

## FTC Policy Statement Foreshadows Heightened Enforcement of Unfair Methods of Competition

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On November 10, the Federal Trade Commission (FTC) published a new [Policy Statement](#), superseding all prior FTC statements and guidance addressing Section 5 of the FTC Act. The three Democratic Commissioners, Chair Lina M. Khan and Commissioners Rebecca K. Slaughter and Alvaro M. Bedoya, voted in favor, with the lone Republican Commissioner, Christine S. Wilson, voting against. According to the FTC's [press release](#), the Policy Statement “put[s] businesses on notice” that the FTC will now “rigorously enforc[e]” Section 5’s prohibition on unfair competition, including challenging conduct that falls outside the scope of the Sherman and Clayton Acts—the two main federal antitrust laws.

Below is a brief overview of policy changes to the FTC’s Section 5 authority under the Policy Statement, followed by a discussion of enforcement implications we can expect to see.

### The FTC’s Section 5 Policy Changes

Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce.”<sup>[1]</sup> Section 5 has been little used on a standalone basis in recent years. Indeed, in 2015, the [FTC issued a Statement](#) stating that the FTC would apply Section 5 by only challenging conduct that “cause[s], or [is] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]” In short, this practice focused Section 5 enforcement on conduct that violates the familiar rule of reason that serves as the general test for violations of the Sherman Act. Under the rule of reason, claimants must plead harm to competition in terms of market power and structure, which defendants can justify with valid business objectives like efficiency, and which courts then weigh against the anticompetitive effects on consumers.<sup>[2]</sup> Since this 2015 Statement, the FTC has brought only one Section 5 case without antitrust claims.<sup>[3]</sup>

In 2021, the newly seated Biden-administration FTC [issued a Statement](#) rescinding the 2015 Statement, without replacing it.<sup>[4]</sup> Now, the new Policy Statement begins to clarify how the Biden-administration FTC will enforce Section 5. Broadly speaking, Section 5 enforcement will “encompass various types of unfair conduct that tend to negatively affect” competition beyond the Sherman and Clayton Acts. The Policy Statement establishes two criteria for evaluating unfair conduct: it must (a) be unfair, coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature; and (b) tend to negatively affect competitive conditions. These criteria do not require showing anticompetitive harm or anticompetitive intent, and, indeed, the conduct need

not even “directly cause[] *actual* harm in the specific instance” if it “has a tendency to generate negative consequences.” Further, the FTC states that “Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions.”

Under the Policy Statement, a party engaged in unfair methods of competition will have a narrow escape hatch if it can show a justification for the conduct. The burden, however, will fall on the party to show that “the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in *standalone* Section 5 cases.” Significantly, the “inquiry would not be a net efficiencies test or a numerical cost-benefit analysis” familiar from antitrust.

In a Dissenting Statement, Commissioner Wilson strongly objected to the Policy Statement. She argued that it fails to provide meaningful guidance and “announces that the [FTC] has the authority summarily to condemn essentially any business conduct it finds distasteful.” Commissioner Wilson further criticized the Policy Statement for sidelining consumer welfare and the rule of reason in favor of a near *per se* approach whereby the FTC will determine if conduct is “facially unfair” and “discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate.” Commissioner Wilson also believes that the new policy sidelines precedent requiring the FTC to show a likelihood of anticompetitive effects.

### **Foreshadowed Enforcement**

To provide guidance as to how the FTC will bring Section 5 cases, the Policy Statement includes a non-exhaustive list of categories of conduct previously found to violate Section 5. Beyond violations of the antitrust laws, the list includes conduct that:

- (a) may result in monopoly or market power;
- (b) has the tendency to ripen into violations of the antitrust laws;
- (c) tends to cause potential harm similar to an antitrust violation; or
- (d) may fall into a “gap” in the antitrust laws.

Specific practices the FTC identified as potential targets for standalone Section 5 enforcement include:

- invitations to collude;
- a series of transactions that may not individually violate the antitrust laws, but collectively tend to bring about the harms that the antitrust laws seek to prevent;
- acquisitions of potential or nascent competitors;
- practices that facilitate tacit coordination;
- parallel exclusionary conduct;
- loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into antitrust violations due to industry conditions and the party’s position within the industry;
- price discrimination not covered by the Clayton Act;
- fraudulent and inequitable practices that undermine the standard-setting process;
- using market power in one market to gain an advantage in an adjacent market;
- interlocking directors and officers of competing firms;
- commercial bribery and corporate espionage that tends to create or maintain market power;
- false or deceptive advertising or marketing that tends to create or maintain market power; and
- discriminatory refusals to deal that tends to create or maintain market power.

In fact, as discussed in a recent [Competition Corner post](#), the FTC has already prioritized enforcement of a number of these practices under the Sherman and Clayton Acts, including acquisitions of potential or nascent competitors, a series of “roll-up” transactions, and interlocking directors and officers of competing firms.

## Bottom Line

Businesses should be more mindful than ever of agreements or practices that could be seen as reducing competition in markets. Beyond traditional consumer welfare concerns, enforcement action is increasingly targeting areas of competition including labor markets and services markets, with the FTC’s [stated](#) goal of “keeping up with the evolving nature of anticompetitive behavior.” While the FTC indicated rulemaking consistent with the Policy Statement is forthcoming, enforcement action may not wait. Businesses engaging in the types of conduct called out in the Policy Statement may wish to reconsider their risk tolerance in light of the FTC’s increased enforcement proclivities.

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<sup>[1]</sup> 15 U.S.C. § 45(a)(1).

<sup>[2]</sup> See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

<sup>[3]</sup> Apart from certain administrative complaints involving invitations to collude. 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, Federal Trade Commission (July 9, 2021) (the “2021 Statement”).

<sup>[4]</sup> This 2021 Statement observed that the statutory text, structure of the law, legislative history, and Commission’s institutional strengths reflected a mandate beyond the Sherman and Clayton Acts, contrary to the assertions of the 2015 Statement.

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