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# Axinn Antitrust Insight: FTC Policy Statement Re Section 5

November 21, 2022

## PRACTICE AREAS

Antitrust

*Axinn Update*

On November 10, 2022, the Federal Trade Commission ("FTC") issued its long-anticipated *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* ("Policy Statement"), more than a year after it had withdrawn previous guidance issued during the Obama Administration in 2015. This new Policy Statement, which was adopted along party lines (3-1), articulates an expansive view of the FTC's power under Section 5 to take action against "unfair methods of competition" that are not in-and-of-themselves prohibited by the Sherman Act or Clayton Act. The Policy Statement is a substantial departure from past guidance, relies on case-by-case judgments of what is "unfair", and may ultimately be limited by the courts.

**A Brief History of Section 5**

Brought into existence as part of the law that established the FTC, Section 5 of the FTC Act prohibits "unfair methods of competition" ("UMC"). Section 5 has long been understood to go beyond conduct that would be illegal under the Sherman or Clayton Acts, but the precise contours of UMC have remained elusive.

The FTC has not frequently invoked its so-called "standalone" Section 5 power, and the case law is as a result limited and mixed on the breadth of that power. In a 1972 case, *FTC v. Sperry & Hutchinson Co*., the Supreme Court wrote that Section 5 "empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." The 1980s saw three separate U.S. Circuit Courts in *Official Airline Guides v. FTC*, *Boise Cascade v. FTC*, and *E.I. du Pont de Nemours v. FTC* overturn FTC orders involving Section 5, with each criticizing the FTC for interpreting its Section 5 authority too broadly and without limiting principles. In 2015, the FTC issued on a bipartisan basis its now-withdrawn policy statement, which articulated a relatively modest view of its Section 5 power that aligned with the rule-of-reason analytical framework and goal of promoting consumer welfare used in Sherman Act cases.

From time to time, the FTC has successfully used Section 5 to reach incipient conduct that did not presently harm competition but that was likely to do so if left unrestrained, such as invitations to collude or an early-stage group boycott that had not yet adversely affected competition. It has also employed Section 5 to fill perceived gaps in the Sherman and Clayton Acts. For example, the FTC has brought Section 5 challenges against acquisitions that it concluded were likely to lessen competition but that involved parties that were not corporations or did not participate in interstate commerce so were not technically covered at the time by the Clayton Act (the Clayton Act was eventually amended to capture these types of transactions).

**The New Policy Statement**

The new Policy Statement lays out a vision of Section 5 that vests the FTC with very broad discretion and, in the eyes of the 3-1 majority, returns Section 5 to its original intent. In announcing the new Policy Statement, FTC Chair Lina Khan was highly critical of the 2015 policy statement, which she described as "an abdication of the commission's statutory mandate." Indeed, the Policy Statement expends considerable space to discussing the text, structure, and purpose of the FTC Act, perhaps in an effort to forestall future court challenges.

The Policy Statement establishes a two-step framework:

1. Conduct must be "a method of competition" as opposed to a condition of the market (i.e., the existence of entry barriers are a condition not a method); and
2. Conduct must be "unfair," defined as conduct "beyond competition on the merits" and evaluated under two criteria:

    i. whether the conduct is "coercive, exploitive, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," or "otherwise restrictive or exclusionary" and

    ii. whether "the conduct . . . tend[s] to negatively affect competitive conditions" by "affecting consumers, workers or other market participants."

According to the Policy Statement, these 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.

And the FTC will view asserted procompetitive justifications with deep skepticism and, in assessing them, will eschew quantitative tests such as a net efficiencies test or numerical cost-benefit analysis.

In other words, the FTC will no longer be employing a rule-of-reason style analysis in Section 5 cases, nor will it be narrowly focused on consumer welfare. Instead the FTC will take into account the welfare of other actors, such as industry incumbents or workers.

The Policy Statement also provides a list of conduct it characterizes as having been previously accepted by courts as violative of Section 5. The Policy Statement groups this conduct into three categories: (i) conduct that also violates the Sherman or Clayton Acts; (ii) incipient violations, such as invitations to collude or mergers with the tendency to "ripen" into violations; and (iii) conduct that violates the "spirit of the antitrust laws" 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."

Under this last category, the Policy Statement lays out a host of examples of conduct that courts have repeatedly found to be legal under the Sherman and/or Clayton Acts, including:

- "parallel 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;"
- "using 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
- "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."

Commissioner Christine Wilson dissented from the Policy Statement. In her own lengthy statement, Commissioner Wilson criticized the Policy Statement for abandoning the rule of reason, the consumer welfare standard, and precedent requiring the FTC to consider anticompetitive effects and business justifications. In her view, the Policy Statement takes a "I know it when I see it" approach that grants the FTC "authority summarily to condemn essentially any business conduct it finds distasteful." According to Commissioner Wilson, the Policy Statement fails to "provide clear guidance to businesses seeking to comply with the law"

or offer an analytical framework that will be resistant to the "vicissitudes of prevailing political winds."

Commissioner Wilson also pointed out that the Policy Statement's approach to the term "unfair" does not match the analytical rigor employed by the FTC in the consumer protection context to interpret the same term, nor does it grapple with the legislative history that runs counter to an expansive reading of Section 5. Finally, Commissioner Wilson argued that the Policy Statement should have been put out for public comment before its adoption, given the significant departures from the prior policy.

**Key Takeaways**

While not unexpected, the new Policy Statement is a dramatic assertion of regulatory power. Through it, the FTC has signified that it will use Section 5 to counteract the judicial interpretations of the Sherman and Clayton Acts that some view as having made it too difficult to challenge allegedly anticompetitive conduct and transactions. In the announcement of the Policy Statement, Chair Khan invoked the FTC's rulemaking authority, indicating that it is likely to exercise that authority to issue regulations under Section 5. We expect any such regulations will face challenges in court, but interested parties should prepare to offer their views during public comment periods.

In the coming years, we also expect to see the FTC rely on Section 5 to challenge conduct that is difficult to challenge under the Sherman Act, such as refusals to deal with rivals absent a prior course of dealing with those rivals, or predatory pricing absent evidence of recoupment of losses. Similarly, the FTC may rely on Section 5 to challenge transactions that courts might not view as violations of the Sherman or Clayton Acts, such as acquisitions of nascent competitors or conglomerate mergers. The FTC's likelihood of success in such cases is uncertain, and we would expect to see defendants respond by challenging both the procedure followed in adopting the Policy Statement, as well as its substance. If the FTC is met with a string of losses in court, we may see the FTC urge Congress to update Section 5 to impose legislatively the approach laid out in the Policy Statement.