

---

# The FTC Expands Scope of Unfair Methods of Competition Enforcement

The Federal Trade Commission (“FTC” or “the agency”) announced a new enforcement policy<sup>1</sup> for the prohibition of unfair methods of competition under Section 5 of the FTC Act.<sup>2</sup> The FTC’s policy statement declares that the FTC will take an expansive view of its power under the FTC Act to investigate and prevent conduct that violates Section 5. The FTC’s stated goal is to stop “unfair methods of competition in their incipiency based on their tendency to harm competitive conditions” and identify and police conduct that may fall beyond the reach of other antitrust laws. While the FTC has attempted to provide a framework to determine what constitutes an unfair method of competition, its guidance may leave businesses uncertain of what conduct runs afoul of Section 5.

---

## I. Background

The FTC’s enforcement of Section 5 has engendered much debate over many decades, with several policy adjustments by the agency. In the 1960s and 1970s, the FTC applied Section 5 broadly to challenge conduct on public policy grounds and suffered several court reversals.<sup>3</sup> But subsequent criticism led the agency to adopt a more conservative approach to Section 5. In 2015, the FTC announced a policy statement providing that, when deciding whether to challenge conduct under Section 5 on a standalone basis, the FTC would evaluate the conduct under a “framework similar to the rule of reason,” consider business efficiencies and justifications, and be guided by the consumer welfare standard.<sup>4</sup> In July 2021, the agency rescinded the 2015 policy statement, stating that it was “short-

---

<sup>1</sup> *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FEDERAL TRADE COMMISSION, Nov. 10, 2022, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf) (“*Section 5 Statement*”).

<sup>2</sup> 15 U.S. Code § 45 (2020).

<sup>3</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,”* FEDERAL TRADE COMMISSION, Nov. 10, 2022, at 15, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf) (“*Dissenting Statement*”).

<sup>4</sup> *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act*, FEDERAL TRADE COMMISSION, Aug. 13, 2015, at 1, [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf) (“*2015 Statement of Enforcement Principles*”). The Rule of Reason analysis typically requires the plaintiff to establish (i) the relevant product and geographic market definition, (ii) market power of the defendant in the relevant market, and (iii) the existence of anticompetitive effects. The burden will then shift to the defendant to show an objective procompetitive justification. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. The analysis helps distinguish procompetitive restraints from anticompetitive restraints. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *State Oil v. Kahn*, 522 U.S. 3, 10 (1997); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Under the consumer welfare standard, an act is anticompetitive “only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.” *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

---

sighted” and constrained the agency’s authority, counter to its statutory obligations.<sup>5</sup> The FTC’s November 2022 statement, supported by three commissioners and opposed by one – is cast as an attempt to remedy analytical gaps, citing Section 5’s text, legislative history, and case law to support the revised approach.

---

## II. Guidance

On November 10, 2022, the FTC affirmed its intention to vigorously enforce Section 5 of the FTC Act. The FTC stated that Section 5 reaches beyond other antitrust laws and prohibits conduct that tends to negatively affect competition, including “incipient” violations and violations of the “spirit” of the antitrust laws. According to the FTC, conduct constitutes an unfair method of competition if (1) the conduct is “a method of competition” and (2) is “unfair.” The FTC stated that conduct is a method of competition when it is undertaken by an individual or business in the marketplace and implicates competition, either directly or indirectly.<sup>6</sup>

The FTC may view a method of competition as unfair when the conduct goes beyond competition on the merits.<sup>7</sup> Two key criteria are relevant:

- First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.
- Second, the conduct must *tend* to negatively affect competition, such as conduct tending to foreclose or impair opportunities to market participants, limit choice, or harm consumers.<sup>8</sup> According to the FTC, Section 5 is focused on incipient threats to competition, not whether conduct directly caused actual, specific harm, and thus the test analyzes whether the conduct has a *tendency* to negatively affect competitive conditions, including when examined in the aggregate with actions of other market participants or as part of a cumulative effect of a business’s other market practices.

