



Office of the Chair

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

**Statement of Chair Lina M. Khan  
Joined by Commissioner Rebecca Kelly Slaughter  
and Commissioner Alvaro M. Bedoya  
On the Adoption of the Statement of Enforcement Policy Regarding  
Unfair Methods of Competition Under Section 5 of the FTC Act**

**November 10, 2022**

When Congress passed the FTC Act in 1914, it didn't just create a new agency. It created new law for that agency to enforce. Section 5 of the Act provides that "unfair methods of competition in or affecting commerce" are "hereby declared unlawful."<sup>1</sup> The next clause states, "The Commission is hereby empowered and directed to prevent" businesses "from using unfair methods of competition."<sup>2</sup>

Together these sentences form the heart of the Commission's legislative mandate in the domain of competition.<sup>34</sup> Accordingly, over the last century the Commission used its Section 5 authority to challenge a host of unlawful business practices. In recent decades, however, the Commission has allowed this Section 5 authority to lay dormant. With today's policy statement, we rededicate ourselves to executing the full set of duties Congress tasked us with more than a century ago.

Our deployment of Section 5 will be firmly rooted in statutory text, history, purpose, and judicial precedent. Reactivating Section 5 in a way that is fully faithful to the authority that Congress gave us is critical for promoting the rule of law and for ensuring the democratic legitimacy of our work.

Congress passed the Federal Trade Commission Act because it determined that the Sherman Act wasn't enough. Following the *Standard Oil* case—where the Supreme Court announced it would interpret the Sherman Act using the open-ended "rule of reason"—lawmakers were alarmed. They worried that the rule of reason generated erratic, contradictory results, prolonged the resolution of cases, and handed unchecked discretion to the judiciary.<sup>5</sup> A

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<sup>1</sup> 15 U.S.C. §45(a)(1).

<sup>2</sup> 15 U.S.C. §45(a)(2).

<sup>3</sup> For the purposes of this statement, I use Section 5 as shorthand for the unfair methods of competition prohibition; I do not address unfair or deceptive acts or practices, which Congress added to Section 5 in 1938 and are the subject of neither the 2015 nor 2022 statement.

<sup>4</sup> See Remarks of Chair Lina M. Khan as Prepared for Delivery, Fordham Annual Conference on International Antitrust Law & Policy, at 2–4 (Sept. 16, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf).

<sup>5</sup> 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, at 3 (July 1, 2021) [hereinafter "Statement on 2015 Statement

1913 Senate committee report stated that Sherman Act cases had become “impossible to predict” and called for legislation “establishing a commission for the better administration of the law.”<sup>6</sup>

Accordingly, Congress passed the FTC Act and prohibited “unfair methods of competition.” With this text, Congress distinguished between *fair* and *unfair* methods of competition and tasked the FTC with policing the boundary. Crucially, lawmakers chose language that clearly departed from the Sherman Act and judicial interpretations of it. They intended Section 5 to prohibit conduct that threatened fair competition even if it fell beyond the scope of the Sherman Act.<sup>7</sup>

A large body of judicial precedent affirms this view. The Supreme Court has repeatedly made clear that Section 5 does not apply only to practices that violate the Sherman Act or other antitrust laws.<sup>8</sup> Through the late 1970s, the FTC frequently brought Section 5 cases against

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Withdrawal”] (citing 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)), [https://www.ftc.gov/system/files/documents/public\\_statements/1591498/final\\_statement\\_of\\_chair\\_khan\\_joined\\_by\\_rc\\_and\\_rks\\_on\\_section\\_5\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 3. As Senator Albert Cummins, one of the FTC Act’s chief proponents, put it, “the only purpose of Section 5” was to “prevent some things, that can not [sic] be punished or prevented under the antitrust law.” See 51 CONG. REC. 12454 (1914) (statement of Sen. Cummins).

