Insight

FTC Expands Interpretation of Its Authority to Challenge Unfair Methods of Competition

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Executive Summary

- On November 10, 2022, the Federal Trade Commission (FTC) published a policy statement broadening the agency's interpretation of its authority to challenge "unfair methods of competition" under Section 5 of the FTC Act, signaling a monumental shift in enforcement policy; this action reflects the Biden Administration and the FTC's commitment to a more aggressive antitrust enforcement regime.
- Many of the policies outlined in the statement directly conflict with previously issued guidance on Section 5 enforcement and abandon the long-held consumer welfare standard in favor of a focus on "fairness" for small businesses.
- The vagueness of what the FTC deems as "unfair" leaves business vulnerable to costly investigations, and it is unclear whether the courts will accept this expanded authority.

Introduction

On November 10, 2022, the Federal Trade Commission (FTC) released a policy statement that considerably expanded the agency's authority to challenge "unfair methods of competition" under Section 5 of the FTC Act. This action signals a monumental shift in antitrust enforcement policy.

The policies and practices outlined in the statement would replace long-held enforcement standards published in 2015—including a focus on consumer welfare—that were supported by decades of court precedent and underpinned by vigorous economic analysis. Instead, the agency would rely on an ambiguous policy framework that affords the FTC wide latitude to challenge business practices the agency deems "unfair."

This drastically broadened scope and direct rebuke of past agency policy statements keeps with the Biden Administration's aggressive stance on antitrust enforcement outlined in the executive order on Promoting Competition in the American Economy.

The vagueness of what constitutes as an "unfair" business practice leaves businesses without a clear set of rules and makes them vulnerable to challenges. Furthermore, this expanded interpretation of Section 5 runs the risk of being repudiated by the courts.

Previous Guidance

In August 2015, the Federal Trade Commission issued its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. This policy statement outlined the core tenets the agency would use in its decision "whether to challenge an act or practice as an unfair method of

competition in violation of Section 5 on a standalone basis." These principles included an evaluation "framework similar to the rule of reason," a limit to the likelihood of a challenge to an "act or practice as an unfair method of competition…if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm," and a commitment to adhere to the "promotion of consumer welfare" as the overall guiding doctrine.

In July 2021, the FTC withdrew the guidance without offering an immediate replacement, sowing confusion among businesses and antitrust practitioners. On November 10, 2022, the FTC issued the replacement policy statement that "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."

This policy statement dramatically broadens the scope of business practices potentially subject to antitrust challenges and directly conflicts with the principles issued in 2015. The most recent guidance is another policy step toward more aggressive antitrust enforcement outlined in the Biden Administration's executive order on Promoting Competition in the American Economy.

FTC's Murky Interpretation of Section 5

Citing various court cases and congressional debates, the FTC stated that previous guidance wrongly limited the scope of Section 5 challenges to violations covered by the Sherman Act. A statement released in conjunction with the new policy by Commissioner Bedoya joined by Chair Khan and Commissioner Slaughter noted "Congress was motivated in significant part by an express desire to ensure fairness and a level playing field for small business," citing "statutes passed between 1890 and 1950."

In a Bloomberg Law article concerning the FTC policy statement, University of Michigan Law School Professor Daniel Crane contended that "The precedents commission staff cited to justify the guidance are mostly from cases so old they have little bearing on modern antitrust law." Richard Pierce, administrative law and antitrust professor at The George Washington University Law School, called the expanded interpretation of Section 5 "extraordinarily weak."

The commission issued the policy statement in a 3-1 vote split along party lines. The sole dissent came from Commissioner Christine Wilson who criticized the majority for abandoning the consumer welfare standard and rejecting a "vast body of relevant precedent."

New Agency Practices

Applying these old statutes, the FTC's new policy statement outlined two components to a Section 5 violation: 1) the conduct must be a method of competition 2) the conduct is unfair.

A method of competition, as described by the FTC, is "conduct undertaken by an actor in the marketplace – as opposed to merely a condition of the marketplace." In other words, it must be a business practice, not merely a characteristic of the market such as "high concentration or barriers to entry." Unfairness is defined as business activity that goes "beyond competition on the merits."

The FTC will use two criteria to determine unfairness. "First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary…. Second, the conduct must tend to negatively affect competitive

conditions." The notable shift in policy is how the FTC will evaluate the two criteria. The agency abandoned the rule of reason, which measures the net effect of anticompetitive harm and procompetitive benefits of a business activity using a defined relevant market and market power and replaced it with a "sliding scale."

Evaluating based on a sliding scale means that if there is more evidence of one activity, less evidence of the other activity is required. The FTC stated "'unfair methods of competition' need not require a showing of competitive harm or anticompetitive intent in every case," but that the agency must prohibit conduct that "has a tendency to generate negative consequences." In a statement accompanying the new policy, the FTC stated that "Section 5 was intended to have the breadth to stop monopoly in its incipiency," which is why the agency concluded that "a tendency to generate negative consequences" is sufficient to stop the business practice. This is undoubtedly a weaker burden of proof for the FTC.

Additionally, the FTC asserted that these consequences do not need to be evaluated on an individual basis but can be "examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent."

No Meaningful Guidance to Business

Commissioner Wilson's statement highlighted the ambiguity of the new policy, citing the Second Circuit that explained "'the Commission owes a duty to define the conditions under which conduct…would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.'"

Wilson described the new policy as an "'I know it when I see it' approach…[that] provides no methodology…[and] no meaningful guidance for courts and businesses to analyze unfair methods of competition." Wilson further criticized the policy statement saying it was analogous to the Monopoly game instructions where "the respondent essentially will be told, 'Go to jail. Go directly to jail. Do not pass go. Do not collect $200.'"

Wilson doubted whether the policy statement could "be turned into workable rules for businesses." She asserted that all of "the adjectives that may be invoked to establish facially unfair competition…require subjective interpretation, and frequently lack established antitrust or economic meaning," and expressed concern that enforcement will depend "on the whims and political worldviews of three sitting Commissioners."

Such uncertainty surrounding the FTC's expanded interpretation of its authority leaves enforcement credibility in question.

Conclusion

The FTC published a policy statement broadening the agency's authority to challenge "unfair methods of competition" under Section 5 of the FTC Act, signaling a monumental shift in enforcement policy. The statement outlined new policies that are in direct conflict with previously issued guidance on Section 5 enforcement and abandon consumer welfare in favor of "fairness" for small businesses. The reversal reflects the Biden Administration and the FTC's commitment to a more aggressive antitrust enforcement regime.

The vagueness of what the FTC deems as “unfair” leaves business vulnerable to costly investigations, and it is unclear whether the courts will accept this expanded interpretation.