

FTC Announces Expanded Enforcement Authority

Alert

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Late last week, the Federal Trade Commission (FTC) [issued formal guidance](#) regarding the scope of its enforcement authority under Section 5 of the FTC Act. This guidance previews a material expansion of the FTC's enforcement agenda to reach conduct that does not violate the principal federal antitrust statutes.

Section 5 of the FTC Act prohibits “unfair methods of competition.” Unlike the Sherman and Clayton Acts—which are enforceable by the Department of Justice, the FTC, and private litigants—FTC Act Section 5 is subject to enforcement only by the FTC itself. The agency's prior guidance treated “unfair methods of competition” as largely synonymous with the type of conduct already prohibited by the Sherman and Clayton Acts—i.e., agreements in restraint of trade, monopolization, and anticompetitive mergers.

Last week's updated guidance reflects a fundamental shift in approach. The FTC is no longer tying itself to the legal standards applicable to claims under the Sherman or Clayton Acts. Instead, the agency intends to apply the following “general principles” concerning whether conduct is an “unfair method of competition”:

- “Unfair” competition as conduct that “goes beyond competition on the merits,” including conduct that may be “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.”
- For conduct it does not deem “facially unfair,” the FTC will consider the conduct's effects on various constituencies, including consumers, employees, and competitive rivals. The agency indicates that it will not apply a “a net efficiencies test or a numerical cost-benefit analysis” similar to the Rule of Reason standard under the Sherman Act.

The FTC further sets forth a non-exclusive set of examples of “unfair methods of competition,” separated into three categories:

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1. Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act.
2. Conduct deemed to be an “incipient violation” of the antitrust laws.
3. Conduct that violates the “spirit” of the antitrust laws, including conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the language of the antitrust statutes or case law.

Despite the FTC’s strong rhetoric, it is important to note that this policy statement does not change the law. Whether the FTC can convince a court to view Section 5 in such a broad manner remains to be seen. Nevertheless, the policy statement suggests the FTC will take aggressive enforcement positions and may challenge conduct that would arguably pass muster under traditional antitrust analysis.

For more information on the formal guidance issued by the FTC, please contact [Logan Fancher](#), [Bill Greene](#), [Vicki Smith](#), [Nicci Warr](#) or the Stinson LLP contact with whom you regularly work.

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