UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act"

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In July 2021, the newly-minted majority at the Commission abruptly withdrew the bipartisan Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under the FTC Act ("2015 Statement").[1] The 2015 Statement had been adopted on a bipartisan basis by the Commission six years prior because it embodied a sound approach to antitrust law that reflected decades of legal precedent and economic learning. I dissented from the decision to rescind the 2015 Statement not only because it reflected a repudiation of the consumer welfare standard and the rule of reason, but also because withdrawing the 2015 Statement without issuing new guidance left businesses in the dark on how to structure their conduct to avoid a challenge by the Commission.[2] Due process demands that the lines between lawful and unlawful conduct be drawn clearly;[3] this interest is heightened when the enforcer at issue promises a new era of aggressive action.[4]

Today, the Commission issues a Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act ("Policy Statement"). Unfortunately, instead of providing meaningful guidance to businesses, the Policy

[1] *See* Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

[2] *See* Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

[3] *See* Connally v. Gen'l Construction Co., 269 U.S. 385 (1926).

[4] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, Memorandum to [Federal Trade] Commission Staff and Commissioners regarding Vision and Priorities for the FTC, (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf

Statement announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful.

In the past, both the FTC and its sister agency, the Antitrust Division of the Department of Justice, have issued clear and constructive guidance on enforcement policies and practices.[5] The Policy Statement that the Commission issues today takes a very different approach. Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that "honest businesses"[6] can map the boundaries of lawful conduct.

The Second Circuit explained that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[7] Instead of heeding this admonition, the Policy Statement adopts an "I know it when I see it" approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning. It provides no methodology to explain which adjectives may apply in any given set of circumstances. The only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct "facially unfair," the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences. The instructions in the iconic Monopoly game provide an apt analogy: the respondent essentially will be told, "Go to jail. Go directly to jail. Do not pass go. Do not collect $200."[8]

But these concerns are only the tip of the iceberg. As explained below in more detail, the Policy Statement affirmatively takes several steps with sweeping implications.

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[5] Fed. Trade Comm'n & U.S. Dep't of Just., Horizontal Merger Guidelines (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., Vertical Merger Guidelines (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-mergerguidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., Statements of Antitrust Enforcement Policy in Health Care (Aug. 1996), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

[6] Memorandum from Chair Lina M. Khan to [Federal Trade] Commission Staff and Commissioners, *supra* note 4, at 1.

[7] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984) ("*Ethyl*").

[8] The analogy is imperfect, as the FTC does not have criminal authority. But I trust that the reader gets the point.

- First, the Policy Statement abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct. The majority prefers a near-per se approach that discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate.

- Second, the Policy Statement repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust "protects competition, not competitors."[9] The Commission will now seek to advance the welfare of inefficient competitors, "workers," and other unnamed but politically favored groups – at the expense of consumers.

- Third, the Policy Statement rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct.

In other words, the Policy Statement abandons bedrock principles of antitrust that long have been accepted by the Commission, the courts, the business community, and enforcers across the globe.

It is also necessary to consider what the Policy Statement does *not* do.

- First, as noted in the preceding paragraphs, the Policy Statement does not provide clear guidance to businesses seeking to comply with the law.

- Second, the Policy Statement does not establish an approach for the term "unfair" in the competition context that matches the economic and analytical rigor that Commission policy offers for the same term, "unfair," in the consumer protection context.

- Third, the Policy Statement does not provide a framework that will result in credible enforcement. Instead, Commission actions will be subject to the vicissitudes of prevailing political winds.

- Fourth, the Policy Statement does not address the legislative history that both demands economic content for the term "unfair" and cautions against an expansive approach to enforcing Section 5.

On a procedural note, I believe the Policy Statement should be issued for public comment rather than adopted as a final Commission policy at this time. Chair Khan announced a commitment to foster transparency and democratize the FTC.[10] Obtaining public input on the

[9] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (the antitrust laws "were enacted for the protection of competition, not competitors")).

[10] *See* Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "*Oversight of the Enforcement of the Antitrust Laws*" 14-15 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf, (describing FTC efforts to prioritize public participation);

new Policy Statement would be consistent with that commitment. The majority likely will point out that when the now-rescinded 2015 Statement was issued, the Commission did not solicit public comment. But there are significant differences between the 2015 Statement and today's Policy Statement that warrant a different procedure. The 2015 Statement described the enforcement approach that the Commission had followed for many decades; it was consistent with long-standing Commission practice, as well as legal precedent and economic learning. In contrast, the Policy Statement announced today represents a radical departure from the Commission's recent enforcement efforts, and a dramatic expansion of the agency's purported authority. Given these circumstances, hearing from the public is essential.

Below, I first explain the enforcement approach laid out in the Policy Statement. I then elaborate on my concerns about the affirmative steps that the Policy Statement takes. I close with a discussion of the four tasks the Policy Statement does not accomplish.

For all of these reasons, I dissent.

I. The Policy Statement's Framework

The Policy Statement establishes a framework to identify unfair methods of competition under Section 5 of the FTC Act. First, under the Policy Statement, conduct must be "a method of competition," defined as conduct by a marketplace actor that implicates competition, even if only indirectly. Second, the method of competition must be "unfair," defined as going beyond competition on the merits.

To determine whether the method of competition is "unfair," the Policy Statement provides two relevant criteria. Under the first criterion, conduct may be "coercive, exploitive, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," or "otherwise restrictive or exclusionary."[11] Under the second criterion, "the conduct must tend to negatively affect competition conditions" by "affecting consumers, workers or other market participants."[12] These two criteria are weighed using a sliding scale. When conduct is labeled "facially unfair" pursuant to the first criterion, the second criterion is rendered essentially irrelevant. If conduct is not labeled "facially unfair," pursuant to the second criterion, the conduct must be shown to have a "tendency to negatively affect market conditions."

