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WHITE PAPER

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FAQ About the FTC's Controversial New "Unfair Methods of Competition" Policy

The Federal Trade Commission ("FTC") released a new Policy Statement of its enforcement priorities for Section 5 of the FTC Act, which makes unlawful "unfair methods of competition." Since the passage of the FTC Act in 1914, the FTC has struggled to define with precision what conduct violates § 5 beyond conduct that is unlawful under other antitrust laws. If implemented as drafted, the Policy Statement would mark a significant expansion of antitrust enforcement. However, past FTC efforts at expansive § 5 enforcement have been rejected in the courts.

This Jones Day *White Paper* summarizes the FTC's Policy Statement, identifies the areas where business risk has changed the most, and provides practical guidance for business about how to react (and not overreact) to this development.

WHAT DID THE FTC ANNOUNCE?

Most private and federal agency antitrust cases involve challenges to conduct that purportedly violates the Sherman Act (conspiracies that harm competition, monopolization, attempted monopolization) or the Clayton Act (certain exclusive contracts, mergers). Section 5 of the FTC Act also makes unlawful "unfair methods of competition." However, it does not define what practices are unfair, and there has been debate since its passage about the extent to which § 5 provides for a wider scope of enforcement than the Sherman or Clayton Acts.

Following a series of losses in court in the early 1980s, the FTC largely has confined § 5 enforcement to cover practices that parallel conduct prohibited under the Sherman or Clayton Acts, for instance, invitations to collude. After withdrawing in July 2021 bipartisan guidance on § 5 that dated back to 2015, the FTC issued a sprawling Policy Statement that, if implemented as drafted, would significantly expand the practices condemned as unlawful.

WHAT DOES THE POLICY STATEMENT SAY?

The Policy Statement introduces "general principles" that indicate—in the FTC's view—whether a practice is an "unfair method of competition" that violates § 5.

- **Method of Competition.** The FTC defines "methods of competition" to include conduct in the marketplace that directly or indirectly "implicates" competition. The FTC's definition excludes violations of laws such as environmental or tax laws that provide a cost advantage or structural features of a marketplace that are not attributable to a company's conduct such as high concentration or entry barriers.
- **Unfair.** The Policy Statement then states that conduct is unfair if it "goes beyond competition on the merits." The Policy Statement offers a two-part test to identify such conduct: (i) "conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature"; and (ii) "must tend to negatively affect competitive conditions."

Unlike under the Sherman and Clayton Acts, the Policy Statement claims that the FTC need not prove market definition, market power, or that the conduct harmed or may in the future harm competition. Instead, the FTC says it only has to prove that the conduct "has a tendency to generate negative consequences" for competition, considered in the aggregate with a party's other conduct or the conduct of others in the marketplace. Over the last four decades, the guiding principle in most antitrust cases and agency enforcement (including the FTC's last § 5 policy statement) has been whether a practice harms customers or consumers. The Policy Statement expands that focus to include the effect of any practice on competitors, workers (a novel and progressive concept), or other marketplace participants.

The Policy Statement places the burden on the party to prove any procompetitive justification. And even if there is a legitimate procompetitive benefit, the party must prove that there was no less-restrictive alternative to achieve that objective, and that any benefit outweighs the harm. The Policy Statement expresses skepticism about procompetitive benefits and does not say how the FTC will weigh the effects on different constituencies.

The Policy Statement also includes a list of practices that the FTC or the courts have found to violate § 5 (the first three items below), or that the FTC believes violates the "spirit" of the antitrust laws (the remaining items):

- **Invitations to collude**;
- **Mergers & acquisitions** ("M&A"s) or **joint ventures** ("JV"s) with the tendency to ripen into antitrust violations;
- A **series of M&A** or **joint ventures** tending to harm, but individually may not have violated the antitrust laws;
- **Loyalty rebates**, **tying**, **bundling**, and **exclusive dealing** arrangements tending to ripen into antitrust violations because of industry conditions and the company's position within the industry;
- De facto **tying**, **bundling**, **exclusive dealing**, or **loyalty rebates** that use market power in one market to harm competition in the same or a related market;
- Practices that facilitate **tacit coordination**;
- **Parallel exclusionary conduct** that may cause aggregate harm;
- **Fraudulent and inequitable practices** that undermine the standard-setting process or that interfere with the Patent Office's full examination of **patent applications**;

- **Price discrimination** claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by the Robinson-Patman Act;
- M&A of a **potential** or **nascent competitor** that may tend to lessen current or future competition; and
- **Cumulative conduct** that tends to undermine competitive conditions in the market.

