

SECTION 5 OF THE FTC ACT: WHAT NEXT?

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Executive Summary

This paper examines the Federal Trade Commission's (FTC's) authority under Section 5 of the FTC Act, which prohibits "unfair methods of competition" (UMC). It critiques the FTC's evolving guidance on UMC enforcement, particularly the 2015 and 2022 policy statements, and proposes a new approach to provide clarity and predictability for consumers, courts, and businesses.

Overall, Section 5's ambiguous enforcement criteria raises compliance costs and litigation risks while chilling legitimate competition. In particular, the 2022 policy statement, still in effect, rejects established antitrust principles and introduces vague criteria like "coercive" or "exploitative" conduct. Adding to the uncertainty, courts have consistently overturned attempts to expand UMC authority without clear legal guardrails.

As an alternative, this paper recommends a targeted, practical approach to UMC enforcement, guided by three principles:

- **Specificity in Enforcement:** The FTC should identify specific practices it intends to challenge as UMC, explain its legal and economic rationale, and outline the market conditions relevant to enforcement.
- **Advance Notice:** The FTC should give prior notice of enforcement priorities to consumers and businesses to encourage advance compliance.
- **Consensus and Public Input:** The FTC should seek public and stakeholder feedback on proposed enforcement policies to ensure clarity and alignment with legal and economic principles.

Such a focused, bipartisan approach would reduce uncertainty and compliance costs, align UMC enforcement with established antitrust principles, encourage procompetitive behavior, and deter harmful practices – regardless of the party in power. At the same time, this approach would avoid the pitfalls of vague policy statements and overly broad rulemaking.

Introduction

In 2009, the Chamber issued a whitepaper on the role of the Federal Trade Commission’s Section 5 competition authority, known as unfair methods of competition (UMC)¹. As the paper explained, Congress arguably granted the FTC authority to challenge conduct that might not also be illegal under the antitrust laws, which are also enforced by the Department of Justice. The paper called on the FTC to issue meaningful guidance.

Since then, the FTC has twice issued guidance, in 2015 and 2022. The 2015 policy statement, while principled, offered little clarity for future UMC enforcement. In 2022, that guidance was thrown out by the Biden Administration’s FTC Chair Lina Khan for being too restrictive of the far-reaching control she envisioned the agency should exercise over the economy. The current FTC is not likely aligned with the current guidance, but a move to overturn the 2022 guidance, raises the question: what comes next?

Section 5 UMC guidance should clarify the FTC’s enforcement intentions and rest upon a firm legal foundation able to withstand judicial scrutiny. To accomplish this, the FTC should shift from previous FTC statements, which attempted to state broad principles applicable to all potential future UMC enforcement actions, to a targeted approach that focuses on practical guidance for specific types of conduct that have previously been or are increasingly of active concern. The result, over time, would be a growing compendium of guidance statements that are taken together form the basis for Section 5 policy and enforcement.

Under this new approach, the Commission would flag commercial practices that are likely to be challenged as a UMC violation, identify its underlying legal foundation and policy concerns, and specify the factual predicates for enforcement action – including the specific type of conduct targeted and the relevant market characteristics. Such an approach would allow the FTC to provide notice of its enforcement intentions to create practical guidance for those who must follow the law.

In addition, this approach would provide the Commission with procedural flexibility, allowing it to declare its future enforcement intentions without the need to obtain the new statutory authority that would be required to engage in UMC rulemaking. Finally, this approach would allow the FTC to enforce Section 5 in a manner consistent with the constitutional imperatives of fair notice, predictability, and manageable standards, all of which are integral to the rule of law.

¹ [UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FTC ACT: Does the U.S. Need Rules “Above and Beyond Antitrust?”](#)

I. Section 5's History

A. Origins of UMC Enforcement

Basic legal restrictions on business conduct were established by the Sherman Act of 1890, which prohibited anticompetitive agreements and monopolization.² In 1914 Congress added the Clayton Act to ensure coverage of several specific practices: anticompetitive price discrimination, exclusive agreements, and stock acquisitions.³

In 1914 Congress also created the FTC⁴, giving it authority to enforce the Clayton Act (concurrently with the Justice Department).⁵ Section 5 of the FTC Act authorized the FTC to prohibit UMC.⁶ Congress did not define UMC, but it was understood that UMC could include some practices that did not violate the Sherman Act.⁷ How to define such “stand-alone” Section 5 violations – so called because while all FTC action are brought under its Section 5 authority, those that are not also antitrust violations “stand alone” on the UMC prohibition – remains controversial.

FTC decisions were made subject to judicial review. As the law evolved, practices illegal under the Sherman or Clayton Acts could also be prohibited as UMC. A 1972 Supreme Court decision held that the Commission is not required to base UMC findings on antitrust considerations alone.⁸ Thereafter the Commission asserted stand-alone UMC authority in several cases.

² 15 U.S.C. §§1, 2. Attempts and conspiracies to monopolize were also prohibited. “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.” *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

³ 15 U.S.C. §§ 2, 3, 7. The Clayton Act also prohibited certain specified interlocking directorates, without regard to competitive effect. 15 U.S.C. §8. Most Clayton Act provisions have been extended, clarified or otherwise adjusted, notably by the Robinson-Patman Act (1936) (price discrimination and related practices) and the Celler-Kefauver Act (1950) (coverage of asset acquisitions). The Sherman Act, unchanged in substance since 1890, provided comprehensive limits on anticompetitive business conduct and has proven very flexible in applying to new forms of business conduct. The Sherman Act included a broad portfolio of enforcement mechanisms, authorizing the Attorney General to challenge violations with criminal and/or civil suits in federal court, and allowing recovery of treble damages by “any person” injured by an antitrust violation (the “private attorney general” provision). States are also authorized to enforce the federal antitrust laws in many circumstances.

⁴ Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended.

