

The Biden Federal Trade Commission Signals an Aggressive Antitrust Enforcement Agenda

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On July 1, 2021, the full complement of Federal Trade Commission (FTC) commissioners voted in an open meeting to advance the agency's antitrust enforcement agenda. Led by newly appointed Chair Lina M. Khan, the commission voted 3-2 to approve resolutions empowering staff to issue compulsory process, such as civil investigative demands and subpoenas, to investigate conduct and mergers in key industries. The targeted resolutions prioritize investigations into technology platforms, healthcare businesses, such as hospitals, pharmaceutical companies, and pharmacy benefit managers, and business practices that target workers and operators of small businesses. The resolutions authorize compulsory process for 10 years and maintain the requirement that a commissioner sign compulsory process documents prior to issuance.

In another 3-2 vote, the commissioners rescinded a 2015 policy statement on "unfair methods of competition" that the majority viewed as constraining the FTC's use of standalone authority to stop anticompetitive business tactics under Section 5 of the FTC Act. The "Statement of Enforcement Principals Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" – issued in August 2015 – delineated three principles to guide the FTC's decisions to use standalone Section 5 authority. First, an action should align with the public policy behind the antitrust laws, specifically the promotion of consumer welfare. Second, the business practice should be evaluated under a framework similar to the rule of reason, where the harm to competition is balanced against cognizable efficiencies and business justifications. Finally, a challenge under standalone Section 5 authority is less likely to occur if the conduct could be addressed under the Sherman Antitrust or Clayton Acts.

At the time the statement was adopted, it was seen as a victory for stakeholders seeking clear guidance regarding the FTC's standalone unfair methods of competition authority; indeed, the statement was the first such guidance for Section 5 authority issued since the 1914 enactment of the FTC Act. The decision to revoke the guidance will allow the agency to further scrutinize a broad array of practices and further enhance the FTC staff's investigatory discretion.

The FTC's standalone unfair methods of competition authority has been controversial for decades. It is generally recognized as encompassing, but also understood to be broader than the codified

antitrust laws. How much broader it is than the traditional framework, or in what circumstances this authority should be used, is unclear. With these votes, Khan has signaled that the FTC under the Biden administration takes a broad view of its authority and power.

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