The lone Republican FTC commissioner, in a stinging 20-page dissent, criticized the Policy Statement for: (i) abandoning the consumer-welfare standard[1] and the rule of reason (which balances potential harm to competition against procompetitive effects); (ii) lacking guidance about what conduct would violate § 5; and (iii) rejecting the FTC's long-established evidence-based approach in favor of "merely labeling conduct with an appropriate adjective [to] establish liability."

HOW HAS THE FTC ENFORCED § 5 IN RECENT YEARS?

The now-withdrawn 2015 bipartisan policy statement articulated the FTC's view that Congress intended § 5 to cover a broader scope of conduct than the Sherman and Clayton Acts. Less than a page long, it set forth the following § 5 enforcement principles:

- The promotion of consumer welfare is the FTC's guiding principle in § 5 enforcement;
- The FTC uses the rule of reason for § 5 violations to determine the net effect on competition; and
- The FTC is less likely to challenge practices under § 5 on a standalone basis if the conduct could be addressed under the Sherman or Clayton Acts.

The FTC's § 5 cases in recent years have focused on two areas: "incipient" antitrust violation such as invitations to collude and signaling; and misuse of standard-setting processes. Invitations to collude occur when one party invites another to conspire to raise prices, reduce output, or otherwise coordinate competitive behavior without the other party accepting the invitation.[2] Signaling involves public statements intended to induce the same outcome. Signaling, invitation to collude, and misuse of standard-setting processes complaints typically involve unilateral conduct. The FTC cannot use Sherman Act § 1 in those cases because an element of a § 1 case—an agreement—is lacking.

HOW DOES AN FTC § 5 CASE PROCEED?

Although as a technical matter the FTC does not enforce the Sherman Act, it can bring cases under § 5 against the same type of conduct that would violate the Sherman Act, and courts have found that Sherman Act violations also violate § 5. The FTC can enforce the Clayton Act directly. Certain practices identified in the Policy Statement could violate both the Sherman Act and § 5, whereas other practices could not violate the Sherman Act. Whether the FTC brings a case under both Sherman Act and § 5 or instead pursues a standalone § 5 action consistent with the Policy Statement will depend on the conduct at issue.

If the FTC has reason to believe a § 5 violation has occurred, FTC staff can be authorized to issue subpoenas for documents, data, and investigational hearings. Investigations can end with the FTC closing its investigation, a negotiated settlement (typically with a behavioral remedy prohibiting the allegedly unlawful practice), or litigation. A majority of the FTC's five commissioners must vote to issue a complaint, and the FTC can proceed either in federal court or, more likely, in its own administrative court before an administrative law judge ("ALJ").

The losing party in an administrative trial may appeal to the five-member Commission, which reviews the ALJ's findings de novo. A party may obtain review of a Commission order by appealing to any circuit court of appeals where the practice "was used," the company resides, or the company conducts business. Appellate courts must treat the factual findings of the Commission, if supported by evidence, as conclusive.

MATTERS IN MY INDUSTRY TYPICALLY HAVE BEEN ASSIGNED TO THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ("DOJ"), NOT THE FTC. IS MY COMPANY THEREFORE INSULATED FROM § 5?

Not necessarily. The DOJ and the FTC have a process to decide which agency will investigate a matter. An agency's

experience with an industry is one important factor, as is an agency's jurisdictional capabilities and resource limitations. Because the DOJ and the FTC allocate matters in part based on industry, there is a concern that the Policy Statement unfairly subjects companies to different standards based on their industry. Parallel reviews by both agencies under different standards are unlikely based on the agencies' historic cooperation. However, that type of duplication would provide fodder to those who have questioned the need for dual antitrust enforcement at the federal level.

