

**Address by FTC Chairwoman Edith Ramirez**  
**Competition Law Center**  
**George Washington University Law School**  
**August 13, 2015**

Good afternoon. I want to thank Bill Kovacic and the George Washington University Law School for hosting this event and inviting me to speak.

This afternoon I am pleased to announce an important milestone in the Commission's application of its founding statute, enacted 101 years ago. As most of you know, the central provision of the original Federal Trade Commission Act is a prohibition on "unfair methods of competition."<sup>1</sup> As Congress understood when it gave the Commission the authority to apply this broadly worded phrase, the Commission would need to apply this provision flexibly, and on a case-by-case basis, to deal with constant flux in the American economy.

That flexibility is just as important in today's digital age as it was in the old-economy world of 1914. Our understanding of the antitrust laws in general, and Section 5 in particular, has evolved significantly since 1914 to reflect changing times, new business practices, and improved techniques for evaluating competitive harms and benefits. Since 1914, courts have continuously refined their application of the broadly written phrases of the Sherman and Clayton Acts, such as "restraint of trade," "monopolization," and "substantial lessening of competition." It is no less essential that we preserve a flexible understanding of Section 5's related prohibition on "unfair methods of competition."

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<sup>1</sup> Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–51 (2013)). In 1938, Congress added a consumer protection prohibition on "unfair or deceptive acts or practices." Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41, 44, 45 & 52–58 (2013)). My remarks today concern only the original prohibition on "unfair methods of competition." Because the interaction between that prohibition and the Sherman Act is the main focus of inquiry, I sometimes use the term "Sherman Act" to denote both the Sherman Act and the Clayton Act.

Today, in the overwhelming majority of our antitrust cases, we address unfair methods of competition that, in our view, violate the Sherman or Clayton Act, and in those cases we typically invoke our Section 5 authority to incorporate Sherman or Clayton Act principles by reference. But in a small number of cases, we pursue, as Congress intended, “unfair methods of competition” that may fall outside the scope of the other antitrust laws. In doing so, we exercise what has now become known as our “standalone” Section 5 authority.

Consistent with broader trends in antitrust law, we now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century. In particular, we focus our “unfair methods” enforcement efforts on conduct that threatens competition or the competitive process, not conduct that conflicts with other public policy goals. And when we do so, we invoke the same kind of careful economic analysis that we use in all of our enforcement matters to ensure that we exercise our authority wisely.

I have previously explained that I favor a common-law approach to the development of Section 5 doctrine rather than a prescriptive codification of precisely what conduct is prohibited. As Congress understood when it enacted the FTC Act, it would be nearly impossible to describe in advance all of the conduct that may threaten competition or the competitive process in our dynamic economy. But I have also stated that I have no objection to restating the general principles that guide us, all of which are reflected in the Commission’s recent precedents exercising standalone Section 5 authority.<sup>2</sup>

Today, I am happy to announce that a bipartisan majority of the Commission has adopted a statement of principles concerning how we will exercise our standalone Section 5 authority.

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<sup>2</sup> See, e.g., Keynote Address by FTC Chairwoman Edith Ramirez, Unfair Methods and the Competitive Process: Enforcement Principles for the FTC’s Next Century, George Mason Univ. School of Law (Feb. 13, 2014).

The policy statement reaffirms that, in deciding whether to bring a standalone Section 5 claim, the Commission will be guided by three principles on which there is broad consensus. First, we will use our standalone Section 5 authority to promote consumer welfare as that term is generally understood in antitrust precedent. Second, we will evaluate commercial practices by focusing on harm to competition or the competitive process, accounting for procompetitive benefits. Third, the Commission is less likely to rely on a standalone Section 5 theory if the Sherman or Clayton Act is sufficient to address the competitive concern at issue. Our aim in adopting this policy statement is to reaffirm the principles that guide our enforcement decisions, leaving for future generations the flexibility to do the same.

Before I discuss today's policy statement in greater detail, I would like to provide a brief overview of Section 5 and how we have enforced it over time. As will become clear, these precedents illustrate how, for several decades, the Commission has closely followed the principles announced today in deciding whether to pursue a standalone Section 5 theory.

#### **I. A Brief Overview of Section 5**

Congress wrote the prohibition against unfair methods of competition into Section 5 of the FTC Act at the same time that it created the FTC itself, and it purposefully chose open-ended language to accommodate the new agency's broad institutional mission. Congress had enacted the Sherman Act nearly a quarter century before, in 1890, and had relied on the Department of Justice to prosecute the anticompetitive conduct outlawed by that Act. But by 1914, Congress saw a need for a new competition law that reached beyond the Sherman Act's substantive coverage and, to enforce that new law, a new expert agency with a more complete set of enforcement, advocacy, and research tools. The twin products of that legislative initiative were Section 5 and the FTC.

