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Six Things For In-House Counsel to Avoid When Appearing Before the Antitrust Agencies

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Like other law enforcement agencies, the antitrust agencies put a premium on investigating thoroughly and resolving matters as effectively as they are able. They highly value dealing with defense counsel who are well-informed, truthful and responsive. To the extent you are able to cooperate with their legitimate investigative needs while still defending the interest of your client you will increase the likelihood of achieving a satisfactory outcome and you will decrease the amount of time it takes to do so. In particular, if you avoid a few specific mistakes you can make your time in front of the agency a little easier to handle -- and increase your odds of getting the deal through, or making the investigation go away.

1. Don't treat the agency like an enemy.

As the old saying goes, you can disagree without being disagreeable, and that is wise counsel, especially during the investigation stage. There will be plenty of time for battling it out later, if you wind up in litigation. For now, keep in mind that that it is likely that you will eventually reach an accommodation that works for both sides. These investigations may involve disputes of various types: how to approach the more complex and evolving areas of antitrust law, how the facts are best applied in the context of the law, or just what the facts actually show -- but these disagreements rarely reflect insurmountable differences between two unalterably opposed views of the market. Indeed, the areas of potential dispute between the agency and your client typically narrow during the course of the investigation. So of course, you should advocate vigorously -- but there is little to be gained by pounding on the table about market definition or the appropriate limits of Section 2 liability. Even forceful disagreement will be well-received if it is delivered respectfully and with an understanding that the issues confronting the staff are complex and require time to assess. Take some care to maintain an open and civil dialogue with the staff. It will help build trust during the investigation and will establish a rapport that will enable both sides to feel comfortable if and when the time comes to negotiate a settlement.

Similarly, it is rarely a good idea to badmouth the staff. The agency leadership has an almost uniformly negative reaction to that approach. It is simply not a winning strategy to sit in a meeting and tell the front office, for example, that you have received no cooperation from the staff. They won't believe it, and it will poison the atmosphere. The agency leadership understands that sometimes a staffer does not handle an issue appropriately or may not be well-suited to the investigation he or she is assigned to run -- in that case, a quiet, off-the-record discussion with the staffer's supervisor or the front office can usually resolve the problem and allow everyone to move forward more productively.

2. Don't assume that your view of the market is widely held.

Staff is doing an investigation because they need to learn the facts, and they are going to be looking very broadly at the relevant market or industry. They will be speaking to a wide range of third parties, including your competitors, and they may develop a view of the market that is inconsistent with your experience. Don't give up; instead, try to find out what they think is happening in the marketplace, why they may disagree with your view, and then go find some information to show them why they may be mis-informed. Even if you cannot entirely convince the staff that your view is the correct one, the more information you can

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provide the more complete their view will be, and the more likely they will be to see your side of the relevant issues.

3. Don't lose the staff.

Although of course the final decisions are made by either the Assistant Attorney General or the Commissioners, the press of business and the structure of the agencies dictates that most of the work on any given case is done by the staff. The front office at the Antitrust Division and the FTC Bureau carefully review the matters that come before them, but the context for that review is developed by the staff. Staff have done the interviews, reviewed the documents, and lived with the investigation -- so their views are highly respected by the decision-makers.

Accordingly, if you can convince the staff on an issue or set of issues you have a much better chance of persuading the decision-makers to agree as well. And, because the staff is responsible for the day-to-day work, you should have ample time with the staff to make your case. While you may not always be granted multiple meetings at each level of the chain of command, it is expected that the staff will engage with potential respondents frequently and routinely, and you should have all the opportunity you need to provide information and make your arguments at the staff level. Take every advantage of those opportunities so that the staff is thoroughly acquainted with your views and you have a clear understanding of where open issues may remain.

4. **Don't ignore economics.**

The economic staff are an important part of the calculation at both agencies. In every investigation the economists are working early on with the investigative staff and making an independent assessment of both the facts and the economics of various theories, and this input is often critical. Indeed, the agencies generally are not willing to take action without an economic model that supports it, and if the case poses difficult economic issues they need to be able to effectively engage on those issues and provide a court or other decision-maker with an effective and understandable response.

Economics staff and sometimes management will be at meetings throughout the course of the investigation, and this will provide an important opportunity to explore with them any specific concerns or areas of interest, and assess how you may be able to respond on those points. For more complex and serious matters it is worth considering whether you want to engage an economist as well, but in any event your advocacy must address economic issues and concerns in order to be fully effective.

