

FTC Issues First Statement of Enforcement Under Section 5 in 101 Years

by Patricia M. Wagner, Daniel C. Fundakowski, and M. Brian Hall, IV

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On August 13, 2015, the Federal Trade Commission (“FTC” or “Commission”), by a 4-1 vote, approved a bipartisan “Statement of Enforcement Principles” (“Statement of Enforcement”),¹ which purports to shed light on the principles and overarching analytic framework that guide the Commission’s application of its statutory authority under Section 5 of the FTC Act. The one-page Statement of Enforcement marks the first time in the FTC’s 101-year history that it has provided official guidance on how it views and approaches its “standalone” Section 5 authority. The Statement of Enforcement, while leaving much to be desired in terms of clarity and concrete guidance, applies to all business sectors—especially health care, where enforcement has been persistent—and, as described below, is likely to have significant consequences for both federal and state antitrust agencies.

I. Section 5 of the FTC Act and “Standalone” Authority

Section 5 of the FTC Act renders “unfair methods of competition in or affecting commerce” to be unlawful.² Generally, the FTC addresses unfair methods of competition that allegedly violate the Sherman Act or Clayton Act by invoking its Section 5 authority and then incorporating the Sherman Act or Clayton Act principles by reference in the complaint. Less often, when the FTC pursues “unfair methods of competition” that do not fit squarely within the contours of these other statutes (such as invitations to collude), it exercises what is known as its “standalone” Section 5 authority.

¹ Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

² 15 U.S.C. § 45(a)(1).

II. Summary of the Commission's Statement of Enforcement

The Statement of Enforcement provides high-level guidance on how the FTC intends to apply its Section 5 authority and is generally consistent with the Commission's previous statements in connection with enforcement actions brought over the past decade. According to the Statement of Enforcement, the Commission will adhere to the following three broad principles when deciding whether to use its authority under Section 5 to challenge unfair methods of competition:

1. The Commission will be **guided by the public policy** underlying the antitrust laws, namely, the promotion of **consumer welfare**.
2. The act or practice will be evaluated under a **framework similar to the rule of reason**, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any **associated cognizable efficiencies and business justifications**.
3. The Commission is **less likely to challenge** an act or practice as an unfair method of competition on a standalone basis **if enforcement of the Sherman or Clayton Act is sufficient** to address the competitive harm arising from the act or practice.³

III. Commissioner Ohlhausen's Dissent

In her dissent, Commissioner Maureen Ohlhausen took issue with virtually every aspect of the Statement of Enforcement—from the procedural manner in which the statement was issued to its effects as applied within the FTC and among regulated entities. Commissioner Ohlhausen criticized the Commission for not seeking public comment before issuing the Statement of Enforcement and contended that it was “too abbreviated in substance and process” for her to support. She also took issue with how the Commission failed to mention, “much less grapple with,” the “unfortunate” Section 5 case law history or provide examples of what constitutes lawful or unlawful conduct to provide practical guidance on the Commission's enforcement policy.

Commissioner Ohlhausen also noted that the Statement of Enforcement is written so broadly that it could potentially encompass a “host of controversial theories” that fall short of actual Sherman Act or Clayton Act violations, such as “breach of standard-setting commitments, loyalty discounts, facilitating practices, conscious parallelism, business torts, incipient violations of the antitrust laws, and unfair competition through violation of various laws outside the antitrust context.”⁴ Finally, the Commissioner noted

³ Fed. Trade Comm'n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

⁴ Maureen Ohlhausen, Commissioner, FTC, Dissenting Statement (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

her concern that the Statement of Enforcement will have deleterious results at the staff enforcement level, cautioning that “[a]rming the FTC staff with this sweeping new policy statement is likely to embolden them to explore the limits of [unfair methods of competition] in conduct and merger investigations.”⁵

IV. Key Takeaways

While the Statement of Enforcement is admittedly terse, there are four significant takeaways for regulated entities:

1. **The Statement of Enforcement May Have Undesirable Effects on State Unfair Competition Laws.** Around 30 states have enacted FTC Act analogues, known as “Little FTC Acts,” which, like the FTC Act itself, prohibit “unfair methods of competition.” Because courts often look to FTC Act cases when applying and interpreting the state analogues, the FTC’s generalized analytical framework that is perplexingly “similar to the rule of reason” analysis and then proclaims to condemn acts and practices that merely contravene the “spirit” of the antitrust laws, may lead to judicial confusion, increased plaintiff activity, and inconsistent interpretations of state statutes with parallel statutory provisions.
2. **The Guidance Promotes Agency Flexibility at the Expense of Clarity.** Although the succinct one-page Statement of Enforcement is perhaps more beneficial than no statement at all, it provides little practical guidance to other courts, enforcers, and regulated entities. For instance, the second of the three principles touts that the Commission will utilize an analysis “similar to” the rule of reason, taking into account “associated cognizable efficiencies” and “business justifications.” It is unclear how these terms are to be defined, applied, or what weight they should be accorded by enforcement agencies when mounting a Section 5 challenge or negotiating settlements. It is also unclear what types of acts or practices would receive treatment “similar to” rule of reason treatment, or what types of conduct undergoing this type of analysis would not otherwise violate the Sherman Act’s rule of reason analysis.

⁵ Commissioner Ohlhausen’s dissenting statement also noted that, in her view, a Section 5 policy statement should include, among other things,

(1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws; (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice.

Id. at 6.

3. **The “Rule of Reason” Test Remains a Useful Guidepost.** The framework and principles of the Statement of Enforcement, while generalized, do appear intended to follow the contours of a “quick look” rule of reason analysis, where likely procompetitive benefits are balanced against likely anticompetitive effects without the “full market analysis” that would be applied under the traditional “rule of reason” analysis. However, even a “quick look” rule of reason analysis is a fact-intensive and case-by-case exercise.
4. **Statement of Enforcement May Create Interagency Confusion While Providing Impetus for Novel FTC Challenges.** The FTC’s enforcement policy, now proclaimed to condemn acts and practices that contravene the mere “spirit” (not necessarily the letter) of the antitrust laws appears to go beyond that of other antitrust enforcement agencies and may create disparities in enforcement activity and tensions among enforcement agencies. Further, as mentioned in Commissioner Ohlhausen’s dissent, arming FTC staff lawyers with this type of unfettered policy statement may encourage unwarranted enforcement activity as a means of exploring the contours and bounds of what constitutes “unfair methods of competition.”

V. Conclusion

The Statement of Enforcement perhaps unearths more issues than it resolves and so does not provide much to health care practitioners by way of conclusions. However, it is clear that the Commission wanted to ensure that the Statement of Enforcement is flexible and malleable to the FTC’s institutional mission and dynamic initiatives.

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*This Client Alert was authored by **Patricia M. Wagner, Daniel C. Fundakowski, and M. Brian Hall, IV**. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

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