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

**Statement of Commissioner Alvaro M. Bedoya
Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter
On the Adoption of the Statement of Enforcement Policy Regarding
Unfair Methods of Competition under Section 5 of the FTC Act**

November 10, 2022

Today’s policy statement is a long overdue step toward enforcing Section 5 of the FTC Act in line with what Congress intended when it prohibited unfair methods of competition in 1914. I agree with Chair Khan’s analysis but want to address in depth two key criticisms that today’s policy statement will face: (1) that this is an overreach beyond the authority that Congress has lawfully given the Commission; and (2) that the majority is grafting a pro-small business frame onto a law that was emphatically motivated by the desire to maximize efficiency and consumer welfare.

The historical record shows that these criticisms do not reflect reality. The Commission’s actions today are squarely in line with Congress’s design of the FTC—a design Congress adopted despite initial resistance from the most powerful man in the United States at the time, President Woodrow Wilson. The historical record also shows that, like all other major antitrust statutes passed between 1890 and 1950, Congress was motivated in significant part by an express desire to ensure fairness and a level playing field for small business.

1. Congress gave the Commission broad power to define and prohibit “unfair methods of competition” after considering and then abandoning a much narrower proposal.

The FTC’s power to enforce a general prohibition on “unfair methods of competition” may never have come about without the efforts of one man challenging the wishes of the President of the United States. On a warm summer day in 1914, George Rublee, a lawyer from New York who would later be appointed as one of the original commissioners of the FTC, made his way to the White House in the company of Louis Brandeis and Congressman Raymond B. Stevens of New Hampshire.¹ His goal: To convince President Wilson to support a plan to provide the proposed agency with the regulatory power to define “unfair methods of competition.”²

One would think that President Wilson would be a receptive audience. After all, he ran in 1912 on the promise of strengthening America’s antitrust laws, which had been weakened in the early 20th century by judicial activism taking antitrust policy in a direction unintended by

¹ Reminiscences of George Rublee, Comm’r at Fed. Trade Comm’n, 112-13 (1951) (on file with the FTC and available at Columbia University’s Butler Library).

² *Id.* at 107, 113.

Congress. According to Rublee, Wilson ran on the idea “that large combinations of capital were inherently uneconomic and wasteful and were able to obtain and keep their power through the use of oppressive practices for the purpose of excluding competitors from the field.”³ President Wilson even advocated for the creation of a new agency in his January 20, 1914 address to Congress, stating, “the business men of the country . . . desire the advice, the definitive guidance and information which can be supplied by an administrative body, an interstate trade commission.”⁴

President Wilson, however, supported the idea of a narrower bill that would forbid conduct “explicitly and item by item.”⁵ His go-to antitrust advisor, Louis Brandeis, also drafted and supported a bill that listed out specific, criminal offenses for unfair competition.⁶ George Rublee disagreed with this approach. He believed Congress “could cover the whole field [of unfair competition] by the mere prohibition of unfair methods of competition”—a phrase he borrowed from the case law of the time.⁷ Rublee believed it was impossible to define all unfair methods of competition and “that the best way to solve the problem of improving the anti-trust laws would be merely to prohibit unfair methods of competition and to leave it to whomever was administering the law to determine whether a method in a particular case was unfair and harmful or not.”⁸

He drafted a bill creating the Federal Trade Commission, which would have the power to “come to a conclusion about whether [a] method was unfair or not.”⁹ The purpose, he believed, “was to nip restraint of trade in the bud.”¹⁰ Rublee’s bill, however, was defeated in the House, which then passed a version of the “Trade Commission” bill that listed specific unfair competition offenses, in line with President Wilson’s initial demands for a bill that prohibited conduct “explicitly and item by item.”¹¹

At that point, George Rublee had given up his push for a broader prohibition of unfair methods of competition, but his wife, Juliet Barrett Rublee, a notable suffragist and women’s rights activist, urged him to continue his fight.¹² Rublee was friends with Louis Brandeis, who had the President’s ear but had supported the idea of listing specific offenses in the Trade Commission bill.¹³ Rublee convinced Brandeis to come with him to the White House. Although

³ George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 TRADE ASS’NS & BUS. COMBINATIONS 114, 114-15 (1926).