⁵ 15 U.S.C. §21. As applicable to the FTC, the enforcement provisions of the Clayton Act are identical to those of the FTC Act, which directly govern UMC proceedings.

⁶ 15 U.S.C. §45(a)(1). Congress also prescribed detailed procedural requirements for the Commission, set forth in 15 U.S.C. §§45(b)-(l).

⁷ Congress excluded the UMC provision from the statutory definition of “antitrust laws”. 15 U.S.C. §12. This exclusion prevents private plaintiffs from challenging UMCs with the litigation tools available under antitrust law, including the treble-damage remedy. The Commission is the only federal agency empowered to define UMC (subject to judicial review).

⁸ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

B. Skeptical Courts

Although FTC discretion to identify UMC may be broad, it is not unlimited; federal appellate courts rejected each of these stand-alone UMC challenges. A brief historical background will clarify the significance of these appellate rulings.

1. The Evolution of Antitrust Jurisprudence

In 1911 the Supreme Court adopted the rule of reason as the proper mode of analysis for business conduct under antitrust law, requiring consideration of the market circumstances and other relevant facts of each specific case.⁹ Only cartel behavior¹⁰ and (until 2007) vertical price agreements were automatically illegal.¹¹ This view prevailed for decades.

In 1937, during Franklin Roosevelt's second term as President, a clear switch in policy began a steady tightening of antitrust limits on business conduct, which persisted until 1974. During this period, the Supreme Court expanded the *per se* rule to many practices, prohibiting case-by-case analysis as well as reliance on any substantive antitrust defenses. The *per se* rule extended to all vertical restraints,¹² numerous patent license terms,¹³ and a variety of joint-venture provisions.¹⁴ Mergers challenged under Clayton Act §7 and alleged acts of monopolization challenged under Sherman Act §2 – while not explicitly subject to a *per se* rule – were burdened with strong presumptions of illegality.

⁹ *United States v. Standard Oil Co.*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). A classic statement of the rule was provided in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.: “The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. 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. . . .”).

¹⁰ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

¹¹ *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (treating resale price agreements as automatically illegal); *overruled*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹² *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹³ Bruce B. Wilson, Deputy Ass't Atty. Gen., Antitrust Div., Dep't of Justice, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions*, Remarks Before the Fourth New England Antitrust Conference (Nov. 6, 1970).

¹⁴ *United States v. Topco Associates*, 405 U.S. 596, 610 (1972) (territorial restrictions); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (price restrictions).

In 1972, the Supreme Court applauded the certainty provided by *per se* rules and said its absence would “leave courts free to ramble through the wilds of economic theory...”¹⁵ Given the steady strengthening of antitrust prohibitions on business conduct throughout this nearly 40-year period, there was little consideration given to the boundaries of the FTC’s UMC authority.

Despite the Court’s 1972 rejection of economic analysis in conduct matters, in 1974 the Supreme Court used economic analysis to reject two merger challenges brought by the federal government under the Clayton Act.¹⁶ In 1977 the Court went further, explicitly requiring consideration of economics in analyzing non-price vertical restraints, rejecting the *per se* rule and restoring such practices to rule-of-reason treatment.¹⁷ Following these decisions, the US antitrust community – scholars of antitrust law and economics, enforcement agency officials, and the bar – forged a broad consensus supportive of the Supreme Court’s approach, interpreting US antitrust to protect competition rather than competitors,¹⁸ and relying on sound, fact-based economic analysis. Gradual restoration of the rule of reason (except for cartel restraints) once again allowed consideration of case-specific evidence of market and consumer impact and any procompetitive business justifications.

2. UMC in the Courts

As the Supreme Court was restoring the rule of reason, the Commission challenged a variety of business conduct as stand-alone UMC. In each of three distinct cases, a federal appellate court rejected the Commission’s decision to condemn a practice as a stand-alone UMC.¹⁹ Among the reasons given were (1) lack of clear criteria for distinguishing between proper and improper conduct; (2) inability of businesses to

¹⁵ United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 n.10 (1972) (“Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”)

¹⁶ U.S. v. General Dynamics Corp., 415 U.S. 486 (1974); U.S. v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

¹⁷ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

¹⁸ Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977).

¹⁹ E.I. duPont de Nemours & Co. (“Ethyl”) v. FTC, 729 F.2d 128 (2d Cir. 1984) (“facilitating practices” among gasoline additive producers); Boise Cascade Corp. v. FTC¹⁰, 637 F.2d 573 (9th Cir. 1980) (multiple basing-point pricing system for lumber); Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980) (unilateral policy of flight-information publisher alleged to distort competition among commuter airlines).

conform their conduct to standards asserted by the FTC; and (3) the need to provide some limits on FTC discretion to define and prohibit UMC.

Following judicial rejection of its UMC approaches, and consistent with the prevailing trend in Supreme Court decisions, the FTC limited its actions against stand-alone UMC, generally relying on traditional antitrust theories. However, some stand-alone

UMC litigation continued. For example, the Commission challenged alleged efforts by Dell Computer to exploit proprietary technology by inducing a standards-setting organization to adopt an industry-wide standard that could not be implemented without a license from Dell.²⁰ The Commission also pursued several cases challenging “invitations to collude” (also called “inchoate conspiracies”). These are offers by one firm to another to enter an agreement that would be illegal under antitrust law (e.g., price-fixing among competitors), where the offer is not accepted. Lacking agreement, this conduct cannot be prosecuted under Sherman Act §1.²¹

Aside from invitation-to-collude cases²², suggestions for extension of Section 5 to new forms of conduct and for a more aggressive UMC enforcement program continued to emerge from both inside and outside the FTC. “Facilitating practices,” commercial bribery, “kickbacks,” and other conduct were proposed as appropriate candidates for UMC attack. There was also a proposal to use UMC to move US law closer to the competition enforcement approaches of the European Union, specifically (among others) by challenging unilateral practices by firms lacking monopoly power. Finally, there were

²⁰ In the matter of Dell Computer Corp., 121 F.T.C. 616 (May 20, 1996) (settlement).

