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WHAT DOES THE NEW FEDERAL TRADE COMMISSION POLICY STATEMENT MEAN FOR ANTITRUST?

The Center for Growth and Opportunity
at Utah State University

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Policy Paper

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I. Introduction

On November 10, 2022, the Federal Trade Commission ("FTC") announced its Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act (the "2022 Policy Statement"). The 2022 Policy Statement was issued on a party-line vote, with the sole Republican commissioner issuing a strong dissent. In the 2022 Policy Statement, the three Democratic commissioners asserted that they intend to significantly expand the scope of the FTC's Section 5 enforcement.[1]

Section 5 of the FTC Act had rarely been employed as a stand-alone antitrust statute, taking a back seat to the substantive provisions against price fixing, monopolization, and anticompetitive mergers in the Sherman Act and the Clayton Act. With the 2022 Policy Statement, the FTC majority announced that they now plan to interpret Section 5 very differently, abandoning the decades-long, multi-administration commitment to the rule of reason framework and consumer welfare standard. Instead, the FTC majority announced that its focus will now be "on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."[2]

Stopping unfair methods of competition in their incipiency may, on first glance, seem like a policy designed to encourage startup businesses and promote creativity in the marketplace by keeping larger competitors from abusing their advantages. But a closer reading of the 2022 Policy Statement reveals that the FTC has something else in mind. The current FTC leadership is proposing to use the vague "unfair methods of competition" language in Section 5 as a hook to transform the FTC from a law enforcement agency to a regulatory agency, free to pursue agendas far afield from promoting competition and innovation in the marketplace. Thus, the 2022 Policy Statement signals a hard turn away from time-tested principles of antitrust and toward activist enforcement for the FTC.

Policy Statements typically narrow and clarify an agency's intentions. But the 2022 Policy Statement does the opposite, as Commissioner Christine Wilson pointedly summarized in her dissent:

> In the past, both the FTC and its sister agency, the Antitrust Division of the Department of Justice, have issued clear and constructive guidance on enforcement policies and practices. The Policy Statement that the Commission issues today takes a very different approach. Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy.[3]

1 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (November 10, 2022) [hereinafter 2022 Policy Statement], at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

2 *Id.* at 1.

3 Christine S. Wilson, Dissenting Statement of Commissioner Christine S. Wilson (Nov. 10, 2022), at 2, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

The 2022 Policy Statement raises several significant concerns about the future of FTC antitrust enforcement under Section 5 of the FTC Act. First, the Statement leaves many key terms undefined, evidently for the future FTC to attach meaning as it goes along. This lack of useful guidance from the FTC imposes unnecessary costs on businesses as they delay or change business decisions based on their guesses and fears about how to comply with future Section 5 enforcement; thus it will inevitably suppress economic growth and discourage capital investment.

Second, by explicitly rejecting the consumer welfare standard, the 2022 Policy Statement makes it clear that protecting consumers and ensuring a fair playing field for competitors is no longer the FTC's priority. The FTC's only previous policy statement on how it would interpret unfair methods of competition, issued in 2015 with bipartisan support, was explicitly grounded in the consumer welfare standard.[4] Ever since the previous policy statement was repealed in 2021, the FTC has not offered any clarification of what it will use to replace the consumer welfare standard.[5]

Third, and probably most troubling, the new FTC policy reinforces other actions by the FTC that signal an intention to pursue politicized antitrust action in areas that are far outside traditional antitrust enforcement. The current FTC leadership is making it clear they intend to greatly expand the scope of their enforcement powers and actions.[6] This includes remaking the FTC from an antitrust enforcement agency into a regulator with open-ended powers to intervene almost anywhere the commissioners choose in the economy.[7]

Indeed, the first major initiative by the FTC under Section 5, seeking to outlaw a common type of noncompete agreements between employers and employees, demonstrates the radical nature of what the FTC intends to do under Section 5 and adds uncertainty to nearly all business conduct at a time when businesses are already dealing with inflationary and recessionary concerns in the U.S. economy.[8]

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4 Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) [hereinafter 2015 Policy Statement], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

5 *See* Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

6 *See, e.g.,* Chair Lina M. Khan, Fed. Trade Comm'n, Memorandum to Commission Staff and Commissioners regarding Vision and Priorities for the FTC (Sept. 22, 2021), at 1–2, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf ("First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. Focusing on power asymmetries and the unlawful practices those imbalances enable will help to ensure our efforts are geared towards tackling the most significant harms across markets, including those directed at marginalized communities.").

7 *See., e.g.,* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 *U. of Chi. L. Rev.* 2, 359 ("Congress envisioned that the Commission's data collection from market participants would ensure that the agency stayed abreast of evolving business practices and market trends, and that it would use this expertise to establish market-wide standards clarifying what practices constituted an 'unfair method of competition,' even as the market evolved.").

8 Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

II. The Structure of the 2022 Policy Statement

The 2022 Policy Statement proposes a three-step process for evaluating whether business conduct may lead to an enforcement action under Section 5. In the first step, the FTC may classify as "unfair" any conduct that is "coercive, exploitative, collusive, abusive, deceptive, predatory," "involve[s] the use of economic power of a similar nature," or is "otherwise restrictive or exclusionary."[9] In the second step, the FTC considers whether the conduct may "tend to negatively affect competitive conditions."[10] In the third step, the FTC may consider affirmative defenses to the conduct that have been deemed to be prima facie Section 5 violations (*i.e.,* that meet the criteria for steps 1 and 2), but the 2022 Policy Statement expresses skepticism about whether any such defenses will ever be recognized.[11]

Step 1. Classifying Conduct as Unfair

The first step in the FTC review is to consider whether the conduct it is evaluating may be "coercive, exploitive, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," or "otherwise restrictive or exclusionary."[12] It should be noted at the outset that the 2022 Policy Statement does not provide definitions for any of these terms, but rather replaces one undefined term with several undefined terms.

The 2022 Policy Statement lists 20 categories of conduct that the FTC might consider an unfair method of competition under Section 5. Some of these examples are:

- invitations to collude;
- practices that facilitate tacit coordination;
- a series of mergers, acquisitions, or joint ventures that, while not on their own meeting the Clayton Act's standard of "substantially lessening competition," have an unfair aggregate effect;
- loyalty rebates, tying, bundling, or exclusive dealing arrangements that have the tendency to ripen into violations of the Sherman and Clayton Acts due to industry conditions or a company's position within the industry;
- parallel exclusionary conduct that may cause aggregate harm;
- conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market; and
- discriminatory refusals to deal, which tend to create or maintain market power.[13]

Notably, the 2022 Policy Statement explicitly says that these are examples of unfair conduct, but the list is not exhaustive.[14] The 2022 Policy Statement also adds a catchall that conduct that is not "facially unfair" may still violate Section 5 if, in the view of the FTC, the size and market power of

9 2022 Policy Statement, at 9.

10 *Id.* at 9.

11 *Id.* at 10–11.

12 *Id.* at 9.

13 *Id.* at 12–16.

14 *Id.* at 12.

the party and the purpose of the conduct indicate that the conduct may tend to negatively affect competitive conditions.[15] Notably, the 2022 Policy Statement only lists categories of conduct that may be deemed unfair (and no conduct that would be considered fair), which is the first indication that the 2022 Policy Statement is paving the road toward a per se illegality standard. The 2022 Policy Statement continues down that road to establishing this near-per se illegality in steps 2 and 3.

Step 2. Evaluating Whether the Conduct May Tend to Negatively Affect Competitive Conditions

Under the second criterion, "the conduct must tend to negatively affect competition conditions" by "affecting consumers, workers, or other market participants."[16] The burden the FTC majority claims it must meet for step 2 is very low. The 2022 Policy Statement says very little about what constitutes a "tendency to negatively affect market conditions," but it does give a rather striking list of elements it claims it does not have to show. According to the 2022 Policy Statement, the FTC need not show any of the following:

- **Harm.** The FTC does not have to show actual harm. According to the 2022 Policy Statement, "this inquiry does not turn on whether the conduct directly caused *actual* harm in the specific instance at issue" (emphasis in original).[17]
- **Unreasonableness.** The FTC does not have to show that the conduct it is reviewing is unreasonable. Instead, the 2022 Policy Statement states explicitly that "the inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."[18] This language suggests the standard is basically a per se rule—if the FTC finds that conduct is occurring that a majority of FTC commissioners believe is somehow unfair, then step 2 is satisfied.
- **Causation.** The FTC does not have to show that the party it is charging with a Section 5 violation is causing the alleged harm or potential for harm. Instead, the 2022 Policy Statement says it is sufficient to show that the negative "consequences may arise when the conduct is examined in the aggregate along with the conduct of others . . ., or when the conduct is examined as a part of the cumulative effect of a variety of different conduct by the respondent."[19]
- **Market definition or market power.** The FTC does not have to define a market or make any showing of market power. Instead, citing several cases from 1971 and earlier, the 2022 Policy Statement asserts that "Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions."[20]

15 *Id.* at 10

16 *Id.* at 9. The 2022 Policy Statement sets up a sliding scale for steps 1 and 2. If the FTC finds in step 1 that the conduct is "facially unfair," then it considers both step 1 and step 2 to be satisfied and the conduct is presumed to negatively affect competitive conditions. If the conduct is not clearly "facially unfair," then the FTC can proceed to evaluate step 2.

17 2022 Policy Statement at 9–10.

18 *Id.* at 10.

19 *Id.* at 10.

20 *Id.* at 10.

- **Impact on consumers.** The FTC does not have to make any showing that consumers are likely to be affected unfavorably. Instead, the FTC majority claims that the alleged negative impact can be to "consumers, workers, *or* other market participants."[21] This language indicates that a negative impact to workers, competitors, the environment, politically favored special interests, or anything else the FTC wants to prioritize over consumers will be sufficient.

From this list, it appears that the FTC majority is asserting that all they have to do is label something as having a "tendency to negatively affect market conditions" and that makes it so (*i.e.*, effectively per se illegal). Moreover, by not requiring that consumers be harmed, the FTC is opening the door for it to declare that conduct that actually benefits consumers may be condemned.[22] Indeed, as Commissioner Wilson puts it in her dissent, the 2022 Policy Statement "announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful."[23]

Step 3. Evaluating Affirmative Defenses to Prima Facie Section 5 Violation

If steps 1 and 2 lead the FTC to conclude that a prima facie violation of Section 5 has occurred, the 2022 Policy Statement then shifts to the accused parties the burden of showing whether there are affirmative defenses that may justify the conduct.[24] With step 3, the 2022 Policy Statement offers somewhat more guidance than in the two previous steps; however, that guidance does little more than tell the parties that they are unlikely to satisfy the FTC with evidence of offsetting benefits to any harm the FTC claims to have identified.

A preliminary question is whether the FTC even has the authority to shift the burden to the accused parties to prove any defense when the FTC finds a prima facie violation. The answer is probably no. As a law enforcement agency, the FTC has the burden of proving its case in court. That means that if a party asserts an efficiency justification or other defense for its actions, the burden is on the FTC to show that the harms outweigh the benefits.

That is different from how it often works at a regulatory agency, where an affirmative approval of the agency is required. For example, in many telecommunications mergers, the acquiring company needs to obtain approval from the Federal Communications Commission ("FCC") to transfer a broadcast license or rights to spectrum. Without regulatory approval from the FCC, the merger cannot go forward, and the merging parties bear the burden of proving whatever they need to prove to obtain that approval.[25]

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21 *Id.* at 9 (emphasis added).

22 This outright rejection of the consumer welfare standard would contradict Supreme Court precedent calling the Sherman Act a consumer welfare prescription. Reiter v. Sonotone Corp., 442 U.S. 330, 443 (1979). While courts could rule that the consumer welfare standard does not apply to Section 5 cases, that would be inconsistent with how the courts have interpreted the antitrust laws generally. There is no precedent since the Supreme Court adopted the consumer welfare standard for a court to say that Section 5 cases should be subject to a different standard for evaluating harm, and some precedent for being skeptical that courts would rule that the consumer welfare standard does not apply in Section 5 cases. *See, e.g.,* FTC v. Boise Cascade, 637 F.2d 573 (9th Cir. 1980).

23 Wilson, *supra* note 3, at 2.

24 2022 Policy Statement, at 10–11.

25 For example, when Echostar, the parent company of Dish Network, tried to buy rival satellite television service DirecTV, the Department of Justice investigated the proposed merger as a violation of the Clayton Act, and the FCC investigated whether the transfer of the DirecTV license to Echostar was in the public interest. The license transfer required the affirmative approval of the FCC.

In this way, the FTC's 2022 Policy Statement further demonstrates that this FTC majority view themselves as regulators more than law enforcers.

