



# Regulatory Alert

## Regulatory Insights



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## FTC UDAP Authority: Policy Statement on Unfair Competition

**KPMG Insight:** The FTC's new policy statement is consistent with the President's Executive Order 14036, "Promoting Competition in the American Economy." It signals the agency's intention to pursue an expanded number of cases involving potentially unfair competition, and in particular, cases that involve conduct that is not specifically covered by the antitrust law. The policy requires only that the conduct under review has "a tendency to negatively affect competitive conditions" and those conditions may be in initial or developing stages. Further, competitive impacts may include labor market effects (where workers are considered market participants) as well as limitations on potential or nascent competitors. Companies should anticipate heightened scrutiny of their activities and be prepared to explain both quantifiable and nonquantifiable effects on competition. Notably, earlier this year the FTC and DOJ sought public input on their merger guidelines also in response to the Executive Order.

The Federal Trade Commission (FTC) issued a policy [statement](#) regarding the scope of unfair methods of competition under Section 5 of the FTC Act. The statement describes the key principles of general applicability concerning whether conduct is an unfair method of competition and clarifies that Section 5 of the FTC Act "reaches beyond the Sherman Act and the Clayton Act (i.e., the antitrust laws) to "encompass various types of unfair conduct that tend to negatively affect competitive conditions." The FTC states the new policy statement "restores the agency's policy of rigorously enforcing the federal ban on unfair methods of competition," and is based on the legislative history of Section 5 and interpretations across the FTC's decisions, consent orders, and court decisions, including Supreme Court decisions.

**Key principles.** The policy statement provides the following two key principles that generally describe whether a business practice or conduct is considered unfair:

1. **The conduct must be a method of competition.** To violate Section 5 of the FTC Act, conduct must be a "method of competition," which the FTC defines as "conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry. The conduct must implicate competition."
2. **The method of competition must be unfair.** The FTC clarifies that a method of competition would be unfair if "the conduct goes beyond competition on merits" (e.g., superior products or services, truthful marketing and advertising practices). Two key criteria, which are weighed according to a sliding scale, will be considered by the FTC when evaluating whether conduct goes beyond competition on merits:
  - i. The conduct is coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. The FTC notes that conduct may also be otherwise restrictive or exclusionary, depending on certain circumstances described in the policy statement.
  - ii. The conduct must have a *tendency* to negatively affect competitive conditions, such as foreclosing or impairing the opportunities of market participants, reducing competition between rivals, reducing innovation, limiting choice, reducing output, raising prices, or otherwise harming consumers; the conduct may affect consumers, workers, or other market participants. Actual harm is not a criterion.



**Conduct examples.** A non-exclusive list of examples of conduct that have been deemed to be in violation of Section 5 of the FTC Act is provided in the policy statement, such as:

- Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws).
- Conduct deemed to be an incipient (i.e., developing, emerging) violation of the antitrust laws, such as:
  - Invitations to collude.
  - A series of mergers or acquisitions that tend to bring about the harms the antitrust laws were designed to prevent but individually may not violate the antitrust laws.
  - Loyalty rebates, tying, bundling, and exclusive dealing arrangements that have tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.
- Conduct that violates the spirit of the antitrust laws, including conduct that tends to cause potential harm similar to an antitrust violation but that may or may not be covered by the literal language of the antitrust laws.
  - Practices that facilitate tacit coordination.
  - Using market power in one market to gain a competitive advantage in an adjacent market.
  - False or deceptive advertising or marketing which tends to create or maintain market power.

- Conduct that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market.
- Fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent application.
- Price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act.

The policy statement supersedes the FTC's previous policy statements and advisory guidance relating to the scope and definition of unfair methods of competition.

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