

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).¹ 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 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. 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. § 1-7.² 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.³

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.”⁴ 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.”⁵

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;⁶ practices that

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

³ 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”).

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

⁵ *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”).

⁶ 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

¹ 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).