Setting aside the issue of whether the FTC has authority to shift the burden of proof, the 2022 Policy Statement makes it clear that the FTC majority is very skeptical about whether companies can ever establish such defenses to their satisfaction. First, the 2022 Policy Statement asserts at the outset that "some courts have declined to consider justifications altogether" in Section 5 cases.[26] The FTC majority then says that the parties cannot rely on "a net efficiencies test or a numerical cost analysis,"[27] that "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind,"[28] and "any restriction used to bring about the benefit is narrowly tailored to limit the adverse impact on competitive conditions.[29]

As Commissioner Wilson summarizes in her dissent:

> The Policy Statement hedges on whether business justifications for conduct will be considered. 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. In fact, courts expressly have identified business justifications as part of the test for unfair methods of competition.[30]

Finally, it is worth noting that the 2022 Policy Statement creates a double standard for evaluating harm versus benefits. Any "asserted benefits must not be outside the market where the harm occurs."[31] But harms identified by the FTC may be counted even if they are based on "using market power in one market to gain a competitive advantage in an adjacent market"[32] and "conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely on market definition."[33]

Thus, when the FCC refused to give that approval, the transaction could not go forward and the Department of Justice investigation was made moot. *See* Press Release, Fed. Commc'ns Comm'n, FCC Declines to Approve Echostar-DirecTV Merger (Oct. 10, 2002), https://www.fcc.gov/general/echostar-directv-merger-page.

26 2022 Policy Statement, at 10–11.

27 *Id.* at 10 (citing three cases from 1965 to 1971).

28 *Id.* at 11.

29 *Id.* at 11-12.

30 Wilson, *supra* note 3, at 11 (citations omitted). Commissioner Wilson adds: "For instance, the Second Circuit in Ethyl [the du Pont case] 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.'"

31 2022 Policy Statement, at 12.

32 *Id.* at 10.

33 *Id.* at 10.

III. A Brief History of Section 5 Enforcement

To appreciate what a significant departure the 2022 Policy Statement is from recent legal precedent and FTC enforcement policies, it is helpful to consider the history of Section 5 enforcement. The main antitrust laws, the Sherman Act,[34] the Clayton Act,[35] and the Federal Trade Commission Act,[36] are notable because the statutes are very short and contain language that is famously vague. Cases brought under the antitrust laws depend on the judicial interpretation of terms like "restraint of trade," "monopolization," and "unfair methods of competition," which are not defined in any detail in the statutes.

While standards set by courts have varied over time, the antitrust agencies' enforcement actions for nearly half a century have consistently followed certain principles set forth by the U.S. Supreme Court, including being guided by the consumer welfare standard, the "rule of reason," and the overarching goal of protecting competition rather than competitors.

A. Interpreting the Antitrust Laws

The vagueness of the language in the key antitrust statutes was an issue federal courts had to confront as antitrust cases reached the courts. One of the first antitrust cases, in 1898, dealt with the question of what it means for a contract to restrain trade in violation of the Sherman Act. The case was assigned to Judge (later President) William Howard Taft of the Sixth Circuit, who noted that an overly broad interpretation of the "restraint of trade" creates problems that cannot be what Congress intended in enacting the Sherman Act. For example, if the owner of an established business sells the business to someone else, the buyer normally will not be willing to buy the business without an agreement that the entrepreneur selling the business agree to not re-enter the same market for a certain amount of time, which would undermine the value of the business to the buyer.[37] Such an agreement restrains trade in some sense, but if such a broad interpretation of "restraint of trade" were applied to it, entrepreneurs would not be able to sell their businesses and would therefore likely find it difficult to attract capital investment to build their businesses if they are foreclosed from the opportunity to profit by selling their business at a later date.

In his decision, Judge Taft laid the intellectual foundation for the distinction between "rule of reason" cases, which involve conduct that has at least some legitimate purpose but may also have an anticompetitive impact, and "per se" cases, like price fixing agreements, that have a clear anticompetitive intent. To win a per se case, the FTC only has to demonstrate that the conduct occurred. In a rule of reason case, the FTC must prove that the conduct occurred and that it was an unreasonable restraint on trade.

What the courts consider to be reasonable and unreasonable varied over the decades that followed, until a consensus standard finally emerged in the late 1970s. During the nearly 50 years since, "reasonableness" under the Sherman and Clayton Acts has been defined by the U.S. Supreme

34 15 U.S.C. §§ 1–2.

35 15 U.S.C. §§ 12–27 (with the relevant language on mergers in restraint of trade in § 18).

36 15 U.S.C. §§ 41–58 (with the relevant language on unfair methods of competition in § 45).

37 Judge Taft described the competitive effect of a sale of a business as follows: "This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property." United States v. Addyston Pipe Steel Co., 85 F. 271, 280–81 (6th Cir. 1898).

Court using the consumer welfare standard.[38] Applying the consumer welfare standard, conduct with an adverse impact on consumers can be challenged, but conduct that is harmful to competitors is considered part of the normal competitive process, and conduct that is not closely related to price and quantity outcomes in a relevant market is generally outside the scope of the Sherman and Clayton Acts.[39]

The current legal standards are not as clear for Section 5 of the FTC Act. That is mostly because there is little precedent. Very few cases have been brought that are stand-alone Section 5 cases, in the sense that they are cases that could not be brought under other antitrust statutes. Under Section 5 of the Federal Trade Commission (FTC) Act, the FTC is given authority to prosecute unfair methods of competition.[40] How broad this authority is for the FTC, as well as what is meant by "unfair methods of competition," remains unsettled by federal courts.

In practice, Section 5 is normally cited by the FTC in case filings as its source of authority, but the FTC, at least until recently, has aligned Section 5 with the Sherman Act to address anticompetitive conduct. In effect, the FTC imports the Sherman Act through Section 5. The key point is that the FTC has substantially limited the use of stand-alone Section 5 authority to bring cases that are not grounded in a theory of harm supported by the Sherman Act. Historical use has maintained that convergence of Section 5 and the Sherman Act to provide consistency in enforcement between the FTC and the Antitrust Division, the two federal agencies that share jurisdiction in enforcing antitrust law.

B. Older Cases Deferred to the FTC on the Scope and Interpretation of Section 5

More recent cases take the view that Section 5 applies to some conduct that may not be covered by the Sherman or Clayton Acts, but may nonetheless lead to consumer harm. Some older cases, however, take the view, advocated by the current leadership of the FTC, that the agency's Section 5 authority can potentially be as broad as the agency wants it to be in order to pursue its policy goals.

Several early cases—from more than 50 years ago—appear to give the FTC wide discretion to condemn business practices as unfair methods of competition. For example, in 1948 the appeals court deferred to the FTC's conclusion that an agreement among cement manufacturers to use a base-point pricing system (*i.e.,* to charge prices based on the cement mill price at its location plus the cost of shipping to the buyer) is an unfair method of competition, explaining, "we give great weight to the Commission's conclusion, as this Court has done in the past."[41]

Similarly, in 1968 the Supreme Court deferred to the FTC when the agency claimed that an agreement between Texaco and Goodrich to promote the sale of Goodrich tires and other products, in exchange for cash payments from Goodrich to Texaco, was unfair to other tire manufacturers because of the leverage Texaco had over its independently owned and branded Texaco gas stations. The Supreme Court concluded: "While the ultimate responsibility for the construction of

38 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

39 Under the consumer welfare standard, conduct is considered to be anticompetitive "only when it harms both allocative efficiency and raises the price of goods above competitive levels or diminishes their quality." Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

40 15 U.S.C. § 18.

