

Before the
United States Federal Trade Commission
Washington, D.C.

In re

Comments submitted before the Federal Trade Commission with respect to consideration to rescind the “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act”

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

The Federal Trade Commission (FTC) has announced that it will hold an open meeting on Thursday, July 1, 2021 and has requested public commentary on the proposed agenda for such meeting.¹ In response to this announcement, the Computer & Communications Industry Association (“CCIA”)² submits the following comments with respect to the consideration to rescind the “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act”³ issued by the FTC in 2015 (Section 5 Policy Statement). Due to the limited time period available for comment, CCIA’s comments are necessarily brief and focus on one item of the proposed agenda. However, CCIA would be willing to expand its views should the FTC consider providing more time to explore these important matters around Section 5 and other relevant rulemaking procedural discussions pertaining to the FTC Act.

¹ FTC Announces Agenda for July 1 Open Commission Meeting, 24 June, 2021, <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>

² CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A complete list of CCIA members is available at <http://www.ccianet.org/members>.

³ Fed. Trade Comm’n, Statement of Enforcement Principles Regard “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

CCIA has been supportive of antitrust enforcement and has advocated for policies promoting competition in the tech industry since 1972. In this respect, CCIA supports the FTC's willingness to use the FTC's standalone authority under Section 5 of the FTC Act to address market concerns negatively impacting consumers. However, it is important to recall that in the 1970s, the FTC unsuccessfully attempted to expand the use of its standalone Section 5 authority and suffered numerous federal court losses. The FTC has not won a single standalone antitrust Section 5 case since then.

In August 2015, in response to concerns from Members of Congress that the FTC's standalone Section 5 authority was undefined, the FTC issued a bipartisan written framework for the application of this authority to acts or practices that fall outside the scope of Sherman Act or Clayton Act violations. The FTC recognized in its Section 5 Policy Statement that Congress had left the development of Section 5 to the FTC as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review. In this respect, the Section 5 Policy Statement affirmed that the Commission's standalone Section 5 authority extends to unilateral conduct that violates the spirit of the antitrust laws and conduct that, if allowed to mature or complete, could violate the Sherman or Clayton Act.

CCIA is of the view that the FTC's mandate to protect consumers will not be served by rescinding the Section 5 Policy Statement. First, another attempt to expand the use of Section 5 of the FTC Act beyond the scope established in the Section 5 Policy Statement risks repeating litigation losses of the past, which is a poor use of agency resources, to the detriment of consumers. Second, an attempt to shift a case-by-case adjudication system towards rulemaking would run against Congress's desire to establish a measure of flexibility with Section 5. Finally, adopting a rulemaking approach with respect to other sections of the FTC Act by rescinding established procedures as implied in the proposed agenda might raise concerns with respect to the FTC's procedural legitimacy when protecting consumers.

For all of the above reasons, CCIA encourages the FTC to preserve the Section 5 Policy Statement and to advance its enforcement actions under the bipartisan framework adopted therein. Similarly, CCIA discourages the FTC from favoring rulemaking over the adjudicative

process when enforcing the FTC Act overall, and to preserve its reputation as an enforcement agency under the highest standards of judicial review.

Respectfully submitted,

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