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

STATEMENT OF THE COMMISSION

On

standalone Section 5 claim "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."[5]

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be "aligned with" the Sherman and Clayton Acts and thus subject to "the 'rule of reason' framework developed under the antitrust laws[.]"[6] In a speech announcing the statement, Chairwoman Ramirez noted that she favored a "common-law approach" to Section 5 rather than "a prescriptive codification of precisely what conduct is prohibited."[7] She also acknowledged that the Commission's policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission's historic approach and more constraining than the prevailing case law.[8] She added, "[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century."[9]

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement.[10]

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission's core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission's institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust

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[5] 2015 Statement, supra note 2.

[6] FTC, Statement on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 2 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf; see also Chairwoman Ramirez, supra note 3aC1 (e)-1.6 (nt)-4.7 (, (i)-16 y4.6 (s.48 72 272.64 T16 3D3a (ez)11.

laws.[11] After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended "standard of reason" under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.[12] For instance, Senator Newlands complained that Standard Oil left antitrust regulation "to the varying judgments of different courts upon the facts and the law"; he thus sought to create an "administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction."[13] Likewise, a 1913 Senate committee report lamented that the rule of reason had made it "impossible to predict" whether courts would condemn many "practices that seriously interfere with competition, and are plainly opposed to the public welfare," and thus called for legislation "establishing a commission for the better administration of the law and to aid in its enforcement."[14] These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.[15]

At the heart of the statute was Section 5, which declares "unfair methods of competition" unlawful.[16] By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law.

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to define, and after writing 20 of them into the law it would be quite possible to invent others."[18] Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws.[19] For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was "to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law."[20]

The Supreme Court has repeatedly affirmed this view of the agency's Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws.[21] The Court, recognizing the Commission's expertise in competition matters, has given "deference"[22] and "great weight"[23] to the Commission's determination that a practice is unfair and should be condemned.

Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement's decision to tether Section 5 to the Sherman and Clayton Acts. For example, in Boise Cascade the Ninth Circuit ruled that the evidence did not support the Commission's factual finding that the defendants' conduct had an adverse effect on prices.[24] In Ethyl, the Second Circuit explicitly held that the FTC's Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is "collusive, coercive, predatory, or exclusionary," or has an "anticompetitive purpose," or "cannot be supported by an independent legitimate reason."[25] In short, these decisions confirm that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

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[18] S. REP. NO. 597, 63d Cong., 2d Sess., 13 (1914) ("

III. The 2015 Statement Overlooks the Unique

standard and signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 Statement effectively turns standalone Section 5 into a dead letter.

More generally, the 2015 Statement assumes a case-by-case approach to "unfair methods of competition," despite widespread recognition that this adjudication-only approach often fails to deliver clear guidance.[37] Without explanation, the Statement fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants.