

FTC interprets “unfair competition” broadly in new Section 5 policy statement

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On November 10, the FTC issued a long-awaited FTC Act Section 5 policy statement on “unfair methods of competition.” The statement adopts an expansive view of FTC authority and sets forth a more lenient (and amorphous) standard for challenging conduct as unlawful. But it is unclear how the policy will play out in practice. The statement does not provide specific enforcement principles or guidance. It remains to be seen how the FTC will implement the statement and whether courts will accept it.

The FTC’s Section 5 policy statement

On November 10, 2022, the Federal Trade Commission (FTC or Commission) announced its *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5* of the Federal Trade Commission Act (“*Section 5 Policy Statement*” or “*Policy Statement*”).

For decades, there has been considerable disagreement about the meaning and scope of Section 5 of the Federal Trade Commission Act (FTC Act), and how Section 5 interacts with other statutes, such as Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The last time that the FTC sought to take a policy stance on Section 5 enforcement was during the Obama administration in 2015. This prior guidance took a focused approach to Section 5 enforcement, such as by relating Section 5 authority to antitrust claims that are also available to the DOJ and private plaintiffs,¹ which the current Chair of the FTC, Lina M. Khan, describes as an “abdication” of the FTC’s statutory mandate.² The 2022 *Policy Statement* replaces this earlier Obama-era guidance.

The FTC adopted the *Policy Statement* on a party-line vote of 3-1. It was not submitted for public comment prior to its issuance.³

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” In general, the agency uses its unfair competition authority to challenge anticompetitive behavior. Under the new *Policy Statement*, conduct is deemed to be “unfair” if it meets a broad two-pronged test: (1) “the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature... [or] be otherwise restrictive or exclusionary, depending on the circumstances” and (2) “the conduct must tend to negatively affect competitive conditions [which] may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.”⁴ The FTC said that it will evaluate these factors on a sliding scale, but it has not provided guidance on how the scale will be measured.

In her dissent, Commissioner Christine Wilson (the Republican Commissioner) criticized the new standard for failing to provide actionable guidance to businesses and other market actors.

The Section 5 *Policy Statement* has the potential to significantly expand FTC enforcement practice

The FTC's new *Policy Statement* represents a significant departure from the agency's 2015 Section 5 policy guidance. In the 2015 Section 5 statement, the FTC (then headed by Chair Edith Ramirez) announced that: (1) unfair competition would be evaluated under the rule of reason; (2) the FTC's analysis would be guided by the promotion of consumer welfare; and (3) the FTC would be less likely to challenge an act or practice as unfair under Section 5 if the Sherman Act or Clayton Act were sufficient to challenge the behavior.⁵

The 2022 *Section 5 Policy Statement* rejects these principles in favor of a broader interpretation of Section 5. According to Chair Khan and the other Democratic Commissioners:

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.⁶

The *Policy Statement's* examples of unfairness cover a wide range of conduct

The *Policy Statement* identifies a wide range of conduct it considers to be unfair competition under Section 5, including:

- Practices that violate the Sherman Act or Clayton Act⁷;
- “Conduct deemed to be an incipient violation of the antitrust laws. Incipient violations include conduct by respondents who have not gained full-fledged monopoly or market power, or by conduct that has the tendency to ripen into violations of the antitrust laws”; and
- Conduct that “violates the spirit of the antitrust laws,” such as:
 - A series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws;
 - Conduct that is “undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market”; and
 - Fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications.⁸

These examples offer further evidence of the agency's intent to aggressively enforce the antitrust laws, even for conduct that has not necessarily been understood to create antitrust risk.

The FTC may be taking a more expansive view of what conduct can be challenged with little or no showing of competitive harm

The *Policy Statement* articulates a new analytical framework for evaluating what is required for a Section 5 enforcement action. In particular, the *Policy Statement* describes a two-part “sliding scale” approach.

First, the conduct must go “beyond competition on the merits.” This could include conduct that is “coercive,

exploitative, collusive, abusive, deceptive, predatory or involve[s] the use of economic power of a similar nature” or “otherwise restrictive or exclusionary.”⁹ Second, the conduct “must tend to negatively affect competitive conditions.” This may include “conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.”¹⁰

These principles are to be weighed according to a “sliding scale.” In particular, the more unfair that conduct is found to be under the first part of the test, the lesser showing that is required under the second part, if any showing is required at all.¹¹ When the conduct in question is deemed unfair under the second criterion, the *Policy Statement* says that Section 5 does not require the FTC to define a relevant product market or to establish market power in that market.¹²

The *Policy Statement* further asserts that the FTC will consider procompetitive justifications only in narrow instances. And in these narrow instances, the *Policy Statement* places a significant burden on parties to prove the justifications:

It is the party’s burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. In addition, the asserted benefits must not be outside the market where the harm occurs. Finally, it is the party’s burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases.¹³

Under the *Policy Statement*, the FTC can challenge conduct even where there is *only* a clear “indicia of unfairness,” regardless of the actual impact of the conduct on competition. Moreover, as described above, the FTC appears to interpret Section 5 as not requiring market definition, market power, or similar factors that courts and agencies have traditionally used to evaluate a defendant’s actual ability to affect competition. Commissioner Wilson strongly criticized this policy as allowing “the Commission [to] find liability merely by selecting an adjective and then limiting the defenses of the respondent.”¹⁴

The *Policy Statement* allows the FTC to challenge conduct affecting a wide range of actors, not only consumers, and does not limit itself to “consumer welfare”

Unlike the 2015 statement, the 2022 *Policy Statement* does not reference “consumer welfare” or the “consumer welfare standard.” (The consumer welfare standard, a traditional method of antitrust analysis, focuses principally on consumers and evaluates whether challenged conduct tends to increase prices, reduce output, or reduce innovation.) Instead, the new *Policy Statement* identifies competitive conditions that may affect, “consumers, workers, or other market participants.” The *Policy Statement* does not define “[o]ther market participants,” which may include competitors.

This is another potential shift for unfair competition enforcement. Under the *Policy Statement*, the FTC can challenge as unfair an “indicia of unfairness” that effects “a market actor” who is not a consumer. As described in Commissioner Wilson’s dissenting statement, “[n]o clarity is provided regarding which other market participants may be considered, or how this array of interests will be prioritized or balanced.”¹⁵ This departure from traditional antitrust analysis has not been tested in the courts.

The *Policy Statement* may face notable hurdles

Significant legal and practical impediments may limit the FTC's ability to expand its Section 5 authority, without assistance from Congress or the courts. As noted in our last update, certain recent decisions suggest that some courts are wary of non-traditional theories proposed by the FTC or the Department of Justice's Antitrust Division.¹⁶ Staffing and resource constraints could also limit the FTC's ability to police the wide range of conduct now potentially being swept into the scope of Section 5.

Moreover, the *Policy Statement's* broad description of "unfair conduct" arguably does not provide actionable guidance for many businesses seeking to avoid unfair competition liability. The conclusory terms that the FTC uses to describe facially unfair conduct ("coercive, exploitative, collusive, abusive, deceptive, [and] predatory," as well as "restrictive" and "exclusionary") are not self-evident and therefore do not serve as clear standards that businesses can follow; those terms instead "require subjective interpretation" that accounts for specific facts and circumstances.¹⁷

Finally, the *Policy Statement* may be in tension with other antitrust laws, which could affect its influence. Two notable examples include:

- *Mergers*: The *Policy Statement* asserts that Section 5 applies to mergers that may not be anticompetitive at the time of the transaction but which may be considered anticompetitive years in the future after a transaction has closed. It remains to be seen how courts will evaluate this policy in light of established law under Section 7 of the Clayton Act.
- *Interlocking Directorates*: Section 8 of the Clayton Act expressly prevents an officer or director of one corporation from serving as an officer or director of a competitor corporation. The statute provides clear guidance as to what "interlocks" are illegal and those that are not, such as because an interlock does not meet certain financial thresholds. The *Policy Statement*, however, purports to make illegal "interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act."¹⁸ Yet, the *Policy Statement* does not include any clarity as to what sort of interlocks exist outside of the clear language of the Clayton Act that could be found to violate Section 5.

As written, any merger or any interlock may be challenged as unlawful under Section 5, even though other statutes specifically do not create or suggest such liability.

Until these principles are tested in the courts, market actors should prepare to litigate more often.

Key takeaways

The Section 5 *Policy Statement* is another important development in the Biden administration's aggressive antitrust enforcement agenda.¹⁹ The FTC's Democratic majority interprets its Section 5 statutory authority as covering a broad range of conduct, without reference to traditional antitrust standards or economic analysis. It remains to be seen how the FTC will implement its Section 5 statement and whether the courts will accept the FTC's new interpretation of its own authority.

We will continue to monitor and provide updates on the FTC's efforts in this area.

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¹ Fed. Trade Comm'n, 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 (hereinafter, "The 2015 Statement").

² Lina M. Khan, Chair, Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya On Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act, at 3 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf (hereinafter, "Khan Statement").

³ By contrast, the FTC provided the opportunity for public comment in its revision of the FTC/DOJ merger guidelines, where the agencies received over 1,000 comment letters. This indicates substantial public interest in FTC enforcement policies and procedures.

⁴ Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Comm'n File No. P221202 at 9 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (hereinafter, "Policy Statement").

⁵ The 2015 Statement.

⁶ Khan Statement, at 3.

⁷ As previously noted, in 2015, the FTC said that it would be less likely to challenge an act or practice as unfair under Section 5 if the Sherman Act or Clayton Act were sufficient to challenge the behavior. But now, the FTC will challenge this behavior as unfair, potentially creating a gap for similar conduct challenged under different standards.

⁸ Policy Statement, at 12-16.

⁹ *Id.*, at 9

¹⁰ *Id.*

¹¹ *Id.* (“Where the indicia of unfairness are clear [the first criterion], less may be necessary to show a tendency to negatively affect competitive conditions [the second criterion].”).

¹² *Id.*, at 10. Under traditional antitrust analyses, determining market definition and market power is a common first step, because it is that relevant market in which the effect on competition is evaluated. If an entity does not have significant market power (also referred to as monopoly power) in a relevant market, then it is unlikely that the conduct undertaken by that entity will have an effect on the marketplace or competition.

¹³ Policy Statement, at 11–12. Of note, the requirement that the respondent prove that any benefit be found within the market where the harm occurs is itself contradictory to the FTC’s assertion that no relevant market definition is need.

¹⁴ Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Dissenting Statement Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,” at 17 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf (hereinafter, “Dissenting Statement”).

¹⁵ *Id.*, at 8.

¹⁶ See Davis Polk, Three recent merger enforcement decisions signal challenges for U.S. antitrust agencies (Oct. 6, 2022), <https://www.davispolk.com/insights/client-update/three-recent-merger-enforcement-decisions-signal-challenges-us-antitrust>.

¹⁷ Dissenting Statement, at 13.

¹⁸ Policy Statement, at 15.

¹⁹ See Davis Polk, President Biden’s Executive Order on Competition: One year later (Aug. 25, 2022), <https://www.davispolk.com/insights/client-update/president-bidens-executive-order-competition-one-year-later>.