41 FTC v. Cement Inst., 333 U.S. 683, 720 (1948).

this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight."[42]

Probably the case that represents the high-water mark for federal courts deferring to the FTC on Section 5 is the 1972 Supreme Court decision regarding Sperry & Hutchinson ("S&H"). S&H sold its "green stamps" to retailers, who in turn would give the stamps to the customers of the retailer as a bonus for their purchases from the stores. When customers collected enough stamps, they would exchange them for merchandise at one of the S&H Redemption Centers. S&H imposed various restrictions on how green stamps could be distributed and redeemed, including prohibiting trading green stamps at locations other than S&H Redemption Centers. The FTC claimed these restrictions were an unfair method of competition because they prevented the emergence of a secondary market for trading green stamps, thereby reducing the value of green stamps to retail customers who received them. The Supreme Court held that even though S&H's conduct did not fit the usual antitrust definitions of anticompetitive conduct, Section 5 allowed the FTC to condemn the conduct based on "'public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws' when determining whether a practice is an unfair method of competition."[43]

C. More Recent Cases Give the FTC Little Deference under Section 5

By the late 1970s, legal standards changed in a direction that was at odds with the earlier Section 5 cases, undermining their precedential value. In 1977, the Supreme Court held that business conduct raising Sherman Act concerns must be evaluated based upon demonstrable economic effect.[44] In another 1977 case, the Supreme Court stated firmly that the antitrust laws "were enacted for the protection of competition, not competitors."[45]

The consumer welfare standard and requirement that conduct be evaluated using economic criteria quickly became relatively uncontroversial in antitrust law, at least until recently. Justice Elena Kagen emphasized this point in a 2015 case, when she reviewed recent Sherman Act cases and found that "because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics."[46]

After the Supreme Court adopted the consumer welfare standard for other antitrust laws, federal courts became much less willing to allow the FTC such broad authority under Section 5. Three appellate cases involving the FTC's authority under Section 5 soon followed. First, the Second

42 FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968) (citing FTC v. Cement Inst. and *FTC v. Motion Picture Advert. Services Co., 344 U.S. 392 (1953)).* The FTC majority, in footnote 3 of the 2022 Policy Statement, cites several other older cases supporting its broad powers under Section 5, including FTC v. Brown Shoe, 384 U.S. 316 (1966), Atlantic Refin. Co. v. FTC, 381 U.S. 357 (1965), FTC v. Colgate-Palmolive, 380 U.S. 377 (1965), FTC v. Nat'l Lead Co., 352 U.S. 419 (1957), and FTC v. F. Keppel & Bros., Inc., 291 U.S. 304 (1934).

43 FTC v. Sperry & Hutchinson Co., 405 US 223, 244 (1972).

44 In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court held that territorial restraints on franchisees should be evaluated under the rule of reason (rejecting the per se rule in this situation). After recognizing that such restrictions can enable manufacturers to compete more effectively against other manufacturers, the Court declared that the rule of reason analysis by the court must be based upon demonstrable economic effect. 433 U.S. 36, 1977.

45 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

46 Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2413 (2015).

Circuit in 1980 stated that it would give some deference to the FTC in deciding whether conduct is unfair under Section 5, but reserved for the courts the power to make the ultimate decision.[47] Four years later, the Second Circuit overturned a Section 5 finding by the FTC that parallel conduct by competing firms was "unfair," holding that the FTC could not challenge such practices unless the business conduct had either an anticompetitive purpose or no legitimate business reason.[48]

In the third 1980s case, the Ninth Circuit expressed even more skepticism about the scope of FTC authority under Section 5. In this case, the Court held that if the FTC is unable to show an actual agreement to fix prices, the FTC must be able to show an actual anticompetitive effect. The Ninth Circuit added that "[t]he policies calling for deference to the Commission are, of course, in tension with the acknowledged responsibility of the courts to interpret Section 5."[49] One finding by the Ninth Circuit is especially relevant for the 2022 Policy Statement because the Court concluded that "to allow a finding of a Section 5 violation on a theory that the mere widespread use of a practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[50]

The only case cited by the FTC in the 2022 Policy Statement regarding its authority under Section 5 from after the Supreme Court adopted the consumer welfare standard is the 1986 case against the Indiana Federation of Dentists. This case is cited by the FTC majority for "holding that the standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws."[51] That statement is true, but the implications appear to be much narrower than the FTC majority implies. The Supreme Court explicitly stated that it was evaluating the FTC's claims against the dentists under Section 1 of the Sherman Act so that it was not necessary for the Court to look at any standalone Section 5 claims.[52] Thus, the Supreme Court did not address any meaningful issues regarding whether and how the FTC may condemn business conduct as unfair method of competition when it relies on its stand-alone Section 5 authority.

D. Settlement Agreements under Section 5

Since the early 1980s, the appellate courts have not reviewed any cases under Section 5 that could not have also been brought as Sherman or Clayton Act cases. The FTC has, however, settled cases based on alleged stand-alone violations of Section 5. In a 2015 article, law professor James Cooper provides a list of antitrust cases the FTC settled based on pure Section 5 claims. He notes that most of these cases fell into two categories: invitations to collude, and breaches of agreements to disclose patent licenses during a standard-setting process that gave the patent holding company an advantage under the new standard.[53]

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47 Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

48 E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) ("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.").

49 FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980).

50 FTC v. Boise Cascade, 637 F.2d 573, 582 (9th Cir. 1980).

51 2022 Policy Statement, n. 3, citing FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citations omitted).

52 FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 465–66 (1986) ("The factual findings of the Commission regarding the effect of the Federation's policy of withholding x-rays are supported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act.").

53 James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. of Antitrust

Of course, settlements have little meaning as precedents for future courts. Companies often prefer to sign a consent order over litigation. They do so because they are concerned about the costs and possible unfavorable outcome from going to court, as compared to relatively low settlement costs, which often are no more than a cease-and-desist order. Thus, many defendants facing a Section 5 challenge would rather sign a consent agreement based on a pure Section 5 theory than to test the validity of the Commission's Section 5 authority in litigation. Courts generally will approve the settlement if no party is objecting. But since the disputes were not fully litigated before a court, future courts will not consider themselves bound by past settlements nor by any language contained in the settlements.

