



The FTC's New Section 5 Guidance: What You Need to Know

In a new [policy statement](#), the Federal Trade Commission declared that it may deem many types of routine business conduct as “unfair methods of competition,” without any showing of harm to consumers or anticompetitive intent. In particular, the FTC announced that it may be illegal for companies to compete in ways that harm *competitors* (rather than just consumers), disadvantage workers, use intellectual property, or rely on economies of scale. According to the FTC, for example, loyalty rebates, bundling, exclusive contracts, and small acquisitions all may constitute illegal “unfair” activity.

This memo analyzes the FTC's new policy statement. In short, the FTC has unilaterally decided that it has almost complete discretion to declare illegal any competitive behavior that it disfavors. The FTC is likely to use this authority to target companies and business practices that do not conform to its progressive policy agenda, irrespective of the impact on consumers.

Still, the FTC faces a myriad of constraints. The FTC simply lacks the resources to reshape every contract and practice across the economy; it will have to pick its targets. Moreover, the courts are very unlikely to endorse the FTC's sweeping claims of authority, which selectively ignore decades of court precedent and contain numerous internal inconsistencies. Ultimately, companies should understand the breathtaking scope of the FTC's policy statement, appreciate that the FTC may try to bully them into accepting its view of “fair” competition, yet recognize that the FTC's claimed authority rests on a very thin reed.

The History of Section 5

In 1914, Congress passed the Federal Trade Commission Act, which created the FTC. Section 5 of the Act authorized the FTC to attack “unfair methods of competition.” Congress did not define the term and there has never been a consistent authoritative definition. In the late 1970s and early 1980s, the FTC brought some cases relying on an expansive view of Section 5, but the courts consistently rejected those efforts because the agency failed to define “unfair methods” according to acceptable criteria. As a result, as a practical matter, the FTC and courts largely treated Section 5 in concert with the other major antitrust statutes, the Sherman and Clayton Acts.

In 2015, the Commission issued a “[Statement of Enforcement Principles](#)” consistent with this coherent and stable view of Section 5. Although recognizing that Section 5 could encompass acts that “contravene the spirit of the antitrust laws,” the Statement tied enforcement to two pillars of traditional antitrust enforcement, the consumer welfare standard and the rule of reason. In other

words, the Commission would employ its “standalone” Section 5 authority only where a business practice harmed consumers based on a complete assessment of the practice’s competitive impact, including any business rationales and efficiencies.

In 2021, under Chair Khan’s leadership, the Commission [withdrew](#) this Statement. The new Commission believed that Congress had intended for Section 5 to cover much more business conduct than that encompassed by the Sherman and Clayton Acts, and in fact that Congress wanted the FTC to have more discretion to define and attack “unfair” competition.

The FTC’s New Section 5 Policy Guidance

In its new statement, the FTC affirmatively declares that Section 5 extends far beyond the other antitrust statutes. According to the agency, the FTC Act’s legislative history shows that Congress enacted Section 5 “to protect against various types of unfair or oppressive conduct in the marketplace,” with no need to show anticompetitive intent or effects. The agency then cites cases from the 1930s to the 1960s, and one case from 1986, for the proposition that the “Supreme Court has affirmed this same broad view of the scope of Section 5 on numerous occasions.”

Next, the FTC explains that unfair competition “goes beyond competition on the merits.” Such “unfair” competition may be “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.” The competitive behavior also may be “otherwise restrictive or exclusionary, depending on the circumstances.” In addition, the conduct “must tend to negatively affect competitive conditions,” such as “conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers,” or, harming “workers” or “the likelihood of potential or nascent competition.”

In its statement, the FTC purports to give itself *carte blanche* to enforce Section 5, which contains no private right of action, by eliminating virtually any constraints or defenses. The courts must defer to the agency: “Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency.” The FTC need not show market power, define a market, nor justify its analysis under a traditional rule of reason inquiry. A company cannot defend its conduct based on net efficiencies or a numerical cost-benefit analysis. Instead, the FTC may consider a variety of non-quantifiable 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.”

The FTC then provides dozens of examples of conduct that it may deem to violate Section 5. Those examples include the following:

- mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws;
- loyalty rebates, tying, bundling, and exclusive dealing arrangements;

- conduct that violates the “spirit of the antitrust laws,” including parallel exclusionary conduct and price discrimination;
- fraudulent and “inequitable” practices that undermine the standard-setting process or that interfere with the Patent Office’s full examination of patent applications;
- using technological incompatibilities to negatively impact competition in adjacent markets; and
- discriminatory refusals to deal that tend to create or maintain market power.

With this guidance, the FTC purports to radically reshape competition law in the United States. In the FTC’s view, the competition laws protect competitors and workers, rather than just consumers (and the FTC apparently will have discretion to choose among competing interests). Instead of valuing economic efficiency, the FTC now arguably goes further than simply embracing the European concept of abuse of dominance, which effectively allows regulators to determine that a company competes unfairly by using its size and scale to outcompete smaller rivals.

The FTC, and the FTC alone, will decide whether, when, where, and how companies can compete, unconstrained by the courts, the language of the statute, or objective evidence about harm to consumers. As Commissioner Christine Wilson [explains](#) in her twenty-page dissent, “The Policy Statement adopts an ‘I know it when I see it’ approach premised on a list of nefarious-sounding adjectives, many of which have no antitrust or economic meaning.”

Legal Shortcomings in the FTC’s Guidance

Despite, or perhaps because of, its breadth, courts are likely to be skeptical of or even outright reject the FTC’s expansive view of Section 5. As Commissioner Wilson explains, the statement “abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct.” The statement also “repudiates the consumer welfare standard and ignores the Supreme Court’s admonition that antitrust ‘protects competition, not competitors.’” Similarly, the statement “rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct.”

The statement also contains numerous internal inconsistencies. For instance, the FTC says that it can be unfair to “impair the opportunities of market participants” or to “reduce competition between rivals,” but in reality, vigorous competition necessarily impairs the opportunities available to one’s rivals. Likewise, it is unfair to negatively affect “consumers, workers, or other market participants,” but in practice, higher labor and other input costs can result in higher prices for consumers. The FTC provides no guidance as to how it will weigh these competing factors. In short, the statement replaces objective criteria with political discretion. It fails to provide a viable framework that could result in credible enforcement. In the 1970s and 1980s, courts rejected the FTC’s expansive view of Section 5 for these same reasons.

The FTC Likely Will Use Its Section 5 Guidance to Resume its Status as “National Nanny”

Under its current leadership, the FTC is likely to use its Section 5 guidance to intimidate companies into complying with its view of “fair” competition. In particular, the FTC is likely to attempt to bully companies, particularly politically disfavored companies, into accepting settlements that purport to agree with the FTC’s legal analysis.

As the Chamber has [explained](#), such deep government intervention into our economy would have catastrophic consequences to free enterprise. The Chamber opposes any use of Section 5 beyond the current antitrust laws without clear standards that bound the use of Section 5 narrowly to improper business behavior that could distort the competitive process and harm consumers.