



**Statement of Chair Lina M. Khan
Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter
on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair
Methods of Competition” Under Section 5 of the FTC Act**

July 1, 2021

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”¹ In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.² Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,³ the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our view, the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”⁴ The 2015 Statement advised that the Commission is “less likely” to raise a

¹ 15 U.S.C. § 45(a)(1).

² FTC, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) [hereinafter “2015 Statement”], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

³ Address by Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School, 3 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf (“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.”).

⁴ 2015 Statement, *supra* note 2. Chairwoman Ramirez and Commissioners Julie Brill, Terrell McSweeney, and Joshua Wright voted in favor of the statement. Commissioner Maureen Ohlhausen dissented. FTC Press Release, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute (Aug. 13, 2015), <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act>.

standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”⁵

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”⁶ In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”⁷ She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.⁸ She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”⁹

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement.¹⁰

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust

⁵ 2015 Statement, *supra* note 2.

⁶ FTC, Statement on the Issuance of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, at 2 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf; *see also* Chairwoman Ramirez, *supra* note 3, at 10 (“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.”).

⁷ Address by Chairwoman Ramirez, *supra* note 3, at 2.

⁸ *Id.* at 4-5.

⁹ *Id.* at 2.

¹⁰ *See* Federal Trade Commission’s Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), [hereinafter “Qualcomm Complaint”], https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf. Even in *Qualcomm*, the Commission primarily relied on arguments under the Sherman Act; the standalone theory was not a core focus of the litigation.

laws.¹¹ After the Supreme Court announced in *Standard Oil* that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.¹² For instance, Senator Newlands complained that *Standard Oil* left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal ... with powers of recommendation, with powers of condemnation, [and] with powers of correction.”¹³ Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”¹⁴ These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.¹⁵

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.¹⁶ By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law.

The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.¹⁷

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices

¹¹ See Neil Averitt, *The Meaning of ‘Unfair Methods of Competition’ in Section 5 of the FTC Act*, 21 B.C. L. REV. 227, 229-240 (1980).

¹² *Id.* at 232-237. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

¹³ See 47 CONG. REC. 1225 (1911) (statement of Sen. Newlands).

¹⁴ S. REP. NO. 1326, 62d Cong., 3d Sess., at xiv (1913).

¹⁵ See Averitt, *supra* note 11, at 232-37.

¹⁶ 15 U.S.C. § 45(a).

¹⁷ William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932 (2010).

to define, and after writing 20 of them into the law it would be quite possible to invent others.”¹⁸ Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws.¹⁹ For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”²⁰

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws.²¹ The Court, recognizing the Commission’s expertise in competition matters, has given “deference”²² and “great weight”²³ to the Commission’s determination that a practice is unfair and should be condemned.

Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement’s decision to tether Section 5 to the Sherman and Clayton Acts. For example, in *Boise Cascade*, the Ninth Circuit ruled that the evidence did not support the Commission’s factual finding that the defendants’ conduct had an adverse effect on prices.²⁴ In *Ethyl*, the Second Circuit explicitly held that the FTC’s Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is “collusive, coercive, predatory, or exclusionary,” or has an “anticompetitive purpose,” or “cannot be supported by an independent legitimate reason.”²⁵ In short, these decisions confirm that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

¹⁸ S. REP. NO. 597, 63d Cong., 2d Sess., 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 the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”).

¹⁹ See Averitt, *supra* note 11, at 251-252.

²⁰ 51 CONG. REC. 11, 236 (1914) (statement of Sen. Cummins).

²¹ See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 309-310 (1934).

²² *Ind. Fed’n of Dentists*, 476 U.S. at 454.

²³ *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948)).

²⁴ *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577-82 (9th Cir. 1980).

²⁵ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-40 (2d Cir. 1984). See also *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (holding that while courts must give “great weight” to the Commission’s judgment that a practice is unfair, the Commission could not condemn a monopolist’s refusal to deal where it “has no purpose to restrain competition or expand [its] monopoly, and does not act coercively”).

III. The 2015 Statement Overlooks the Unique Features of Section 5, Ratifies an Unadministrable Approach, and Perpetuates Uncertainty in the Law

In addition to flouting a clear congressional mandate, the 2015 Statement fails to consider or even recognize the unique features of or limits on Section 5. By instead confining Section 5 to the framework that presently governs the Sherman and Clayton Acts, the 2015 Statement willfully surrenders the Commission's key institutional advantages as an administrative agency with the power to adjudicate cases, issue rules and industry guidance, and conduct detailed marketplace studies.²⁶

The Commission's efforts to constrain Section 5 in this way have only hindered the agency's enforcement efforts. Coupling Section 5 to the Sherman Act has led courts to bind the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act, despite the striking differences in institutional contexts and the Commission's unique role as an expert public body.²⁷ Aside from invitations to collude—which the agency has long treated as a violation of Section 5²⁸—the Commission has pled a standalone Section 5 claim just once since the issuance of the 2015 Statement.²⁹ In practice, the Statement has doubled down on the Commission's longstanding failure to investigate and pursue “unfair methods of competition.”