²¹ Where such an offer, if accepted, would result in joint monopoly control of a defined relevant market, all elements of an attempt to monopolize offense are met, and thus the offer can be prosecuted under this specific part of Sherman Act §2. The first successful inchoate conspiracy case took this specific form. *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), and the Biden DOJ obtained a guilty plea in a criminal Section 2 case. Absent those characteristics, however, antitrust prosecution of an unaccepted offer to collude would not succeed because (1) no agreement arose, and (2) there is no antitrust law (other than the attempt-to-monopolize/conspiracy-to-monopolize provision of Sherman Act §2) that condemns attempts to collude absent a dangerous probability of attaining monopoly.

²² Cases in this line include *In re Valassis Comm’n, Inc.*, FTC File Number 0510008 (April 28, 2006), Complaint available at

<https://www.ftc.gov/sites/default/files/documents/cases/2006/04/0510008c4160valassiscomplaint.pdf>; *In re U-Haul International, Inc. and AMERCO*, FTC File Number 0810157 (July 20, 2010), Complaint available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100720uhhaulcmpt.pdf>; *In re Sigma Corp.*; Compl., FTC File Number 1010080 (Feb. 28, 2012), Complaint available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/02/120228sigmacmpt.pdf>, *In re Fortiline, LLC*, F.T.C. File No. 151 0000, ¶¶ 18-19 (Aug. 9, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160809fortilinecmpt.pdf>; Compl., *In re Drug Testing Compliance Group, LLC*, F.T.C. File No. 151 0048, ¶ 9 (Jan. 21, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160129drugtestingcmpt.pdf>; Compl., *In re Step N Grip, LLC*, F.T.C. File No. 1510181, ¶ 8 (Dec. 7, 2015), available at <https://www.ftc.gov/system/files/documents/cases/151216stepngripcmpt.pdf>.

proposals to use UMC authority to condemn forms of price discounting that are not reached by the price discrimination provisions of the Robinson-Patman Act, including certain conduct by firms lacking monopoly power.

II. The FTC's Policy Statements

A. Rationale for Guidance

In 2008, the FTC convened a public workshop where Commissioners, academics, practitioners and representatives of public interest organizations addressed the history and the legal and economic aspects of UMC enforcement.²³ Some offered suggestions for expanded pursuit of UMC enforcement by the Commission. Ultimately the Commission began to consider issuing UMC guidelines²⁴ – an option rendered plausible by the long FTC/Antitrust Division tradition (dating at least to 1968) of issuing guidelines on various important antitrust topics, including mergers, international enforcement, intellectual property, competitor collaboration, and other subjects.²⁵

Given Commission discretion in defining UMC, clarification of the FTC's UMC enforcement intentions is essential to enable businesses to comply with the law. The UMC provision applies throughout the private sector economy, subject only to limited statutory exemptions for specific regulated industries.²⁶ Since there is no statutory text or other recognized authoritative definition of UMC (unlike UDAP), businesses throughout the economy are exposed to Commission attack for a wide range of marketplace conduct. As indicated by the federal appellate courts' rejection of prior FTC efforts to define UMC broadly, the situation calls for some source of clarity, fair warning to market actors, and limiting principles. The potential for frequent, prolonged, and costly litigation with regard to a wide and undefined range of business conduct is a threat to business initiative and

²³ Public Workshop Concerning the Prohibition of Unfair Methods of Competition In Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50818 (Aug. 28, 2008). The agenda, speaker biographies, written submissions, and a transcript of the proceedings (among other materials) are available via links at <https://www.ftc.gov/news-events/events/2008/10/section-5-ftc-act-competition-statute>.

²⁴ See, e.g., Commissioner Maureen K. Ohlhausen, "Section 5 of the FTC Act: principles of navigation", *Journal of Antitrust Enforcement* (2013) (proposing principles of UMC enforcement and recommending that "the agency should provide clear guidance and minimize uncertainty in the UMC area."), available at https://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf.

²⁵ While such guidelines are frequently issued jointly by both federal antitrust agencies given their concurrent antitrust jurisdiction, the Justice Department's UMC authority involves only enforcement against violations of FTC final orders, at Commission request. Thus, the initiative in issuing UMC guidance is logically regarded as the domain of the Commission.

²⁶ 15 U.S.C. §45(a)(2). These regulated industries include banks, savings and loan institutions, federal credit unions, common carriers of communications and of energy, air carriers, and businesses subject to the Packers and Stockyards Act.

therefore to economic progress. Moreover, as Congress clearly recognized in 1914 when it created the FTC and enacted the UMC provision, lack of an “intelligible principle” for the exercise of FTC discretion would be fatal to the constitutionality of the UMC provision.²⁷

Also supporting the suggestion for UMC guidance is the reality that federal appellate court decisions in UMC cases have identified specific defects in prior Commission approaches to UMC. Even in *Topco*, the 1972 Supreme Court case refusing to limit UMC to antitrust considerations alone²⁸, the Court overturned the FTC’s order due to a mismatch between the Commission’s arguments before the Court and the grounds on which the FTC had based its decision. On remand, the matter was settled by entry of a consent order. Thus, the ultimate viability of the Commission’s UMC approach in that case was never determined in a fully contested proceeding. As described above, the later federal appellate cases reversing UMC orders identified multiple grounds for challenge: (1) lack of clear criteria for distinguishing between proper and improper conduct; (2) inability of businesses to conform their conduct to standards asserted by the FTC; and (3) the need for some limits on FTC discretion.

