Effective Advocacy Before the Commission

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SINCE THE OBAMA ADMINISTRATION came into office in January 2009, the Federal Trade Commission has been extraordinarily active, filing litigation in six competition matters,[1] entering into almost two dozen consent decrees,[2] and continuing to litigate a number of other matters initiated during the Bush administration.[3] A recent FTC report noted that the number of FTC antitrust enforcement actions remained steady in its most recent completed fiscal year, notwithstanding the sharp decline in merger activity.[4] The number of Hart-Scott-Rodino investigations resulting in an enforcement action actually increased, albeit slightly, and the percentage of Hart-Scott-Rodino filings that resulted in a second request increased from 1.3% to 2.2%.[5] Both merger and non-merger enforcement are up in the first half of the agency's current fiscal year.[6] The Commission's active docket, combined with the likely upturn in merger activity, suggests that there will be more matters in which parties will be appearing before the Commission in the future.

While the Commission has made significant strides over the last few years in moving matters more quickly once they enter litigation—including an overhaul of its Part 3 administrative rules last year[7]—the process through which the Commission votes out a complaint is not well-documented. There are Part 2 rules that govern the investigative process and Part 3 rules that govern administrative litigation, but no playbook on how to navigate the Commission once agency staff recommend an enforcement proceeding.

No two Commissioners or cases are alike. Nevertheless, the most effective advocates before the Commission tend to adhere to a few key strategies. To that end, we offer an overview of the complaint recommendation process, some observations on the considerations relevant to the Commission's decision to enforce, and some suggestions for how parties can be effective before the Commission in light of those considerations.[8]

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The Complaint Recommendation Process

The Commission considers whether to vote out a complaint only after several layers of review by agency staff. First, the staff from the Bureau of Competition and the Bureau of Economics prepare separate recommendations to the Commission. The two teams work closely together, but they are not always in agreement. The recommendations discuss, among other things, the theory of the case; relevant facts obtained pursuant to the second requests, investigational hearings, and third-party subpoenas and CIDs; preliminary litigation strategy; and possible litigation risks. Management for both Bureaus reviews the staff recommendations and then meets with the parties.

If the Bureaus agree with their respective staff recommendations, they will draft short cover memos to the Commission in support of the enforcement recommendation. If either Bureau disagrees with its staff, that Bureau will prepare a more detailed memorandum describing the basis for its own recommendation. All four memoranda—from the Bureau of Competition staff, the Bureau of Competition management, the Bureau of Economics staff, and the Bureau of Economics management—are then sent to the Commissioners for their consideration, along with a draft complaint. Occasionally, memoranda may also be prepared by the Office of General Counsel or the Assistant Director supervising the

case if he or she disagrees with or wishes to supplement the staff recommendation.

Around the same time that the Bureau of Competition is finalizing the recommendation memo, the staff will hold a briefing for attorney advisors assigned to the case from each Commissioner office. This is typically the first formal briefing that the Commissioner offices receive as part of the complaint recommendation process. That is not to say that the matter will be entirely new to the Commission. By this point, Commissioners will often already have a basic understanding of the case from the staff memoranda prepared at the outset of the investigation (in conjunction with the decision to vote out compulsory process) and periodic updates from the Bureau of Competition. Following the attorney advisor briefings, the staff and Bureau management will often provide follow-up briefings to the individual Commissioners to explore any issues or concerns that they may have. The Commissioners and their attorney advisors will continue to discuss the matter informally with other offices, the staff, and Bureau management throughout this process.

If the Bureau of Competition concurs with the staff recommendation to enforce, the Bureau will inform the parties that it has forwarded a recommendation to the Commission to vote out a complaint and that the parties should contact the Commission. The parties will then begin setting up meetings with Commissioners and submit any written advocacy materials, such as a white paper or presentation.[9] Due to the Sunshine Act, parties need to schedule separate meetings with each Commissioner.[10] Commissioner offices will often coordinate to limit the number of trips the parties need to make to the Commission. Meetings with Commissioners are typically scheduled for sixty minutes, although it is not uncommon for meetings to run longer. Commissioners typically invite members of the investigating staff and Bureaus of Competition and Economics to sit in on their meetings with the parties.

At approximately the same time that the Bureau forwards its recommendation to enforce, the Commission will schedule a closed-door Commission meeting to discuss the case.[11] The date of the Commission meeting is not made public or provided to the parties. Because of the Sunshine Act, the debate at the Commission meeting is often the only chance the Commissioners have to discuss a case as a group. The Commission can vote out a complaint at the Commission meeting or through subsequent notational voting "on the papers."[12] Until recently, the Commission meeting was scheduled in unconsummated merger investigations near the end of the HSR waiting period (plus any extensions by the parties) and, in conduct and consummated merger investigations, when it appeared that the Commission had reached a decision. Now it is not uncommon for the Commission to hold non-voting meetings earlier in the process (i.e., during the staff's investigation or while the Bureau is still formalizing its recommendation) and to vote in a subsequent meeting or "on the papers."[13]

Considerations Surrounding the Commission's Decision to Bring a Case

The Commission's primary enabling statute gives Commissioners considerable discretion over whether to issue a complaint. Section 5 of the FTC Act empowers the FTC to issue a complaint when it has "reason to believe" that an unfair method of competition or an unfair or deceptive act or practice has occurred and "a proceeding . . . would be to the interest of the public."[14] The courts have held that the agency's "reason to believe" determination is ordinarily not reviewable until administrative action is complete and, even then, only under narrow circumstances.[15] For example, the Tenth Circuit held that "[a]ll that the law requires is that the FTC . . . has conducted an investigation . . . before it issued a complaint."[16] Notwithstanding this relatively low standard, Commissioners often spend considerable time deliberating—

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as a group, on a one-on-one basis, and with their respective staffs—before voting out a complaint. A number of considerations are relevant to this decision.