IV. The 2015 Statement of Enforcement

Until 2015, the FTC did not issue any policy statements on how it would use its authority under Section 5, perhaps because it was investigating relatively few instances of conduct under Section 5 that could not have been brought under other antitrust statutes. In its first policy statement ("2015 Policy Statement"), issued in 2015 with a bipartisan 4-1 vote by the FTC commissioners , the FTC made it clear that it viewed the scope of Section 5 as somewhat broader than the Sherman Act.[54] According to the 2015 Policy Statement:

> Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act. . . . This statement is intended to provide a framework for the Commission's exercise of its "standalone" Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act.[55]

Later in the 2015 Policy Statement, the FTC indicated that it was not going to interpret Section 5 as an expansive mandate to bring all kinds of new cases. Instead, the FTC stressed that it was firmly grounding its enforcement under Section 5 in the consumer welfare standard. The three principles included in the 2015 Statement all tied the enforcement of Section 5 in the same principles the FTC uses when enforcing the Sherman Act, as follows:

> In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:
>
> - the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;

Enf't 1, 87–132, nn. 11, 12 (Apr. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350452.

54 One commissioner dissented in 2015, but mostly on the grounds that the language in the 2015 Policy Statement was too vague. Maureen Ohlhausen, Dissenting Statement of Commissioner Ohlhausen - FTC Act Section 5 Policy Statement (August 13, 2015), at 1, https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy-statement ("I appreciate the effort to issue some form of guidance on the scope of Section 5 of the FTC Act's prohibition of 'unfair methods of competition.' (UMC). However, I voted against the issuance of this policy statement in this manner. The approach of my colleagues to this important issue of competition policy is too abbreviated in substance and process for me to support.").

55 2015 Policy Statement.

- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.[56]

Thus, in the view of a majority of the FTC commissioners in 2015, Section 5 gave the FTC the authority to challenge conduct that did not fit neatly into the Sherman Act or Clayton Act categories of prohibited behavior, but which nonetheless had the potential to harm consumers. In doing so, the FTC could show respect for the Congressional intent in passing a statute prohibiting "unfair methods of competition," which potentially could be different from the restraints of trade and monopolization conduct prohibited by other antitrust statutes. As the same time, the FTC made any such Section 5 challenges consistent with other antitrust challenges by emphasizing that the FTC was using the same rule of reason and consumer welfare standards the federal courts apply in Sherman and Clayton Act cases.

In July 2021, in a party-line vote, the FTC repealed its 2015 Policy Statement without issuing any additional guidance.[57] In their dissent, the two Republican commissioners objected because the withdrawal statement indicated a repudiation of the consumer welfare standard and the rule of reason, and also left businesses in the dark on whether conduct they were considering was likely to lead to a challenge by the FTC.[58]

V. FTC Using Section 5 to Become a Regulatory Agency

The replacement of the 2015 Policy Statement with the new 2022 Policy Statement signals the FTC leadership's intention to use its newly asserted powers under Section 5 to establish itself as a regulatory agency with an open-ended mandate to regulate potentially any part of the economy where they choose to intervene. Indeed, the FTC majority announced such a plan for asserting Section 5 regulatory authority when it withdrew the 2015 Policy Statement, saying the 2015 Policy Statement "fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants."[59]

In making this point, the FTC majority specifically cited an article by former commissioner Rohit Chopra[60] and current FTC chair Lina Kahn in which they asserted that Section 5 gave an

56 *Id.*

57 Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

58 Noah Joshua Phillips & Christine S. Wilson, Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021) [hereinafter Phillips & Wilson Dissent], https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson-statement-commission.

59 2015 Policy Statement, at 7.

60 Rohit Chopra was an FTC Commissioner in 2021, at the time the 2015 Policy Statement was withdrawn. He is currently the Director of the Consumer Financial Protection Bureau.

open-ended and broad mandate to the FTC and argued that the agency should use it. According to their 2020 article:

> [L]awmakers designed the FTC with two distinct features: (1) delegated authority to interpret and prohibit "unfair methods of competition," as established by § 5 of the Federal Trade Commission Act (FTC Act) and (2) extensive authority to collect confidential business information and conduct industry studies, as established by § 6(b) of the FTC Act.
>
> By designing the Commission this way, Congress sought to create a regime where the law developed not just through the judiciary but also through an expert agency. Congress envisioned that the Commission's data collection from market participants would ensure that the agency stayed abreast of evolving business practices and market trends, and that *it would use this expertise to establish market-wide standards clarifying what practices constituted an "unfair method of competition,"* even as the market evolved.[61]

In their dissent to the repeal of the 2015 Policy Statement, Commissioners Phillips and Wilson responded by strongly objecting to assertions of regulatory authority for the FTC:

> [N]or do they cite any sound basis to support their apparent proposition that Congress intended to give a few unelected commissioners of a federal agency limitless authority to enjoin business practices.
>
> Nor did Congress vest the Commission with broad authority to regulate the economy without an intelligible principle. The majority have repeatedly stated their desire to step outside the Commission's congressional mandate to bring and adjudicate cases and instead fashion antitrust regulations.
>
> In addition to being legally dubious, this is a bad idea. . . . To claim authority to fashion regulations while explicitly ignoring the good things they would prevent—looking only at the purported benefits of regulation, and not the costs—is perverse, not to mention inconsistent with American administrative law and sound public policy.[62]

Thus, the FTC leadership is announcing it has the authority under Section 5 to not only enforce a broad amorphous mandate but also to issue rulemakings that would govern conduct across virtually the entire American economy without procedural safeguards.

VI. What Is the Economic Harm?

The opposing positions taken by the FTC majority and the minority commissioners—those who dissented from the 2022 Policy Statement and the 2021 repeal of the 2015 Policy Statement—reflect very different visions for the role of the FTC in the economy. There is, however, good reason to expect that the economic outcomes will not be improved under the enforcement vision contained in the 2022 Policy Statement; rather, the outcomes are much more likely to be worse.

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61 Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 *U. of Chi. L. Rev.* 2, 359–360 (2020) (emphasis added; citations omitted).

62 Phillips & Wilson Dissent, *supra* note 58, at 2–3 (citations omitted).

A. 2022 Policy Statement Gives No Meaningful Guidance for Business Conduct

The U.S. antitrust agencies have a history of providing guidance to companies to help them evaluate whether their conduct may risk an antitrust challenge. This guidance is often in the form of guidance statements issued by the DOJ and the FTC, often jointly. Some important examples include the statements on horizontal mergers,[63] licensing of intellectual property,[64] human resources practices,[65] cybersecurity,[66] and international enforcement,[67] among others.