It took 101 years for the Commission to provide its first general UMC guidance: a single-page “Statement of Enforcement Principles” (2015 Statement), adopted with bipartisan support.²⁹ When the Administration changed in 2021, however, the Commission summarily retracted the 2015 Statement.³⁰ In 2022, during the Biden Administration and under the leadership of former Chair Lina Khan, it issued a radically different 16-page statement regarding UMC³¹. Both the withdrawal of the 2015 Statement and the issuance of the 2022 Statement were by party-line votes of the Commission. Remarkably, Chair Khan’s 2022 Statement remains in effect.

B. 2015 Policy Statement

The FTC first issued general guidance on UMC in 2015 following extensive internal Commission deliberations. The key content was limited to three broad principles:

²⁷ For a description and analysis of Congressional deliberations of how to ensure that the UMC provision would pass the test of constitutionality, see Gregory J. Werden, *Unfair Methods of Competition Under Section 5 of the FTC Act: What is the Intelligible Principle?* 85 *Antitrust L.J.* 819 (2024).

²⁸ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

²⁹ Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, 80 Fed. Reg. 57056 (Sept. 21, 2015), <https://www.ftc.gov/legal-library/browse/federal-register-notices/statement-enforcement-principles-regarding-unfair-methods-competition-under-section-5-ftc-act>

³⁰ <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act> (July 1, 2015).

³¹ Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 (Nov. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- 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.

An introductory paragraph stated the Commission’s view that “[UMC] 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 seemed to convey that the FTC would not pursue more open-ended approaches to UMC based on values other than those of antitrust law or policy.

Despite the brevity, simplicity and reliance on antitrust concepts to provide guardrails for the Commission, the decision to adopt the 2015 Statement drew a dissent from Commissioner Ohlhausen.³² Although she supported the fundamental antitrust policies and principles underlying the 2015 Statement, she warned that the 2015 Statement might be interpreted and applied in unpredictable and counterproductive ways: “Because the policy statement fails to address past case law or give examples of lawful and unlawful conduct, . . . the business community and other agency stakeholders are left guessing whether these previous theories of liability are now revived.” The dissent also expressed concerns that the 2015 Statement’s reliance on what might be termed “antitrust-adjacent” concepts would create ambiguity leading to actions contrary to the 2015 Statement’s purpose:

For example, to what extent will the Commission be “guided by the public policy underlying the antitrust laws”? In what way does “a framework similar to the rule of

³² Dissenting Statement of Commissioner Ohlhausen - FTC Act Section 5 Policy Statement (August 13, 2015), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy-statement>. Commissioner Ohlhausen had previously encouraged the Commission to adopt some form of guidance for UMC enforcement. Maureen K. Ohlhausen, Section 5 of the FTC Act: principles of navigation, *Journal of Antitrust Enforcement* (2013), available at https://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf.

reason” differ from a traditional rule of reason analysis? Does “taking into account any associated cognizable efficiencies” mean the Commission will actually balance any such efficiencies against the alleged harms, or is there some other formula anticipated by the majority? . . . What factors will the Commission consider in deciding whether to pursue under Section 5 conduct that it considers insufficiently addressed by the antitrust laws?

Some responded by asserting that the 2015 Statement – even if subject to the defects alleged – would be better than no guidance at all. As events evolved, however, the 2015 Statement was short-lived, so little practical experience was gained that could have shed light on the merits of the conflicting positions. The FTC brought no stand-alone UMC cases relying on the 2015 Statement, and even though the statement survived the first change in Administration in 2017, the next Administration’s rescission of it preempted further developments.

C. The 2022 Policy Statement

This transition brought new leaders to the FTC who asserted radically different approaches to antitrust enforcement, explicitly rejected virtually every element of antitrust law and policy as practiced in the half-century since the Supreme Court-led consensus emerged (*e.g.*, the consumer welfare standard), and sharply criticized both the Supreme Court and former antitrust agency enforcement officials of both major political parties. Among the FTC’s earliest actions – less than a month following investiture of the new FTC Chair in 2021 – was retraction of the 2015 Statement without any prior public announcement or opportunity for public input.³³ Therefore, the merits of the 2015 Statement – never seriously tested in practice or in the courts – remain debatable.

As explained below, the 2022 Statement contains important and consequential defects. The FTC claims authority to challenge virtually any commercial practice that it views negatively, even if unrelated to considerations of antitrust law or policy (*e.g.*, conduct that is “coercive, exploitative . . . abusive, [or] deceptive . . .”). It rejects long-accepted antitrust principles and methods of analysis and warns businesses not to rely on potential justifications, defenses, or other exonerating circumstances that might be available to those accused of UMC. As such, the 2022 Statement provides little if any useful guidance to businesses in understanding how to comply with the law, creating the specter of prolonged and complex proceedings for a limitless variety of common and legitimate

³³ 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/p210100commnstmtwithdrawals/ec5enforcement.pdf.

business practices. As it now stands, the 2022 Statement, particularly in the hands of another misguided administration, could chill competition on the merits, discourage innovation, disadvantage US firms in competing globally, and reduce U.S. consumer welfare, economic growth and productivity.

The FTC issued the 2022 Statement a little more than a year following retraction of the 2015 Statement. The 2022 Statement is far more extensive than that of 2015, but paradoxically provides even less clarification of practical use to business. Rejecting consumer welfare analysis and the rule of reason, it adopts a totally different framework and range of unprecedented criteria, as accurately summarized in Commissioner Wilson's dissent:

To determine whether the method of competition is “unfair,” the Policy Statement provides two relevant criteria. Under the first criterion, conduct may be “coercive, exploitive, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature,” or “otherwise restrictive or exclusionary.” Under the second criterion, “the conduct must tend to negatively affect competition conditions” by “affecting consumers, workers or other market participants.” These two criteria are weighed using a sliding scale. When conduct is labeled “facially unfair” pursuant to the first criterion, the second criterion is rendered essentially irrelevant. If conduct is not labeled “facially unfair,” pursuant to the second criterion, the conduct must be shown to have a “tendency to negatively affect market conditions.”

