# FTC Claims Broader Section 5 Powers in New Policy Statement; Provides Limited Practical Guidance

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## Key Points

- The Federal Trade Commission (FTC) issued a Policy Statement that dramatically broadens its approach to enforcement of Section 5 of the FTC Act, which prohibits "unfair methods of competition."
- The FTC is taking the position that Congress created the Commission to address competitive ills not reached by the Sherman or Clayton Act. The new approach departs from the Obama-era FTC and will seek to combat any conduct that the agency deems coercive, exploitative, or collusive, even in its incipiency, or that violates the "spirit" of the antitrust laws.
- The Policy Statement lists a wide range of conduct that could potentially fall under its purview, but offers little by way of practical guidance on how the agency will actually enforce the law, creating uncertainty and potential compliance challenges for businesses.
- In testing the bounds of this "standalone Section 5 authority," the FTC could bring standalone complaints alleging "unfair" conduct or could bootstrap such Section 5 "unfair competition" theories of harm onto Sherman or Clayton Act complaints.
- Policy statements are not binding on courts, and the FTC would have to convince courts to find such conduct liable on a case-by-case basis.

On November 10, 2022, the FTC issued a Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act that revisited the Commission's decades-long enforcement approach under Section 5 of the FTC Act, which makes illegal "unfair methods of competition." The Policy Statement pushed aside an Obama administration-era recitation of enforcement principles that limited application of Section 5, and adopted a much broader approach built on the 1914 legislative history of the FTC Act. According to the new Policy Statement, Section 5 gives the agency a broad mandate to challenge conduct outside the bounds of the Sherman or Clayton Acts, and to apply an analytical framework that does not require a "rule of reason" balancing analysis, a formal market definition, or even findings of harmful effects. The Policy Statement details the types of claims the FTC intends to bring under Section 5 (also known as "standalone Section 5" cases), from tying, bundling, or loyalty rebates to acquisitions of potential future competitors or a series of acquisitions that allegedly trend toward competitive harm. In the Policy Statement, the FTC appears to have collected a wide range of theories of harm historically criticized or rejected by courts as antitrust violations and reframed them as Section 5 violations. The FTC's very broad approach led Commissioner Christine Wilson to say in a dissenting statement that the majority of the Commission was claiming "the authority summarily to condemn essentially any business conduct it finds distasteful." Indeed, if the FTC follows through and applies this new Section 5 framework, the consequence will be substantial uncertainty surrounding conduct that for years has not presented meaningful antitrust risk and mergers that may not meet the standards of Section 7 of the Clayton Act, but may meet the relaxed standards of Section 5 as articulated in the Policy Statement. Of course, policy statements are not binding on courts, and the FTC would have to convince courts to find such conduct liable one case at a time.

Enacted in 1914, Section 5 of the FTC Act "empowered and directed" the FTC to "prevent persons … from using unfair methods of competition" and made unfair methods of competition illegal. 15 U.S.C. § 45. In 1934, the Supreme Court interpreted Section 5 to reach conduct not violative of the Sherman Act. This interpretation was

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affirmed in a number of cases through the 1960s, but in the 1980s courts found FTC standalone Section 5 claims lacking. These decisions rejected the FTC's positions for a variety of reasons, including: (1) the absence of clear criteria for distinguishing between proper and improper conduct; (2) the inability of businesses to conform their conduct to the standards asserted by the FTC; and (3) the need to provide some limits to the discretion of the FTC to condemn competitive practices as illegal.[1] In the past three decades, with a few notable exceptions,[2] the FTC applied Section 5 primarily to attempts to collude that are outside the reach of Section 1 of the Sherman Act, which prohibits agreements to collude as unreasonable restraints on trade.[3] In August 2015, after two commissioners issued individual statements arguing for a reduction in the FTC's standalone Section 5 authority, the Obama administration FTC issued a Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act. The statement provided a framework for standalone Section 5 enforcement going forward. Put simply, the guidance indicated that the FTC would evaluate conduct that caused or would likely cause harm to competition or the competitive process under a "rule of reason" approach, and that the FTC is less likely to challenge conduct under Section 5 alone if the Sherman Act or Clayton Act sufficiently address the harms.

Within one month of her appointment as Chair of the FTC, Lina Khan withdrew the 2015 Statement of Enforcement Principles, asserting that it "contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence." She wrote, "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." The new Policy Statement doubles down on this criticism and returns attention to the policy positions rooted in the legislative history of Section 5 for support for a far broader mandate. The Commission, returning to 1914, writes that "Congress created the FTC as an expert body charged with elucidating the meaning of Section 5." It further explains, Congress made the FTC an independent agency with members' terms of service extended seven years, so that commissioners might become experts in "what constitutes an unfair method of competition." The Policy Statement is a full-throated endorsement of the FTC's power to enforce Section 5 as broadly as the Sherman and Clayton Acts, as seen through the lens of the 1914 legislative history. According to the Policy Statement, the following are among the goals and parameters of Section 5:

- "to protect 'smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals'";
- "'it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another, or prohibit another from engaging in business, or restrain trade'"; and
- "to secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances."

Moreover, the Commission claims that a showing of anticompetitive harm or intent is not necessary under Section 5 "in every case," because, again drawing from the legislative history, unfair methods of competition are a source of monopoly, and Section 5 is intended to "'check monopoly in the embryo.'" The framework for defining "unfair methods of competition" draws from these congressional statements as well as the dozen-or-so Supreme Court opinions affirming application of Section 5 up through the 1960s. Key tenets include:

1. "Unfair competition" reaches conduct that is coercive, exploitative, collusive, abusive, deceptive, predatory, or otherwise restrictive or exclusionary.
2. The conduct must tend to negatively affect competitive conditions — by affecting consumers, workers, or "other market participants," including actual or potential competitors, but it need not directly cause actual harm. Notably, this view of Section 5 is at odds with the axiom that U.S. antitrust laws should protect competition and not competitors.[4]
3. The Commission will use a sliding scale such that conduct that is "clearly unfair" will require less of a showing that the conduct tends to negatively impact competitive conditions.
4. No separate showing of market power or market definition is required if the evidence indicates that it tends to negatively affect competition.