In contrast to these previous guidance statements, as well as the 2015 Policy Statement for Section 5, the 2022 Policy Statement provides no meaningful guidance. The vagueness of the term "unfair method of competition" is not made less vague by equating it with other undefined terms like "coercive, exploitive, collusive, abusive, deceptive, predatory, or involv[ing] the use of economic power of a similar nature."[68] Moreover, presumably the meaning attached to these terms will change as commissioners change at the FTC. The Second Circuit in 1984 recognized the problem that the current FTC leadership is creating when it said that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[69] As Commissioner Wilson points out:

> Instead of heeding this admonition [from the Second Circuit in 1984], 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. It provides no methodology to explain which adjectives may apply in any given set of circumstances.[70]

The uncertainty created by the lack of guidance by the FTC empowers the commissioners to pursue changing agendas and makes it impossible for market participants to know in advance whether their conduct will be considered unfair. Thus, the 2022 Policy Statement is structured in a way that precludes businesses from structuring their conduct to avoid possible liability.

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63 U.S. Dept. of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010), https://www.justice.gov/atr/file/810276/download. The FTC and Department of Justice announced that they propose to issue a major revision to the horizontal merger guidelines. *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), at: https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

64 U.S. Dept. of Just. & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download.

65 U.S. Dept. of Just. & Fed. Trade Comm'n, Antitrust Guidelines for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

66 U.S. Dept. of Just. & Fed. Trade Comm'n, Antitrust Policy Statement on Sharing of Cybersecurity Information (Apr. 10, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/04/10/305027.pdf.

67 U.S. Dept. of Just. & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines/download.

68 2022 Policy Statement, at 9.

69 E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).

70 Commissioner Wilson pointedly adds: "The only crystal-clear aspect of the Policy Statement pertains to the process following invocation of an adjective: after labeling conduct 'facially unfair,' the Commission plans to skip an in-depth examination of the conduct, its justifications, and its potential consequences. The instructions in the iconic Monopoly game provide an apt analogy: the respondent essentially will be told, 'Go to jail. Go directly to jail. Do not pass go. Do not collect $200.'" Wilson, *supra* note 3, at 2.

Rather than benefitting the U.S. economy, the 2022 Policy Statement itself causes several forms of economic harm because of the uncertainty it creates. If businesses cannot identify the line between legal and illegal behavior, it will be in their interest to avoid potentially beneficial actions that nonetheless raise the risk and consequences of violating the law. If such businesses must worry about causing harm to their competitors that the FTC might deem unfair, they will compete less aggressively, leading to higher prices, lower quantities sold, and the "deadweight loss" triangles from supply and demand analysis. Ultimately, the unclear operation of the 2022 Policy Statement outside the traditional consumer welfare standard and rule of reason will further displace innovators coming into the market and further distance FTC enforcement from the rule of law itself.

The FTC may not be able to win in court under the Statement's standard. But even if a federal court may ultimately find that the conduct challenged by the FTC does not violate Section 5, antitrust investigations and litigation are always costly and divert company resources from productive and innovative activities. This will give firms the incentive to settle Section 5 challenges, even when the conduct benefits consumers and the economy as a whole. When that happens, the FTC leadership will likely declare the capitulations of the company signing the consent decree to be a victory, but at best it will be unclear whether consumers and the economy as a whole are better off.

B. No Standard Given to Replace the Consumer Welfare Standard

The 2022 Policy Statement says that the FTC will consider the interest of "consumers, workers, or other market participants,"[71] but gives no indication as to how those interests will be balanced or how the FTC will deal with the very common situation of conduct that favors some market participants and disfavors others. Inevitably, enforcement actions involve tradeoffs between such participants, and the 2022 Policy Statement gives no unifying principles to replace the consumer welfare standard.

Moreover, allowing the FTC more discretion will incentivize firms to compete at FTC headquarters rather than in the marketplace. If firms can hinder their competitors' ability to compete in the marketplace by complaining about them to the FTC, then their resources will be diverted from innovation and production to rent-seeking before the FTC.

C. Abandoning Consumer Welfare Standard Will Lead to Higher Prices and Other Consumer Harms

The 2022 Policy Statement claims that the FTC is seeking to prevent "conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."[72] But everything about the 2022 Policy Statement indicates that they intend to use the powers of the FTC in ways that inevitably will cause much of the harm they claim to be trying to prevent.

71 2022 Policy Statement, at 9.

72 *Id.*

As Commissioner Wilson warns in her dissent, the FTC's abandonment of the consumer welfare standard will necessarily lead to higher prices:

> Equally important, the Policy Statement's abandonment of the consumer welfare standard demonstrates that the Commission majority will support higher prices for consumers so that it may protect or reward political favorites. The consumer welfare standard protects consumers, resulting in lower prices, higher quality, and more innovation. Efforts to protect other groups, including inefficient rivals and labor, necessarily will require tradeoffs that will harm consumers. Simply put, it is impossible to serve two masters. Protecting inefficient firms or labor will be "broadly redistributive, although consumers are not the beneficiaries. Rather the benefits flow to smaller firms or those that are wed to older technologies that have been displaced or threatened by newer ones[.]" American consumers are unlikely to support antitrust enforcement that chooses to eliminate low prices, whether in the interest of protecting small businesses that wish to charge higher prices or to protect jobs at firms that are acknowledged to be inefficient.[73]

The U.S. Chamber of Commerce made a similar point about the 2022 Policy Statement:

> The FTC Seeks to bar a slew of common business practices that have long been viewed on a bipartisan basis as good for competition, good for consumers, good for lowering prices, and good for a dynamic economy. Further, the FTC now wants to suggest it has powers to review mergers in ways Congress and the courts have explicitly rejected under merger law. All of this is made possible because the FTC no longer believes that the consumer is at the heart of the agency's mission.[74]

By giving no meaningful guidance and creating uncertainty in the marketplace, the FTC will foreclose and impair the opportunities of market participants. By undermining the longstanding principle that the antitrust laws are intended to protect competition rather than competitors, the FTC threatens to reduce competition to pursue other agendas that will limit choice for consumers. And the 2022 Policy Statement explicitly rejects the consumer welfare standard, which means that preventing harm to consumers will no longer be the priority for Section 5 enforcement.

73 Wilson, *supra* note 3, at 9–10 (internal citations omitted).

74 U.S. Chamber of Com., FTC's Section 5 Policy Statement Effectively Declares Competition Illegal (Nov. 10, 2022), https://www.uschamber.com/finance/antitrust/the-ftcs-section-5-policy-statement-effectively-declares-competition-illegal.

