



FTC and Unfair Competition

Trademark & Unfair Competition
Eric E. Johnson
ericejohnson.com



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If you're going to talk about
"unfair competition" in the
U.S., then you've got to talk
about the FTC and one of
the most powerful federal
statutes in existence:
FTC Act § 5

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It looks like you could bring a lawsuit to do all kinds of things with this language! Such as:

- break up a multi-billion-dollar monopoly
- sue a social media influencer who's getting paid to hype products but acting like they're an unbiased reviewer
- force eye doctors to give you your lens prescription so you can shop around for cheaper glasses

And it's true! All this *is* possible with FTC Act §5!

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And remember what we were saying about false advertising suits under Lanham Act §43(a) being difficult to bring? You know with the standing / injury / causation requirements, and so on?

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Only the FTC itself can enforce §5 of the FTC Act. So the broad scope of the FTC Act's substantive reach is checked by an agency that Congress built to be careful, bi-partisan, and independent.

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- airlines, other common carriers
- meatpackers, livestock dealers

(Congress created specific schemes for unfair-competition/consumer-protection regulatory work for these sectors.)

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But there is a lot of overlap ...

Despite the §5 exceptions, the FTC's broad economy-wide portfolio allows it to work in many sectors where there's overlap with other federal agencies doing consumer-protection/unfair-competition work in specific industries.

The FTC (the entity)

The Federal Trade Commission

- The Federal Trade Commission Act of 1914 (known as the "FTC Act") created the body called the Federal Trade Commission (known as the "FTC").
- Its mission is focused on protecting the public from unfair and deceptive business practices and stopping unfair competition.
- That includes two key kinds of work:
 - consumer protection (for instance going after scammers and businesses that rip people off)
 - antitrust enforcement

FTC – commission structure

- The FTC is independent. It's not like executive agencies whose heads serve at the pleasure of the president.
- The FTC is set up as a commission. It has five commissioners, appointed by the president with the advice and consent of the Senate.
- They have staggered terms of seven years.
- By statute, not more than three of the commissioners can be members of the same political party.

FTC – the agency

- The 5-member commission is assisted by a workforce of over 1,000 employees.
- The FTC has regional offices in Chicago, Cleveland, Dallas, Atlanta, New York, Los Angeles, Seattle, and San Francisco.
- The FTC's headquarters is the Apex Building in DC.

**Apex Building in D.C.
Headquarters of the FTC.**



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Headquarters of the FTC.**

**On the National Mall
right across from the
Smithsonian's National
Galley of Art. Very
close to the Archives
metro station on the
yellow and green lines.**

**And yes, they hire lots of lawyers! Even
fresh out of law school. (Check their
website for their hiring programs.)**





FTC has three important kinds of authority:

- **rule-making authority**
- **investigatory authority**
- **enforcement authority**

FTC Rulemaking Authority

- The Commission may use rulemaking to address unfair or deceptive practices or unfair methods of competition that occur commonly, in lieu of relying solely on actions against individual respondents.
- The Commission's rulemaking authority comes from FTC Act §6(g) and §18.
- FTC Act §6(g) authorizes rules concerning unfair methods of competition,
- FTC Act §18 concerns rules addressing unfair or deceptive acts or practices and authorizes the FTC to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act. These rules are known as "trade regulation rules."

FTC Rulemaking Authority

- The statute requires that Commission rulemaking proceedings provide an opportunity for informal hearings at which interested parties are accorded limited rights of cross-examination.
- Before commencing a rulemaking proceeding, the Commission must have reason to believe that the practices to be addressed by the rulemaking are "prevalent." 15 U.S.C. §57a(b)(3).
- All FTC rules are published in Title 16 of the C.F.R. (Code of Federal Regulations).

FTC Enforcement of its Rules

- Once the Commission has promulgated a trade regulation rule, anyone who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” is liable for civil penalties for each violation.
- The Commission obtains such penalties by filing a suit in federal district court under FTC Act §5(m)(1)(A).
- In addition, any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation, which Commission can recover in a suit for consumer redress of the FTC Act §19.

FTC Rules Examples

- requiring gas stations to put octane labels on gasoline pumps
 - upheld in *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974) (Commission has authority)
- requiring care labels with clothes – e.g., “dry clean only,” “wash with like colors,” “tumble dry low”; and requiring instructions to be visible at purchase
 - so consumers won't be surprised with “dry clean only” or “spot clean only” after purchase
 - 16 C.F.R. § 420
- eye doctors must supply your lens prescription, allowing consumers to shop around for eyeglasses and contacts
 - so that consumers aren't compelled to purchase glasses and contacts from the eye doctor's affiliate
 - 16 C.F.R. § 456 (eyeglasses); 16 C.F.R. § 315 (contact lenses)

FTC Investigative Authority

- The Commission may “prosecute any inquiry necessary to its duties in any part of the United States,” FTC Act §3, and is authorized “to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce [excepting banks, common carriers, etc.]”
- Pre-complaint investigations are generally non-public.
- FTC can issue subpoenas requiring witness testimony and documents. FTC Act §9.
- FTC can require entities to file “annual or special . . . reports or answers in writing to specific questions” to provide information about the entity’s “organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.” FTC Act §6.

FTC Receipt of Statutorily Required Notices

- **Pre-merger Notifications:** Under Clayton Act §7A (15 U.S.C. §18a), which was added by the Hart-Scott-Rodino Act of 1976, parties to certain mergers or acquisitions must notify the FTC and DOJ before consummating the deal. FTC (or DOJ) can elect to require information and documents before the deal can be closed. FTC (or DOJ) can then elect to challenge the merger in court.
- **Pharma Agreements Notifications:** The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 requires that brand-name drug manufacturers and generic drug applicants file certain agreements with the FTC and DOJ within 10 business days of execution. This allows a window into settlements of patent infringement litigation that may serve as a vehicle for brand-name and generic drug companies to collude to delay the introduction of generic drugs, thus keeping drug prices high.

FTC Enforcement Authority

- The FTC can file complaints against private parties that are adjudicated before an administrative law judge (“ALJ”) in a trial-type proceeding.
- The FTC can file civil lawsuits in federal court to get powerful injunctive relief.
- The FTC does not do any criminal prosecution, but it can refer matters to DOJ for prosecution.

Notes about this slide show

Photo of Apex building by Carol M. Highsmith, from the Carol M. Highsmith collection, reproduction number LC-DIG-pplot-13734-01527 via https://en.wikipedia.org/wiki/Federal_Trade_Commission_Building#/media/File:ApexBuildingHighsmith.jpg

Much of the text of several slides was taken verbatim or nearly verbatim from the FTC’s own documentation about the agency, including *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, available at: <https://www.ftc.gov/about-ftc/mission/enforcement-authority>