<sup>8</sup> See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (holding that “[t]he standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws”); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (holding that “the Commission has broad powers to declare trade practices unfair.”); *FTC v. Texaco, Inc.*, 393 U.S. 223, 262 (1968) (holding that “[i]n large measure the task of defining ‘unfair methods of competition’ was left to the [FTC]. . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations”); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (holding that the FTC “has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts”); *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act. . .” and that “there are many unfair methods of competition that do not assume the proportions of antitrust violations”); *FTC v. Colgate-Palmolive et al.*, 380 U.S. 377, 384–85 (1965) (noting that the proscriptions in section 5 are flexible); *Pan Am. World Airways v. United States*, 371 U.S. 296, 306–308 (1963) (“[Section 5] was designed to bolster and strengthen antitrust enforcement[,] and the definitions are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly”); *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428–29 (1957) (affirming past rulings finding that the commission is clothed with “wide discretion in. . . [bringing] an end to the unfair practices found to exist[;]. . . [is] ‘the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed[;]. . . has wide latitude for judgment and’[;]. . . [that] ‘to attain the objectives Congress envisioned, [the FTC] cannot be required to confine its road block to the narrow lane the transgressor has traveled”); *Am. Airlines, Inc. v. N. Am. Airlines, Inc.*, 351 U.S. 79, 85 (1956) (finding that “[u]nfair or deceptive practices or unfair methods of competition’ . . . are broader concepts than the common-law idea of unfair competition”); *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (noting that “Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipency] which, when full blown, would violate those Acts[;]. . . as well as to condemn as ‘unfair methods of competition’ existing violations of them”); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5); *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934) (finding that unfair methods of competition not limited to those “which are forbidden at common law or which are likely to grow into violations of the Sherman Act”).

conduct that would not necessarily run afoul of the Sherman Act. We now call these “standalone” Section 5 cases. They included invitations to collude;<sup>9</sup> price discrimination claims against buyers not covered by the Clayton Act;<sup>10</sup> de facto bundling,<sup>11</sup> tying, and exclusive dealing;<sup>12</sup> and many other practices.<sup>13</sup>

In the 1980s, however, the Commission backed away from bringing standalone Section 5 cases. This is sometimes attributed to a trifecta of cases that the Commission lost in the early 1980s.<sup>14</sup> It’s true that those losses were a stinging setback that made agency leaders more cautious. But none of the three rulings disputed the Commission’s authority or narrowed the reach of Section 5. Rather, in each case, the courts held that the FTC had not met its factual or evidentiary burden.<sup>15</sup>

The 2015 Statement of Enforcement Principles marked the full retreat from standalone Section 5 cases. In that statement, the Commission announced that the FTC would interpret Section 5 “under a framework similar to the rule of reason.”<sup>16</sup> This made Section 5 essentially coterminous with the Sherman Act, implying that we would only bring cases under Section 5 if they also met the standard under the Sherman Act.

The 2015 policy statement, however well intentioned, departed from the plain text, purpose, structure, and history of the FTC Act. It also effectively amounted to an abdication of the Commission’s statutory mandate, undermining our legitimacy. As enforcers, we of course must exercise discretion in deciding what cases to bring and how to use our limited resources. But we cannot simply ignore the text of our governing statutes and our core congressional mandate.<sup>17</sup>

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<sup>9</sup> *Cement Inst.*, 333 U.S. 683.

<sup>10</sup> *Alterman Foods v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. FTC*, 450 F.2d 733 (5th Cir. 1971); *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Am. News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); *In re Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987).

<sup>11</sup> *Atl. Refin. Co.*, 381 U.S. 357.

<sup>12</sup> *Motion Picture Advert. Co.*, 344 U.S. 392.

<sup>13</sup> *Atl. Refin. Co.*, 381 U.S. 357.

<sup>14</sup> *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (1980); *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)* 729 F.2d 128 (2d Cir. 1984).

<sup>15</sup> See, e.g., Concurring Opinion of Commissioner Jon Leibowitz in the Matter of Rambus, Inc., Docket No. 9302, at 7 (Aug. 2, 2006),

<https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf> (“The decision in each, however, turns primarily on an evidentiary failure to demonstrate that the challenged conduct constituted an effort to acquire market power, tacitly collude, or manipulate price for anticompetitive purposes. *None* of these cases significantly constrains the FTC’s authority to apply Section 5 to violations of the policies that underlie the antitrust statutes or that cause actual or incipient antitrust injury.” (emphasis original)).

<sup>16</sup> Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015),

[https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

<sup>17</sup> See, e.g., Opening Remarks by Chairman Kovacic, Workshop on Section 5 of the FTC Act as a Competition Statute, at 4 (Oct. 17, 2008) [hereinafter Kovacic Remarks at Section 5 Workshop] (transcript available at [https://www.ftc.gov/sites/default/files/documents/public\\_events/section-5-ftc-act-competition-statute/transcript.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf)) (describing Section 5 as “a critical assumption upon which the agency itself was founded.”); see also *id.* at 5 (“If you pull Section 5 out of the mix of what the Commission does, I think you begin to ask profound questions about whether the institution ought to exist at all.”)

