

KING & SPALDING LLP

Antitrust Law Implications of Voluntary Standards Activities

Presented by
Andrew G. Berg
King & Spalding LLP

Objective

- A “working” understanding of the relevance of federal antitrust law to standards-setting and certification activities (and the “fundamentals” to this understanding)

Overview – Three Inquiries

1. What do standards-setting and certification entities do?
2. How do they do this?
3. Why (and how) do the federal antitrust laws regulate what they do and how they do it?

1. What Do Standards-Setting And Certification Entities Do?

- Standards are numerous and far-reaching
- Standards have broad economic impact and play a significant role in our modern economy
- Although there are several sources of standards (governmental, private standards-setting organizations [“SSO”], and de facto market place), our focus is on SSO activities (but others are not exempt from antitrust scrutiny)

- There are numerous types of product and non-product standards:
 - Quality standards
 - Informational standards
 - Uniformity standards
 - Interoperability standards
 - Professional conduct standards
 - Certification standards
- Standards-setting has both positive and negative economic effects – often magnified by “network” effects / externalities

2. How Do SSOs Operate And What Concerns Arise Under The Federal Antitrust Laws – And What Antitrust Concerns Do They Entail?

- Composition of the SSO
- Selection of competing standards
- Enforcement of standards

- Abuse of the standards-setting process and procedures
- Restrictions on access to the use or implementation of standards
- Reducing incentives to compete and facilitate collusion

3. Why (And How) Do The Federal Antitrust Laws Regulate SSO Activities?

- “Collusion” and “exclusion” claims
- Statutory causes of action
 - Section 1 of the Sherman Act
 - Section 2 of the Sherman Act
 - Section 5 of the Federal Trade Commission Act

- Antitrust standards of review of SSO activities: the Per Se Rule and the Rule of Reason
- Market analysis under the Rule of Reason, and application of the Rule of Reason to how SSOs operate

Fundamental Conclusion

- “Pay attention” to antitrust law principles in their application to standards-setting activities

Questions ?

Andrew Berg
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Washington, DC 20006
Direct Line: 202-626-2924
E-mail: agberg@kslaw.com