But the Policy Statement explains how little is needed to satisfy the second criterion; in fact, it expressly rules out what must be shown. There need be no showing of actual effects; it is enough to assert that there is a “tendency” for the conduct to generate negative consequences. Also, that “tendency” need not be attributable to the particular conduct at issue, or even the conduct of the particular market actor under investigation; the tendency for 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.” Finally, it is unnecessary to show market power, 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. Under the Policy Statement, the Commission will not employ a rule of reason analysis, 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” and “the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind.” For a respondent to be heard, the justification must show that the benefits of the conduct redound to market participants other than the respondent, those benefits must be in the same market where the harm occurs (even though market definition is unnecessary to find competitive harm), and the respondent has the “burden to show that the asserted justification for the conduct is legally cognizable, that it is nonpretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any impact on competitive conditions.”³⁴

Viewed as a whole, the 2022 Statement launches the entire enterprise of UMC enforcement in unpredictable new directions without support in thoughtful or accepted policy analysis nor sound legal precedent. The 2022 Statement also contains a long list of “non-exclusive . . . examples and citations of past decisions and consent decrees” involving UMC violations.

The first of these – “[p]ractices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws)” – is not controversial, but unhelpful because by its own terms it does not raise any question of stand-alone UMC liability. Another entry on the list, “invitations to collude,” refers to the long-standing and still-growing list of UMC cases based on inchoate conspiracy and is perhaps the clearest and most widely accepted example of a practice not unlawful under the antitrust statutes but subject to challenge as a stand-alone UMC.

The other items on the list, however, stray from previously recognized categories of stand-alone UMC violations. Few are self-explanatory, and no effort to explain or defend their inclusion on the list is attempted. One example given is “mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws”. For this proposition the 2022 Statement cites only *Yamaha Motor Co. v. Fed. Trade Comm’n*,³⁵ a case involving a joint venture. But this case was decided by the Commission under the “actual potential competition” theory of Section 7 of the Clayton Act, and affirmed by the appellate court on that basis. The Commission also challenged as UMC certain agreements between the joint venture partners that accompanied the venture. It remains

³⁴ 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, available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf

³⁵ 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

unclear, however, how this could support the 2022 Statement’s claim that the transaction was condemned due to its “tendency to ripen into violations of the antitrust laws”.³⁶

Other items on the list are similarly debatable, but the 2022 Statement does not pause to explain further why these particular examples have been included, or to provide any further detail as to how they might be analyzed in specific cases. In any event, the list is presented as “non-exclusive”, suggesting there are still other categories of conduct that the Commission would consider suspect as UMC. As to the scope of this category of practices and the conditions that would cause the Commission to bring a UMC challenge, no guidance is provided.

In its lengthy discussion of UMC enforcement policy, the 2022 Statement refers to and relies on many dated and largely discredited or superseded precedents, suggesting that the agency could resurrect long-dormant or abandoned approaches to UMC enforcement and interpretation, but without any indication when or under what marketplace conditions the Commission might do so. For example, the 2022 Statement begins with a string citation of a dozen Supreme Court cases dealing with the UMC provision, claiming they support the assertion that “Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.”³⁷ All but one of the cited cases are at least 50 years old, however, with the oldest dating back to 1934. That Section 5 prohibits “various types of unfair conduct that tend to negatively affect competitive conditions” is the 2022 Statement’s gloss on these cases.

Moreover, the only relatively recent case cited in this context did not consider any stand-alone UMC claim; the Commission’s only basis for its decision and order was that

³⁶ The 2022 Statement’s list of “historical examples” of UMC includes other practices involving mergers that the Commission might consider UMC even though they comply with the Clayton Act. 2022 Statement at 13, 14. It is doubtful, however, that Congress intended to imbue the Commission with authority over mergers and acquisitions via the UMC provision that exceeded the authority granted to the FTC under the Clayton Act. The FTC Act and Clayton Act were considered in parallel and approved in final form within 30 days of each other (September 8 - October 8, 1914). The provisions of each were fashioned in light of the other (*e.g.*, detailed FTC procedures specified for UMC enforcement, 15 USC 45(b) *et seq.*, were also applied to FTC’s Clayton Act authority, 15 U.S.C. §21). A system authorizing the Justice Department to challenge mergers based on one standard but authorizing the FTC to rely on either the Clayton Act or a more restrictive UMC provision would involve confusion and costly duplication of effort as well as a risk of conflicting outcomes. In the half-century of Hart-Scott-Rodino Act enforcement, both agencies consistently strive to avoid such risks, limiting transaction review to a single agency. Finding “stand-alone” authority for the FTC to challenge mergers under the UMC provision when they are lawful under the Clayton Act would undermine these efforts and pose a host of other conflicts and complexities in antitrust compliance and enforcement involving mergers. Intent to allow such a quagmire should not be lightly imputed to Congress.

³⁷ Statement at 1 & n.3.

the respondent had engaged in a conspiracy prohibited by Sherman Act Section 1.³⁸ Thus, the Court’s brief reference to the central holding in *Sperry & Hutchinson* (1972) – that the Commission is not *required* to limit UMC to conduct in violation of antitrust law or policy – is *dictum* at best and not an endorsement of any particular legal theory concerning how far the UMC prohibition may be stretched by the Commission.

The 2022 Statement rejects key elements of antitrust analysis as established by a consistent line of Supreme Court cases dating back to 1974: consumer welfare as a fundamental antitrust objective, protection of competition rather than competitors, and reliance on the rule of reason as the default approach to antitrust analysis of non-cartel conduct. The statement also relies primarily on outmoded, dormant, or heavily criticized cases pre-dating the transition from near-universal application of *per se* rules and heavy presumptions of illegality, to the rule-of-reason approach based on sound economic analysis. Thus the 2022 Statement is subject to numerous questions about the viability of its legal basis.