But the Policy Statement explains how little is needed to satisfy the second criterion; in fact, it expressly rules out what must be shown. There need be no showing of actual effects; it is enough to assert that there is a "tendency" for the conduct to generate negative consequences.[13] Also, that "tendency" need not be attributable to the particular conduct at issue, or even the conduct of the particular market actor under investigation; the tendency for negative "consequences may arise when the conduct is examined in the aggregate along with the conduct

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Memorandum from Chair Lina M. Khan to [Federal Trade] Commission Staff and Commissioners, *supra* note 4, at 2.

[11] Policy Statement at 9.

[12] *Id.*

[13] *Id.* at 10.

of others . . ., or when the conduct is examined as a part of the cumulative effect of a variety of different conduct by the respondent."[14] Finally, it is unnecessary to show market power,[15] a common tool in antitrust cases to predict or infer likely effects from conduct.

After a prima facie case has been established, the respondent has little recourse.[16] Under the Policy Statement, the Commission will not employ a rule of reason analysis,[17] which provides a well-defined framework to analyze competitive impact. A respondent can assert a justification for the conduct but, according to the Policy Statement, the Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis"[18] and "the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[19] For a respondent to be heard, the justification must show that the benefits of the conduct redound to market participants other than the respondent,[20] those benefits must be in the same market where the harm occurs[21] (even though market definition is unnecessary to find competitive harm[22]), and the respondent has the "burden to show that the asserted justification for the conduct is legally cognizable, that it is nonpretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any impact on competitive conditions."[23]

II. The Policy Statement Rejects Longstanding Antitrust Policies and Legal Precedent, Instead Embracing an Unstructured "I Know It When I See It" Approach

A. The Policy Statement Replaces the Rule of Reason With an Open-Ended and Near-Per Se Approach

The Policy Statement abandons the structured analysis of the rule of reason because, it asserts, Section 5 has "distinctive goals" and was enacted to overcome concerns in 1914 about the application of the rule of reason.[24] When it withdrew the 2015 Statement, the Commission majority explained that the rule of reason "hamstrings [the FTC's] enforcement mission with an approach that poses significant administrability concerns" because courts assess whether

[14] *Id.*

[15] *Id.*

[16] *Id.* at 10 (When "conduct prima facie constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence.").

[17] *Id.* at 10 ("Given the distinctive goals of Section 5, the inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act").

[18] *Id.* at 11.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 12.

[22] *Id.* at 10.

[23] *Id.* at 11-12.

[24] *Id.* at 10.

procompetitive effects outweigh anticompetitive harm.[25] Put plainly, too many practices can be justified by legitimate business rationales and procompetitive effects. But, as described below, the rule of reason played a role in Section 5's legislative history and benefits sound enforcement by providing a structured framework for examining challenged conduct.[26] Moreover, contrary to the concerns expressed by the Commission majority, most rule of reason cases are decided at the early stages of the analysis, sparing the court the need to balance procompetitive benefits against anticompetitive effects.[27]

Eschewing the structured approach of the rule of reason, the Policy Statement instead adopts an open-ended inquiry. Under the new framework, the Commission will consider the effects of conduct on consumers, labor, competitive rivals, and unnamed others. The Policy Statement provides no content for the list of adjectives that may signal the presence of "unfair" methods of competition. There is no methodology for the adjective-labeling exercise. Ultimately, there is no meaningful guidance for courts and businesses to analyze unfair methods of competition.

The Policy Statement not only abandons the rule of reason, it applies a quick look analysis that approximates per se condemnation. Specifically, the Policy Statement advances a framework that condemns conduct with little showing necessary to establish a prima facie case while also ruling out meaningful consideration of efficiencies and other benefits or justifications. This approach is inconsistent with antitrust principles. Per se rules are reserved for conduct that is so inherently and commonly understood to be unreasonable that courts dispense with a rule of reason analysis.[28] Although courts have eliminated the dichotomy between per se and rule of reason analysis, and endorsed abbreviated analysis,[29] courts have not summarily condemned conduct without considering likely competitive effects in some manner. As the Commission has explained, an abbreviated analysis is reserved for conduct that is "inherently suspect owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation."[30]

Prudential concerns abound. Summary condemnation should require experience; academic learning, empirical insights, and judicial experience should be demanded. Here, however, the Policy Statement provides that merely labeling conduct with an appropriate adjective can establish liability. Even when conduct is found to be unfair based on a tendency for

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[25] Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 5, *supra* note 1.

[26] *See* Ohio v. American Express Co., 138 S. Ct. 2274, 2284 (2018). The plaintiff has the initial burden of proving that conduct has had or is likely to have a substantial adverse effect on competition. If this burden is met, the burden shifts to the defendant to produce evidence of procompetitive benefits. If there is such evidence, the plaintiff must show that the conduct is not reasonably necessary to achieve the objective or that the anticompetitive effects outweigh the benefits. *Id.*

[27] *See* Michael A. Carrier, *The Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1364 (1999).

[28] *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[29] *See, e.g.*, California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756 (1999).

[30] Polygram Holding, Inc., 136 F.T.C. 310, 344-45 (2003).

anticompetitive effects, the Policy Statement is silent regarding whether accepted scholarly support or judicial experience must undergird the claim that there is a tendency for harm (after all, actual harm need not be shown). In fact, the concern is greater because the Policy Statement expressly states that it is willing to disregard judicial experience.[31] In other words, under the Policy Statement, the Commission majority will challenge as "unfair methods of competition" practices that courts previously, and repeatedly, have found to be legal. In these cases, the Commission's invocation of nefarious-sounding adjectives and conclusory assertions of a "tendency" for harm will trump sometimes substantial judicial experience regarding the likelihood of competitive harm.

