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CLIENT MEMORANDUM

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FTC Rescinds "Unfair Methods of Competition" Enforcement Guidance, Suggesting Broader Regulatory Reach

- The Federal Trade Commission has rescinded its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act which provided guidance on when the FTC would use its authority to challenge anticompetitive conduct that does not fall within the prohibitions of other antitrust laws.

- This action signals that the FTC may take action against a broader range of conduct it deems to be unfair, beyond what the FTC has historically found to violate Section 5. However, the FTC has not issued any new guidance on what additional conduct may now be subject to enforcement scrutiny.

Today, in one of the first public actions taken since Lina Khan became Chair, the Federal Trade Commission (FTC), in a 3-to-2 vote along party lines, rescinded its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. This development suggests the FTC will seek to broaden the scope of its regulatory and enforcement agenda and may bring actions against a wider range of conduct.

Section 5 of the FTC Act, 15 USC §45, declares "unfair methods of competition" to be "unlawful" and "empower[s] and direct[s]" the FTC to prevent persons, corporations and certain other entities from using such methods. To do so, the FTC may bring an administrative proceeding for a cease and desist order. Also, if the FTC believes that a violation is occurring or about to occur, it may seek an injunction in federal district court.

The FTC Act does not define "unfair methods of competition." In 2015, the FTC issued the Statement of Enforcement Principles which said that "unfair methods of competition encompass[] not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act." In other words, the Commission asserted a "'standalone' Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act." At the same time, the Statement sought to cabin the use of this standalone authority. The FTC stated that, in "deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis" it would "be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare" and that "an act or practice challenged by the Commission [using standalone authority] must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justification."

At the time the Statement was issued, then-Chairwoman Edith Ramirez remarked that "the Commission has, for the past few decades, consistently grounded its exercise of [its standalone Section 5] authority 'in the spirit' of the antitrust laws. In particular, it has confined its Section 5 cases to conduct that diminishes consumer welfare by harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition." Historically, the FTC has used its standalone Section 5 authority to bring actions against so-called "invitations to

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collude," which, if consummated, would have violated Section 1 of the Sherman Act; and problematic exchanges of non-public competitively-sensitive information which may have facilitated anticompetitive coordination. It has also used this authority to bring claims related to patent licensing.

The current Commission majority – and in particular the current Chair – has criticized the consumer welfare standard as a basis for evaluating whether conduct is anticompetitive, and today's FTC action can be seen as an attempt to move away from that longstanding tenet of competition law. Indeed, the rescindment of the 2015 Statement opens the door to a potentially much broader assertion of regulatory authority by the FTC. It remains to be seen precisely what type of conduct might now be viewed by the FTC as an unfair method of competition beyond what the FTC has historically found to violate Section 5. The FTC would ultimately have to persuade a court to agree with it in the face of a challenge. Nevertheless, today's action is quite significant in signaling that the FTC may take action against a broader range of conduct it deems to be unfair. Chair Khan, in her remarks prior to the vote, suggested that today's action is "only the start of [the FTC's] efforts to clarify Section 5" and that further guidance may be forthcoming. However, until the FTC says or does more, businesses are left with a degree of uncertainty.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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