Aside from its pervasive resistance to the last half-century of widely accepted Supreme Court law, the 2022 Statement fails to address the specific legal defects that led courts to reverse the Commission’s stand-alone UMC cases during the 1980s. Indeed, the 2022 Statement seems to repeat the problems cited by the courts: (1) lack of clear criteria for distinguishing between proper and improper conduct; (2) inability of businesses to conform their conduct to standards asserted by the FTC; and (3) the need to provide some limits on FTC discretion to define and prohibit UMC. The 2022 Statement provides no clear criteria to identify UMC, only some mostly subjective adjectives – “coercive, exploitative . . . abusive . . .”. It offers an extensive list of potentially objectionable practices and diverse bases for challenge, and many caveats regarding any justifications, defenses or exonerating circumstances on which business might rely. This makes it very difficult for business to conform their conduct to the Commission’s standards, and places almost no perceptible limit on Commission discretion to identify and condemn UMC.

Finally, apart from the important evolution of substantive antitrust law over the last 50 years, the Supreme Court has now clearly established that administrative agencies are not entitled to deference in their interpretations of governing statutes. In

³⁸ *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (“In the case now before us, the sole basis of the FTC’s finding of an unfair method of competition was the Commission’s conclusion that the Federation’s collective decision to withhold x-rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. Accordingly, the legal question before us is whether the Commission’s factual findings, if supported by evidence, make out a violation of Sherman Act § 1.”)

overturning *Chevron*³⁹, *Loper Bright* held that courts, not agencies, are best situated to interpret ambiguous statutory provisions, even in areas of agency expertise.⁴⁰ As Chief Justice Roberts explained, “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” rather than simply endorsing agency interpretations in their organic statutes. Thus, it is the courts rather than the Commission that will be supplying the critical interpretations on which UMC enforcement depends. Amazingly, the 2022 policy statement elevated the FTC’s views above that of the Supreme Court, declaring that “Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency.” A new approach, outlined below, would address *Loper Bright*’s concerns by incorporating public input and providing specific guidance on the types of UMC that the FTC finds problematic – of course, the courts, not the FTC, ultimately would interpret Section 5’s meaning as applied to specific cases, but the FTC could lay a much stronger legal and factual predicate by delving into specific problematic practices.

D. A Failed Attempt at UMC Rulemaking

Following adoption of the 2022 Statement, the FTC undertook a further radical and ultimately unsuccessful attempt to extend its UMC authority. On January 5, 2023, the Commission issued a notice of proposed rulemaking, proposing to declare that “it is an unfair method of competition – and therefore a violation of Section 5 – for an employer to enter into or attempt to enter into a non-compete clause with a worker; [or to] maintain with a worker a non-compete clause . . .”⁴¹ This proposal was extraordinary for multiple reasons.

First, state law has always governed the validity of employee non-compete agreements (ENCA). There is no recognized need to “federalize” a legal regime that appears to have functioned at least tolerably well for many decades. Second, both courts and most state legislatures have long recognized and accepted many types of ENCA as reasonable means to protect business interests essential to the function of a market economy. For example, courts have upheld non-compete restrictions on senior executives so long as the scope and duration of such restrictions are reasonable in light of the character of the business and the position of the individual. The notion of a total nationwide *per se* prohibition on all ENCA – intended to be prospective *and retrospective*, invalidating all currently effective non-compete agreements – was truly radical.

³⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

⁴⁰ *Loper Bright Enterprises v. Raimondo*, No. 22-451, 603 U.S. ___ (2024).

⁴¹ 88 Fed. Reg. 3482 (Jan. 19, 2023).

Even the Commission did create some limited carve-outs to the absolute prohibition initially proposed. However, regardless of the content of the Commission’s idea for a non-compete rule, the Commission simply ignored the fact that – unlike its UDAP authority – it has no rulemaking authority with regard to UMC⁴². To support its claim to UMC rulemaking power, the Commission found a single questionable appellate case more than 50 years old.⁴³ Following adoption of the non-compete rule, the Commission faced legal challenges to the rule, and ultimately multiple courts ordered *vacatur* of the rule or enjoined enforcement given the lack of UMC rulemaking authority.⁴⁴ New Commission leadership in 2025 voluntarily withdrew the appeals that had been filed by the previous Administration, and accepted *vacatur* of the rule. Even with the demise of the rule, however, the Commission under the current Administration has challenged ENCA as UMC through individual cases and by issuing warning letters.⁴⁵

III. **A New Vision for Section 5 UMC Enforcement**

A. **The Continuing Need for Practical Guidance**

The breadth and generality of the UMC provision is a source of concern to the business community because it renders it difficult to anticipate which practices might be attacked by the FTC. This uncertainty prevents businesses from reaching firm conclusions, even when aided by skilled legal counsel. An FTC challenge often leads to complex, lengthy and costly litigation, and many other adverse consequences typically associated with being the target of a public law enforcement action: business disruption and distraction, opportunistic behavior by competitors or other market players, steep costs of complying with discovery and the other aspects of litigation, adverse publicity leading to doubts among customers, suppliers, current and prospective employees, among other downsides. Moreover, broad governmental discretion directly contravenes the principles behind limited government, which cabins the ability of government to play favorites.

These risks discourage firms from engaging in procompetitive conduct that creates any chance of a legal challenge, ultimately reducing competition – the opposite of the intended objective of the antitrust laws and the UMC provision itself. The provision of practical guidance by the FTC would enhance the ability of business to determine

⁴² [Pushing the Limits? A Primer on FTC Rulemaking Authority](#)

⁴³ *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

⁴⁴ – *Ryan LLC v. FTC* (No. 24-10951, 5th Cir.) the *Properties of the Villages v. FTC* (No. 24-13102, 11th Cir.).