The unbounded application of Section 5 that is heralded by the Policy Statement is inconsistent with the Commission's authority to impose a broad set of remedies. The Policy Statement discusses the balance struck by Congress in the FTC Act: namely, while the FTC Act enables the Commission to challenge a broader range of conduct than that covered by the Sherman and Clayton Acts, it did not create a private right of action and it limited the preclusive effect of FTC enforcement in private antitrust cases.[32] In fact, the bargain went further than the Policy Statement acknowledges; Commission remedies were limited to cease-and-desist orders in exchange for the ability to challenge this broader range of conduct. It is appropriate to attach severe remedies to well-defined prohibitions, and less severe remedies to more amorphous prohibitions. But it is inappropriate to couple a broad range of remedies with the authority to challenge a broad (and nebulously defined) universe of conduct. For this reason, I have explained that any Congressional response to the Supreme Court's decision in *AMG*[33] must include guardrails to limit the range of conduct subject to disgorgement or restitution.[34]

B. The Policy Statement Rejects the Consumer Welfare Standard to Protect and Reward Politically Favored Groups

The Policy Statement abandons the long- and widely-accepted consumer welfare standard and instead adopts a standard that seeks to pursue multiple goals. Enforcement decisions are not predictable in a regime that seeks to advance many goals, including potentially conflicting ones, simultaneously.[35] Under the consumer welfare standard, enforcers and businesses understood

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[31] Policy Statement at 13-14 (explaining that Commission's analysis regarding liability "may depart from prior precedent based on the provisions of the Sherman and Clayton Acts" and identifying conduct that is not currently illegal under the antitrust laws that will be subject to challenge as unfair methods of competition as violations of "the spirit of the antitrust laws").

[32] Policy Statement at 5.

[33] AMG Cap. Mgmt, LLC v. FTC, 141 S. Ct. 1341 (2021).

[34] For instance, the limitations on the use of monetary equitable remedies in competition cases provided by the Commission's 2003 Policy Statement are appropriate. *See* Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003), https://www.ftc.gov/system/files/documents/public_statements/410451/030804policystatementequitable.pdf.

[35] *See* Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 Geo. Mason L. Rev. 1435, 1454 (2019) ("if the list of goals and the weights assigned to each is indeterminate, then firms contemplating particular conduct will not be able to predict reliably whether antitrust enforcement is likely in a particular case. . . . The indeterminacy of

that there was one goal – enforcement protected consumers – and the analysis followed accepted economic theory and principles. The Policy Statement emphasizes that when it enacted Section 5, "Congress wanted to give the Commission flexibility to adapt to changing circumstances."[36] Ironically, the very tools that the Policy Statement rejects, the consumer welfare standard and the rule of reason, facilitate a flexible approach to assessing conduct that adapts to changing markets, emerging technologies, new business models, and evolving economic analysis – while still providing clarity and consistency in enforcement.

In contrast, the Policy Statement establishes a model that will provide neither clarity nor consistency in enforcement. Conduct may be challenged as an unfair method of competition if it might negatively impact consumers, workers, competitors, and other market participants. No clarity is provided regarding which other market participants may be considered, or how this array of interests will be prioritized or balanced. And it is mathematically impossible to maximize more than one value, so the pursuit of one goal will require tradeoffs that adversely impact other competing interests. Oddly, the Commission majority claims that the rule of reason is not administrable because it requires balancing, but the approach embodied in the Policy Statement is far worse. It requires balancing among multiple goals without identifying the complete array of special interests to be protected, or the weights to be assigned to any of them. In short, the lack of identified priorities and rules for balancing interests means that enforcement will be subject to the whims and political agendas of sitting Commissioners.[37] But this outcome is consistent with Chair Khan's assertion that all enforcement decisions are political.[38]

Equally important, the Policy Statement's abandonment of the consumer welfare standard demonstrates that the Commission majority will support higher prices for consumers so that it may protect or reward political favorites. The consumer welfare standard protects consumers, resulting in lower prices, higher quality, and more innovation.[39] Efforts to protect other groups, including inefficient rivals and labor, necessarily will require tradeoffs that will harm consumers. Simply put, it is impossible to serve two masters. Protecting inefficient firms or labor will be "broadly redistributive, although consumers are not the beneficiaries. Rather the benefits flow to smaller firms or those that are wed to older technologies that have been displaced or threatened

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the goals and weights inherent in a multiple goals standard would make antitrust enforcement more susceptible to political whims and influence.").

[36] Policy Statement at 3.

[37] 1 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 25 (1978) (antitrust enforcement that seeks to pursue conflicting interests "would involve courts in essentially political decision-making for which there are no appropriate legal criteria and in a regulatory, supervisory role for which they are ill-suited.")

[38] Fox Business Networks, *Break Up Amazon as a Monopoly?*, YOUTUBE (June 23, 2017), https://youtu.be/VI_DEYqWxqs (Varney asks Lina Khan at the 2:33 mark: "To go after Amazon would be a political decision. Not a market decision. Not an economic decision. A politician would have to instigate this." Khan replies, "I think all decisions are political in so far as government agencies are bringing them.").

[39] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled*, 45 J. Corp. L. 101, 103 (2019) ("Antitrust's consumer welfare principle is best regarded as taking a 'middle man' approach to markets, reacting aggressively to unambiguous harms . . . and more circumspectively to single-firm conduct or other practices that have a significant potential to benefit consumers. The overall goal is clear, however, which is to encourage markets in which output, measured by quantity, quality, or innovation, is as large as possible consistent with sustainable competition.").

by newer ones[.]"[40] American consumers are unlikely to support antitrust enforcement that chooses to eliminate low prices, whether in the interest of protecting small businesses that wish to charge higher prices or to protect jobs at firms that are acknowledged to be inefficient.

The Policy Statement does not justify the rejection of the consumer welfare standard with references to existing case law. Like the enforcement decisions that will flow from this Policy Statement, it is a political decision.