There has never been any question that Section 5’s ban on “unfair methods of competition” reaches conduct beyond the scope of the other antitrust laws.<sup>3</sup> Indeed, the Supreme Court had to confirm in 1948 that Section 5 enables the FTC to pursue “any conduct *within* the ambit of the Sherman Act.”<sup>4</sup> It has long been accepted, therefore, that the FTC Act incorporates, but is not limited by, the Sherman Act’s prohibitions on monopolization and restraints of trade. In particular, Section 5 enables the Commission to supplement and complement the Sherman and Clayton Acts as needed to promote consumer welfare.

In the first decades after enactment of the FTC Act, the Commission used its standalone Section 5 authority to target a wide range of disfavored business conduct that posed little or no threat to competition or the competitive process, such as lotteries and commercial bribery.<sup>5</sup> In 1972, the Supreme Court unanimously endorsed a similarly expansive view of our authority, ruling that Section 5’s ban on “unfair methods of competition” entitled the Commission to promote “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”<sup>6</sup>

Although this precedent legally authorizes the Commission to use its “unfair methods” authority to promote non-competition-related objectives, the Commission has, for the past few decades, consistently grounded its exercise of that authority “in the spirit” of the antitrust laws. In particular, it has confined its Section 5 cases to conduct that diminishes consumer welfare by

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<sup>3</sup> See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

<sup>4</sup> *FTC v. Cement Inst.*, 333 U.S. 683, 692 (1948) (emphasis added).

<sup>5</sup> See William Kovacic and Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 945 (2010).

<sup>6</sup> *Sperry & Hutchinson Co.*, 405 U.S. at 244.

harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition.

That focus on the competitive process dovetails with the FTC's larger institutional mission to promote the interests of consumers, and it underlies all of our recent standalone Section 5 cases. For example, we have brought a number of cases involving "invitations to collude"—that is, efforts by one competitor to reach an anticompetitive agreement with another competitor.<sup>7</sup> In the absence of a consummated agreement or potential monopoly power, such conduct generally falls through the cracks of Sections 1 and 2 of the Sherman Act.<sup>8</sup> But such conduct can nonetheless violate the spirit of the antitrust laws insofar as it threatens harm to competition without countervailing benefits. We have thus relied on our standalone Section 5 authority to reach such conduct, consistent with Congress's intent for the Commission to stop anticompetitive conduct in its incipiency. Although this use of Section 5 was controversial at first, it is now an accepted fixture of our standalone Section 5 enforcement activity.

Our other recent cases likewise confirm that the Commission will invoke standalone Section 5 to challenge anticompetitive conduct that threatens net harm to consumer welfare. For example, when we have invoked standalone Section 5 to charge companies with the improper exchange of competitively sensitive non-price information, we have alleged that "no legitimate purpose" outweighs the threat that such conduct would "endanger[] competition."<sup>9</sup> A similar analysis underlies our invocation of standalone Section 5 to charge companies with breaching

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<sup>7</sup> See, e.g., Complaint, Valassis Commc'ns, Inc., Dkt. No. C-4160 (F.T.C. filed Mar. 14, 2006), <https://www.ftc.gov/sites/default/files/documents/cases/2006/03/060314cmp0510008.pdf>.

<sup>8</sup> See generally *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984).

<sup>9</sup> Complaint, Bosley, Inc., Dkt. No. C-4404 (F.T.C. filed May 30, 2013), <http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregiscmpt.pdf>.

commitments to license standard-essential patents on reasonable terms. In that context, too, we have alleged that the charged conduct lacks a “legitimate efficiency justification” that would outweigh its “likely anticompetitive effects.”<sup>10</sup>

In sum, in these and similar Section 5 cases, we have analyzed conduct within a framework very similar to the antitrust rule of reason, predating liability on competitive harm while taking due account of any countervailing efficiencies. And as the invitation-to-collude cases illustrate, we have also tended to invoke our standalone authority when, for various reasons, the conduct at issue arguably eluded traditional antitrust liability even though it diminished consumer welfare. Our policy statement today simply makes these time-honored principles explicit; it does not signal any change of course in our enforcement practices and priorities. Let me now turn to the particulars of that policy statement.

## **II. The Commission’s Policy Statement**

As I have emphasized, I favor a common law approach to the development of Section 5 doctrine. When Congress assigned the Commission an open-ended mandate over “unfair methods of competition,” it understood that markets, commercial practices, and economic analysis are all in a state of flux, and the Commission must use its accumulated expertise to identify and remedy new forms of anticompetitive conduct as they arise. In that dynamic environment, the Commission functions best by refining antitrust principles over time on a case-by-case basis rather than trying to formulate a detailed and comprehensive code of legitimate business conduct. In that respect, we are little different from the courts, which have used a

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<sup>10</sup> Complaint, Motorola Mobility LLC, Dkt. No. C-4410 (F.T.C. filed July 23, 2013), <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf>; *see also* Complaint, Negotiated Data Solutions LLC, Dkt. No. C-4234 (F.T.C. filed Jan. 23, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf>.

common-law approach for 125 years to refine antitrust doctrine incrementally under the exceptionally general language of the Sherman and Clayton Acts.