⁴ President Woodrow Wilson, Trusts and Monopolies Address of the President of the United States Before the Joint Session of Congress 6 (Jan. 20, 1914).

⁵ *Id.* at 6.

⁶ Reminiscences of George Rublee, *supra* note 1, at 104.

⁷ *Id.* at 106.

⁸ *Id.* at 105.

⁹ *Id.* at 107.

¹⁰ *Id.* at 113.

¹¹ Rublee, *supra* note 3, at 116.

¹² Reminiscences of George Rublee, *supra* note 1, at 108.

¹³ *Id.* at 111.

Brandeis made no commitment to support Rublee’s proposal, George Rublee knew his presence was “most important as the President had the highest opinion of him.”¹⁴

At the meeting with the President, Rublee was surprised that Brandeis spoke enthusiastically on behalf of his idea for a broader regulatory grant of power to the FTC.¹⁵ This caused Rublee to later reflect, “I don’t believe we should have succeeded if he hadn’t gone along—or at least probably not.”¹⁶ By the end of the meeting, it was clear to all who had attended that the President had accepted Rublee’s proposal.¹⁷ With the President’s support, “the whole picture had changed,” and Rublee’s Section 5 language was substituted in the Senate.¹⁸

With the passage of the FTC Act reflecting Rublee’s vision for the agency, Congress had delegated the specifics for determining unfair methods of competition to the FTC and the courts. What’s more, this decision was made deliberately, *after* one chamber of Congress had evaluated and approved a competing proposal that would have given a fraction of that authority to the Commission. The FTC’s power to define unfair methods of competition is no ambiguity or accident; it was a choice made with full consideration of radically different alternatives.

2. Congress passed Section 5 to ensure a level playing field for all competitors and to stop anticompetitive conduct in its incipiency—not to promote “efficiency.”

Today, some argue that Rublee and others in Congress intended an efficiency-based approach to unfair methods of competition enforcement akin to the modern ideas of consumer welfare. William Kolasky, whom Commissioner Wilson cites in her dissent,¹⁹ asserts that Section 5’s proponents in the House and Senate “argued that a business practice should be found to be unfair only when it employs ‘methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper,’ and should not be used to attack ‘a corporation which maintains its position solely through superior efficiency.’”²⁰ But this view is based on a strained reading of Rublee and the legislative history. It also ignores the context of early 20th Century usage of the term “efficiency.”

Kolasky relies on a statement made by Rublee in a memo and repeated by at least one Senator on the floor of Congress, that “[f]air competition is competition which is successful

¹⁴ *Id.* at 111-12.

¹⁵ *Id.* at 113.

¹⁶ *Id.* at 112.

¹⁷ *Id.* at 113.

¹⁸ *Id.* at 115; *see also* Rublee, *supra* note 3, at 117.

¹⁹ 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” (Nov. 10, 2022).

²⁰ *See, e.g.*, William Kolasky, “*Unfair Methods of Competition*”: *The Legislative Intent Underlying Section 5 of the FTC Act 2* (Wash. Legal Found., Critical Legal Issues Working Paper Series, No. 189, Dec. 2014) (citing Memorandum from George Rublee for President Woodrow Wilson Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum) (on file with the FTC) [hereinafter Rublee Memo], which was also quoted and paraphrased on the floor of the House and Senate) [hereinafter Kolasky, “*Unfair Methods of Competition*”]; *see also* William Kolasky, *The FTC’s Rescission of Its 2015 Policy Statement on Section 5: If Not Consumer Welfare and the Rule of Reason, What? 9* (Wash. Legal Found., Critical Legal Issues Working Paper Series, No. 221, July 2021) [hereinafter Kolasky, *Section 5 Policy Statement*].

through superior efficiency . . . The mere size of a corporation which maintains its position through superior efficiency is *ordinarily* no menace to the public interest.”²¹ From this, Kolasky concludes that the purpose of Section 5 was to “protect the public generally from the harms that flow from monopoly power, rather than to protect smaller competitors from larger, more efficient rivals.”²² But Kolasky ignores the rest of Rublee’s memo. In it, Rublee clearly states that the FTC will have the role of “policing competition so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts.”²³