C. The Policy Statement Rejects Precedent

Although the adjectives that the Policy Statement uses to signal the existence of "unfair methods of competition" can be found in cases, it is worth noting that those adjectives generally do not provide the basis for the holdings in those cases.[41] Instead, courts indicate that the conduct at issue is *not* described by those adjectives; courts then proceed to examine evidence of anticompetitive effects and procompetitive justifications for the challenged conduct. In other words, modern cases are diametrically opposed to the approach adopted by the Policy Statement; they reject labels and instead look to the evidence to consider liability. Moreover, even the old cases cited by the Policy Statement do not adopt the array of shortcuts in the Policy Statement, including foregoing the need to show anticompetitive harm and ignoring the role of procompetitive justifications. A fair reading of the cases reveals that the approach of the Policy Statement is inconsistent with the law.

1. The Policy Statement Ignores Precedent Regarding the Need to Demonstrate Anticompetitive Effects

When enforcement of Section 5 would require a showing of anticompetitive effects under the second criterion because the conduct is not facially unfair, the Policy Statement minimizes the necessary showing. The Policy Statement asserts that Section 5 "analysis is purposely focused on incipient threats to competitive conditions" and focuses the analysis on "whether the respondent's conduct has a tendency to generate negative consequences."[42] It further claims that it is unnecessary to prove actual harm, market power, or market definition,[43] but admits that the "size, power, and purpose of the respondent may be relevant."[44] As a consequence, the Policy Statement discounts the showing of anticompetitive effects required to allege a law violation.

In support of this claim that only a limited showing is necessary, the Policy Statement and Explanatory Guide point only to the legislative history and the Commission's 1941 case

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[40] *Id.* at 117.

[41] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d at 140 ("in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason" and finding "no evidence of coercive or predatory conduct.").

[42] Policy Statement at 9-10.

[43] *Id.* at 10

[44] *Id.*

against the Fashion Originators Guild of America.[45] But in *Fashion Originators Guild of America v. FTC*, the Supreme Court determined that the Commission found that there was market power and that the challenged conduct excluded manufacturers and distributors, which "tend[ed] to create . . . a monopoly in the said industries."[46] In short, the Court determined that the Commission found evidence of anticompetitive effects.

The Policy Statement also ignores the showing of competitive effects demanded by later cases. In *Boise Cascade Corp. v. FTC*,[47] the Ninth Circuit found that a Section 5 violation was not supported by substantial evidence when "the Commission . . . provided [the court] with little more than a theory of the likely effect of the challenged . . . practices.[48] The Ninth Circuit found that "[t]here is a complete absence of meaningful evidence in the record that price levels . . . reflect an anticompetitive effect"[49] and data on costs and profits were not informative because they were "largely a deduction from the Commission's reasoning about the tendencies of the challenged practice."[50] Despite the Commission's argument that a greater showing was not required because Section 5 addressed incipient conduct, the court concluded, "where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a [S]ection 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."[51]

The decision in *Boise Cascade* is not an anomaly. The Commission enforces Section 7 of the Clayton Act, which employs an incipiency standard for merger enforcement.[52] While courts generally do not require proof of actual effects for unconsummated mergers, courts expect evidence of likely anticompetitive effects, perhaps shown by evidence of market power and market definition.[53] The Commission's experience challenging anticompetitive mergers counsels against the discounted showing of likely competitive effects that the Policy Statement envisions.

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[45] Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

[46] *Id.* at 466-67.

[47] Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).

[48] *Id.* at 578.

[49] *Id.* at 579.

[50] *Id.* at 580.

[51] *Id.* at 582.

[52] The Policy Statement asserts that Section 5 enables the Commission to challenge incipient violations of the antitrust laws. Incipient violations of Section 7 of the Clayton Act would constitute an incipient violation of an incipiency standard, which is nonsensical. Unfortunately, the Policy Statement indicates that the Commission will use Section 5 to challenge mergers and acquisitions that do not violate the antitrust laws.

[53] *See, e.g.*, FTC v. Thomas Jefferson Univ., 505 F.Supp.3d 522, 528 (E.D. Pa 2020) ("To establish its prima facie case, the Government must put forth enough evidence to prove that the insurers would not avoid a price increase in any one of the government's proposed markets by looking to hospitals outside those markets. The government has not met this burden."); FTC v. RAG-Stiftung, 436 F.Supp.3d 278, 287 (D.D.C. 2020) ("the FTC has not made out its prima facie case, which requires it to show undue concentration for a particular product in a particular geographic area, and it has not otherwise shown a likelihood that the proposed . . . merger will substantially harm competition.").

Also, the Policy Statement's position that incipiency allegations negate a need to demonstrate likely anticompetitive effects is inconsistent with Commission opinion. The Commission expressly refused to rely on an incipiency standard for its findings about competitive effects in *General Foods Corp.*[54] The Commission rejected the argument that Section 5 could prohibit conduct by a firm with market power even when there was no dangerous probability that the firm could obtain monopoly power.[55] In short, the Commission found that the showing of likely anticompetitive effect required under Section 5 is no lower than the showing required to prove allegations of attempted monopolization under the Sherman Act.

2. The Policy Statement Ignores Precedent Requiring Consideration of Business Justifications

The Policy Statement hedges on whether business justifications for conduct will be considered.[56] It points to language from cases decided in the 1960s and early 1970s to suggest there is no role for business justifications in the analysis of unfair methods of competition. This language is inconsistent with subsequent cases and modern analysis. In all recent cases, justifications – even if rejected – were considered; the Commission and courts do not affirmatively choose to ignore relevant evidence.[57] In fact, courts expressly have identified business justifications as part of the test for unfair methods of competition.[58] For instance, the Second Circuit in *Ethyl* summarized its test, "in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."[59]

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[54] General Foods Corp., 103 F.T.C. 204 (1984).

[55] *Id.* at 365-66 ("To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law. If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the FTC Act.").