⁴⁵ Gateway Services, <https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements> (Sept. 4, 2025). FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies, <https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-chairman-ferguson-issues-noncompete-warning-letters-healthcare-employers-staffing-companies> (September 10, 2025).

compliance responsibilities efficiently and increase the likelihood of avoiding litigation, thus better ensuring that behavior opposed by the Commission can be avoided, while allowing other conduct to go forward at minimal cost.

Prior experience with UMC enforcement carries important lessons for how the Commission can provide such guidance. Repeated losses in the UMC litigation of the 1980s indicate that the Commission is best positioned in litigation when it targets specific conduct and effectively articulates why protecting competition requires that such conduct be blocked. As suggested by the appellate courts, such articulation should be specific, based on clear procompetitive goals, and capable of informing businesses how they can comply with the Commission's understanding of what constitutes UMC.

The experience with the 2022 Statement and – to some extent – the 2015 Statement illustrates why broad statements involving universal principles (legal, economic or policy-oriented) are unlikely to convey useful guidance. Although requiring UMC definitions to be tethered to proven antitrust values and principles provides some help in keeping the Commission's discretion within reasonable bounds of law and sound policy, such broad principles may provide limited understanding for businesses anticipating how the Commission would interpret its authority regarding any specific business practice. Similarly, it is not an answer – or at least not the best answer – to say that a business can understand its compliance obligations by simply reading FTC cases as they become public during litigation.

This last point is well illustrated by the contrasting treatment of non-competes during the current and previous Administrations. In the Biden Administration, the Commission took two separate paths in attacking non-competes: first it entered a brief flurry of settlements in administrative cases challenging non-compete agreements.⁴⁶ Because settlements are between the Commission and the parties, however, statements therein may exceed positions consistent with the law and likely to be approved on judicial review. The main utility of settlement is to avoid litigation, with the downside to all parties that they do not attain full vindication of their position. Positions asserted as part of that process are not precedential and are therefore always debatable as legal standards. Second, the Commission launched the ill-fated non-compete rulemaking, rejected by several courts as unauthorized and ultimately resulting in the current Commission acceding to judicial *vacatur* of the rule.

⁴⁶ Complaint, In re Prudential Security, Inc. et al., Matter No. 2210026 (Jan. 4, 2023); Complaint, In re O-I Glass, Inc., Matter No. 2110182 (Jan. 4, 2023); Complaint, In re Ardagh Group S.A. et al., Matter No. 2110182 (Jan. 4, 2023).

The current Administration has also launched complaints against specific non-compete agreements. In a Statement explaining its settlement of the UMC claim against Gateway Services, the Commission thoroughly explores the background of legal constraints on non-compete agreements, highlighting the features that make such agreements poor candidates for categorical rules. In the Chamber's view, what counts is not the content of the complaint or consent order in Gateway Services, but the thoroughness and precision of the Statement of the Chairman (joined by Commissioner Holyoak) in explaining the legal and policy background for the action taken in a measured, balanced and objective manner. The Statement traces the nature of the non-competes at issue and describes in market context and in relation to the position of the affected employees why the Commission ordered termination of most (but not all) of Gateway's non-competes.

This specific, reasoned discussion of the legal basis, precedent and economic policy background of the case could be a model for providing guidance to the business community, allowing improved understandings of the circumstances in which the Commission would seek to challenge UMC. The reasoned explanation of the elements of the claim and the balanced assessment of its legal and competition-policy foundations would serve to guide business to a greater extent considering that most practices are not susceptible to categorical rules of legality or illegality, and that the Commission has no legal basis for UMC rulemaking.

Two additional considerations merit attention in similar future Commission efforts to provide UMC enforcement policy guidance: advance notice and Commission consensus. The issuance of a Commission statement, as in the Gateway Services matter, is in many respects a worthy model for future Commission guidance statements regarding UMC. A remaining question, however, concerns what might have preceded the filing of the complaint. As indicated previously, legal constraints on ENCA have been matters of common law for centuries, and have largely been confined to State law until very recently. The fairness of the sudden shift to federal enforcement might reasonably be questioned – especially when the proposed federal standard proved to be a dramatic departure from rule-of-reason analysis to *per se* condemnation, both prospective and retrospective. At the least, it would have been preferable for the Commission to flag its concern to the business community in advance, thus enabling affected businesses to seek legal counsel and remedy any perceived shortcomings in their existing practices before being confronted with a federal legal proceeding. Perhaps the ill-fated non-compete rulemaking should have placed all on notice of the impending shift to federal enforcement, but given the patent legal and policy defects in the attempted rulemaking, one might question this as an effective form of advanced warning.

The second issue concerns the question of whether a Commission consensus should be regarded as essential to the provision of guidance. As indicated above, the 2015 and 2022 Statements drew dissents. The Commission vote even to initiate the rulemaking was 3-2 along party lines, and also voted out along party lines, although given changes to Commission membership the vote was 3-1. Especially given the obvious doubts about the Commission's legal basis for the 2022 Statement, some businesses hesitated to reorient their compliance policy, while others did so, fearing that there was still a chance of profound disruption to their employee practices should the non-compete rule become effective, even temporarily.

The best assurance that Commission enforcement policy will be sound and will induce compliance by the business community may be to have the Commission explain clearly the legal, economic and policy basis for challenging each specific form of business conduct that the Commission regards as a worthwhile enforcement target. If – unlike the processes that led to the 2015 Statement and the 2022 Statement – proposed enforcement approaches can be offered for public review and input, they would stand a much better chance of receiving consensus support within the main segments of the antitrust community – the bar, legal and economic scholars, the business community, and the Commission itself. Given that any enforcement action by the Commission can be tested before the federal courts, the Commission's enforcement principles will be better prepared for that test if subject to public review before implementation.