The DOJ and the FTC also have jurisdiction over different matters. For example, the FTC does not have authority to prosecute criminal antitrust violations or use § 5 to reach the conduct of non-profit entities. If the FTC becomes aware of conduct that only the DOJ can address, it will refer a matter to the DOJ.

In addition, the DOJ could conclude that, despite prior industry experience, it will refer an investigation to the FTC if that agency has greater bandwidth; and/or is more likely to achieve a favorable outcome, say, based on an action brought under the FTC Act versus the Sherman Act. The Policy Statement therefore may result in the DOJ referring matters to the FTC that it cannot (or prefers not to) bring under the Sherman and Clayton Acts, either at the outset of a DOJ investigation or at a later point.

WHAT ARE THE CONSEQUENCES OF A § 5 VIOLATION?

The FTC can issue cease and desist orders enjoining a company from a practice. Any party that violates an FTC cease and desist order could be liable for maximum civil penalties of $46,517 per day, per violation, but the FTC rarely imposes the maximum fine.[3] The FTC cannot otherwise obtain monetary remedies for § 5 antitrust violations.

IS THERE ANY RISK OF PRIVATE LAWSUITS FROM AN FTC § 5 CASE?

There is no private right of action under § 5.

Many of the FTC's § 5 cases in recent decades involved conduct that fell short of satisfying the agreement element in a Sherman Act § 1 case, e.g., signaling or invitations to collude. Some argued that private follow-on litigation was therefore not likely to arise from FTC § 5 enforcement.

However, the FTC's expanded list of purported § 5 violations, which extend well beyond signaling and invitations to collude, may encourage plaintiffs to file cases under the Sherman Act, relying on the FTC's § 5 allegations. In addition, some state unfair competition laws that parallel the general language of § 5, such as Massachusetts, include a private right of action.

WHAT DOES THE § 5 POLICY STATEMENT MEAN FOR M&A ENFORCEMENT?

The Policy Statement suggests that the FTC will take a more aggressive approach to M&A, relying on § 5 to challenge acquisitions involving two types of transactions:

- "A series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws," or
- "Mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition."

Commissioner Wilson's dissent expressed concern that the FTC "will use § 5 to challenge mergers and acquisitions that do not violate the antitrust laws." Despite that concern, the FTC already has made clear that it plans more vigorous enforcement in those areas under the merger statute (Clayton Act § 7), and the precedent for expansive § 5 enforcement in M&A beyond the Clayton Act is thin. Except for the narrow set of transactions identified in the Policy Statement, the FTC is not likely to bring a standalone challenge to a merger under § 5. The Policy Statement therefore should not affect most M&A transactions.[4]

WHAT CASES MIGHT BE BROUGHT THAT PREVIOUSLY WOULD NOT HAVE BEEN?

Commissioner Wilson criticizes the laundry list of practices that the FTC says may violate "the spirit of the antitrust laws"

as a "list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning." In many cases, the underlying practice (e.g., a product bundle or a loyalty rebate) may enhance competition, or at worst be competitively neutral. Beyond identifying the practices listed above, the Policy Statement does not provide guidance about how the FTC will determine what is or is not unlawful. Below, we highlight the most likely areas of FTC enforcement under its expansive view of § 5.

Competitors adopt practices that facilitate "tacit coordination" or exclude small competitors or entrants.
Remember that Sherman Act § 1 requires proof of an agreement. An agreement need not be formal or written, but a § 1 plaintiff cannot make its prima facie case on merely parallel behavior.

The Policy Statement states that the FTC can use § 5 to prohibit practices that facilitate tacit coordination or parallel exclusionary conduct that may cause aggregate harm. Although the FTC does not define tacit coordination or state what practices may be exclusionary, we expect the following areas to be a focus of enforcement, especially in industries with few competitors:

- Companies adopt similar pricing mechanisms or algorithms that contribute to parallel, coordinated pricing;
- Upstream suppliers impose identical limits on retailer advertising of discounts;
- Manufacturers across an industry dictate the minimum resale price at which resellers may sell the manufacturers' products;
- Competitors adopt similar exclusionary practices that impede entry; for example, by reducing a nascent competitor's access to critical customers or inputs; and
- Information sharing among competitors or public statements that reduce uncertainty about pricing or output.