[56] Policy Statement at 10 ("There is limited caselaw on what, *if any*, justifications may be cognizable in a standalone Section 5 unfair methods of competition case.) (emphasis added).

[57] *See*, *e.g.*, Valassis Communications, Inc., File No. 051-0008, complaint at ¶14 (2006), https://www.ftc.gov/sites/default/files/documents/cases/2006/04/0510008c4160valassiscomplaint.pdf; Intel Corp., File No. 061-0247, complaint at ¶¶ 91, 96 (2010), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf; Boise Cascade Corp. v. FTC, 637 F.2d 573, 580-81 (9th Cir. 1980 (conduct explained by "common-sense proposition" regarding pricing practice as a "natural competitive response to buyer preference"); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 923 (2d Cir. 1980) (Commission reversed ALJ on 2 counts, "holding that [respondent] had sufficient business justification for" challenged conduct).

[58] Consequently, despite any instruction from the Commission in the Policy Statement, courts will consider business justifications.

[59] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d at 140. *See also id.* at 139 (noting that "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. and finding, on the facts of the case that "the evidence is overwhelming and undisputed . . . that each petitioner independently adopted its practices for legitimate business reasons.").

Precedent establishes that conduct may not be labelled "unfair" without considering whether there is an absence of a business justification; that is, a business justification is not considered only to be a defense. Even cases cited by the Policy Statement do not suggest that conduct may be declared unfair without considering the legitimate business justifications. *Atlantic Refining Co. v. FTC* only acknowledged the unremarkable principle that defendants may not justify anticompetitive conduct by showing "economic benefit to themselves."[60] In *Fashion Originators Guild of America v. FTC*, the Court held that the FTC did not need to consider justifications in light of the egregious facts of that case where the guild had "aim[ed]" for the "intentional destruction of one type of manufacture and sale which competed with Guild members."[61]

In addition, there are important reasons to consider business justifications for conduct. Business rationales for undertaking challenged practices not only provide context for those choices, but also illuminate the likely competitive effects of the practices at issue. Particularly when the Commission is examining conduct in its incipiency – in other words, before competitive outcomes are known – business explanations and justifications for the practices at issue constitute important predictors of the likely outcomes. As the Supreme Court and the Commission have explained in numerous opinions, while intent generally does not constitute an element of most antitrust violations, it is informative concerning the likely effects on the market.[62]

Finally, in Section 5 of the FTC Act, the Commission is instructed to bring cases only when they are in the public interest.[63] Consequently, it is essential that the Commission consider the business justification, potential efficiencies, and other procompetitive outcomes of the challenged conduct. The Policy Statement's position that the Commission will not consider whether conduct yields net benefits means the Commission likely will challenge conduct that is beneficial to consumers and the U.S. economy, merely to protect the interests of politically favored groups. That approach is inconsistent with the FTC Act, as well as with principles of good government.

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[60] Atlantic Refining Co. v. FTC, 381 U.S. 357, 371 (1965).

[61] Fashion Originators' Guild of Am. v. FTC, 312 U.S.at 467-68.

[62] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (J. Brandeis) ("the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences."); In re McWane, Inc. 157 F.T.C. 108, 144 n.11 (2014) (quoting United States v. Microsoft, 253 F.3d 34, 59 (D.D.C. 2001) ("while our aim is to ascertain the effect of McWane's [conduct], evidence of McWane's intent is relevant 'to the extent it helps us understand the likely effect of [McWane's] conduct.'").

[63] 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, . . .").

III. The Policy Statement Fails to Provide a Predictable, Credible Enforcement Approach for Unfair Methods of Competition

A. The Policy Statement Does Not Provide Guidance to Businesses That Seek to Comply with the Law

The framework described by the Policy Statement cannot be turned into workable rules for businesses. The list of adjectives that may be invoked to establish facially unfair competition is lengthy, and includes "coercive," "exploitive," "collusive," "abusive," "deceptive," "predatory," "restrictive," and "exclusionary".[64] These labels require subjective interpretation, and frequently lack established antitrust or economic meanings. But the Policy Statement does not provide content to the adjectives. Consequently, identifying whether conduct falls under one of the labels depends on the whims and political worldviews of three sitting Commissioners. As the composition of the Commission changes, so too will the application of Section 5. The subjective nature of the labeling process to determine liability means that it is not possible for businesses to know in advance whether their conduct will be considered unfair. In other words, the approach articulated in the Policy Statement does not allow businesses to structure their conduct to avoid possible liability.

Not only does the Policy Statement withhold meaningful guidance, it significantly increases uncertainty for businesses. When the Commission decides that particular conduct "tends to cause potential harm similar to an antitrust violation" – despite contrary precedent – the Policy Statement provides that the "analysis may depart from prior precedent based on" the antitrust laws.[65] In other words, conduct that courts repeatedly have refused to condemn may now be subject to summary condemnation under the Commission's open-ended approach. Newly condemned conduct may include tacit coordination; parallel conduct; price discrimination not covered by the Robinson-Patman Act; de facto tying, bundling, exclusive dealing, and loyalty rebates; mergers that do not violate the Clayton Act; and interlocking directorates not covered by the Clayton Act.[66] Which precedent will be embraced, and which precedent will be rejected, is unclear, and will vary depending on the composition of the Commission. Businesses are left with no navigational tools to map the boundaries of lawful and unlawful conduct.

Also, as previously described, the Policy Statement rejects the consumer welfare standard in favor of pursuing multiple (and sometimes competing) goals. When enforcement decisions may be premised on the furtherance of many and sometimes conflicting interests, and no guidance is provided regarding how those potential goals will be balanced, enforcement outcomes will be unpredictable. Businesses cannot know how to structure their conduct when they do not know which interest(s) will drive a Commission decision in any particular circumstance.

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[64] Policy Statement at 9.

[65] Policy Statement at 13.

[66] *See id.* at 13-15.