Last year, the Commission voted to rescind the 2015 policy statement.<sup>18</sup> Today’s statement replaces that document and brings the agency back in line with its statutory obligations. The new policy statement is based on the text, structure, purpose, and history of the FTC Act, as well as approximately 180 judicial opinions interpreting Section 5—including in cases where the Commission did not prevail. The statement lays out the core framework that emerges from this review of precedent, as well as from the Commission’s experience and expertise.

In her dissent, my colleague Commissioner Wilson states that the policy statement gives the Commission freewheeling authority to outlaw conduct “subject to the whims and political agendas of sitting Commissioners,” unconstrained by “guardrails.” She specifically laments that the policy statement “abandons” the rule of reason and “repudiates” consumer welfare, ushering in an “unbounded” approach.<sup>19</sup>

Respectfully, I believe these concerns are misplaced. First, the Commission is obliged to enforce the law that Congress actually passed, not a different law that Congress might have passed instead. Lawmakers codified the FTC Act to prohibit a set of conduct that overlapped with, but was distinct from, that which was prohibited under the Sherman Act.<sup>20</sup> While courts have applied the rule of reason and consumer welfare standards in the context of the Sherman Act, there is no basis in precedent for applying them wholesale to standalone Section 5. In fact, the text of the statute and, as Commissioner Bedoya’s careful recounting shows, its history, suggest the opposite.<sup>21</sup> To import into Section 5 the legal standards we happen to prefer, rather than faithfully following the instructions that Congress and courts have given us, would reflect an agency gone rogue.

Second, the policy statement identifies the framework and factors the Commission will consider when determining whether a business practice constitutes an “unfair method of competition.” The statement has important guardrails built into the definitions of “methods of

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<sup>18</sup> Statement on 2015 Statement Withdrawal, *supra* note 5.

<sup>19</sup> 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”, at 2, 3, 7 (Nov. 10, 2022) [hereinafter “Wilson Statement”]. While Commissioner Wilson contrasts the “structured approach of the rule of reason” with the “open-ended inquiry” outlined in the policy statement, *id.* at 6, judges and scholars have noted that rule of reason poses serious administrability challenges. *See, e.g., FTC v. Actavis, Inc.*, 570 U.S. 136, 173 (2013) (Roberts, C.J., dissenting) (“[T]he majority declares that such questions should henceforth be scrutinized by antitrust law’s unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the ‘likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances.’” (quoting *id.* at 149 (majority opinion))); *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.*”); Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND L. REV. 1 (2016); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1421–73 (2009).

<sup>20</sup> *See R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (“It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, *if that had been the purpose of the legislation.*”) (emphasis added).

<sup>21</sup> Statement of Commissioner Alvaro M. Bedoya on the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

competition,” “unfair,” and the “tendency to harm competitive conditions.” We also identify the types of justifications the Commission will and will not consider, in accordance with the relevant case law.

Inasmuch as the policy statement does not neatly set out a bounded list of prohibited practices, this follows Congress’s design. Lawmakers opted against a pre-specified list of proscribed tactics because they knew that such a list would quickly become outdated. Congress instead tasked the FTC with concretizing the meaning of “unfair methods of competition” through litigation and rulemaking, informed by the agency’s expertise and ability to do rigorous research into real-world markets and evolving business practices.<sup>22</sup> The policy statement outlines the framework and factors the Commission will use to do so, guided by many decades of agency experience and judicial precedent.

Lastly, Commissioner Wilson states that the policy statement ignores the practical wisdom of antitrust litigation. It “resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy,” she writes.<sup>23</sup> To the contrary, the policy statement reflects countless hours of input and guidance from agency lawyers with many decades of collective experience litigating antitrust cases.

I am deeply grateful to the cross-agency team of staff—spanning the Office of Policy Planning, the Bureau of Competition, the Bureau of Economics, and the Office of General Counsel—for their careful and diligent work to develop today’s statement. And I look forward to our agency’s continuing work in the coming months and years to ensure we use Section 5 and our other statutory tools in a manner that is faithful to the mandate and mission that Congress laid out. Promoting the rule of law and ensuring the democratic legitimacy of our work requires nothing less.

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<sup>22</sup> *Texaco, Inc.*, 393 U.S. 223, 226 (“While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.”).

<sup>23</sup> Wilson Statement, *supra* note 19, at 2.