The practices described above also may be procompetitive, but the Policy Statement seeks to close the door on defenses involving procompetitive justifications. However, the courts have taken the opposite approach and instead have considered procompetitive justifications in their analyses of a practice's competitive effect.[5] In addition, the courts have reined in the FTC's past efforts to argue that parallel conduct in the absence of an agreement violates § 5.[6]

Price discrimination not covered by the Robinson-Patman Act.
Over the last several decades, there has been little government enforcement of the Robinson-Patman Act, which prohibits price discrimination and the discriminatory provision of promotional funds or services. In the last year, however, the FTC has stated its intent to renew enforcement under the statute, and it is likely that the FTC will seek to challenge conduct that violates the spirit of the statute, if not its actual language, under § 5.

For example, the Robinson-Patman Act prohibits the knowing receipt or inducement of discriminatory pricing but does not prohibit the knowing receipt or inducement of discriminatory promotional funds or services. Between the 1960s and 1980s, the FTC used § 5 to fill that "gap" in the Robinson-Patman Act, and the FTC appears intent on doing so again.

A company's use of "market power" in one market to "impede" competition in another market through tying, bundling, or loyalty rebates.
Although the antitrust laws prohibit tying, bundling, and other acts that could protect or expand a dominant market position if that action has a significant likelihood to lead to consumer harm,[7] the FTC views that precedent as inadequate. Under the Policy Statement, the FTC may focus on conduct that harms competitors, even if the evidence is not clear that the practice harms customers, such as through higher prices or lower quality.

For example, loyalty rebates and product bundles can benefit customers. The Policy Statement, however, suggests that such conduct could be unlawful if other (often smaller) competitors cannot compete on similar terms, including price. Under those circumstances, the FTC may claim that the larger company's actions are unlawful even if the FTC cannot prove that customers will be harmed.

WHAT ARE THE PRACTICAL IMPLICATIONS OF THE POLICY STATEMENT FOR MY BUSINESS? IS MY COMPANY AT RISK OF A § 5 INVESTIGATION?

The FTC Policy Statement does not have the force of law, nor is it binding on U.S. courts. Instead, it is intended to provide guidance about the agency's position on enforcement priorities,

prosecutorial discretion, and prohibited conduct. Courts have cited certain agency policy statements like the U.S. antitrust agencies' horizontal merger guidelines as persuasive authority for how to approach antitrust issues. However, courts are less likely to defer to agency policies if they are inconsistent with case law, ignore economic learnings, and mark a dramatic reversal in policy.[8]

There are also practical limits on the FTC. The agency has limited resources and must choose which battles to fight. In addition, even if the politically appointed leadership of the FTC wants to be more aggressive, career staff could have a moderating effect. Although the commissioners can vote out a complaint, career staff investigates cases, builds the record, makes enforcement recommendations, and litigates cases.

The Policy Statement is likely to have little, if any, impact for the majority of businesses, especially those that operate in fragmented industries with many competitors and for businesses that do not enjoy large market shares in any conservatively defined product or geographic market. For a limited number of companies, however, the FTC is likely to investigate practices that otherwise would not have received scrutiny in the past. If a company cannot convince the FTC to close or settle an investigation, the FTC may bring a novel action under § 5. For that small number of companies, the options will be settlement (including terminating the conduct) or fighting the FTC in administrative and federal court. Those investigations, and any ensuing litigation, are likely to take years to complete.

