UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**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"**

Commission File No. P221202

November 10, 2022

In July 2021, the newly-minted majority at the Commission abruptly withdrew the bipartisan Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under the F0.o( (F)2 ( C)-1 (o)[14 B (i)-2 (r)3 ( M)-1 (e)4 (t)-2 (hods)-11 (2 (2oa(U)1.63 012oa(U52oa(U 5)]TJ

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Statement

- First, the Policy Statement abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct. The majority prefers a near-per se approach that discounts or ignores both the business rationales underlying challenged conduct and the potential efficiencies that the conduct may generate.

- Second, the Policy Statement repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust "protects competition, not competitors."[9] The

new Policy Statement would be consistent with that commitment. The majority likely will point out that when the now-rescinded 2015 Statement was issued, the Commission did not solicit public comment. But there are significant differences between the 2015 Statement and today's Policy Statement that warrant a different procedure. The 2015 Statement described the enforcement approach that the Commission had followed for many decades; it was consistent with long-

of others . . ., or when the conduct is examined as a part of the cumulative effect of a variety of different conduct by the respondent."[14] Finally, it is unnecessary to show market power,[15] a common tool in antitrust cases to predict or infer likely effects from conduct.

After a prima facie case has been established, the respondent has little recourse.[16] Under the Policy Statement, the Commission will not employ a rule of reason analysis,[17] which provides a well-defined framework to analyze competitive impact. A respondent can assert a justification for the conduct but, according to the Policy Statement, the Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis"[18] and "the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[19]

anticompetitive effects, the Policy Statement is silent regarding whether accepted scholarly support or judicial experience must undergird the claim that there is a tendency for harm (after all, actual harm need not be shown). In fact, the concern is greater because the Policy Statement expressly states that it is willing to disregard judicial experience.[31] In other words, under the Policy Statement, the Commission majority will challenge as "unfair methods of competition" practices that courts previously, and repeatedly, have found to be legal. In these cases, the Commission's invocation of nefarious-sounding adjectives and conclusory assertions of a "tendency" for harm will trump sometimes substantial judicial experience regarding the likelihood of competitive harm.

The unbounded application of Section 5 that is heralded by the Policy Statement is inconsistent with the Commission's authority to impose a broad set of remedies. The Policy Statement discusses the balance struck by Congress in the FTC Act: namely, while the FTC Act enables the Commission to challenge a broader range of conduct than that covered by the Sherman and Clayton Acts, it did not create a private right of action and it limited the preclusive effect of FTC enforcement in private antitrust cases.[32] In fact, the bargain went further than the Policy Statement acknowledges; Commission remedies were limited to cease-and-desist orders in exchange for the ability to challenge this broader range of conduct. It is appropriate to attach severe remedies to well-defined prohibitions, and less severe remedies to more amorphous prohibitions. But it is inappropriate to couple a broad range of remedies with the authority to challenge a broad (and nebulously defined) universe of conduct. For this reason, I have explained that any Congressional response to the Supreme Court's decision in *AMG*[33] must include guardrails to limit the range of conduct subject to disgorgement or restitution.[34]

### B. The Policy Statement Rejects the Consumer Welfare Standard to Protect and Reward Politically Favored Groups

The Policy Statement abandons the long- and widely-accepted consumer welfare standard and instead adopts a standard that seeks to pursue multiple goals. Enforcement decisions are not predictable in a regime that seeks to advance many goals, including potentially conflicting ones, simultaneously.[35] Under the consumer welfare standard, enforcers and businesses understood

that there was one goal – enforcement protected consumers – and the analysis followed accepted economic theory and principles. The Policy Statement emphasizes that when it enacted Section 5, "Congress wanted to give the Commission flexibility to adapt to changing circumstances."[36] Ironically, the very tools that the Policy Statement rejects, the consumer welfare standard and the

against the Fashion Originators Guild of America.[45] But in *Fashion Originators Guild of America v. FTC*, the Supreme Court determined that the Commission found that there was market power and that the challenged conduct excluded manufacturers and distributors, which "tend[ed] to create . . . a monopoly in the said industries."[46] In short, the Court determined that the Commission found evidence of anticompetitive effects.

The Policy Statement also ignores the showing of competitive effects demanded by later cases. In *Boise Cascade Corp. v. FTC*,

Also, the Policy Statement's position that incipiency allegations negate a need to demonstrate likely anticompetitive effects is inconsistent with Commission opinion. The Commission expressly refused to rely on an incipiency standard for its findings about competitive effects in *General Foods Corp.*[54] The Commission rejected the argument that Section 5 could prohibit conduct by a firm with market power even when there was no dangerous probability that the firm could obtain monopoly power.[55] In short, the Commission found that the showing of likely anticompetitive effect required under Section 5 is no lower than the showing required to prove allegations of attempted monopolization under the Sherman Act.