B. A New Approach

With this backdrop, the Chamber recommends a new approach to FTC guidance regarding UMC enforcement. This would involve a Commission policy commitment to identify specific forms of conduct that it intends to pursue as stand-alone UMC, to explain the underlying legal and analytical basis for that intention (*i.e.*, why prohibiting such conduct will protect competition without limiting or chilling competition on the merits or imposing undue uncertainty on common, accepted business practices), to identify the key market and other factual circumstances that it will consider relevant to enforcement, and to explain the analysis to be employed by the Commission in determining whether to pursue enforcement.

This approach would not involve rulemaking, and indeed any statements of enforcement intention would not be legally binding. Advance clarification of the basis for Commission challenges to specific forms of UMC, however, would likely encourage compliance and limit the potential unfairness of sudden and unannounced turns in Commission enforcement trends. Achieving Commission consensus on broad principles of enforcement has proven difficult and would be reduced by this proposed approach. This

approach would require the Commission to remain alert for new practices and market developments that might give rise to novel forms of conduct that could comprise UMC. The Commission has always regarded itself as an effective monitor of industry developments, however, so it would need no additional authority to proceed as suggested. Its existing 6(b) authority to conduct market studies enables it to obtain information mandatorily but on a confidential basis to inform its future enforcement.

The Commission itself would benefit materially from the superiority of this approach. First, as illustrated by the ill-fated efforts of the post-*S&G Green Stamps* campaign to challenge stand-alone UMCs, the Commission could test its proposed approach to specific conduct in advance through public comment opportunities, without the need to run the full arduous course of administrative hearing, Commission decision and appellate review, resulting in rejection after years of contested litigation. While the ultimate judicial reception for Commission UMC enforcement is not fully predictable, preliminary airing of the Commission's proposed analysis and enforcement approach prior to litigation of specific cases would reduce the chance of years-long futile efforts like those experienced in the 1970s and 1980s.

Second, the proposal would avoid any effort – like that of the Khan-led 2022 Statement – to essentially undo the past half-century of Supreme Court antitrust jurisprudence. Instead, it would preserve the Court's well-supported reliance on case-by-case review and sound empirically based economic analysis, and the rejection of wholesale presumptions and *per se* rules. By basing its approach on current Supreme Court law, the stability of UMC enforcement would be enhanced, and there would be significantly less danger that business will be whipsawed by radical changes in enforcement approach after a change in administration.

Third, the proposal would allow the Commission to clarify its future enforcement intentions, thus encouraging business compliance and reducing the need for numerous costly enforcement proceedings to establish the limits on business conduct sought by the Commission. Specifically, it would allow the Commission to achieve broad enforcement objectives even though – as established by recent judicial decisions on review of the non-compete rule – the Commission lacks any statutory authority to engage in UMC rulemaking.

This proposed new approach would provide significant advantages for the business community, which is generally eager to reduce uncertainties resulting from vague standards of legality, compounded by the notoriously costly, lengthy and disruptive character of administrative and court litigation. To the extent the Commission's intentions are released for public comment, business would have the opportunity to point out any

shortcomings in the Commission's approach, and to bring to light any business circumstances and other practical considerations that should be accounted for in any statement of Commission enforcement policy. Of course, it can be expected that the Commission would utilize this new approach only rarely, as a century of history has revealed that the existing antitrust laws are flexible enough to capture almost all genuinely anticompetitive conduct.

Once established following public comment opportunities, the Commission's statements would remain simply guidance to its future enforcement intentions and would have to be tested in court by bringing cases. Although businesses might contest the Commission's proposed approach to certain types of conduct, this approach is superior to alternatives previously pursued by the Commission – years of litigation without tangible impact, or very broad and general policy statements that provide little guidance for particular instances of conduct. This proposed approach could even be used by the Commission to establish a basis for challenging conduct under Sherman Act theories. No matter which statute the Commission chooses to rely on, the business community greatly benefits from a clear and well-considered statement of the grounds for challenge by the Commission.

There are at least three types of conduct that have been well-explored by the Commission and could be subjects of enforcement policy statements in the near future, in accordance with this proposed new approach. The first is the invitation to collude. It has already been the subject of numerous Commission cases, and the legitimacy of treating invitation to collude as UMC is already reasonably well accepted. Second is conduct that deceives a standard-setting organization to create or enhance the monopoly power of a holder of intellectual property needed to practice an industry standard. This theory has been pursued under Sherman Act Section 2 in several Commission cases: *Unocal*⁴⁷, which resulted in a settlement included as part of a merger case, and in *Rambus v. FTC*⁴⁸. Although the appellate court in *Rambus* rejected the Commission decision for insufficient proof, it accepted the Commission's legal theory. A third case (*N-Data LLC*) pursued similar conduct using a stand-alone UMC theory, and a settlement was reached.⁴⁹ The third area that is ripe for Commission action pursuant to this new proposed policy involves non-compete clauses. Although the Khan-led effort to adopt a *rule* prohibiting virtually all non-competes was struck down by multiple courts, leading to withdrawal of the rule by the

⁴⁷ Chevron Corp., FTC No. C-4144, at § II (Decision and Order) (July 27, 2005), available at http://www.ftc.gov/os/caselist/0510125/050802do_0510125.pdf

⁴⁸ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008);

⁴⁹ *Negotiated Data Solutions LLC*, FTC No. 051 0094 (Decision and Order) (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/080122do.pdf>.

current Commission, the basis for concern about non-competes has been well-explored and is the subject of a present Request for Information issued by the Commission.⁵⁰

Conclusion

This proposed new approach has the potential to clarify Commission enforcement policy, allow businesses to perceive and implement their compliance obligations in a more certain and efficient manner than under previous guidelines, and materially improve the competitive process, with resulting increases in productivity, innovation and economic performance. This is precisely the type of economic progress that is the true objective of federal legal limits on business conduct.⁵¹

⁵⁰ Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements, <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-issues-request-information-employee-noncompete-agreements>

⁵¹ Northern Pacific R. Co. v. United States, 356 U.S. 1, 4 (1958)