup>

### FTC ADOPTS NEW UNFAIR METHODS OF COMPETITION STANDARD

The 2022 Policy Statement articulates general principles the agency will use to evaluate unfair methods of competition under Section 5 revoking all prior interpretations of Section 5.<sup>4</sup> These principles assert that Section 5 “reaches beyond the Sherman and Clayton Acts” to capture “unfair conduct that tend[s] to negatively affect competitive conditions”.<sup>5</sup> Based on a review of judicial precedent, legislative history and congressional intent, the FTC argues that (1) Section 5 does not “require a

showing of current anticompetitive harm or anticompetitive intent” but rather can stop anticompetitive conduct in its incipency, and (2) Congress created the FTC “as an expert body charged with elucidating the meaning of Section 5”.<sup>6</sup>

The 2022 Policy Statement outlines conduct the FTC believes constitutes an “unfair method of competition” in violation of Section 5. The challenged conduct must be “unfair”, meaning that it “goes beyond competition on the merits”.<sup>7</sup> Notably, the Commission rejects the traditional rule of reason analysis, including the necessity of proving an antitrust market, market power or anticompetitive effects.<sup>8</sup> The Commission asserts that Section 5 only requires a showing that the conduct has a “tendency to generate negative consequences” like “raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition”.<sup>9,10</sup> These consequences need not arise from the party’s conduct exclusively, but may arise “when the conduct is examined in the aggregate” or “as part of the cumulative effect” of a variety of conduct by the party.<sup>11</sup> The consideration of harm to workers and other market participants signals a distinct shift away from the consumer welfare standard the FTC explicitly adopted in its 2015 Section 5 Policy Statement. The FTC provides two criteria to consider to determine whether conduct is unfair:

1. “The conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory or involve the use of economic power of a similar nature” or it may “be otherwise restrictive or exclusionary, depending on the circumstances”.<sup>12,13</sup> In conducting its analysis, the Commission notes that “[t]he size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct”.<sup>14</sup>
2. The conduct must “tend to negatively affect competitive conditions”, such as conduct that tends to “foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers”.<sup>15</sup>

The FTC explained that these two factors are weighed on a “sliding scale”. If it is deemed that “indicia of unfairness are clear”, less is needed to prove a tendency to negatively affect competitive conditions, and vice versa.<sup>16</sup> In effect, this moves Section 5 closer to a “quick look” or *per se* standard, as “facially unfair” conduct may be deemed illegal without specific consideration of its impact on competition.<sup>17</sup>

While the FTC leaves the door open only slightly for parties to raise affirmative defenses, it notes that the burden will be on the party to show that the asserted benefits are cognizable and outweigh any harm. However, the FTC notes that the “inquiry would not be a net efficiencies test or a numerical cost benefit analysis”.<sup>18</sup> Rather, “the more facially unfair or injurious the harm, the less likely it is to be overcome by” procompetitive justifications.<sup>19</sup>

## FTC EXPANDS SCOPE OF CONDUCT PROHIBITED BY SECTION 5

Prior to the 2022 Policy Statement, the FTC’s recent enforcement actions, settled by consent, suggested that the FTC would pursue stand-alone Section 5 cases in two principal contexts: (1) to challenge incipient collusive behavior, including invitations to collude and signaling;<sup>20</sup> and (2) to challenge conduct related to standard setting.<sup>21</sup> By contrast, the 2022 Policy Statement provides a list of behaviors deemed to violate Section 5, including:

- **Conduct deemed to be an “incipient violation of the antitrust laws”**, *i.e.*, “conduct by respondents who have not gained full-fledged monopoly or market power, or conduct that has the tendency to ripen into violations of the antitrust laws”; including “invitations to collude”, “mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws”, “a series of mergers, acquisitions, or joint ventures that . . . individually may not have violated the antitrust laws”, 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”.<sup>22</sup>
- **Conduct that violates the “spirit of the antitrust laws”**, *i.e.*, “conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a ‘gap’ in those laws”; including “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”, conduct that “use[s] market power in one market to entrench that power or impede competition in the same or a related market” or “to gain a competitive advantage in an adjacent market”, “mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition”, “conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition”, “interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act”, “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”.<sup>23</sup>

We believe the FTC is likely to first apply this new Section 5 standard in areas of current focus, including to challenge acquisitions of nascent or potential competitors, interlocking directorates not covered by the “literal language” of the Clayton Act, tying, bundling or exclusive dealing arrangements and serial mergers and acquisitions. Importantly, the Commission expressly calls out conduct that does not rely upon market definition; we expect that the revised merger guidelines that will be issued in the coming months may also shift away from the focus on market definition and market concentration in the current guidelines.