Courts have been unwilling to find violations of Section 5 beyond the limits of the Sherman, Clayton, and Robinson-Patman Acts[67] when the Commission's theory of liability cannot be turned into workable rules or standards that can guide the conduct of businesses. In *Ethyl*,[68] the Second Circuit explained that when conduct "does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5[.]"[69] Consequently, the Second Circuit explained that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[70] Accordingly, the court explained that "[r]eview by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied."[71] Sadly, today's Policy Statement does not offer definable standards.

Similarly, in *Official Airlines Guides, Inc. v. FTC*, the Second Circuit recognized the practical difficulty of applying the Commission's expansive theory of liability in that case and refused to endorse an FTC order challenging an alleged monopolist's conduct. The Second Circuit explained that "enforcement of the FTC's order . . . 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. Such a decision would permit the FTC to delve into . . . 'social, political, or personal reasons' for a monopolist's" conduct.[72] In explaining its decision, the appeals court said it was "weighing benefits to competition in the other field [where the firm did not operate] against the detrimental effect of allowing the Commission to pass judgment on many business decisions of the monopolist that arguably discriminate among customers in some way."[73] The concerns of the Second Circuit are magnified under the Policy Statement. In *Official Airlines Guides*, the respondent was arguably a monopolist. In contrast, the Policy Statement's approach will be applied to all businesses regardless of market status, because the emphasis is on foreclosing growth and evidence of market power is unnecessary.

Despite this concern by courts that firms be given "an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability," the Policy Statement

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[67] It is striking that the Policy Statement proposes to use Section 5 as a gap-filler for the much-maligned Robinson-Patman Act. Not satisfied with resuscitating Robinson-Patman enforcement, the majority now seeks to expand the scope of that law beyond Congressional intent.

[68] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128 (2d Cir. 1984).

[69] *Id.* at 138.

[70] *Id.* at 139.

[71] *Id.* at 136.

[72] Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

[73] *Id.* (explaining that the FTC's theory of liability would enable the FTC to require a supermarket that was the only grocery in town to stock a particular brand of frozen vegetables if the Commission found that brand had been competitively disadvantaged when the supermarket chose to stock a different brand).

provides a subjective inquiry that leaves businesses in the dark. In fact, the Policy Statement utterly fails to deliver on its promise that it will "assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act."[74]

B. The Policy Statement Fails to Provide the Rigor Demonstrated by the Approach to the Term "Unfair" for Challenging Unfair and Deceptive Acts and Practices Under Section 5 of the FTC Act

The term "unfair" appears in Section 5 more than once; Section 5 also prohibits "unfair and deceptive acts and practices"[75] to address consumer protection issues. The Commission's current interpretation of "unfair" in its consumer protection mission has been lauded for its flexibility to address a myriad of harmful practices while still providing businesses clarity and certainty about the boundaries of lawful conduct. The Policy Statement does not offer that level of rigor and clarity regarding unfair methods of competition.

Consider the intentional approach to defining the boundaries of unfairness for consumer protection purposes under Section 5, and contrast it with today's Policy Statement. Before the current interpretation of "unfairness" for consumer protection issues was adopted, the Commission interpreted "unfair" to have few restraints, and Congress responded. Before 1980, the Commission attempted to condemn a wide variety of conduct by asserting that a practice was unfair – as a consumer protection offense – when it offended public policy.[76] The Commission engaged in numerous rulemaking efforts in the 1970s in which it relied on public policy as a substitute for analysis and evidence.[77] This rulemaking crusade nearly led to the demise of the agency.[78] The misuse of unfairness drove Congress to shut down the agency for several days, decline to reauthorize the agency for fourteen years, and pass the Federal Trade Commission Improvements Act of 1980, which imposed additional procedural obligations on trade regulation

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[74] Policy Statement at 2.

[75] 15 U.S.C. § 45, as amended by the Wheeler-Lea amendment, 52 Stat. 111 (1938).

[76] A footnote in *FTC v. Sperry & Hutchinson Co*., appeared to adopt the Commission's articulation of unfairness from the Statement of Basis and Purpose for Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking Trade Regulation Rule. The rule posed three factors the Commission considers when determining whether a practice that neither violates the antitrust laws nor is deceptive is nonetheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." 405 U.S. 233, 244 n.5 (1972).

[77] *See* TIMOTHY J. MURIS & HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 13 (1991).

[78] The Commission explored a broad swath of trade regulation rules in the 1970s, including proposing rules that regulated warranty terms and performance of mobile home manufacturers, required detailed disclosures in food advertisements that discussed a product's nutritional characteristics, required antacid advertising disclosures, mandated that over-the-counter drug advertising mirror the precise language on FDA-approved labels, and required free trial periods for purchased hearing aids. The FTC also proposed rules based on public policy arguments, to ban all advertising directed to children. *Id.* at 3, 12-15.

rulemaking efforts.[79] That is, legislative history shows that Congress rejected an open-ended interpretation of "unfair" in the Commission's consumer protection enforcement efforts.

