



Chair Lina M. Khan

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**Remarks of Chair Lina M. Khan
on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair
Methods of Competition” Under Section 5 of the FTC Act**

July 1, 2021

Today, we are considering whether to withdraw the 2015 *Statement of Enforcement Principles* regarding the Commission’s exercise of its “standalone” Section 5 authority.

The 2015 Statement states that the Commission will apply its standalone authority using a “framework similar to the rule of reason” under the Sherman and Clayton Acts, but signals that the Commission will typically avoid exercising this authority in cases where those other statutes apply.

In practice, the 2015 Statement has doubled down on the agency’s longstanding failure to investigate and pursue “unfair methods of competition.” Apart from invitations to collude—which the agency has long treated as a violation of Section 5—the Commission has pled a standalone Section 5 violation just once since publishing the Statement.

In my view, because the 2015 Statement ties Section 5 to the Sherman Act framework, it contravenes the FTC Act’s text, structure, and history. Congress directed the Commission to identify and combat “unfair methods of competition” *even if* they do not violate the Sherman Act, and I intend to help restore the agency to this critical mission.

In 1914, Congress enacted the FTC Act partially in response to the Supreme Court’s decision in *Standard Oil*, which announced that it would subject restraints of trade to a “rule of reason” standard under the Sherman Act. Congress feared that this approach would produce inconsistent and unpredictable results and give unchecked power to the courts. Responding to this concern, lawmakers created the FTC to police unlawful business practices with greater expertise and democratic accountability than courts provided.

Consistent with this history, Section 5 of the FTC Act prohibits “unfair methods of competition,” which was a new standard broader than the Sherman Act. *Unlike* the Sherman Act, however, the FTC Act does not feature criminal penalties or private remedies. The FTC’s institutional design therefore reflects a basic tradeoff: Section 5 gives the Commission extensive authority to shape doctrine and reach conduct not prohibited by the Sherman Act, but provides a more limited set of remedies.

The 2015 Statement is at odds with this institutional design, because it declares that the Commission’s authority under Section 5 is largely coterminous with the Sherman Act. In effect, the Statement surrenders the FTC’s unique advantages as an expert body with the power to adjudicate cases, issue rules and guidance, and conduct marketplace studies.

The Commission's efforts to constrain Section 5 in this way have only hindered the agency's enforcement efforts. Courts have bound the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act, despite the striking differences in institutional contexts. The Commission's approach also raises significant administrability concerns, since the rule of reason has resulted in soaring enforcement costs. Scholars have also shown that the defendant has prevailed in nearly all rule-of-reason cases in recent decades.

The 2015 Statement is also rife with internal contradictions that may effectively read the Commission's standalone Section 5 authority out of the statute. First, although the 2015 Statement recognizes that Section 5 prohibits conduct that would violate the Sherman Act "if allowed to mature or complete," it then requires the Commission to prove "likely" anticompetitive effects under the rule of reason. Importing the rule of reason's likelihood requirement would prevent the Commission from combatting incipient wrongdoing *before* it becomes likely to harm competition.

Second, although the 2015 Statement declares that the Commission will apply a "framework similar to the rule of reason," it then suggests that the Commission will typically refrain from bringing a standalone Section 5 case where the Sherman Act applies. By both wedding Section 5 to the Sherman Act's legal standards *and* signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 Statement largely turns standalone Section 5 into a dead letter.

More generally, the 2015 Statement assumes a case-by-case approach to "unfair methods of competition" despite widespread recognition that an adjudication-only approach often fails to deliver clear guidance.

Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets. Section 5 is one of the Commission's core statutory authorities in competition cases; the agency must use it to fulfill Congress's directive to prohibit unfair methods of competition.

In the coming months, the Commission will consider whether to issue new guidance or to propose rules further clarifying the types of practices that warrant scrutiny under this provision. The task will require careful and serious work, but it is one that our enabling statute expected and required.
