

FTC ISSUES GUIDANCE ON ANTITRUST ENFORCEMENT ACTIONS AGAINST “UNFAIR METHODS OF COMPETITION”

A divided U.S. Federal Trade Commission (FTC) issued a statement of enforcement principles regarding its authority to prohibit unfair methods of competition under Section 5 of the Federal Trade Commission Act on August 13, 2015. While Section 5 has been used to reach conduct that would also violate other antitrust statutes, it is clear that Congress also intended Section 5 to reach “unfair” conduct that would not violate another antitrust statute. And, while the U.S. Supreme Court has held that Section 5 reaches conduct that violates the spirit but not the letter of another antitrust statute, the court also noted that using the statute to reach such conduct raises questions of fair notice to the business community. FTC’s enforcement statement may be an attempt to provide the business community with notice of the factors that the agency will consider in using Section 5 to challenge conduct that would not be reached by other antitrust laws.

Issued over the dissent of Commissioner Maureen Ohlhausen, the FTC’s guidance, succinctly set forth in less than a page, states that FTC is most likely to enforce Section 5 against conduct which does not violate another antitrust law – a so-called “standalone” enforcement action -- when (a) that conduct harms consumer welfare; (b) FTC has applied a rule of reason analysis and the anticompetitive aspects of the conduct outweigh the conduct’s procompetitive aspects; and (c) no other antitrust statute can sufficiently address the competitive concerns relating to the conduct.

In essence, the policy statement asserts that FTC will enforce Section 5 to prosecute standalone violations using the same standards that the agency uses to enforce other antitrust laws. But the enforcement statement raises more questions than it answers. For example, “traditional” antitrust laws do not reach unilateral conduct unless the actor is an actual or potential monopolist: will FTC now seek to use Section 5 to prosecute unilateral conduct by non-monopolists? And there are many other practices (e.g., “excessive” pricing, enforcement of dubiously valid IP rights, oligopoly behavior, negotiation of FRAND commitments) for

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ABOUT SHOOK

Amid the current highly competitive marketplace or demanding negotiations of a merger, acquisition or joint venture, companies face the risk of high-stakes antitrust litigation, which can be an additional drain on valuable financial and human resources. Companies need experienced counsel that knows how to dismantle a plaintiff's antitrust claims without undermining the company's business operations or proposed business change.

Shook, Hardy & Bacon has worked with numerous industries to develop an in-depth understanding of how antitrust laws affect individual markets. Our antitrust team takes particular pride in the scope of its services, which cover substantive and procedural issues, as well as its relationships with government regulators both in the United States and abroad.



which it would be helpful to know how FTC would decide whether to use its standalone Section 5 powers. Yet, apart from the extremely general factors, the enforcement policy statement provides no guidance to any company seeking to avoid Section 5 liability in such situations.

The lack of meaningful guidance in the enforcement statement would be of great concern if FTC were to start bringing many new standalone Section 5 cases, but we suspect that the agency will hesitate to do so. More than 30 years ago when FTC last sought to use Section 5 expansively to challenge unfair competitive practices not reached by other antitrust laws, the Second Circuit Court of Appeals refused to permit the agency to use Section 5 in such cases unless it had first supplied the public with "appropriate standards" as to the conduct that could be challenged as a standalone Section 5 violation. The court further noted that judicial scrutiny of these standards would become stricter the further the challenged conduct strayed from conduct reached by the other antitrust laws. Because FTC's recent enforcement statement makes no attempt to provide appropriate standards to identify conduct reached by Section 5 on a standalone basis, we suspect that FTC will limit its future standalone enforcement efforts to cases where the case law indicates to the public that Section 5 might apply and will not be used to go beyond the prior precedent.

The new enforcement statement does provide a helpful reminder that, using Section 5, FTC can challenge conduct that cannot be reached by other antitrust laws. Despite our predictions that the new enforcement statement does not presage the opening gambit in a Section 5 enforcement program, given that the costs of litigating any antitrust case can be high and that FTC has brought some standalone Section 5 cases in recent years, companies should consult antitrust counsel before taking any contemplated actions that might be reached by Section 5 of the FTC Act.