5. Don't waste the front-office meeting.

Before either agency takes formal action on a matter it will grant potential respondents, as a matter of right, the opportunity to meet with management and then the decision-maker(s). In practice that usually means a meeting with one of the Deputy Assistant Attorneys General at the DOJ, then the AAG, and with the Bureau Director then with the individual Commissioners at the FTC.[2] By the time these meetings occur, a great deal of work has gone into reviewing the facts and analyzing the strengths and weaknesses of a potential case. Prior to such a meeting, the management and decision-makers will have reviewed detailed staff memos (and often important pieces of evidence as well) and they will have met with the staff to focus on the key issues. You can expect that when you walk in the door for your meeting, they are going to be well-prepared -- and looking for you to engage on the critical issues in the case.

By this time, of course, you should know what those issues are and be ready to explain why they break in your direction, or at least why they are not as significant or damaging as the staff believes them to be. If for

[2] Under a statute known as the Sunshine Act, the FTC cannot meet as a voting body without advance public notice. The result of this is that unless they are at such a meeting, the Commissioners cannot get together on substantive issues in groups large enough to form a quorum. When the Commission has a full roster of five Commissioners it would be possible for two Commissioners at a time to have a meeting with a potential respondent, but as a matter of practice that rarely happens.

some reason you have not been sufficiently apprised of staff concerns, this isn't the time to raise that issue -- it will just detract from the focus of your meeting. If you are not certain what concerns are driving the investigation, just explain what you believe the key concerns to be and ask management to confirm your understanding and to let you know if they have any other issues they would like to discuss. Then use this time to lay out your best case on those key points.

It is often useful to spend a little bit of time on background to set the stage for your presentation, but spend as much time as you can on the core issues. It is usually not a good idea to stick to a pre-set script -- instead, do your best to engage in an open, back and forth conversation.[3] Answer questions directly and engage as much as possible, not just on the strengths of your case but on the weakest parts of your case as well. If there is a particularly difficult issue for your client, acknowledge the difficulty and then explain why you nonetheless have the better part of the argument. The more open and complete your conversation the better your chances of convincing your target audience. This isn't the time to hold back or be guarded or evasive in your answers -- if you don't persuade them now, you are likely headed for a complaint.

As part of this discussion, ask for specific guidance regarding what exactly you could provide to resolve their concerns. What documents would they need, what data, what facts could you prove that would change their perception of the market in the way that you want? And if you can find out what they need, do your best to provide that information. On numerous occasions I've observed defense counsel promise to provide follow-up materials responsive to the expressed concerns, and then fail to do so, or provide information that was not especially responsive. Every single time, the management or the Commissioner concluded that the exculpatory material did not exist, which simply reinforced their views as to the strength of the staff position on that issue. In contrast, in the situations where the parties were able to provide some additional information on those key points, it moved management or Commission thinking on the issue.

6. Don't think they are afraid to litigate -- they aren't.

Like anyone, staff and the decision-makers at the agency make go/no-go litigation decisions largely based on the perceived strength of their legal position, and they consider the resource implications as well. But unlike most private litigants, the agencies also have a broader agenda to implement and thus they also consider the public policy aspects of a case. Does the case offer an opportunity to address an important legal principle? Does it provide a mechanism to send a signal to the business community and the antitrust bar about the enforcement approach of the agency going forward?[4] Does the merger or conduct at issue have significant competitive effects in the market? If the agencies think the broader public policy aspects are significant they may well be willing to invest the resources even on a marginal litigation. In fact, it is a fairly widely held view at the agencies that if they don't lose some cases then they aren't bringing enough cases. So, even if you have a reasonably solid position under the law as it currently stands, the agency may be willing to litigate as part of a plan to try to change or clarify the law. This doesn't mean that you should agree to unreasonable terms just to avoid litigation -- but it's worth keeping in mind that even if you have a strong legal position the agency may still insist on a settlement that does not reflect the strength of that position because it has a broader public policy concern that it is attempting to address.

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[3] In contrast, someone once came to a front office meeting I attended and used almost all of the allocated time simply reading the white paper his client had submitted several weeks earlier. We had already read the white paper as part of our routine preparation for the meeting, so it didn't advance our understanding and limited his opportunity to engage on the issues.

[4] For example, an agency might be interested in making it clear that it will aggressively scrutinize and sometimes litigate against 4-3 deals, in order to limit the number of such deals that are proposed.