The two criteria are weighed on a sliding scale. For example, even when the conduct is not facially unfair under (1), it may still violate Section 5 by tending to negatively affect competitive conditions under (2). Relevant factors include the size, power, and purpose of the business and the current and potential future effects of the conduct. Notably, in sharp contrast to the FTC’s prior policy,<sup>9</sup> the test does not require a showing of market power or market definition or a rule of reason analysis. According to the dissenting commissioner’s statement, the FTC has adopted an “I know it when I see it” approach premised on a list of nefarious-sounding adjectives.<sup>10</sup>

---

## III. Possible Justifications

The FTC cautions that justifications might not be considered in a standalone action, as Section 5 liability normally attaches to conduct *prima facie*. But where a party chooses to assert a justification, the FTC will not

---

<sup>5</sup> *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act*, FEDERAL TRADE COMMISSION, Jul. 1, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>.

<sup>6</sup> According to the FTC, an example of conduct indirectly implicating competition is misuse of a regulatory process that creates or exploits impediments to competition. See *Section 5 Statement* at 8.

<sup>7</sup> Examples of competition on the merits include “superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.” See *Section 5 Statement* at 8-9.

<sup>8</sup> Examples include raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. See *Section 5 Statement* at 10.

<sup>9</sup> *2015 Statement of Enforcement Principles* at 1.

<sup>10</sup> *Dissenting Statement* at 2.

---

conduct a net efficiencies test or numerical cost-benefit analysis, and the more facially unfair and injurious the harm, the less likely it can be overcome by countervailing justifications.

Additionally, it is the party's burden to show that the asserted justification for the conduct is not pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. 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.

---

#### IV. Historical Examples of Unfair Methods of Competition

The FTC has provided a non-exhaustive list of historical examples of unfair methods of competition. This list is meant to provide guidance on the types of conduct that may violate Section 5 and includes:

- Practices deemed to violate the antitrust laws;
- Conduct deemed to be an incipient violation of the antitrust laws.<sup>11</sup> Past examples of such use of Section 5 include:
  - invitations to collude,
  - mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws,
  - a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws, and
  - loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the business's position within the industry.
- Conduct that violates the spirit of the antitrust laws.<sup>12</sup> Examples of such violations, to the extent not covered by the antitrust laws, include:
  - practices that facilitate tacit coordination,
  - parallel exclusionary conduct that may cause aggregate harm,
  - conduct by a business that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market,
  - fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications,
  - price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,

---

<sup>11</sup> Incipient violations include conduct by businesses that have not gained full-fledged monopoly or market power, or conduct that has the tendency to ripen into violations of the antitrust laws. See *Section 5 Statement* at 12.

<sup>12</sup> The FTC explains that this conduct includes business practices that tend to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may fall into a "gap" in those laws. As such, the analysis may depart from prior precedent based on the provisions of the antitrust laws. See *Section 5 Statement* at 13.

- 
- de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market,
  - mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition,
  - using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets,
  - conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition,
  - interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act,
  - commercial bribery and corporate espionage that tends to create or maintain market power,
  - false or deceptive advertising or marketing which tends to create or maintain market power, or
  - discriminatory refusals to deal which tend to create or maintain market power.

---

## V. Conclusion

The FTC's policy statement departs from the recent understanding of Section 5 of the FTC Act. Although the FTC's published guidance attempts to describe the application of Section 5, and the list of practices and examples includes activities that have previously been addressed by the antitrust laws and the FTC Act, the suggested disavowal of traditional antitrust standards (such as a showing of market power and anticompetitive effects) introduces significant uncertainty about the circumstances where commonplace business practices would be found in violation of Section 5 and which, if any, justifications would be considered.

According to the FTC, Congress intended the courts to provide deference to the FTC as an independent, expert agency. The FTC has cited judicial decisions finding that FTC determinations deserve "great weight," but it is unclear how the federal judiciary's recent efforts to restrain powers of federal administrative agencies<sup>13</sup> will impact the FTC's interpretation of Section 5's broad scope. Additional litigation and congressional oversight will likely ensue.

The FTC's guidance may also chill procompetitive conduct, as businesses become risk averse to avoid Section 5 liability. We recommend consulting experienced counsel to assess the potential enforcement risk for conduct under Section 5.

\* \* \*

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com); Lauren Rackow (counsel) at 212.701.3725 or [lrackow@cahill.com](mailto:lrackow@cahill.com); or Ryan M. Maloney (associate) at 212.701.3269 or [ryan.maloney@cahill.com](mailto:ryan.maloney@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

---

<sup>13</sup> *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2599 (2022); *Sec. & Exch. Comm'n v. Cochran*, 142 S. Ct. 2707 (2022) (pending); *Axon Enter., Inc. v. Fed. Trade Comm'n*, 142 S. Ct. 895 (2022) (pending).

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.