### 2. The Policy Statement Ignores Precedent Requiring Consideration of Business Justifications

The Policy Statement hedges on whether business justifications for conduct will be considered.[56] It points to language from cases decided in the 1960s and early 1970s to suggest there is no role for business justifications in the analysis of unfair methods of competition. This language is inconsistent with subsequent cases and modern analysis. In all recent cases, justifications – even if rejected – were considered; the Commission and courts do not affirmatively choose to ignore relevant evidence.[57] In fact, courts expressly have identified business justifications as part of the test for unfair methods of competition.[58] For instance, the Second Circuit in *Ethyl* summarized its test, "in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not 'unfair' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason."[59]

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[54] General Foods Corp., 103 F.T.C. 204 (1984).

[55] *Id.* at 365-66 ("To distinguis 3666 (48 0-Td[(66 (48 0-Td[(66 (4l35t-1 ( )-10 (6nd 1)4 (n i)-2 (nde)4 (pe)4 (n96.9 (s)9.(T)2.6 (lop2.6

Precedent establishes that conduct may not be labelled "unfair" without considering whether there is an absence of a business justification; that is, a business justification is not considered only to be a defense. Even cases cited by the Policy Statement do not suggest that conduct may be declared unfair without considering the legitimate business justifications. *Atlantic Refining Co. v. FTC* only acknowledged the unremarkable principle that defendants may not justify anticompetitive conduct by showing "economic benefit to themselves."[60] In *Fashion Originators Guild of America v. FTC*, the Court held that the FTC did not need to consider justifications in light of the egregious facts of that case where the guild had "aim[ed]" for the "intentional destruction of one type of manufacture and sale which competed with Guild members."[61]

In addition, there are important reasons to consider business justifications for conduct. Business rationales for undertaking challenged practices not only provide context for those choices, but also illuminate the likely competitive effects of the practices at issue. Particularly when the Commission is examining conduct in its incipiency – in other words, before competitive outcomes are known – business explanations and justifications for the practices at issue constitute important predictors of the likely outcomes. As the Supreme Court and the Commission have explained in numerous opinions, while intent generally does not constitute an element of most antitrust violations, it is informative concerning the likely effects on the market.[62]

Finally, in Section 5 of the FTC Act, the Commission is instructed to bring cases only when they are in the public interest.[63] Consequently, it is essential that the Commission consider the business justification, potential efficiencies, and other procompetitive outcomes of the challenged conduct. The Policy Statement's position that the Commission will not consider whether conduct yields net benefits means the Commission likely will challenge conduct that is beneficial to consumers and the U.S. economy, merely to protect the interests of politically favored groups. That approach is inconsistent with the FTC Act, as well as with principles of good government.

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[60] Atlantic Refining Co. v. FTC, 381 U.S. 357, 371 (1965).

[61] Fashion Originators' Guild of Am. v. FTC, 312 U.S.at 467-68.

[62] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (J. Brandeis) ("the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences."); In re McWane, Inc. 157 F.T.C. 108, 144 n.11 (2014) (quoting United States v. Microsoft, 253 F.3d 34, 59 (D.D.C. 2001) ("while our aim is to ascertain the effect of McWane's [conduct], evidence of McWane's intent is relevant 'to the extent it helps us understand the likely effect of [McWane's] conduct.'").

[63] 15 U.S.C. § 45(b) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, . . .").

## III. The Policy Statement Fails to Provide a Predictable, Credible Enforcement Approach for Unfair Methods of Competition

### A. The Policy Statement Does Not Provide Guidance to Businesses That Seek to Comply with the Law

The framework described by the Policy Statement cannot be turned into workable rules for businesses. The list of adjectives that may be invoked to establish facially unfair competition is lengthy, and includes "coercive," "exploitive," "collusive," "abusive," "deceptive," "predatory," "restrictive," and "exclusionary".[64] These labels require subjective interpretation, and frequently lack established antitrust or economic meanings. But the Policy Statement does not provide content to the adjectives. Consequently, identifying whether conduct falls under one of the labels depends on the whims and political worldviews of three sitting Commissioners. As the composition of the Commission changes, so too will the application of Section 5. The subjective nature of the labeling process to determine liability means that it is not possible for businesses to know in advance whether their conduct will be considered unfair. In other words, the approach articulated in the Policy Statement does not allow businesses to structure their conduct to avoid possible liability.