That said, we can preserve our doctrinal flexibility even while we reaffirm the basic objectives that we seek to achieve when we invoke our standalone Section 5 authority. And there is indeed broad consensus at the Commission on what those objectives have been and will continue to be. As discussed, we use our standalone Section 5 authority to promote the same consumer-welfare objectives that underlie the other antitrust laws. And this means that, much like courts in rule-of-reason cases, we analyze business conduct by taking account of both competitive harm and any countervailing efficiencies or other cognizable business justifications. These straightforward observations capture the first two of the three principles set forth in our policy statement.

Let me elaborate briefly on the second principle: the need to evaluate conduct “under a framework similar to the rule of reason.” The rule-of-reason framework pervades antitrust law, whether we are looking at restraints of trade, monopolies, or mergers. Apart from naked horizontal agreements on price and output, there are few antitrust contexts in which we do not at least *ask* whether a challenged practice has some plausible economic justification.

I wish to stress, however, that we are using the term “rule of reason” in its broad, modern sense. As the Supreme Court has explained, the rule of reason does not “necessarily ... call for the fullest market analysis” in all cases; “[w]hat is required, rather, is an enquiry meet for the case,” depending on “whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a [practice] will follow from a

quick (or at least quicker) look, in place of a more sedulous one.”<sup>11</sup> That observation applies as much to standalone Section 5 theories of liability as to any other antitrust claim. For example, we have applied the equivalent of a quick-look analysis when challenging invitations to collude.<sup>12</sup>

Let me also briefly address the third principle in our policy statement, which notes that we are less likely to rely on a standalone Section 5 theory of liability when we are convinced that the conduct at issue can and will be found to violate the Sherman Act. That has always been our inclination, and it is entirely sensible. In most but not all contexts, the Sherman Act adequately proscribes the forms of anticompetitive conduct that threaten consumer welfare. In those contexts, the Commission benefits from drawing on the same 125-year body of Sherman Act precedent that has evolved organically through both public and private litigation.

Importantly, by bringing Sherman Act cases using its Section 5 authority, the Commission can contribute its institutional expertise to the judicial precedent that will govern antitrust litigation in general, whether brought by the Commission, the Department of Justice, the States, or private plaintiffs. In contrast, only the Commission may bring a standalone Section 5 case. In general, while standalone Section 5 precedent may help inform competition policy, parties other than the Commission may not directly predicate liability on such precedent when they bring antitrust cases of their own. We therefore have generally used our standalone

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<sup>11</sup> Cal. Dental Ass’n v. FTC, 526 U.S. 756, 779–80 (1999).

<sup>12</sup> Analysis of Agreement Containing Consent Order to Aid Public Comment at 4, U-Haul Int’l, Inc., Dkt. No. C-4294 (F.T.C. filed June 9, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100609uhaulanal.pdf> (“It is not essential that the Commission ... define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.”).

Section 5 authority to deal with antitrust problems for which there would be little or no relief to consumers if we did not intervene.

Finally, there may be some who argue that the principles we adopted today are too general to provide sufficient guidance to the business community. Our policy statement is concise, but only because it explicitly incorporates concepts widely used in antitrust law, such as “consumer welfare,” “rule of reason,” “harm to competition,” and “cognizable efficiencies.” Those concepts derive their content from 125 years of precedent under the Sherman and Clayton Acts, and that precedent will inform Commission analysis under Section 5 as well.

To be sure, our policy statement prescribes no detailed code of regulations for the business community at large. Again, however, no such prescriptive code would be feasible or desirable in our variegated and intensely dynamic economy, which is why antitrust has always relied on a case-by-case approach to doctrinal development. As I have previously explained, that common-law approach is at least as appropriate for Section 5, with its limited equitable remedies, as it is for the Sherman Act, which may expose commercial defendants to treble damages awards even in doctrinally uncertain rule-of-reason cases.

### **III. Conclusion**

Let me briefly sum up. For the past several decades, the antitrust agencies and the courts have carefully distinguished anticompetitive conduct that threatens consumer welfare from more benign conduct that poses no such threat. In drawing that distinction, they have rigorously scrutinized claims of competitive harm and have accounted for economic efficiencies and other cognizable business justifications. That basic cost-benefit framework cuts across all of the antitrust statutes and applies to virtually all conduct subject to antitrust scrutiny.

Today's policy statement reaffirms that this same framework governs standalone Section 5 claims no less than claims arising under the Sherman and Clayton Acts. Again, the policy statement marks no change in course; it merely makes explicit what has been evident to close observers of FTC enforcement actions over the past few decades.

As the Supreme Court recently observed in *North Carolina Dental*, "Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is 'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.'"<sup>13</sup> Congress designed Section 5 of the FTC Act as a critical component of that federal antitrust regime. Today's policy statement confirms that, as needed to protect consumers, the Commission will continue to use that provision to supplement the letter of the Sherman and Clayton Acts while fulfilling their spirit.

Thank you.

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<sup>13</sup> N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015) (quoting *United States v. Topco Assocs., Inc.*, 405 U. S. 596, 610 (1972)).