

FTC'S UNSUPPORTED RESCISSION OF ITS SECTION 5 POLICY STATEMENT: IF NOT THE RULE OF REASON, THEN WHAT?

Washington Legal Foundation WORKING PAPER EXECUTIVE SUMMARY

For the last forty years, enforcement of the antitrust laws has been guided by the principle that the laws are meant to protect competition, not competitors, and thereby to protect consumer welfare. The framework the Supreme Court and lower courts have developed to enforce the antitrust laws with that larger goal in mind is a modern version of the rule of reason the Court first enunciated in 1911.

The Biden Administration's senior antitrust appointments, and the "reform" views reflected in those individuals' past academic writings, have placed the consumer-welfare approach to antitrust at substantial risk. The first clear sign of these appointees' preference for a more forceful, structuralist approach was the Federal Trade Commission's decision, taken along partisan lines and after little opportunity for public input, to rescind a 2015 policy statement. The statement provided guidance on how the FTC would interpret FTC Act § 5's ban on "unfair methods of competition." The three Commissioners asserted that the statement contravened the text, structure, and history of the FTC Act, and also that the statement's challenging administrability would undermine enforcement.

This WORKING PAPER explains why both reasons for rescinding the § 5 statement lack merit. First, the 2015 Statement is fully consistent with the principles Congress intended to guide enforcement of FTC Act § 5. Informed by an exhaustive review of the legislative record, the paper details these five principles which, at their core, reflect enforcement to protect competition and the public interest by applying the rule of reason.

Second, contrary to the Commissioners' conclusion, the courts have successfully made the rule of reason more administrable and their approach provided the Commission guidance when making enforcement decisions. Notably, Supreme Court justices that firmly believe in strong antitrust enforcement, such as Justices Stevens and Breyer, have led the creation of a useful analytical framework for reviewing defendants' actions or policies. That framework does not favor plaintiffs or defendants. Instead, the framework seeks to balance the public's interest in both competition and efficiency, just as Congress intended when it created the Federal Trade Commission.

Rescission of the 2015 Statement is a significant step toward expanding the FTC's discretion and seemingly its ability to use antitrust as a tool to cure such social ills as income inequality and increased market concentration. But it's far from clear whether antitrust policy can be blamed for these ills. . And it's further unclear how an antitrust approach detached from the rule of reason and consumer welfare can be an effective tool in protecting competition without unduly impeding the efficient functioning of the market, much less for addressing broader societal problems.