

Client Alert

Antitrust & Litigation Practice Group

August 18, 2015

FTC Issues Statement on “Unfair Methods of Competition” Prohibited by Section 5 of the FTC Act

On August 13, 2015, the Federal Trade Commission (FTC) issued its “Statement of Enforcement Principles” (the “Statement”) regarding how it would interpret Section 5 of the FTC Act (Section 5), a statute that prohibits, among other things “[u]nfair methods of competition.” Although the FTC has issued a number of policy statements regarding the consumer protection aspects of Section 5, the Statement is the first time in the statute’s 100-year history that the FTC has issued guidance regarding the antitrust aspects of Section 5.

Section 5 prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” Typically, the FTC brings competition enforcement actions pursuant to Section 5, as well as the Sherman or Clayton acts, and rarely acts pursuant to Section 5 authority alone. When drafting the statute, Congress did not define specific acts or practices that would be prohibited by Section 5, and therefore there has been considerable uncertainty regarding the scope of the FTC’s Section 5 authority.

The FTC emphasized that this new guidance does not signal new or increased enforcement priorities, and the one-page Statement provides three principles to which the FTC will adhere when enforcing Section 5 on a stand-alone basis. First, the FTC will promote “consumer welfare,” which is the “public policy underlying the antitrust laws.” Second, any act or practice challenged under Section 5 will be evaluated under a framework “similar to the rule of reason,” meaning that the practice must “cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.” Finally, the Statement notes that the FTC will be less likely to challenge an act or practice under Section 5 if such practice can be addressed through enforcement under the Sherman Act or Clayton Act.

Although Republican-appointed FTC Commissioner Joshua Wright voted in favor of issuing the Statement, fellow Republican-appointed Commissioner Maureen Ohlhausen dissented from the Statement, finding its content “seriously lacking.” In her Dissenting Statement (which is five pages longer than the Statement itself), Commissioner Ohlhausen raised concerns that the FTC’s “unbounded interpretation” of Section 5 “is almost certain to encourage more frequent exploration of this authority,” thus leading to more investigations and enforcement activity.

For more information, contact:

Norman A. Armstrong, Jr.
+1 202 626 8979
narmstrong@kslaw.com

Jeffrey S. Spiegel
+1 202 626 2626
jspigel@kslaw.com

John D. Carroll
+1 202 626 2993
jdcarroll@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

While the FTC's Statement on Section 5 is a start in the right direction, it fails to provide the guidance necessary for practitioners' businesses to understand the limits of the FTC's authority. First, the Statement's three principles are vague and arm the FTC with considerable discretion in bringing antitrust enforcement actions pursuant to Section 5 on a stand-alone basis. Moreover, the Statement provides no examples of either lawful or unlawful conduct to provide practical guidance on how the FTC will implement its Section 5 policy. In contrast, other competition-related FTC policy statements (e.g., the 2000 *Competitor Collaboration Guidelines*, the 1996 *Healthcare Statements on the Enforcement of Health Care Policy*) detail the types of conduct and actions that the FTC likely would challenge. At bottom, the FTC seems to have missed an opportunity to provide businesses with meaningful guidance in a controversial area of its enforcement authority.

Documents

The FTC's news release and Statement and Commissioner Ohlhausen's Dissenting Statement are available here: <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act>.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."