Not only does the Policy Statement withhold meaningful guidance, it significantly increases uncertainty for businesses. When the Commission decides that particular conduct "tends to cause potential harm similar to an antitrust violation" – despite contrary precedent – the Policy Statement provides 0.002 Tw -36.46 -1.15 Td[nC (h)-4 (e.002 Tw -36.4u)2 (s)0.9uBrpaF 12.77 (s)-1 ( 0o

Courts have been unwilling to find violations of Section 5 beyond the limits of the Sherman, Clayton, and Robinson-Patman Acts

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when the Commission's theory of liability

provides a subjective inquiry that leaves businesses in the dark. In fact, the Policy Statement utterly fails to deliver on its promise that it will "assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act."[74]

### B. The Policy Statement Fails to Provide the Rigor Demonstrated by the Approach to the Term "Unfair" for Challenging Unfair and Deceptive Acts and Practices Under Section 5 of the FTC Act

The term "unfair" appears in Section 5 more than once; Section 5 also prohibits "unfair and deceptive acts and practices"[75] to address consumer protection issues. The Commission's current interpretation of "unfair" in its consumer protection mission has been lauded for its flexibility to address a myriad of harmful practices while still providing businesses clarity and certainty about the boundaries of lawful conduct. The Policy Statement does not offer that level of rigor and clarity regarding unfair methods of competition.

Consider the intentional approach to defining the boundaries of unfairness for consumer protection purposes under Section 5, and contrast it with today's Policy Statement. Before the current interpretation of "unfairness" for consumer protection issues was adopted, the Commission interpreted "unfair" to have few restraints, and Congress responded. Before 1980, the Commission attempted to condemn a wide variety of conduct by asserting that a practice was m10 (1980, )6 (dcl p)2 (r)5 (2 (i)-1223-dact)-6 (i)-6 (cm)-yoacm1.15 TdDfi4M[(cu)-m (t)-6 (er)- 1 (p)-14 (rf)-1 (o

injury, which Congress endorsed. Third, unfairness is based on quantitative cost-benefit analysis, requiring enforcement decisions to evaluate and balance both harms and benefits. Despite this history and accepted interpretation of the term "unfair" in the same statutory provision, today's Policy Statement repudiates economic content for "unfair methods of competition," rejects the weighing and balancing of anticompetitive effects and procompetitive benefits, and adopts an expansive "I know it when I see it" approach that seeks to protect interests beyond those of consumers. In short, the Policy Statement takes a far different approach to unfairness in the competition context than it does for the antitrust arena.

### C. The Policy Statement Fails to Provide a Framework for Credible Enforcement Decisions

The Policy Statement's approach – invoking an adjective to establish liability – will lead to enforcement decisions that are not credible. Enforcement is credible when it yields results consistent with legal, economic, and societal norms. When outcomes conflict with established and accepted norms, or when government policy leads either to systematic underenforcement or overenforcement, public respect for antitrust enforcement is eroded.[86] Under the Policy Statement, the Commission may find liability merely by selecting an adjective and then limiting the defenses of the respondent. Consequently, when the Commission brings a case under Section 5, the cards are stacked so the Commission should always win. The Commission's Part 3 administrative adjudication process is already under attack as unfair to respondents. This Policy Statement will only add to the critique of the Commission's processes. In addition, the Policy Statement instructs that the Commission's determination regarding what practices constitute an unfair method of competition deserve judicial deference and "great weight" on appeal.[87] The framework embodied in the Policy Statement violates expectations of fairness, and consequently will undermine the credibility of antitrust enforcement.

### D. The Policy Statement Fails to Consider the Full Legislative History Regarding Section 5 of the FTC Act

There is no dispute that Congress intended Section 5 of the FTC Act to reach beyond then-existing expectations about the scope of the Sherman Act.[88] There is also no dispute that Congress left it to the Commission to determine what conduct fell within the broader scope of "unfair methods of competition" rather than articulating a finite list of practices to be condemned.[89] It is similarly undisputed that Congress envisioned that Section 5 would address

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[86] *See* Wilson, Klotz & Sandford, *supra* note 35, at 1452-53.

[87] *See* Policy Statement at 7.

[88] *See, e.g.*, 51 Cong. Rec. 12,454 (1914) (Sen. Cummins) ("That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.").

[89] *See* S. Rep. No. 597, 63d Cong. 2d Sess., at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.").

later stages of the debate upon the floor of the Senate was one of the chief sponsors for the provision regarding 'unfair competition'",[104] repeated the language of the Rublee memo.[105] In short, for the author of Section 5 and one of its chief sponsors, unfair competition has economic content; unfair competition is defined by efficiency, not the list of adjectives provided in the Policy Statement.

Third, the legislative history explains that unfair competition must adversely affect consumers, not merely weaker rivals. That is, the legislative history does not support abandoning the consumer welfare standard. Senator Cummins explained that Section 5 is concerned "not merely with unfairness to the rival or competitor" but instead requires a finding that "the