#### **FTC USE OF RULEMAKING AND CONSENT DECREES TO EXPAND SCOPE OF SECTION 5**

At some point, the FTC’s attempt to expand Section 5 will undergo judicial scrutiny as at least some FTC cases will be litigated in federal court. While federal courts have recognized that the standard of “unfairness” under the FTC Act is an “elusive one”,<sup>24</sup> they have also recognized that “the FTC’s authority to proscribe ‘unfair methods of competition’ under § 5 is not unbounded”.<sup>25</sup> While the Supreme Court has never directly addressed the legal framework that applies to stand-alone Section 5 cases, the Second Circuit has held that “in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct”, conduct must “either have an anticompetitive purpose or cannot be supported by an independent legitimate reason” to violate Section 5.<sup>26</sup> Moreover, the rule of reason framework—which the 2022 Policy Statement expressly disclaims—has been well ensconced in federal court caselaw for decades.

Given the uncertainty surrounding the legal viability of stand-alone Section 5 claims, the FTC may seek to avoid federal court scrutiny in the first instance and focus its pursuit of new stand-alone Section 5 claims in administrative court in an attempt to establish influential precedent. Indeed, in the 2010s, the FTC brought several administrative proceedings based on stand-alone Section 5 claims challenging exclusive dealing arrangements, reverse payment settlements, and other exclusionary conduct.<sup>27</sup> All resulted in consent decrees. The FTC, in turn, may point to these consents as precedent.

While the 2022 Policy Statement has no binding legal effect, it lays the foundation for the FTC to pursue a more aggressive agenda under its expansive view of its authority to proscribe “unfair methods of competition” under Section 5. In addition to pursuing cases in administrative and federal courts, the FTC has a variety of tools at its disposal to further this agenda. These include:

- Rulemaking based on this novel interpretation of Section 5. Indeed, Chair Khan notes that Congress tasked the FTC with defining “unfair methods of competition” through litigation *and* rulemaking, and that the 2022 Policy Statement provides the FTC with the framework to do so.<sup>28</sup>
- As stated above, attempted use of consent decrees to establish precedent to enforce Section 5 on a stand-alone basis.<sup>29</sup>

The FTC's Section 5 Policy Statement is one step in a broader movement toward more aggressive antitrust policy by the FTC and the DOJ. In the coming months, the FTC and DOJ are expected to issue revised merger guidelines that will likely alter the agencies' approach to reviewing and challenging mergers in court that, in the agencies' view, may substantially reduce competition. The Section 5 Policy Statement and the upcoming revisions to merger guidelines will provide the FTC with more ammunition to achieve their stated policy goals of addressing consolidation and countering market dominance, particularly in targeted industries such as technology, healthcare and private equity.

With the 2022 Policy Statement, the FTC has signaled its intent to increase antitrust scrutiny of conduct that has not traditionally been seen as violating the antitrust laws. Accordingly, companies should expect the agencies to use new tools and explore new theories when analyzing, challenging and remediating transactions. Companies can also expect increased conduct investigations, particularly in the technology and healthcare sectors. As agency scrutiny continues to intensify, companies should engage with antitrust counsel to ensure they account for all important developments in this evolving area of antitrust enforcement.

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<sup>1</sup> Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Fed. Trade Comm'n (Nov. 10, 2022) [hereinafter 2022 Policy Statement], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf). In a forceful dissent, Commissioner Wilson argued the 2022 Policy Statement "abandons bedrock principles of antitrust" and "does not allow businesses to structure their conduct to avoid possible liability". Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022) [hereinafter Wilson Dissenting Statement], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf).

<sup>2</sup> 2022 Policy Statement at 10.

<sup>3</sup> Section 5 of the FTC Act declares unlawful and empowers the FTC to investigate and challenge, among other things, "unfair methods of competition". 15 U.S.C. § 45(a)(1). Congress did not define "unfair methods of competition" in the FTC Act, but caselaw is well settled that the scope of Section 5 is at least as broad as that of the Sherman, Clayton and Robinson-Patman Acts. See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (Section 5 encompasses practices "that violate the Sherman Act and the other antitrust laws"). But the contours of "unfair methods of competition" for "stand-alone" Section 5 cases—i.e., cases that do not otherwise rest on violations of the other antitrust laws—have been vigorously debated for decades.

In a series of cases in the mid-20th century, the Supreme Court acknowledged that Congress intended Section 5 to reach beyond the antitrust laws to stop anticompetitive behavior in its "incipiency". *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953); see also e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (the FTC has power to define and prohibit unfair competitive practices "beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws"). By the 1980s, appellate courts began imposing limits on the reach of Section 5 beyond conduct that would otherwise violate the antitrust laws. See, e.g., *Off. Airline Guides v. FTC*, 630 F.2d 920, 927-328 (2d Cir. 1980) (rejecting the FTC's Section 5 claim where effects of challenged conduct were outside the market in which monopolist operated); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 579-81 (9th Cir. 1980) (rejecting the FTC's efforts under Section 5 to presume, absent evidence, that price levels reflect anticompetitive effects); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (requiring, absent tacit agreement, evidence of either anticompetitive intent or absence of legitimate business reason to challenge business conduct in an oligopolistic industry).