The companies at the greatest risk of a § 5 investigation are:

- Companies that have high market shares;
- Companies that operate in concentrated industries, even if a company itself does not have high market shares;
- Companies in technology, health care/pharmaceuticals, agriculture, and consumer products industries. The FTC has made enforcement in those sectors a priority;
- Companies that have an acquisition pipeline that includes startups or "nascent competitors";
- Portfolio companies of private equity firms involved in "rolling-up" an industry;
- Businesses with rancorous relationships with customers and/or those with aggressive or vocal consumer-rights organizations that may generate FTC complaints;
- Companies with executives or board members that serve on the board of a competitor, but that qualify for Clayton Act § 8's de minimis exemption involving "competitive sales";[9] or
- Companies that check multiple boxes above.

Armed with a new list of purportedly unlawful conduct and a more relaxed evidentiary standard, the FTC is likely to believe it has leverage over parties it is investigating. Balancing the cost and time of litigating § 5 matters against the burden of an FTC cease and desist order might result in more § 5 settlements.

DO I NEED TO ALTER MY CURRENT COMPLIANCE PROGRAM OR BUSINESS PRACTICES?

In practice, changing business practices to comply with the Policy Statement may be difficult and potentially counterproductive for some businesses. The FTC offered so little guidance that to bring policies and procedures in line with the Policy Statement might require significant guesswork on the part of businesses and an over-conservative approach. In practice, most companies likely do not need to alter their antitrust compliance programs because their risk profile should be unaffected.

Companies at higher risk (see above), however, should review their compliance programs and consider whether changes are warranted. In many cases, in-house legal departments already have evaluated the practices listed above and most companies will not need to make substantial changes to their day-to-day operations.

For a limited set of activities that are "close to the line," company standards that were historically keyed to precedent under the Sherman and Clayton Acts may merit reevaluation now, especially for companies that prefer to adopt a more risk-averse approach toward antitrust issues.

IS THERE ANY WAY TO CHALLENGE WHAT THE FTC HAS DONE?

Beyond challenges to the substantive antitrust issues in a case, if the FTC pushes § 5 too far beyond the scope of the Sherman and Clayton Acts, parties may raise questions

of administrative and constitutional law in the federal courts. Under the Major Questions Doctrine, the Supreme Court explained that an "[e]xtraordinary grant[] of regulatory authority" requires "clear congressional authorization."[10] Parties might argue that broad authority to regulate "unfair" conduct generally—as opposed to conduct that is anticompetitive under the Sherman and Clayton Acts—is the sort of "extraordinary" authority that may trigger this requirement.

Expect parties to cite the U.S. Supreme Court's recent decision in *West Virginia*, in which the Court said it is unlikely that Congress would make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "a long-extant statute."[11] Indeed, for similar reasons, some courts construing the FTC Act's separate prohibition on "unfair or deceptive acts or practices" have limited "unfairness" to violations of "'clear and well-established' policies that are expressed in the Constitution, statutes, or the common law."[12]

Parties also may raise constitutional issues arising from the Policy Statement, implicating both the nondelegation doctrine and the Due Process Clause's vagueness doctrine. On nondelegation, the Supreme Court has not deemed a statute to be an unconstitutional delegation since 1935. But parties are likely to argue that the decision doing so involved a statute that was similar to § 5.[13] That decision specifically distinguished § 5,[14] but the courts may be less likely to heed that distinction today—particularly if the FTC substantially expands that provision's scope. As for vagueness, courts likely will have to grapple with whether § 5 fails to give "adequate notice" of the FTC's sweeping new policy, and is therefore "impermissibly vague" in violation of the Due Process Clause.[15]

WHAT HAPPENS TO THE POLICY STATEMENT IF THERE IS A CHANGE IN ADMINISTRATION IN 2024?

Recent administration changes resulted in repeals of antitrust guidance: The Biden administration's FTC repealed the Trump administration's vertical merger guidelines, the Trump administration's DOJ withdrew the Obama administration's guidance on merger remedies, and the Obama administration's DOJ repealed the Bush administration's monopolization guidance. To the extent that there is a change in administration in 2024 that results in a Republican or Democrat administration nominating a more centrist, mainstream Commission, the Policy Statement could be withdrawn or wither on the vine through lack of enforcement.[16]

CONCLUSION

The Policy Statement claims sweeping powers for the FTC under § 5, but the scope of the FTC's authority will be tested in the courts, assuming it is not repealed by a different Commission under a new administration before then. The FTC also likely will face headwinds given existing case law. Past FTC efforts to expand the scope of § 5 have led to FTC losses and criticism from the courts for challenging conduct that arose not from a conspiracy among competitors, but, ironically, from hard-nosed competition to win customers.[17] The Policy Statement is an expansive expression of antitrust enforcement, but what will matter more is how the FTC implements it from here. Businesses should be aware of the FTC's aggressive approach to § 5 and consider the potential risks that arise from it.

