King & Spalding
Client Alert

NOVEMBER 14, 2022

For more information, contact:

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

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

Robert M. Cooper
+1 202 626 8991
rcooper@kslaw.com

Brian R. Meiners
+1 202 626 2910
bmeiners@kslaw.com

Albert Y. Kim
+1 202 626 2940
akim@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20006
Tel: +1 202 737 0500

The FTC's Aggressive New Section 5 Policy

On November 10, 2022, the US Federal Trade Commission issued a new Policy Statement indicating that the current Commission plans to expand its use of Section 5 of the FTC Act. Such an expansion would constitute a significant change from past FTC practice and potentially signals the beginning of an even more aggressive enforcement push by the FTC against what it views are "unfair methods of competition."

There has been a long-running debate as to the scope of Section 5. The text of the statute at 15 USC § 45(a)(1)-(2) is sparse and undefined: "Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful," and the FTC is empowered to prevent such conduct. In a 2015 Statement of Enforcement Principles regarding Section 5, the FTC noted that while the text of Section 5 sweeps more broadly than the Sherman and Clayton Acts, it would follow the same principles that generally apply to its enforcement of the Sherman Act and Clayton Act – in particular, the so-called 'rule of reason' test which balances potential anticompetitive harm against possible procompetitive benefits – and there have been few standalone Section 5 enforcement actions.

The current Commission, led by Chair Lina Khan, has now clearly stated that it will take a more expansive approach to Section 5 enforcement. In July 2021, the Commission rescinded the 2015 Statement with Chair Khan asserting that the Commission would restore the role of Section 5 in the FTC mission.

The November 10 Policy Statement represents a significant step in fulfilling this promise. Citing primarily legislative history, the Policy Statement concludes that Section 5 reaches beyond the Sherman and Clayton Acts "to encompass various types of unfair conduct that tend to negatively affect competitive conditions."

The Policy Statement sets out a number of "general principles" in determining whether particular conduct is a Section 5 "unfair method of competition." As an initial matter, the conduct must be a "method of competition," and not just a condition of the marketplace. The Policy

Statement notes that abuse of regulatory process (such as in patents, licensing or standard setting) is a "method of competition."

Next, the conduct must be "unfair" and not "competition on the merits." To identify such conduct, there are two requirements. First, there needs to be an element of unfairness, including conduct that is "coercive, exploitative, collusive, abusive, deceptive, predatory . . . or otherwise restrictive or exclusionary." Second, the conduct also must "negatively impact competitive conditions."

The Policy Statement explicitly rejects the rule of reason test balancing test and emphasizes that unfair methods of competition must be stopped at their incipiency. It also sweeps beyond the traditional consumer welfare standard and cites to impacts on consumers as well as "workers, or other market participants." Although the Policy Statement acknowledges that there may be offsetting procompetitive "justifications" as an affirmative defense, the Policy Statement is somewhat dismissive of the possibility that such justifications could be a viable defense to alleged Section 5 violations. First, the Policy Statement notes that some courts have not even considered justifications in a Section 5 competition case. Second, the Policy Statement expressly rejects a net efficiencies or cost-benefit balancing approach without clearly articulating an alternative framework.

The Policy Statement concludes with a series of "non-exclusive" examples of conduct that may constitute Section 5 violations. These include:

- "Incipient violations" where full monopoly power is not yet present or conduct may "ripen" into Sherman and Clayton Act violations,
- invitations to collude,
- a series of acquisitions that individually do not violate antitrust laws but could "tend to bring about harms that the antitrust laws were designed to prevent," and
- exclusionary conduct such as loyalty rebates or bundling that again may "have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry."

Furthermore, the Policy Statement calls out conduct that violates the "spirit of the antitrust laws" but may not violate the Sharman and Clayton Acts such as facilitation of tacit coordination, parallel exclusionary conduct, cumulative conduct, certain price discrimination claims, acquisitions of nascent competitors and others.

The FTC's Section 5 announcement reinforces the antitrust aggressiveness asserted by the Biden administration in general and the FTC in particular. The Policy Statement appears to leave a great deal of discretion with the Commission, and the articulated standards are not clearly defined. How active and successful the FTC will be in its Section 5 initiative remains to be seen. Indeed, the lengthy and sharp dissent from the sole Republican Commissioner, Christine Wilson, may foreshadow judicial and legislative pushback to the FTC's Section 5 enforcement agenda. Nevertheless, companies with significant market positions should closely review further FTC pronouncements and enforcement actions and consider whether pending commercial and M&A activities potentially may be characterized as Section 5 violations.

ABOUT KING & SPALDING

Celebrating more than 130 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 1,200 lawyers in 23 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.

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	