Congress not only retaliated against the FTC broadly, it codified a more limited interpretation of "unfair" for consumer protection matters. Congressional condemnation of the FTC's overreaching rulemaking proposals of the 1970s led to the Commission's 1980 Unfairness Policy Statement that clarified the reach of the unfairness theory in consumer protection matters. The Unfairness Policy Statement declared that "[u]njustified consumer injury is the primary focus of the FTC Act"[80] and developed a three-part test to determine whether a consumer injury is unfair.[81] A subsequent 1982 Commission letter to Senators Bob Packwood and Bob Kasten recommended codifying a definition of unfair practices and clarified that public policy was not an independent basis for a finding of unfairness.[82] The Commission emphasized that consumer injury is the proper focus for unfairness and that public policy served "as an important check on the overall reasonableness of the Commission's action."[83] The three-part analysis that requires clear consideration of consumer injury was codified into law in 1994, establishing a precise test with factors to weigh.[84] For consumer protection purposes, the unfairness test provides guardrails based on a quantitative cost-benefit analysis.[85]

This history of unfairness for consumer protection issues provides context that is relevant for evaluating "unfair" methods of competition. First, Congress rejected an expansive interpretation of unfairness that relied on general public policy considerations. Second, the Commission explained that the term "unfair" has economic content and is focused on consumer

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[79] J. Howard Beales, III, Director, Bureau of Consumer Protection., Fed. Trade Comm'n, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (June 2003), *available at* https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection; Dissenting Statement of Commissioners Christine S. Wilson & Noah Joshua Phillips regarding the "Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf

[80] FTC Policy Statement on Unfairness, Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n to Wendell H. Ford, Chairman, and John C. Danforth, Ranking Minority Member, S. Comm. on Commerce, Science, and Transp., Consumer Subcomm. (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070-76 (1984) (typically referred to as the FTC's Unfairness Statement).

[81] "It must be substantial; it must not be outweighed by countervailing benefits to consumers or competition that the practice produces; and it must be an injury that the consumers themselves could not reasonably have avoided." *Id*.

[82] Letter from James C. Miller, Chairman, FTC to Bob Packwood, Chairman, Comm. on Commerce, Sci., and Trasnp., and Bob Kasten, Chairman, SubComm. On Consumer Comm. on Commerce, Sci., and Transp. (Mar. 5, 1982), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 11, 1982).

[83] *Id*. at 8.

[84] Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994), codified at 15 U.S.C. § 45(n).

[85] Even with the unfairness test, this Commission is seeking to apply the standard in novel ways, ignoring the rigorous analytical framework. *See* Dissenting Statement of Commissioner Noah Joshua Phillips regarding *FTC v. Passport Automotive Group, Inc*. File No. 2023199 (Oct. 14, 2022) (rejecting the inclusion of an unfairness count to expand the FTC Act's coverage to discrimination); Dissenting Statement of Commissioner Noah Joshua Phillips regarding the "Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking" (Aug. 11, 2022) (discussing FTC overreach), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

injury, which Congress endorsed. Third, unfairness is based on quantitative cost-benefit analysis, requiring enforcement decisions to evaluate and balance both harms and benefits. Despite this history and accepted interpretation of the term "unfair" in the same statutory provision, today's Policy Statement repudiates economic content for "unfair methods of competition," rejects the weighing and balancing of anticompetitive effects and procompetitive benefits, and adopts an expansive "I know it when I see it" approach that seeks to protect interests beyond those of consumers. In short, the Policy Statement takes a far different approach to unfairness in the competition context than it does for the antitrust arena.

C. The Policy Statement Fails to Provide a Framework for Credible Enforcement Decisions

The Policy Statement's approach – invoking an adjective to establish liability – will lead to enforcement decisions that are not credible. Enforcement is credible when it yields results consistent with legal, economic, and societal norms. When outcomes conflict with established and accepted norms, or when government policy leads either to systematic underenforcement or overenforcement, public respect for antitrust enforcement is eroded.[86] Under the Policy Statement, the Commission may find liability merely by selecting an adjective and then limiting the defenses of the respondent. Consequently, when the Commission brings a case under Section 5, the cards are stacked so the Commission should always win. The Commission's Part 3 administrative adjudication process is already under attack as unfair to respondents. This Policy Statement will only add to the critique of the Commission's processes. In addition, the Policy Statement instructs that the Commission's determination regarding what practices constitute an unfair method of competition deserve judicial deference and "great weight" on appeal.[87] The framework embodied in the Policy Statement violates expectations of fairness, and consequently will undermine the credibility of antitrust enforcement.

D. The Policy Statement Fails to Consider the Full Legislative History Regarding Section 5 of the FTC Act

There is no dispute that Congress intended Section 5 of the FTC Act to reach beyond then-existing expectations about the scope of the Sherman Act.[88] There is also no dispute that Congress left it to the Commission to determine what conduct fell within the broader scope of "unfair methods of competition" rather than articulating a finite list of practices to be condemned.[89] It is similarly undisputed that Congress envisioned that Section 5 would address

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[86] *See* Wilson, Klotz & Sandford, *supra* note 35, at 1452-53.

[87] *See* Policy Statement at 7.

[88] *See, e.g.*, 51 Cong. Rec. 12,454 (1914) (Sen. Cummins) ("That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.").

[89] *See* S. Rep. No. 597, 63d Cong. 2d Sess., at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.").

incipient conduct before its perpetrator could become a monopolist.[90] These uncontroversial facts from the legislative history, however, do not translate directly into the expansive enforcement policy the majority announces today. That more than 100 years have elapsed since these legislative statements were made and the FTC Act was enacted makes clear that today's expansive Policy Statement is not the natural outcome of the legislative history. In addition, there is more to the legislative history than the undisputed principles recounted in the Policy Statement; taking into account that fuller history reveals that, for at least three reasons, Congress intended a different path for Section 5 than what is unveiled today.

First, Congressional expectations in 1914 that the reach of the Sherman Act would be limited turned out to be inaccurate. As William Kovacic and Marc Winerman explain, "the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century."[91] Today, "courts recognize the Sherman Act's expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties."[92] In fact, the scope of the Sherman Act is still expanding; just two weeks ago, the Antitrust Division obtained a guilty plea arising from criminal prosecution of an invitation to collude under Section 2 of the Sherman Act.[93] Until this guilty plea, invitations to collude had been prosecuted as stand-alone Section 5 violations.[94] Congressional statements from 1914 must be interpreted in light of the *current* application of the Sherman Act.

