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# *FTC Sows Uncertainty with Unfair Competition Guidance*

By Noah Pinegar & Gary Zanfagna

The Federal Trade Commission upended decades of antitrust compliance principles last week when it announced a broad framework for policing unfair methods of competition under Section 5 of the FTC Act. Conduct deemed to be illegal under Section 5 of the FTC Act that is not illegal under other antitrust laws (the Sherman Act and the Clayton Act) is termed a "standalone Section 5 violation." The FTC policy statement also marks a 180-degree reversal from a 2015 FTC policy that had tethered its enforcement of standalone Section 5 violations to modern federal antitrust principles.[1]

The new FTC policy describes two criteria to determine what conduct is unfair within Section 5, measured on a sliding scale: (1) indicia that the conduct is coercive, exploitative, collusive, abusive, deceptive, predatory, involves the use of economic power, restrictive, or exclusionary—tending to foreclose or impair the opportunities of market participants; and (2) the conduct would tend to negatively affect competitive conditions. But a practice could be "facially unfair" under the first criterion, eliminating the need for inquiry into the second criterion—something like per se illegality, as dissenting Commissioner Christine Wilson noted. Moreover, because the "inquiry does not turn on whether the conduct directly caused actual harm," it would seem that finding the first criteria ends the inquiry and the practice is condemned.

In addition to the absence of clear guidance as to how a company complies with "know-it-when-we-see-it" Section 5 liability, Commissioner Wilson's dissent also cited to decades of experience and economic learning rejected by the framework.

The FTC framework ostensibly considers justifications for the conduct, but how is opaque. It is explicitly not in a net efficiencies test or cost-benefit analysis. The respondent asserting a justification bears the burden of showing the justification is cognizable (not among a list of explanations that are themselves harmful to competition), non-pretextual, narrowly tailored to achieve its benefit, and within the same economic market in which there is a perceived threat to competitive conditions.

The FTC also set forth examples of past conduct that violated Section 5, either because it also constituted an antitrust violation under the Sherman Act or the Clayton Act, constituted an "incipient violation" (though not yet an actual violation) of the antitrust laws, or violated their "spirit."

The FTC policy statement creates significant uncertainty for companies because it is now unclear where the line is to be drawn between permissible and impermissible conduct. For example, if a company has a 20% market share and half its contracts (10% of the market) are exclusive, the Sherman and Clayton

Acts are not offended. Exclusivity can enable planning, stable supply, and increase competition. It is unclear how the FTC would now treat that same scenario under the Section 5 framework. The FTC also cited as a potential standalone Section 5 violation M&A activity that by itself does not violate the Sherman Act or Clayton Act, but may "have the tendency to ripen" to that point. As the dissent identified, the FTC framework expands the universe of standalone Section 5 violations to potentially reach all manner of business torts and otherwise lawful conduct.

Faced with such uncertainty given the new FTC Section 5 policy, how should companies react? For starters, companies should review their existing compliance policies, training programs, and current business conduct and confirm they are compliant with rules of the road understood under the Sherman and Clayton Acts. That will minimize known potential antitrust risk.

As a next step, companies should consider review or auditing, together with antitrust counsel, their current business conduct and the markets in which they operate to weigh whether there may be some risk of conduct that could be seen as violating the "spirit" of the antitrust laws or that "may ripen" into a violation. Such review can inform whether changes may be warranted to conduct that, although lawful under the Sherman and Clayton Acts, may nonetheless be subject to scrutiny under the FTC Act Section 5 in light of the new policy.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

**New York**

Noah Pinegar
1.212.318.6057
noahpinegar@paulhastings.com

**Washington, D.C.**

Michael Murray
1.202.551.1730
michaelmurray@paulhastings.com

Michael Wise
1.202.551.1777
michaelwise@paulhastings.com

Michael Spafford
1.202.551.1988
michaelspafford@paulhastings.com

Gary Zanfagna
1.202.551.1940
garyzanfagna@paulhastings.com

[1] https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf