

Statement of Commissioner Joshua D. Wright

**Proposed Policy Statement Regarding Unfair Methods of Competition
Under Section 5 of the Federal Trade Commission Act**

June 19, 2013

Section 5 of the Federal Trade Commission

largely unfulfilled for a variety of reasons.⁵ In order for enforcement of its unfair methods of competition authority to promote consistently the Commission's mission of protecting competition, the Commission must articulate a clear framework for its application. Such guidance is even more important today in light of dramatic changes in antitrust jurisprudence since the Supreme Court last considered the breadth of the Commission's authority under Section 5 more than four decades ago.⁶ Since 1972, the Supreme Court has issued nearly one hundred antitrust decisions. Those decisions are best characterized as incorporating sound economic analysis into antitrust jurisprudence.⁷ This Policy Statement benefits both consumers and the business community by relying on modern economics and antitrust jurisprudence to strengthen the agency's ability to target anticompetitive conduct and provide clear guidance about the contours of the Commission's Section 5 authority.

This Policy Statement proceeds in four parts. The Policy Statement first defines the two elements the Commission must show to bring a successful enforcement action pursuant to its authority to prosecute unfair methods of competition: harm to competition and an absence of cognizable efficiencies. The Policy Statement then outlines the scope of the agency's authority under Section 5 by examining court decisions that interpret its text as well as the legislative history of the statute. In the remaining two sections, the Policy Statement describes the elements of an unfair methods of competition claim in detail, providing specific guidance to enable the business community to distinguish between conduct the Commission would prosecute as an unfair method of competition and conduct the Commission would not challenge.

I. Definition of Unfair Methods of Competition Under Section 5

To establish an operational framework for applying Section 5, the Commission must define what constitutes an unfair method of competition. Having considered the relevant case law,

unfair.”¹¹ The FTC Act thereby addressed

industry expertise to assess the empirical effects of certain business practices through long term industry study.

In prosecuting cases, the Commission can take advantage of administrative procedure to ensure that it exercises its authority to prosecute unfair methods of competition through a reasoned process. Unlike federal court proceedings, which typically involve generalist judges untrained in antitrust law and can rely on a jury to find facts, the Commission uses an Administrative Law Judge with substantial experience to make initial findings of fact and conclusions of law in any case alleging a violation of Section 5. Finally, the Commission operates under the Administrative Procedure Act, which has more flexible rules of process and evidence than do the federal courts.¹⁶

III. Unfair Methods of Competition Must Harm Competition

The first element of an unfair methods of competition claim is that the act or

methods of competition, the key inquiry for the Commission is the market impact of the conduct claimed to be anticompetitive.²⁴

As with the Sherman Act, conduct challenged under Section 5 “must have an ‘anticompetitive effect.’ That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.”²⁵ The legislative history of the FTC Act supports the notion that harm to competitors alone is insufficient for a business practice to be declared unfair: “The unfairness must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare.”²⁶

In assessing whether a harm to the competitive process results in a harm to competition, the “inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free market economy.”²⁷ The key question is whether the practice is one that “restrict[s] competition and decrease[s] output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.”²⁸ The Commission may use a variety of indicators to assess whether the practice harms competition, but perhaps the most relevant evidence is evidence that the challenged conduct has a harmful impact on price or output.²⁹

More broadly, the Commission has numerous methods and techniques at its disposal to examine the economic evidence and determine the effect of the conduct in question on competition. Conduct that results in harm to competition, and in turn, in harm to consumer welfare, typically does so through increased prices, reduced output, diminished quality, or weakened incentives to innovate.

²⁴ See *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–52 (1977) (analyzing the “market impact” of vertical restraints).

²⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

²⁶ 51 CONG. REC. 11,105 (1914) (Remarks of Senator Cummins).

²⁷ *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 19 (1979) (internal citation omitted).

²⁸ *Id.* (internal 1

b. Conduct that is Likely to Harm to Competition

The Commission may prosecute as unfair methods of competition

Example 2: Firm A

in conduct without any meaningful notice that they may be prosecuted. The Commission therefore creates a clear safe harbor that provides firms with certainty that their conduct can be challenged as an unfair method of competition only in the absence of efficiencies.

b. *Prosecuting Conduct Most Likely to Harm Consumers*

As with all law enforcement agencies, the Commission must allocate its scarce resources in the manner that most effectively achieves its mission. Congress has charged the Commission with promoting competition and furthering consumer welfare by preventing anticompetitive business practices without unduly burdening legitimate business activity. Given the size of the national economy and the range of business practices employed by firms within it, the Commission must identify those patterns of conduct that are most likely to harm consumers so that it can target enforcement efforts to maximize consumer welfare.

Anticompetitive conduct that lacks cognizable efficiencies is the most likely to harm consumers because it is without any redeeming consumer benefits.³³ Through years of learning and regular application, the Commission has developed a core institutional competency in identifying the presence of cognizable efficiencies.³⁴ The Commission's expertise in this regard allows it to effectively target enforcement efforts at conduct that lacks cognizable efficiencies. The Commission therefore will focus its unfair methods of competition enforcement on anticompetitive conduct that lacks cognizable efficiencies.

antitrust violation, is so vague as to permit arbitrary or undue government inference with the reasonable freedom of action that has marked our country's competitive system.").

³³ Such conduct may also be relatively inexpensive 11/10/2010 10:23:11 AM TT51Tf2.02990TD0Tc0231Tj/TT61Tf.287428.2874

c. *Avoiding Deterrence of Consumer Welfare Enhancing Conduct*

Firms engage in a variety of business practices that create efficiencies and thereby enhance their abilities and incentives to compete.

focus the Commission's

outside the usual business planning process. By contrast, efficiency claims substantiated by past experience are likely to be credited. The Commission bears the ultimate burden in establishing that the act or practice lacks cognizable efficiencies. Once a firm has offered initial evidence to substantiate its efficiency claims, the Commission must demonstrate why the efficiencies are not cognizable.

The following are examples of business practices that the Commission can and cannot challenge as unfair methods of competition.

Example 4: Firm A develops and sells

A's conduct as an unfair method of competition because it finds cognizable efficiencies to exist.

Example 7:

prosecute unfair methods of competition. The Policy Statement articulates a definition of unfair methods of competition tethered to the modern economic concept of harm to competition that is well established by the antitrust laws and avoids deterring consumer welfare enhancing competition while targeting conduct most harmful to consumers. In doing so, this Policy Statement strengthens the Commission's ability to target anticompetitive conduct and provides clear guidance on the contours of its Section 5 authority.