

**FEDERAL TRADE COMMISSION****Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act****AGENCY:** Federal Trade Commission.**ACTION:** Notice of Public Workshop

**SUMMARY:** The Federal Trade Commission will hold a public workshop on October 17, 2008, in Washington, D.C., to explore the scope of the prohibition of “unfair methods of competition” in Section 5 of the FTC Act, 15 U.S.C. § 45. In particular, the workshop will consider the appropriate scope of Section 5 in light of legal precedent, economic learning and changing business practices in a global and hi-tech economy. The Commission seeks the views of the legal, academic, and business communities on the issues to be explored at the workshop. This notice poses a series of questions relevant to those issues for which the Commission seeks comment. The agency will consider these comments as it prepares for the workshop. Prior to the workshop, the Commission will publish an agenda on its website.

**DATES:** The workshop will be held October 17, 2008, in the Conference Center of the FTC office building at 601 New Jersey Avenue, N.W., Washington, D.C. Comments must be received on or before October 24, 2008.

**ADDRESSES:** Any interested person may submit written comments responsive to any of the topics identified in this **Federal Register** notice or in any subsequent announcement. Respondents are encouraged to provide comments as soon as possible, but no later than October 24, 2008. Comments should refer to “Section 5 Workshop, P083900” to facilitate the organization of comments. Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.9(c).<sup>1</sup> Because paper mail in the Washington area, and specifically to the Federal Trade Commission, is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by

using the following weblink: (<https://secure.commentworks.com/ftc-Section5workshop>) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on that web-based form. If this notice appears at <http://www.regulations.gov>, you may also file an electronic comment through that Web site. The Commission will consider all comments that [www.regulations.gov](http://www.regulations.gov) forwards to it. A comment filed in paper form should include the “Section 5 Workshop, P083900” reference both on the first page of the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex C), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission requests that any comment filed in paper form be sent by courier or overnight service, if possible, because, as noted above, postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at <http://www.ftc.gov>. The workshop will be transcribed; the transcript will be placed on the public record; and any written comments received will also be placed on the public record. The Commission will consider whether to issue a report following the conclusion of the workshop. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtm>).

**FOR FURTHER INFORMATION CONTACT:** Neil Averitt, Office of Policy and Coordination, Bureau of Competition, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone 202-326-2885; e-mail, [Section5Workshop@ftc.gov](mailto:Section5Workshop@ftc.gov). A detailed agenda and schedule for the workshop will be available on the FTC website (<http://www.ftc.gov>), and can be located through the website’s search function.

**SUPPLEMENTARY INFORMATION:** When Congress created the FTC in 1914, it empowered the agency to prevent “unfair methods of competition” through Section 5 of the FTC Act, 15 U.S.C. § 45. Under Section 5, the Commission may condemn conduct that violates the Sherman Act, 15 U.S.C. § 1-7.<sup>2</sup> But based on its review of the FTC Act’s legislative history, the Supreme Court has stated that Section 5 also reaches beyond violations of the Sherman Act to broader categories of conduct.<sup>3</sup>

The precise reach of Section 5 and its relationship to other antitrust statutes has long been a matter of debate. The Supreme Court has observed that the “standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons.”<sup>4</sup> In the early 1980s, however, lower courts were critical of efforts by the FTC to enforce a reading of Section 5 that captured conduct falling outside the Sherman Act. In striking down the FTC’s orders, those courts expressed a concern that the Commission’s theory of liability failed “to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable.”<sup>5</sup>

The great majority of FTC non-merger cases enforce the Sherman Act. Beginning in the early 1990s, however, the Commission reached a number of consent agreements in matters involving invitations to collude;<sup>6</sup> practices that

<sup>2</sup> See, e.g., *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953).

<sup>3</sup> See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239, 244 (1972) (“section 5 empower[s] the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws.”); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953) (“The ‘unfair methods of competition,’ which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act”).

<sup>4</sup> *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (dicta) (upholding a violation of Sherman Act Section 1).

<sup>5</sup> *E.I. duPont de Nemours & Co. v. FTC* (“Ethyl”), 729 F.2d 128, 138 (2nd Cir. 1984); see also, *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (FTC theory “blur[red] the distinction between guilty and innocent commercial behavior”); *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2nd Cir. 1980) (“enforcement of the FTC’s order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry”).

<sup>6</sup> See, e.g., *Valassis Communications*, Docket No. C-4160 (April 28, 2006); *FMC Corp.*, 133 F.T.C. 815 (2002); *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104

<sup>1</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

facilitate collusion or collusion-like results in the absence of an agreement;<sup>7</sup> and misconduct relating to standard setting.<sup>8</sup> Because the complaints in these matters did not allege all the elements of a Sherman Act violation, the Commission's theory of liability rested on a broader reach of Section 5. As consents, none of these matters have been reviewed by a court.