In August 2015, the FTC released its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act (the "2015 Policy Statement"). Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Fed. Trade Comm'n (Aug. 13, 2015) [hereinafter 2015 Policy Statement], [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf). The 2015 Policy Statement identified three principles that would guide the FTC's decisions to use its stand-alone Section 5 authority: (1) the promotion of consumer welfare; (2) analysis similar to the "rule of reason", balancing harm or likely harm to competition against efficiencies and business justifications and (3) that the FTC would be less likely to bring a stand-alone Section 5 case where conduct could otherwise be challenged under the existing antitrust laws. That 2015 Policy Statement was rescinded by the FTC under the Biden Administration in July 2021. See *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act*, Fed. Trade Comm'n (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>; see also 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

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- Methods of Competition” Under Section 5 of the FTC Act (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591498/final\\_statement\\_of\\_chair\\_khan\\_joined\\_by\\_rc\\_and\\_rks\\_on\\_section\\_5\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf).
- <sup>4</sup> The Commission makes clear that it “supersedes all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act”. 2022 Policy Statement at 1.
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.* at 2-8.
- <sup>7</sup> *Id.* at 8.
- <sup>8</sup> *Id.* at 10.
- <sup>9</sup> *Id.* at 10.
- <sup>10</sup> The challenged conduct must be affirmative “conduct undertaken by an actor in the marketplace”, not “merely a condition of the marketplace”, such as high concentration or high barriers to entry. The conduct must also “implicate competition”, but the FTC expressly notes that this relationship can be “indirect”. *Id.* at 8. The FTC explained that misuse of regulatory processes, such as those related to licensing, patents or standard setting, can constitute a method of competition, whereas violations of generally applicable laws that merely give a cost advantage are unlikely to constitute a method of competition. *Id.*
- <sup>11</sup> *Id.* at 10.
- <sup>12</sup> *Id.* at 9.
- <sup>13</sup> One of Commissioner Wilson’s dissenting criticisms is that this “list of adjectives” “lack[s] established antitrust or economic meanings” and fails to provide businesses with guidance as to what types of conduct will be viewed as violating Section 5. Wilson Dissenting Statement at 6, 13.
- <sup>14</sup> 2022 Policy Statement at 9.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*
- <sup>17</sup> Wilson Dissenting Statement at 4, 6.
- <sup>18</sup> 2022 Policy Statement at 11.
- <sup>19</sup> *Id.*
- <sup>20</sup> See, e.g., Complaint, *In the Matter of Drug Testing Compliance Group, LLC*, File No. 151 0048 (Dec. 14, 2015) (invitation to cease soliciting business from one another’s customers), <https://www.ftc.gov/system/files/documents/cases/151214drugtestingcmpt.pdf>; Complaint, *In the Matter of Step N Grip, LLC*, File No. 151 0181 (Dec. 7, 2015) (invitation to fix prices), <https://www.ftc.gov/system/files/documents/cases/151216stepngripcmpt.pdf>; Complaint, *In the Matter of Valassis Communications, Inc.*, File No. 051 0008 (Apr. 28, 2006) (CEO used an earnings conference call to signal to a competitor how to divide the market), <https://www.ftc.gov/sites/default/files/documents/cases/2006/04/0510008c4160valassiscomplaint.pdf>.
- <sup>21</sup> See, e.g., Complaint, *In the Matter of Dell Computer Corp.*, File No. 931 0097 (June 17, 1996) (Dell undermined standard-setting process by threatening to exercise previously undisclosed patent rights), <https://www.ftc.gov/system/files/documents/cases/960617dellcmpt.pdf>; Complaint, *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094 (Sept. 23, 2008) (Negotiated Data sought royalties in excess of licensing commitments made to SSO), <https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080923ndscomplaint.pdf>.
- <sup>22</sup> 2022 Policy Statement at 12-13.
- <sup>23</sup> *Id.* at 13-16.
- <sup>24</sup> See, e.g., *Ind. Fed’n of Dentists*, 476 U.S. at 454.
- <sup>25</sup> *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 681 (N.D. Cal. 2019), *rev’d on other grounds* 969 F.3d 974 (9th Cir. 2020) (citing *E.I. du Pont De Nemours & Co.*, 729 F.2d at 137).
- <sup>26</sup> *E.I. du Pont De Nemours & Co.*, 729 F.2d at 140.
- <sup>27</sup> See Complaint, *In the Matter of National Association of Music Merchants, Inc.*, No. 001 0203 (Mar. 4, 2009), <https://www.ftc.gov/sites/default/files/documents/cases/2009/03/090304namcmpt.pdf>; Complaint, *In the Matter of Sigma Corporation*, No. 101 0080 (Jan. 4, 2012) <https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120104sigmacmpt.pdf>; Complaint, *In the Matter of IDEXX Laboratories, Inc.*, File No. 1010023 (Feb. 12, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130212idexcmpt.pdf>.
- <sup>28</sup> Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act at 5 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf).
- <sup>29</sup> Past consent decrees, including the one issued in the FTC’s administrative case against Intel, have included assertions that respondent’s conduct violated Section 5 on a stand-alone basis. Agreement Containing Consent Order, *In the Matter of Intel Corp.*, File No. 061 0247 (Aug. 4, 2010), [https://www.ftc.gov/sites/default/files/documents/cases/2010/08/100804intelagree\\_1.pdf](https://www.ftc.gov/sites/default/files/documents/cases/2010/08/100804intelagree_1.pdf).