Moreover, by subjecting Section 5 to a framework similar to the rule of reason, the Commission hamstringing its enforcement mission with an approach that poses significant administrability concerns. The current iteration of the rule of reason invites courts to assess whether particular business conduct is “unreasonable,” including through determining whether the “procompetitive” effects of the conduct outweigh any “anticompetitive” effects.³⁰ Famously unwieldy, the standard leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as unadministrable or exceedingly difficult to meet.³¹

²⁶ See, e.g., Professor Daniel A. Crane, Comments at FTC Workshop on Section 5 of the FTC Act as a Competition Statute, 73-74 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf, (“What I want to suggest is that, in many ways, by marrying the meaning of Section 5 to the Sherman Act, the FTC is losing many, many of its institutional advantages, as both a norm creator and an enforcer of antitrust law.”).

²⁷ See *id.* at 76 (“[B]y coupling the Sherman Act to the FTC Act, the FTC gets saddled with a rule that was created in a completely different institutional context with different considerations.”); *id.* at 77 (“I think this is a huge mistake in terms of the institutional context. You’re taking baggage you don’t have to take and you shouldn’t take and it leads to weakened liability norms in the FTC.”).

²⁸ See, e.g., *Oregon Lithoprint, Inc.*; Analysis to Aid Public Comment, 83 Fed. Reg. 11529, 11531 (Mar. 15, 2018) (“The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.”).

²⁹ See *Qualcomm* Complaint, *supra* note 10.

³⁰ See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018).

³¹ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.*”); Richard A. Posner, *The Rule of Reason and the*

In practice, courts have also used the weaknesses of the rule of reason as a basis for restricting private antitrust plaintiffs.³² As the Supreme Court recently pointed out, scholars have found that the defendant prevailed in “nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.”³³ Indeed, lawmakers’ concerns about the infirmities of the rule of reason standard were partly why Congress enacted Section 5 in the first place.³⁴ Tying Section 5 back to this framework offends the plain text, structure, and legislative history of Section 5 and needlessly constrains the Commission from taking action to safeguard the public from unfair methods of competition.

The 2015 Statement is also rife with internal contradictions that may effectively read the Commission’s standalone Section 5 authority out of the statute altogether. First, although the Statement recognizes that Section 5 prohibits conduct that would violate the Sherman or Clayton Acts “if allowed to mature or complete,” it then requires the Commission to prove “likely” anticompetitive effects under the rule of reason.³⁵ Importing the rule of reason’s likelihood requirement would abrogate the Commission’s statutory mandate to combat incipient wrongdoing *before* it becomes likely to harm consumers or competition. As the Supreme Court has held, Section 5 “was designed to supplement and bolster the Sherman Act and Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts.”³⁶

Second, although the 2015 Statement declares that the Commission will apply a “framework similar to the rule of reason,” it then suggests that the Commission will typically refrain from bringing a standalone Section 5 case where the Sherman or Clayton Acts already apply. But it is hard to imagine what, if any, cases could ever meet both of these criteria: With the exception of invitations to collude, almost every practice that is unlawful under the rule of reason will already be subject to the Sherman or Clayton Acts and thus (according to the 2015 Statement) be improper targets for standalone Section 5 enforcement. The 2015 Statement may have hinted at a broader reading of Section 5 by embracing an undefined “framework *similar to*” the rule of reason, but if that was the Commission’s intent, the reference was far too vague to provide any meaningful guidance. By both wedding Section 5 to the Sherman Act’s legal

Economic Approach: Reflections on the Sylvania Decision, 45 U. CHI. L. REV. 1, 14 (1977) (“The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability.”).

³² Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1383, 1423, 1471 (2009).

³³ *NCAA v. Alston*, No. 20-512, slip op. at 25 (June 21, 2021) (citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9); see also Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

³⁴ See *supra* pp. 2-3.

³⁵ 2015 Statement, *supra* note 2.

³⁶ *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (citing *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463, 466 (1941)); see also *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

standard *and* signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 Statement effectively turns standalone Section 5 into a dead letter.

More generally, the 2015 Statement assumes a case-by-case approach to “unfair methods of competition,” despite widespread recognition that this adjudication-only approach often fails to deliver clear guidance.³⁷ Without explanation, the Statement fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants.

The Commission's inability, after a century of commanding this statutory authority, to deliver clear Section 5 principles suggests that the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts. The task will require careful and serious work, but it is one that our enabling statute expected and required.

IV. Looking Ahead

Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets. Section 5 is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition. In the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under this provision. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.

³⁷ See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 359-63 (2020); Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”*: *The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 668-70 (2017); Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1288, 1304-05 (2014); Kovacic & Winerman, *supra* note 17, at 933-34; C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674-80 (2009); Crane, *supra* note 26, at 78-79.