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FTC Issues Unprecedented but Vague Guidance on Unfair Methods of Competition

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On August 13, 2015, the Federal Trade Commission issued a much anticipated, but very short Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act. It turns out that the guidance is significant only because it is the first guidance that the FTC has issued regarding enforcement under Section 5 of the FTC Act. The FTC failed to provide any details to help businesses better understand which acts or practices the FTC believes constitute unfair competition with respect to acts or practices that are not otherwise prohibited by the Sherman or Clayton Acts. Using broad language, the guidance simply states that Section 5’s prohibitions reach not only conduct prohibited by the Sherman and Clayton Acts, but also conduct that violates the “spirit of the antitrust laws.”

In the guidance, the FTC identifies three general principles that it says it will adhere to when deciding whether to exercise its authority on a “stand-alone basis” outside of conduct prohibited by the Sherman and Clayton Acts. First, the FTC says it will take action only when necessary to promote consumer welfare. Second, the FTC says it will use an analytical framework similar to the rule of reason, taking into account any efficiencies or business justifications in support of the challenged acts or practices. Third, the FTC says it will be less likely to use Section 5 on a “stand-alone basis” to challenge an act or practice if enforcement of either the Sherman or Clayton Act would be sufficient to address the competitive harm. Although certainly not clear from the text of the guidance, according to Chairwomen Ramirez, “[t]he statement formally aligns Section 5 with the Sherman and Clayton Acts.”

In reality, none of the principles outlined in the guidance will dramatically change the way the FTC will exercise its authority under Section 5 in the future. One result may be that the vagueness of the guidance emboldens the FTC to more aggressively exercise its enforcement authority under Section 5. Indeed, Commissioner Maureen K. Ohlhausen issued a Dissenting Statement, in which she criticized the expansiveness of the principles and the lack of specificity in the guidance as “almost certain to encourage more frequent exploration of this authority in conduct and merger investigations and standalone Section 5 enforcement.”

The full text of the guidance can be found [here](#).

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