

Federal Trade Commission Signals Dramatic Shift in Antitrust Enforcement

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On November 10, 2022 the Federal Trade Commission (“FTC”) released a [Policy Statement](#) that is nothing less than a seismic shift in antitrust precedent and practice. In the Statement, the Commission asserts that Section 5 of the Federal Trade Commission Act’s prohibition on “unfair methods of competition” extends beyond other antitrust laws to prohibit business conduct that has not exposed companies to liability for decades. For example, the FTC may now be scrutinizing, among other things, price discrimination, exclusive dealing, tacit coordination, parallel conduct, mergers that have not traditionally violated the antitrust laws, bundling products, exclusivity deals, and even loyalty rebates. Relying largely on legislative history from over a century ago and occasionally citing Supreme Court and circuit court opinions between the 1920s and 1980s, the FTC argues that the authority it now claims to possess has always been at its disposal but has just been unused for many decades...until now.

Importantly, the FTC will not be using a rule of reason analysis to determine whether these business actions on balance have had or may have a positive, pro-competitive or efficiency-enhancing effect. The FTC may still pursue an enforcement action against a business whose conduct had an overall positive effect on the industry but was deemed by the FTC as “unfair” conduct.

Instead, the FTC introduced a sliding scale framework to identify unfair methods of competition between conduct that (1) may be “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature” and (2) “tend[s] to negatively affect competitive conditions” by affecting “consumers, workers, or other market participants.” Where the FTC labels particular conduct “facially unfair,” the focus on the second criterion becomes irrelevant and it becomes more difficult for the business to show a countervailing justification for its action. Conversely, an otherwise routine business action that has a “tendency to generate negative consequences” such as raising prices, reducing output, limiting choice, lowering quality etc., may still expose the business to scrutiny. These consequences need not be the result of a single business action but may be analyzed in conjunction with other actions taken by the business or similar actions taken by other businesses in the industry.

The Commission vote to issue the Policy Statement was 3-1, with the Democratic party

Commissioners voting to approve, and the sole Republican party Commissioner, Christine Wilson, issuing a scathing 20-page dissent. Commissioner Wilson takes the Democratic members to task for repudiating the consumer welfare standard, in which the primary goal of antitrust is to improve products and lower prices for consumers, and especially for abandoning the balancing rule of reason test, rejecting a “vast body” of precedent. This, she argues, will leave businesses without guidance. She writes, “Not only does the Policy Statement withhold meaningful guidance, it significantly increases uncertainty for businesses. When the Commission decides that particular conduct ‘tends to cause potential harm similar to an antitrust violation’ – despite contrary precedent – the Policy Statement provides that the ‘analysis may depart from prior precedent based on’ the antitrust laws. In other words, conduct that courts repeatedly have refused to condemn may now be subject to summary condemnation under the Commission’s open-ended approach.”

Businesses would be well advised to examine the [Policy Statement](#) by the FTC closely and evaluate their existing practices for potential liability. Violations of Section 5 of the FTC Act could potentially lead to very large civil penalties.

It remains unclear what industries or business conduct the FTC will focus on and to what extent the FTC will be scrutinizing business conduct retrospectively. Although the FTC may ultimately lose Section 5 cases it pursues under this new approach, businesses under investigation will have to navigate long, costly investigations and potentially court proceedings.

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