VII. The Policy Statement Signals Intention of FTC to Pursue Politicized Antitrust Enforcement

The FTC leadership's abandonment of the consumer welfare standard for Section 5 enforcement inevitably leads to politicized antitrust enforcement. This is clear from history of antitrust enforcement. From the beginning, courts struggled with finding a standard to apply. For example, soon after the Sherman Act took effect, the Second Circuit said that the purpose of the antitrust laws is to protect "small dealers and worthy men."[75] Later in a major monopolization case, the same court held that the purpose is to "put an end to great aggregations of capital because of the helplessness of the individual before them."[76] Numerous other examples can be found of courts proposing standards that may have seemed reasonable on first glance, but which do not provide any meaningful guidance that could promote consistent and predictable antitrust enforcement.[77]

In the absence of meaningful standards for evaluating business conduct under the antitrust laws, enforcement devolved into antitrust violations being whatever the government said were violations. In 1966, Justice Potter Stewart showed his frustration with the lack of consistent standards in antitrust enforcement when he famously wrote in dissent in a merger case involving two local supermarket chains: "The sole consistency that I can find is that in litigation under Section 7, the government always wins."[78]

The current FTC leadership appears to be taking the opposite lesson from Justice Stewart's admonition. Rather than seeing "the government always wins" as a criticism of antitrust enforcement, the FTC majority appears to be looking at it as a roadmap to enhancing their power and a license to intervene wherever they choose in the economy.

Former FTC commissioner Joshua Wright, writing with scholars associated with the International Center for Law and Economics, summarized the dangers in moving away from the consumer welfare standard in a 2020 article:

> In unifying antitrust under a singular objective, the consumer welfare standard abandons the use of vague tests that incorporate multiple, and often contradictory, social and political goals that fail to meaningfully cabin discretion and thus ultimately permit decisionmakers to reach almost any result they desire. Significantly, the consumer welfare standard grounds antitrust decisions in economics and economic evidence, which has the dual virtues of reducing the role of conjecture and supposition driven by personal preference, and of increasing the consistency of decisions across disparate political administrations.[79]

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75 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

76 United States v. Aluminum Co. of America, 148 F.2d 416, 428–29 (2d Cir. 1945).

77 For example, as late as the 1960s, the Supreme Court said the purpose of antitrust laws is to protect "small, locally owned businesses." Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 428 –29 (2d Cir. 1945).

78 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart & Harlan, JJ., dissenting).

79 Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 Pepperdine L. Rev. 4, 681, at 879 (June 2020), https://digitalcommons.pepperdine.edu/plr/vol47/iss4/1/ (citations omitted).

Without principled standards and limitations on the discretion of antitrust enforcers, it should not be surprising to see the antitrust laws being applied to promote almost any policy agenda. If antitrust enforcers want to use the antitrust laws to promote climate change policies, or to favor the interests of organized labor, or to punish political opponents, it is crucial to have a principled response for why pursuing such agenda should not be allowed. Reports that the FTC is investigating Elon Musk's acquisition of Twitter, which appears to raise no antitrust concerns under traditional antitrust analysis, reinforces this concern that the FTC may use its newly asserted authority in a partisan manner.[80]

In early 2023, the FTC announced its first Section 5 case settlements after the 2022 Policy Statement. The agency announced that it had settled cases against three companies based on claims that noncompete agreements between a company and its various employees constituted an unfair method of competition under Section 5 of the FTC Act. In each settlement, the FTC obtained agreement from the companies to "cease enforcing, threatening to enforce, or imposing noncompete restrictions on relevant workers."[81] They also are required to notify all affected employees that they are no longer bound by the noncompete restrictions. In its press release announcing the settlements, the FTC specifically referenced its new 2022 Policy Statement, implying this type of case is an example of the enforcement actions we can expect from the FTC under the broad Section 5 authority it is asserting.[82] Noncompete agreements can be abused by employers, but they also can offer benefits to the workers who sign them; if an employer is less concerned about employees leaving to work for the competition, an employer may invest in them more. Nonetheless, the FTC is proceeding with a Section 5 rulemaking to ban such noncompete agreements, regardless of whether the particular agreements are favorable for workers.[83]

VIII. How Will Courts Respond?

Because there have been so few stand-alone Section 5 cases brought by the FTC, it is hard to be certain how federal courts will respond to the FTC enforcement of Section 5 if the agency follows its 2022 Policy Statement. There are reasons, however, to believe that federal courts will not look favorably on FTC enforcement actions that rely on its 2022 Policy Statement.

First, the rejection of the consumer welfare standard is at odds with how the Supreme Court has interpreted other antitrust laws, particularly the Sherman Act.[84] The courts have not explicitly applied the consumer welfare standard to Section 5 stand-alone cases, but the Court may well rule that the same logic that applied for the Sherman Act applies for Section 5 of the FTC Act. As Commissioner Wilson pointed out in her dissent, "[c]ourts have been unwilling to find violations of Section 5 beyond the limits of the Sherman, Clayton, and Robinson-Patman Acts when the Commission's theory of liability cannot be turned into workable rules or standards that can guide the conduct of businesses."[85]

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80 *Musk's $44 Billion Buyout of Twitter Faces U.S. Antitrust Review – Report*, Reuters, May 5, 2022, https://www.reuters.com/technology/musks-44-bln-buyout-twitter-faces-ftc-antitrust-review-report-2022-05-05/.

81 Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

82 *Id.*

83 Fed. Trade Comm'n, Non-Compete Rulemaking (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

84 *See, e.g.,* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription").

85 Wilson, *supra* note 3, at 14 (citing E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984)).

Second, as discussed in section III of this paper, all of the appellate court cases looking at stand-alone Section 5 claims since the adoption of the consumer welfare standard have not been very deferential to the FTC. There are only a small number of such cases, but there is no precedent during the consumer welfare standard era for a court to say that Section 5 cases should be subject to a different standard for evaluating harm. Indeed, the *Boise Cascade* decision explicitly rejected the FTC's "incipient threat to competition" theory, which is similar to the standard the Policy Statement proposes to use instead of the consumer welfare standard.[86]

Third, the lack of guidance provided for businesses in the 2022 Policy Statement is likely to cause problems for the FTC in court. The Supreme Court in recent antitrust decisions has emphasized the importance of clear rules in antitrust cases. Chief Justice Roberts, in a unanimous decision, wrote that the Supreme Court justices "have repeatedly emphasized the importance of clear rules in antitrust law,"[87] and that antitrust rules need to "be clear enough for lawyers to explain them to clients."[88] Thus, the concerns raised above in section VI appear to be the very issues that Justice Roberts found objectionable in other antitrust decisions, and the Court seems likely to apply that reasoning to Section 5 enforcement as well.