The workshop will examine three topics: (1) the history of Section 5, including Congress's enactment, the FTC's enforcement, and the courts' response; (2) the range of possible interpretations of Section 5; and (3) examples of business conduct that may be unfair methods of competition addressable by Section 5. The Commission particularly seeks the input of the business community in preparing this last topic.

The Commission invites public comment on questions relevant to these topics, including:

1. What principles concerning the scope of Section 5 can be garnered from Supreme Court and appellate court decisions?

2. What legal, economic, and policy concerns are important when interpreting Section 5's prohibition against "unfair methods of competition?" What is the role of Section 5 in protecting nonprice competition?

3. Is Section 5 coterminous with the Sherman Act? How has the courts' development of the Sherman Act over time altered its relationship to Section 5? Does the Sherman Act encompass all conduct that is truly harmful to competition?

4. Does Section 5 authorize the FTC to fill technical gaps in the coverage of the other antitrust statutes?

5. Can Section 5 reach externally-defined business torts where they threaten to bring about a future lessening of competition?

(1997); YKK (U.S.A.) Inc., 116 F.T.C. 628 (1993); AE Clevite, Inc., 116 F.T.C. 389 (1993); Quality Trailer Products, 115 F.T.C. 944 (1992); FTC v. Mead Johnson & Co., Civ. No. 92-1366 (D.D.C. June 11, 1992), *press release available at* (<http://www.ftc.gov/opa/prehawn/F93/mead-ahp24.htm>).

<sup>7</sup> This category is illustrated by the cases involving minimum advertised prices for CDs. See BMG Music, Docket No. C-3973 (Aug. 30, 2000); Capital Records, Docket No. C-3975 (Aug. 30, 2000); Sony Music Entertainment, Docket No. C-3971 (Aug. 30, 2000); Time-Warner, Inc., Docket No. C-3972 (Aug. 30, 2000); Universal Music and Video Distribution, Docket No. C-3974 (Aug. 30, 2000). See also FTC v. Mead Johnson & Co., *supra*.

<sup>8</sup> Dell Computer Corp., 121 F.T.C. 616 (1996) (misrepresentation of patent rights to a standard-setting body); Negotiated Data Solutions ("N-Data"), File No. 051-0094 (press release Jan. 23, 2008) (provisionally accepting consent subject to public comments) (renewing on prior commitment made to a standard setting body).

6. Should Section 5 be interpreted to reach practices that pose at least a moderate threat to competition and few offsetting benefits to consumers, (e.g., reduced costs, improved products, or other efficiencies), where enforcement is limited to the FTC and relief is limited to an injunction prohibiting or undoing the challenged conduct?<sup>9</sup>

7. Does the FTC's use of Section 5, independent of the Sherman Act, make it less likely that treble damages could be assessed in follow-on actions? If so, should that fact influence the interpretation of Section 5's scope, or its application?

8. What limiting principles should be applied to the definition of "unfair methods of competition?" How can "unfair methods of competition" under Section 5 be defined to avoid capturing benign or procompetitive conduct while allowing for sufficient guidance and predictability for business?

9. If Section 5 captures conduct falling outside the Sherman Act, what economic evidence and analysis would be useful in identifying violations? What economic evidence and analysis would be useful in identifying the proper limiting principles for the enforcement of Section 5?

10. Was the Commission's use during the last two decades of Section 5 claims in settled complaints that did not allege all the elements of a Sherman Act violation beneficial and principled or harmful and unbounded? How might courts have evaluated these claims?

11. What are examples of business conduct that may be unfair methods of competition addressable by Section 5? How does that conduct harm competition and consumers?

By direction of the Commission.

**Richard C. Donohue,**

*Acting Secretary.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institute for Occupational Safety and Health; Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

<sup>9</sup> II P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 302h (2<sup>nd</sup> ed. 2000 Supp. 2007) (proposing this interpretation of Section 5).

**SUMMARY:** The Department of Health and Human Services (HHS) gives notice of a decision to designate a class of employees at the Y-12 Plant in Oak Ridge, Tennessee, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On August 15, 2008, the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy (DOE), its predecessor agencies, and DOE contractors or subcontractors who worked at the Y-12 Plant in Oak Ridge, Tennessee from March 1, 1943 through December 31, 1947 for a number of work days aggregating at least 250 work days occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation will become effective on September 14, 2008, unless Congress provides otherwise prior to the effective date. After this effective date, HHS will publish a notice in the **Federal Register** reporting the addition of this class to the SEC or the result of any provision by Congress regarding the decision by HHS to add the class to the SEC.

**FOR FURTHER INFORMATION CONTACT:**

Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C-46, Cincinnati, OH 45226, Telephone 513-533-6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to [OCAS@CDC.GOV](mailto:OCAS@CDC.GOV).

Dated: August 22, 2008.

**Christine M. Branche,**

*Acting Director, National Institute for Occupational Safety and Health.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institute for Occupational Safety and Health; Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) gives notice of a decision to designate a class of employees at the Spencer Chemical