Rublee even went so far as to argue that the FTC would use its power and resources, in the public interest, to “rescue” small businesses from “great corporations”:

We must not lose sight of another advantage to men in a small way of business. Such men are timid. They fear to incur the hostility of great corporations. They cannot afford the expense of long drawn out legal proceedings carried from one court to another. It will be an inestimable boon to them to have a strong arm of the government come to their rescue and, in the public interest, bear the expense of the contest.²⁴

According to Rublee, therefore, the FTC is to be used to fight the harms to small business by the abuses of larger companies. Senator Hollis of New Hampshire, also cited by Kolasky, agreed not only by repeating Rublee’s lines in debate, but also noting that the purpose of Section 5 was to “preserve the lives of the small competitors, so that when you have got all the monopoly out of the way the little fellows are there to do business.”²⁵

Kolasky argues that Congress was motivated by efficiency and consumer welfare concerns in passing Section 5. The truth is that the notion of efficiency during the period was much different than the economic perspective today. For instance, Kolasky has repeatedly asserted that Senator Albert Cummins from Iowa supported a consumer welfare approach to Section 5.²⁶ But Senator Cummins clearly had a different perspective as to what constituted “efficient” competition:

We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore it is for the welfare and the interest of the people of the country that the commodity shall be produced at the lower cost. I do not accept

²¹ Kolasky, “*Unfair Methods of Competition*,” *supra* note 19, at 3; *see also* Kolasky, *Section 5 Policy Statement*, *supra* note 19, at 21; Rublee Memo, *supra* note 19; 51 CONG. REC. 12,146 (1914) (remarks of Sen. Henry Hollis) (emphasis added).

²² Kolasky, “*Unfair Methods of Competition*,” *supra* note 19, at 2; *see also* Kolasky, *Section 5 Policy Statement*, *supra* note 19, at 17, 21 (concluding that Congress did not seek to protect competitors in passing Section 5).

²³ Rublee Memo, *supra* note 19, at 5-6.

²⁴ *Id.* at 13-14.

²⁵ 15 CONG. REC. 12,146.

²⁶ Kolasky, *Section 5 Policy Statement*, *supra* note 19, at 15, 19-20; *see also* Kolasky, “*Unfair Methods of Competition*,” *supra* note 19, at 23-25, 29-30.

that article of economic faith. I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.²⁷

Senator Cummins, however, had clear perspectives on what constitutes “unfair competition”: “Unfair competition is the antithesis of fair, free competition. Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly. Unfair competition is the deadliest enemy of independence in business. Unfair competition is never employed save by those who have some degree of monopolistic power to exercise.”²⁸

Kolasky also notes that several senators relied on the economic work of William S. Stevens of Columbia University to inform their perspective on the difference between efficient and unfair competition.²⁹ For Professor Stevens, “efficient” competition was a very different idea than that espoused by today’s economists and antitrust scholars. Among his eleven identified “unfair” (and thus, inefficient) methods of competition included local price cutting (another term for discriminatory pricing as later prohibited by the Clayton and Robinson-Patman Acts), tying conduct, exclusive contracts, rebates and preferential contracts, dominant control of inputs, manipulation, certain forms of refusal to deal, information collection on rivals, and coercion, threats, and intimidation.³⁰

This different understanding of efficient and unfair competition played out in the congressional debate. Senator Robinson of Arkansas, relying on Stevens’ analysis, argued that “unfair competition” was distinct from “efficient” competition because unfair competition relied upon “oppression or advantage obtained by deception or some questionable means[.]”³¹ Similarly, Senator Newlands of Nevada believed unfair competition covered “every practice and method between competitors upon the part of one against the other that is against public morals . . . or is an offense for which a remedy lies either at law or in equity.”³²

Senator Newlands, however, was more concerned with Section 5’s ability to stop monopoly before it starts than about promoting efficient competition. He argued, “[t]here are numerous practices tending toward monopoly that may not come within the provisions of the antitrust law and amount to a monopoly or to monopolization. We want to check monopoly in the embryo.”³³ This idea that Section 5 was intended to have the breadth to stop monopoly in its incipiency appears throughout the Congressional record.³⁴

²⁷ 51 CONG. REC. 12,742.

