



Office of Commissioner
Noah Joshua Phillips

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

Remarks of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the Section 5 Policy Statement

July 1, 2021

The Majority's decision today to rescind the Commission's bipartisan 2015 Section 5 Policy Statement reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC.

This policy proposal was announced just a week ago, the bare minimum notice permitted by law¹, diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote, so that the FTC cannot consider their views. That is inconsistent with rhetoric we have heard about opening up the policy-making process.

On the proposal, I still do not know to what aspects of that bipartisan policy my colleagues object.

Perhaps it is the first principle, *i.e.*, that the public policy underlying the antitrust laws is the promotion of consumer welfare.² That has been black-letter Supreme Court law for almost my entire life.³

Maybe they object to the second, applying the "Rule of Reason", which means we look carefully at the facts to determine the effect of a company's conduct. That has been the law for over a century, as a unanimous Supreme Court reminded us just days ago, handing plaintiffs a victory in the *NCAA v. Alston* case.⁴

The policy statement we are rescinding was based on court decisions explaining the limits of Section 5.⁵ Will we follow those?

¹ 5 U.S.C. § 552b(e)(1)

² Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

³ See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (describing the Sherman Act as a "consumer welfare prescription").

⁴ *NCAA v. Alston*, 594 U. S. __ (2021).

⁵ See, e.g., Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it is the Majority's view that the principles outlined in the Statement no longer reflect the Commission's enforcement practice, that the Commission no longer plans to abide by legal precedent, or that Section 5 is a law without limit, they should say so—and how—on the record.

Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty.

This is not consistent with public statements my colleagues have made. Chair Khan and Commissioner Chopra previously wrote, for example, that clear rules “help deliver consistent enforcement and predictable results”.⁶ So why is one of their first initiatives to reduce clarity as to the Commission's interpretation of Section 5? They could offer a replacement—*that* could add clarity—but they decline to do so.

Reducing clarity in how the Commission will approach antitrust enforcement is bad enough, but it is particularly troubling in light of my colleagues' publicly-stated desire to fashion antitrust regulations.⁷ Not only are they refusing to articulate limits to the Commission's ability to declare conduct illegal after investigating it, they are also refusing to articulate limits on their view of what they can regulate. Today, in effect, the majority is asserting broad authority to regulate the economy. They mean, in other words, for just a handful of people to answer major policy questions with no intelligible principle from Congress to guide us.⁸

My view is that our laws permit no such thing. But leaving that aside; if the majority believe they have that power, I believe it is incumbent upon them to explain its limits.

I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful. And, we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. Today, I regret that the Commission came up short.

⁶ Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 Univ. of Chicago L. Rev. 357, 368 (2020).

⁷ See, e.g., *id.*, *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Acting FTC Chairwoman Rebecca Kelly Slaughter).

⁸ Cf. *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); *Paul v. United States*, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting denial of cert.).