[1] The most prominent cases in which the courts rejected the expansion of Section 5 beyond core antitrust prohibitions include: *Boise Cascade Corp. v. Fed. Trade Comm'n*, 637 F.2d 573 (9th Cir. 1980) (holding that in the absence of an agreement to fix prices, the FTC must show an actual anticompetitive effect to constitute a violation of Section 5); *Official Airline Guides, Inc. v. Fed. Trade Comm'n*, 630 F.2d 920 (2d Cir. 1980) (holding that a violation cannot be found where the respondent "does not act coercively"); and *E. I. du Pont de Nemours v. Fed. Trade Comm'n (Ethyl)*, 729 F.2d 128 (2d. Cir. 1984) (holding 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.")

[2] In 2017 the FTC alleged a standalone Section 5 claim against Qualcomm for using anticompetitive tactics to maintain its monopoly in the supply of a key semiconductor device used in cell phones and other consumer products by charging royalties that amounted to a tax that excluded competition. By excluding competitors, the FTC said, Qualcomm impeded innovation that would offer significant consumer benefits, including those that foster the increased interconnectivity of consumer products, vehicles, buildings, and other items. Thus, by anchoring its allegations in consumer harm, the FTC utilized a traditionally deployed approach to Section 5 enforcement.

[3] *See, e.g., In re U-Haul Int'l, Inc.*, File No. 081-0157 (2010); *In re Valassis Communs.*, 2006 FTC LEXIS 25 (2006); In re Stone Container Corp., 125 F.T.C. 853 (1998); *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996).

[4] *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (noting that "[t]he antitrust laws … were enacted for 'the protection of competition not competitors'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

5. The inquiry does not focus on the rule of reason — *i.e.*, weighing anticompetitive harms against procompetitive benefits—but instead focuses on stopping unfair methods of competition in their incipiency.
6. If a party defends with justifications for the conduct, the FTC would not engage in a "net efficiencies or numerical cost-benefit analysis," because the "unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms."

These tenets are a departure from economic analysis underpinned by the "rule of reason" balancing standard and market definition analysis applied in antitrust cases under the Clayton and Sherman Acts, and, as Commissioner Wilson points out in her dissenting statement, could create a near presumptive standard for conduct the FTC determines to be "facially unfair." Under the Policy Statement's framework, any conduct historically addressed by Section 5 would be actionable, including invitations to collude. In this category, the FTC also includes "mergers … that have the tendency to ripen into violations of the antitrust laws." The Policy Statement cites *Yamaha Motor Co. v. Fed. Trade Comm'n* as an example. *Yamaha*, decided in 1981, was the last time a court blocked a merger under Section 7 of the Clayton Act on a theory of actual potential competition, a theory the FTC included in its 2022 challenge to Meta's acquisition of Within. The FTC also includes in this category "a series of mergers … that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws." Chair Khan has spoken out against such serial mergers in the context of private equity M&A strategies involving multiple acquisitions within a particular sector.

The FTC also describes 14 scenarios actionable under the Section 5 framework because they "violate[] the spirit of the antitrust laws." Many of these involve theories of harm that have been rebuffed by courts when brought as Sherman or Clayton Act claims, including tacit collusion, resale price maintenance, price discrimination, acquisition of potential competitors, and company interlocks between competitors that are not otherwise prohibited.

The Commission went to great lengths to support its position with citations to myriad examples of Section 5 being upheld by the Supreme Court through the 1960s and theories of harm once found to be violative of the Sherman or Clayton Act, but in modern times criticized or rebuffed. The Biden administration's FTC is staking out the position that Congress created the Commission to address competitive ills not reached by the Sherman or Clayton Act, and that it is the Commission's mission to prevent "unfair methods of competition" without the encumbrance of the analytical framework of the antitrust laws. The FTC's historical lookback to 1914 legislative history in support of a broader modern enforcement mandate echoes recent public statements by Assistant Attorney General Jonathan Kanter of the Antitrust Division of the Department of Justice, who has claimed that modern antitrust enforcement has gone lacking and emphasized earlier this year that "[i]t is time we get back to first principles and focus on the policies that Congress was trying to advance in passing the antitrust laws."

To test the bounds of its stated standalone Section 5 authority, the FTC could bring *ad hoc* complaints alleging "unfair" conduct akin to claims brought under Section 5 decades ago, even if the conduct appears not to rise to the level of a violation of the Sherman or Clayton Act. In addition, the FTC could look for opportunities to bootstrap Section 5 "unfair competition" fact patterns and theories of harm onto complaints that also allege violations of the Sherman or Clayton Act with the expectation that a fact finder will find a violation under Section 5's ambiguous framework. Although the Policy Statement lists various types of conduct that could fall under its purview, in her dissenting statement, Commissioner Wilson argued that the "Policy Statement adopts an 'I know it when I see it' approach," thereby making it difficult, if not impossible, for businesses to practically structure their conduct to avoid a challenge by the Commission. The FTC would need to convince courts one litigation at a time that its interpretation of "unfair competition" is the right one. Therefore, it will take time for the impact of the Policy Statement to unfold, and future administrations may revisit this broad approach to Section 5.

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Law clerk **Hayley May** assisted in the preparation of this alert.