Second, a closer look reveals that Congress designed Section 5's "unfair methods of competition" prohibition to have economic content. Among Senators debating the legislation, there was substantial discussion about the meaning of "unfair methods of competition,"[95] but no senator propounded the list of adjectives that the Policy Statement now identifies as characteristic of unfair methods of competition. All legislative history analyses must be taken with a grain of salt,[96] but there is evidence that the author of Section 5 believed that "unfair" had economic content, consistent with the consumer welfare standard and the rule of reason.

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[90] *See* Policy Statement at 4-5.

[91] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L. J. 929, 934 (2010) ("Several factors explain why Section 5 has played so small a role in the development of U.S. competition policy principles. Probably the most important is that the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.").

[92] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Remarks on Section 5: Principles of Navigation* 4 (July 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

[93] United States v. Zito, CR22-113-BLG-SPW (D. Mont. Sept. 19, 2022, https://www.justice.gov/opa/press-release/file/1543701/download.

[94] *See* In Re Quality Trailer Products Corp., 115 F.T.C. 944 (1992) (consent); In re Valassis Communs., Dkt. C-4160, 2006 FTC LEXIS 25 (2006) (consent); In re A.E. Clevite, 116 F.T.C. 389 (1993) (consent); In re YKK (USA), 108 F.T.C. 628 (1993) (consent); In re Precision Moulding Co., 122 F.T.C. 104 (1996) (consent); In re Stone Container Corp., 125 F.T.C. 853 (1998) (consent); In re U-Haul Int'l, Inc., File No. 081-0157, 6 (2010) (consent).

[95] *See* Gilbert Holland Montague, *Unfair Methods of Competition*, 25 Yale L.J. 20 (1915).

[96] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring)

As Congress was considering legislation that would become the FTC and Clayton Acts, President Woodrow Wilson and Louis Brandeis asked a lawyer and one-time member of the Progressive Party, George Rublee, to serve as liaison between the White House and Congress.[97] Rublee determined that pending legislation that would create a federal trade commission should include a provision that would give the Commission enforcement authority and power to issue orders challenging unfair methods of competition.[98] A commission with enforcement authority diverged from the "sunshine agency" model that was contained in earlier versions of the legislation, and that was preferred by Wilson and Brandeis.[99] But at a White House meeting with President Wilson and Brandeis, Rublee persuaded them to endorse his approach.[100]

In subsequent correspondence to President Wilson describing legislative developments, another contemporary of Brandeis reported that:

> [Representative Ray Stevens of New Hampshire] has introduced the bill which was really drawn up by Mr. Rublee . . . The Stevens Bill declares unfair competition to be unlawful, and empowers the Commission, whenever it has reason to believe that a corporation is using any unfair method of competition, to hold a hearing, and if it is of [the] opinion that the method of competition in question is unfair to restrain the use thereof by injunction.[101]

In a memo prepared for President Wilson, Rublee – the author of the "unfair method of competition" prohibition[102] – explained the difference between fair competition and unfair competition. "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[103]

A similar description of unfair competition – focused on efficiency among rival companies – was provided by key senators during debate. Senator Henry F. Hollis "who in the

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("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.").

[97] *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN, location 1625 of 5271 on Kindle (1984); s*ee also* William Kolasky, *The FTC's Recission of Its 2015 Policy Statement on Section 5: If Not Consumer Welfare and the Rule of Reason, What?*, Washington Legal Foundation Critical Legal Issues Working Paper Series 112 at 28-35 (July 2021), https://www.wlf.org/2021/07/26/publishing/the-ftcs-rescission-of-its-2015-policy-statement-on-section-5-if-not-consumer-welfare-and-the-rule-of-reason-what/.

[98] Kolasky, *supra* note 97, at 11-12.

[99] McCraw, *supra* note 97, at Location 1633 of 5271.

[100] *Id.* at Location 1650 of 5271.

[101] *Id.* at Location 1640 of 5271.

[102] Kolasky, *supra* note 97, at 13.

[103] George Rublee, Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum), https://www.wlf.org/wp-content/uploads/2021/07/Rublee-1914-Memo-to-Lobby-for-the-Passage-of-Section-5.pdf.

later stages of the debate upon the floor of the Senate was one of the chief sponsors for the provision regarding 'unfair competition'",[104] repeated the language of the Rublee memo.[105] In short, for the author of Section 5 and one of its chief sponsors, unfair competition has economic content; unfair competition is defined by efficiency, not the list of adjectives provided in the Policy Statement.

Third, the legislative history explains that unfair competition must adversely affect consumers, not merely weaker rivals. That is, the legislative history does not support abandoning the consumer welfare standard. Senator Cummins explained that Section 5 is concerned "not merely with unfairness to the rival or competitor" but instead requires a finding that "the unfairness must be tinctured with unfairness to the public."[106]

Moreover, it is worth noting that Congressional activity regarding Section 5 of the FTC Act did not end in 1914 when the statute originally was enacted. As previously described, in 1938, Congress amended Section 5 to add the prohibition of "unfair and deceptive acts and practices." When the FTC pursued an expansive use of Section 5 through 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.[107] And in 1994, Congress made clear that there is economic content to Section 5's use of the term "unfair" for consumer protection issues, when Congress codified the Commission's Unfairness Statement that is based on a quantitative cost-benefit analysis.

The full history of Section 5 that was omitted from the Policy Statement – the intended meaning of "unfair methods of competition" described by George Rublee and Senator Hollis in 1914 and Congressional action on Section 5 in the 1980s and 1990s – demonstrates that Congress did not envision the approach to "unfair methods of competition" that is described in today's Policy Statement.

IV. Conclusion

For the foregoing reasons, I do not support the approach that the Policy Statement describes for enforcement pursuant to Section 5's "unfair methods of competition" authority. Consequently, I dissent.

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[104] Montague, *supra* note 95, at 28.

[105] 51 Cong. Rec. 12,146 (1914). ("Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper.").

[106] 51 Cong. Rec. 11,105 (1914) (Sen. Cummins).

[107] *See* Beales, *supra* note 79.