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ENDNOTES

1 The "consumer welfare" standard focuses antitrust analysis on whether there is harm to consumers as distinct from competing producers, other marketplace participants, or other policy considerations. The typical, though not exclusive, focus of the consumer welfare standard is the effect of a business practice or transaction on prices.

2 As detailed in our November 2022 *Alert*, the Department of Justice Antitrust Division brought its first criminal Sherman Act § 2 case in 50 years involving an invitation to collude. A paving contractor pleaded guilty to attempted monopolization after he allegedly proposed to a competitor for publicly funded highway projects a market-allocation scheme in which the contractor would stop bidding in South Dakota and Nebraska if the competitor stopped bidding in Montana and Wyoming. Instead of agreeing, the competitor reported the contact to the Department of Transportation.

3 This amount is adjusted annually based on the change in the Consumer Price Index.

4 The DOJ and the FTC announced plans to revise the merger guidelines, the document that guides the agencies' analysis in merger review. Those guidelines will expand the scope of merger review and the types of harm over which the DOJ and the FTC will challenge mergers.

5 See, e.g., *Official Airlines, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980) ("[T]he full Commission reversed [the ALJ] as to the second and third counts, holding that [Respondent] had sufficient business justification for" the conduct at issue.)

6 *E.I. du Pont de Nemours v. Fed. Trade Comm'n*, 729 F.2d 128, 139 (2d Cir. 1984) ("Before business conduct in an oligopolistic industry may be labelled 'unfair' within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.")

7 Although there is some precedent that holds tying may be per se unlawful in certain instances, modern cases have rarely found tying to be unlawful without at least analyzing the competitive impact of the tie on consumers.

8 For example, the Policy Statement suggests the FTC will not have to prove anticompetitive effects to succeed on a § 5 claim, but the courts have vacated Commission orders for failure to do just that. See, e.g., *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 579 (9th Cir. 1980) ("There is a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect."); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 141 (2d Cir. 1984) ("[W]e do not find substantial evidence in this record as a whole that the challenged practices significantly lessened competition in the antiknock industry or that the elimination of those practices would improve competition.") The FTC also could be pressed to explain why it must balance harms and benefits in consumer protection cases when enforcing § 5's prohibition against "unfair" deceptive practices, but not (per the Policy Statement) in "unfair" competition actions. Commissioner Wilson noted in her dissent that following expansive unfairness rulemaking in the 1970s, Congress "expressed its disapproval by shutting down the agency for several days, failing to reauthorize the agency for fourteen years, and imposing additional procedural obstacles on trade regulation rulemaking for the FTC." Thereafter, the FTC adopted a policy statement that balanced harms against benefits to consumers or competition, which Congress codified in 1994.

9 Section 8 of the Clayton Act prohibits a person from simultaneously serving as an officer or director of two competing corporations that meet specified size thresholds unless certain de minimis exceptions apply.

10 *West Virginia v. EPA*, 142 S. Ct. 2587, 2614-16 (2022).

11 *Id.* at 2610.

12 *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1231 (11th Cir. 2018).

13 *See ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-22 (1935) (statute authorized president to approve "codes of fair competition").

14 *Id*. at 533-34.

15 *City of Chicago v. Morales*, 527 U.S. 41, 59-60 (1999).

16 Republican control of the U.S. House of Representatives alone is not likely to change the FTC's agenda.

17 *See, e.g.*, *Boise Cascade Corp. v. FTC*, 637 F.2d at 581 ("[W]here the parties agree that the practice was a natural and competitive development in the emergence of the [industry], and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.")

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