Fourth, federal courts could prevent the FTC from applying its 2022 Policy Statement to enforcement decisions under the major questions doctrine . Under this doctrine, federal agencies must base their decisions on a clear statement of authority from Congress when the agency adopts a rule of "vast economic and political significance."[89] The major questions doctrine is intended to limit the ability of federal agencies to claim vast new powers or impose policies with very large economic implications based on thin grants of rulemaking authority, which appears to apply to the FTC's 2022 Policy Statement. Moreover, the sudden change in the FTC's Section 5 policy could also raise due process concerns—businesses might find themselves unexpectedly charged with Section 5 violations they had no reason to anticipate. As law professor Gus Hurwitz summarizes in a forthcoming paper:

> The courts could respond to such overreach in several ways. They could invoke the major questions or similar doctrines, as above. They could raise due process concerns, tracking *Fox v. FCC* and *Encino Motorcars*, to argue that any change to antitrust law must not be unduly disruptive to engendered reliance interests. They could argue that the FTC's [Section 5] authority, while broader than the Sherman Act, must be compatible with the Sherman Act—and that while the FTC has authority for the larger circle in the antitrust Venn diagram, the courts continue to define the inner core of conduct regulated by the Sherman Act.[90]

Nonetheless, U.S. courts tend to move slowly, and there is considerable uncertainty about how they may rule or whether the courts may want to take this opportunity to revisit their commitment to the consumer welfare standard, which is a judicially created standard. While there are reasons to be optimistic that federal courts will rein in the FTC's radical Section 5 policies, that outcome cannot be assumed.

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86 FTC v. Boise Cascade, 637 F.2d 573, 582 (9th Cir. 1980).

87 Pacific Bell Telephone Co. v. linkLine Communications, Inc., 555 U.S. 438, 452 (2009).

88 *Id.* at 453.

89 West Virginia v. EPA, 597 U.S. 20, 31 (2022).

90 Justin (Gus) Hurwitz, *Chevron and Administrative Antitrust Redux*, George Mason U. L. Rev. (forthcoming) (citing FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012), and Encino Motorcars v. Navarro, 579 U.S. 211 (2016)).

IX. Policy Recommendations

The FTC's 2022 Policy Statement signals a major change in how Section 5 of the FTC Act is enforced—one that explicitly rejects the longstanding principle that antitrust laws should be guided by the consumer welfare standard. It also abandons the usual practice of the federal antitrust agencies to provide meaningful guidance in a policy statement, which will necessarily discourage business conduct that is beneficial to consumers and the economy but that might attract unwelcome and costly attention from the FTC. As such, it is hard to see how the FTC's new enforcement strategy will do much to help consumers, as compared to previous enforcement. Yet it is clear the FTC intends to use this Statement to expand its own powers and advance the political agendas of the current FTC leadership.

Thus, one obvious policy recommendation is to have the FTC withdraw the 2022 Policy Statement and replace it with the 2015 Policy Statement or another such statement grounded in the consumer welfare standard. Of course, the current FTC leadership is unlikely to take this action, so such a change will have to wait until a future administration.

A more permanent solution is for Congress to pass a statute clarifying that all antitrust enforcement should be evaluated by the consumer welfare standard. Until the last few years, such a statute would have been relatively uncontroversial. Since the 1970 cases from the Supreme Court on the importance of following economic analysis and the consumer welfare standard, both Democratic and Republican administrations have followed the consumer welfare standard, even though they have disagreed about what that standard means in practice.[91] It is only in the last two years that activists who reject the consumer welfare standard have been appointed to leadership position in the federal antitrust agencies, making this an appropriate time for Congress to mandate that future antitrust enforcement be based on sound economic analysis guided by the consumer welfare standard.

With two new commissioners nominated to join the FTC, and with the FTC recently suffering several setbacks in court, there may be an opportunity for the FTC leadership to make FTC policy more bipartisan.[92] If the FTC leadership chooses to take such an approach, a good starting point would be to revisit the 2022 Policy Statement and develop an approach to enforcement regarding unfair methods of competition that is not dictated by a three-commissioner majority. To do so, the FTC could open a review of its policy and this time solicit public input, either through workshops or by soliciting comments. Some of the improvements that are likely to emerge from such a process are (1) clarity about what would be considered an unfair method of competition; (2) a more balanced treatment of what the FTC has to prove to establish harm, versus what is expected from the parties regarding efficiencies; and (3) a clear statement of what guiding principle the FTC will follow, if not the consumer welfare standard.

91 William Kovacic, a former chair of the FTC, provides a useful survey of the differing viewpoints that have prevailed regarding the meaning of the consumer welfare standard across different recent administrations and how the views grounded in the consumer welfare standard are very different from the views of the current FTC leadership. William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy*, 35 Antitrust L. & Econ. Rev., no. 3, 2021, https://www.americanbar.org/groups/antitrust_law/resources/magazine/2021-summer/root-and-branch/.

92 *See* Josh Sisco & Rebecca Kern, Losing Record in Hand, FTC Chief Faces Jim Jordan, POLITICO, July 13, 2023, https://www.politico.com/news/2023/07/13/ftc-khan-jim-jordan-house-judiciary-hearing-00106063.

Conclusion

Section 5's vague language enjoining "unfair methods of competition" is being interpreted by the current FTC leadership as an undefined and expansive mandate to intervene in economic outcomes almost anywhere they choose. The new FTC Section 5 Policy Statement reinforces other FTC actions that signal an intent to politicize antitrust enforcement into areas that are far outside traditional antitrust enforcement.

The lack of guidance from appellate courts since 1984 has given the FTC majority the opening to radically redefine the mission of the agency under Section 5 of the FTC Act. But the FTC leadership's agenda will come at a high price by discouraging companies from engaging in conduct beneficial to consumers out of fear of being targeted by the FTC, by redirecting company efforts to curry favor and engage in rent-seeking at the FTC, and by forcing outcomes that harm consumers but which benefit interests more politically aligned with the FTC's current leaders.

It is hard to overstate how radical this assertion of sweeping new FTC powers really is, and how much it is at odds with the longstanding principles of rule of reason and consideration of the consumer welfare standard. In its more than 100 years, the FTC has never claimed to have powers that go this far, and it has given little guidance as to what it plans to do with such powers. The only logical conclusion, however, is that the agency intends to use this newly "discovered" authority to target the conduct and transactions that have, thus far, been outside of the scope of past FTC actions. And not just a little outside—the FTC appears to be seeking, as dissenting commissioner Wilson put it, "the authority to summarily condemn essentially any business conduct it finds distasteful." [93]

93 Wilson, *supra* note 3, at 2.