²⁸ 51 CONG. REC. 12,919.

²⁹ Kolasky, *Section 5 Policy Statement*, *supra* note 19, at 22; Kolasky, *supra* note 19, at 31.

³⁰ See 51 CONG. REC. 12,248; Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 25-26 (1915-1916).

³¹ 51 CONG. REC. 12,248; Montague, *supra* note 29, at 26.

³² 51 CONG. REC. 12,158; Montague, *supra* note 29, at 21.

³³ 51 CONG. REC. 13,111; Montague, *supra* note 29, at 21.

³⁴ See Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, No. P221202, at 4-5 n.19-20 and accompanying text (Nov. 10, 2022).

3. The Commission’s action today will help address inflation and help provide a level playing field for small business to compete in America’s concentrated markets.

My colleague, Commissioner Wilson, has written a well-researched and forcefully argued dissent. The majority statement and the Policy Statement address many of her concerns, but I would like to speak to two issues raised by the dissent. First, Commissioner Wilson argues that the Policy Statement will cause prices to rise. Second, she seems to regard small businesses, struggling to compete in America’s concentrated markets, as “politically favored” and “inefficient” competitors. I respectfully disagree on both counts.

Over the past four decades, the efficiency-focused approach to antitrust law has been responsible for concentrating American markets and eliminating small businesses from the competitive landscape.³⁵ Some have argued that less aggressive antitrust enforcement has resulted in higher prices for consumers.³⁶ As a result, firms with market power are able to exploit the current inflationary environment to further raise prices. As one recent study noted, “the already-excessive power of corporations has been channeled into raising prices rather than the more traditional form it has taken in recent decades: suppressing wages.”³⁷

The best way to prevent this consumer harm is to ensure a competitive landscape and that requires the Commission to address unfair methods of competition. That is exactly what the Commission’s action today can help address. Small businesses are neither politically powerful nor necessarily inefficient. They are, however, the backbone of the American economy, providing good jobs for Americans and driving local economies.³⁸ When small businesses can compete on a level playing field, their presence ought to create competitive pressures on larger competitors and force them to abandon increased profit margins in favor of competitive prices for consumers. Congress was distinctly aware of the importance of small business while passing Section 5. Today’s Statement brings the Commission closer in line with that focus.

³⁵ See Stacy Mitchell, *Monopoly Power and the Decline of Small Business: The Case for Restoring America’s Once Robust Antitrust Policies*, INST. FOR LOCAL SELF RELIANCE (Aug. 2016), <https://ilsr.org/wp-content/uploads/downloads/2016/08/MonopolyPower-SmallBusiness.pdf>.

³⁶ See JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2014); COUNCIL ECON. ADVISERS, *BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER* (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [<https://perma.cc/9NMS-4U9L>].

³⁷ Josh Bivens, *Corporate Profits Have Contributed Disproportionately to Inflation. How Should Policymakers Respond?*, ECON. POL’Y INST. (Apr. 21, 2022, 2:43), <https://www.epi.org/blog/corporate-profits-have-contributed-disproportionately-to-inflation-how-should-policymakers-respond/>.

³⁸ See Daniel Wilmoth, *Small Business Facts: Small Business Job Creation*, U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY (Apr. 2022), <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/04/22141927/Small-Business-Job-Creation-Fact-Sheet-Apr2022.pdf>, noting that small businesses have created 2 out of every 3 jobs added to the economy over the past 25 years.

4. We must return to fairness.

I recently argued that we cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law.³⁹ Efforts have been made to limit the FTC's enforcement of Section 5 on efficiency principles that Congress never wrote into law, but today's policy statement returns the scope of enforcement to that originally intended by Congress. It does so by carefully reading the Congressional record and the applicable case law. The Statement also provides market participants with clear guidance as to how the agency will analyze potential Section 5 claims. In doing this, the FTC will be better equipped to stop monopoly power before it develops and to return fairness to American markets.

³⁹ Alvaro M. Bedoya, *Returning to Fairness*, AM. PROSPECT (Oct. 10, 2022), <https://prospect.org/economy/returning-to-fairness-rural-america-open-markets/>.