

**FTC Issues Statement of Enforcement Principles Interpreting
“Unfair Methods of Competition” Under Section 5 of the FTC Act**

The Federal Trade Commission (the “FTC or Commission”) issued a Statement of Enforcement Principles (“policy statement”) addressing the unfair competition clause of Section 5 of the 1914 Federal Trade Commission Act (“FTC Act”).¹ The one-page policy statement released last week sets out three principles and appears to be the product of a compromise. It is notable for being the first, albeit laconic, articulation of the FTC’s interpretation of the unfair competition clause of Section 5, but it likely does not portend significant changes in enforcement priorities.²

Section 5 proscribes “unfair methods of competition in or affecting commerce.” Over the years it has been understood to cover conduct prohibited by the antitrust laws (the Sherman and Clayton Acts) and the FTC has from time to time used this clause more expansively to challenge conduct deemed to contravene the “spirit” of the antitrust laws or that could lead to an antitrust violation.³ Responding to concerns voiced over one hundred years ago that the Department of Justice was not enforcing the antitrust laws with sufficient vigor, Congress enacted the FTC Act without defining the scope of Section 5 and instead granted the Commission authority to enforce the law administratively on a case-by-case basis, subject to judicial review. The policy statement, which passed with a 4-1 vote,⁴ is intended to provide a framework for the FTC’s authority to address anticompetitive conduct that falls outside the reach of the Sherman and Clayton Acts.

The scope of Section 5’s unfair competition clause has long been the subject of debate. The Supreme Court has confirmed that Section 5 applies to conduct beyond the reach of other antitrust statutes in a line of cases beginning shortly after the enactment of the FTC Act.⁵ However, in the early 1980s, lower courts began to strike down the Commission’s attempts to regulate conduct that was not prohibited by the Sherman and Clayton Acts.⁶

¹ 15 U.S.C. §§ 45(a)(1). Section 5 also prohibits “unfair or deceptive acts or practices in or affecting commerce.” This prong is enforced by the FTC’s Bureau of Consumer Protection. The FTC issued separate policy statements clarifying its jurisdiction over “unfair” and “deceptive” acts in 1984, but had not previously provided formal guidance on the “unfair methods of competition” prong. See Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (August 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

² See Remarks by Chairwoman Edith Ramirez Regarding Section 5 Enforcement Principles (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf (the policy statement “does not signal any change of course in our enforcement practices and priorities”).

³ For example, invitations to collude would not violate Section 1 of the Sherman Act in the absence of an agreement but have been the subject of FTC enforcement actions under Section 5. See, e.g., Decision and Order, *In the Matter of 680 Digital, Inc. and Philip B. Peretz*, FTC Docket No. C-4484 (Aug. 20, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140829nationwidedo.pdf>.

⁴ Commissioner Joshua D. Wright, who advocated clarification of Section 5’s unfair competition standard (see *infra* note 6) and voted to pass the policy statement, announced his resignation as Commissioner two days after the statement was issued.

⁵ See *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922) (The FTC Act “was intended to supplement previous anti-trust legislation”); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 311 (1934) (“The [FTC Act] undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. But as this Court has pointed out it also had a broader purpose.”) (internal citation omitted); *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972) (The standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons.”).

⁶ See *E.I duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573

A main criticism of the reviewing courts was that the Commission’s theory of liability failed “to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable.”⁷ The Commission has since attempted to clarify the scope of Section 5’s unfair competition clause, but had been unable to reach a consensus and provide formal guidance on the issue until this policy statement.⁸

The policy statement provides three general principles that the Commission will adhere to in enforcing Section 5’s unfair competition clause: (1) “the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare”; (2) the Commission will evaluate the practice in question under “a framework similar to the rule of reason” when determining whether conduct is likely to harm the competitive process and whether there are cognizable efficiencies and business justifications; and (3) the Commission is less likely to challenge conduct that can be sufficiently addressed by the Sherman and Clayton Acts. The four Commissioners who voted in favor of the policy statement issued a brief statement in which they confirmed that the Commission will continue to rely on the Sherman and Clayton Acts as its primary enforcement tool for protecting competition and promoting consumer welfare.⁹

Commissioner Ohlhausen voted against adopting the policy statement and criticized it as “too abbreviated in substance and process.” She wrote in a detailed dissenting statement that the “highly general” policy statement gave no specific examples of lawful or unlawful conduct to provide practical guidance and failed to address existing case law where courts have struck down the Commission’s previous attempts at asserting its Section 5 authority. The dissent also criticized the Commission’s failure to seek public input.¹⁰

The dissent highlighted the policy statement’s expansive view of Section 5 and noted the lack of a “substantial harm” requirement as well as the failure to exclude a number of “controversial theories” that have previously been considered by the Commission or rejected by courts.¹¹ The dissent further argued that the policy statement fails to constrain the agency in any meaningful way and will likely lead to more uncertainty and burdens for the business community.¹² Lastly, Commissioner Ohlhausen’s dissent expressed concern that the

(9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

⁷ *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138 (2d Cir. 1984). See also Notice of Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818 (Aug. 28, 2008), available at <http://www.gpo.gov/fdsys/pkg/FR-2008-08-28/pdf/E8-20008.pdf> (compiling cases).

⁸ In 2008, the Commission held a Public Workshop to address the wave of early 1980s judicial decisions and to gain insight and develop structure around its Section 5 authority. See Notice of Public Workshop, *supra* note 7. However, the workshop did not result in any formal written guidance on the issue. See also Commissioner Joshua D. Wright, Remarks at the Symposium on Section 5 of the FTC Act (Feb. 26, 2015), https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf; Commissioner Joshua D. Wright, Remarks at the Executive Committee Meeting of the New York State Bar Association’s Antitrust Section (June 19, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf.

⁹ Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

¹⁰ Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement (Aug. 13, 2015) (“Dissenting Statement”), available at https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

¹¹ Dissenting Statement at 3.

¹² The dissent provided specific provisions it would have preferred be included in the policy statement: (1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws, (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice

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majority's "official embrace of such an unbound interpretation [of Section 5 authority] is almost certain to encourage more frequent exploration of this authority in conduct and merger investigations and standalone Section 5 enforcement by the Commission."¹³

It remains to be seen whether this policy statement will serve to constrain (as the majority may have intended) or expand (as Commissioner Ohlhausen feared) the FTC's enforcement of Section 5 or if the case-by-case approach will remain relatively unchanged, subject to administrative interpretation of particular facts with limited opportunities for meaningful judicial review. Businesses and practitioners would benefit from an enforcement agenda committed to pursuing matters under Section 5 only when consumer harm is empirically identifiable and after balancing costs and benefits using the rich jurisprudence applying rule of reason standards.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com.

at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice." Dissenting Statement at 6.

¹³ Dissenting Statement at 1.

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