First, the Commissioners want to know if they have a good story to tell at trial. The Commissioners will typically ask the litigation team to lay out their theory of the case and supply an order of proof to gauge whether the staff's story is persuasive. The Commissioners want to know what the staff's best documents are and whether they are admissible. Likewise, the Commissioners want to assess the strength of each side's witnesses. Commissioners want to know who Complaint Counsel intend to call as their lead witnesses, in what order those witnesses will be called, and whether, based on the staff's interaction with those witnesses to date, the Commission's witnesses are credible.

Second, the Commissioners will evaluate the staff's and parties' respective legal arguments. The Commissioners will be most interested in whether the staff's legal theory is grounded in Supreme Court or appellate case law. If the staff intends to sue in a federal district court, the Commissioners will expect an analysis of the applicable appellate case law in that circuit. In contrast, if the staff intends to sue through the Commission's Part 3 administrative process, the Commissioners will want the staff to make their best assessment of where the parties may appeal if there is an unfavorable Commission ruling.

The Commission will also consider whether the case presents an opportunity to advance or clarify the law. For example, over the last decade, the Commission has sought to clarify the scope of the state action doctrine and to prohibit "pay for delay" pharmaceutical settlements under the Sherman

Act. The Commission will sometimes request a second opinion on these issues from the Office of the General Counsel.

Cases that involve multiple claims or legal theories can raise additional considerations in conjunction with the assessment of whether to vote out a complaint. For example, conduct cases that involve multiple Sherman Act claims—such as claims under Sections 1 and 2 of the Sherman Act or multiple Section 2 theories—will sometimes have one claim that is clearly more likely to succeed than another. In these cases, it is not unusual for the Commissioners to debate whether, from a legal and strategic perspective, weaker claims reinforce or undermine the Commission's case on its stronger claims. Similarly, cases involving pure Section 5 claims may raise questions about whether the Commission should plead a parallel Section 1 or Section 2 claim.

Third, the Commissioners will consider the recommendations from the Bureau of Competition, Bureau of Competition staff, the Bureau of Economics, and Bureau of Economics staff. It is not uncommon for those recommendations to diverge: the Bureaus may split with one another or Bureau management may split with its own staff. In advance of the Commission meeting and vote, the Commissioners and their attorney advisors may meet with each of these groups to further understand the basis for any disagreements.

Fourth, in cases involving localized effects, the Commission will consider whether the relevant state attorney general has elected to serve as a co-plaintiff or is otherwise supportive of the case. The presence or absence of a cooperating state attorney general can be an important consideration for some Commissioners.

Fifth, the Commission will evaluate the proposed remedies, particularly in conduct cases and consummated merger investigations. Even at the complaint stage, this topic can occupy considerable time. Commissioners are reluctant to bring cases where the relief is not readily identifiable and ascertainable.

Sixth, the Commission will discuss the most appropriate venue for the enforcement proceeding. For unconsummated merger cases, the decision will usually be in which district court to bring the preliminary injunction proceeding. For consummated mergers and conduct cases, the Commission must decide whether to sue in federal district court or in Part 3 administrative litigation. Considerations that weigh on this decision include the novelty of any legal issues presented (as a general matter, the more novel, the greater the argument for Part 3), whether the controlling legal standard is settled, the expected time for a final decision, and the extent of consumer harm during the pendency of a decision.

Finally, the Commission will consider whether a legal proceeding would be a prudent use of the agency's resources. The Commission has many talented trial lawyers, but only limited resources. The Commission will not send a team to trial that is understaffed, and will press the Bureau of Competition on the need for staffing changes to accommodate large or multiple litigations. Along the same lines, Commissioners are sensitive to the need to exercise their prosecutorial discretion properly and do not wish to burden businesses with the cost of defending borderline cases.

Effective Advocacy in Light of the Commission's Considerations

The in-person meeting is usually a party's best chance to convince a Commissioner to reject the staff's complaint recommendation. Written submissions, including white papers and shorter correspondence before and after the meeting, can also be helpful, particularly when focused on key issues identified by the Bureaus or Commissioners. We offer a few suggestions on ways to make the most of those opportunities.

Preparing a White Paper. A white paper can be an effective first step for laying the foundation for productive meetings with individual Commissioners. Although the Commission will often be well-versed in the staff and the Bureaus' opinions on the case, it may know comparatively little regarding the parties' arguments and may not have received advocacy materials submitted to agency staff.

In our view, the most effective white papers attack the agency's case head on, as well as respond to the weaknesses of the party's own case. Focusing on the key disputed issues and responding to concerns raised by the Bureaus will be more effective than methodically marching through the elements of a legal standard or the agency's guidelines. Thus, where the parties and agency staff substantially dispute the facts, an effective white paper will often explain why the staff's evidence, even if accepted, is not probative of the core issues. Likewise, where there is disagreement about whether there is legal support for a particular theory, an effective white paper will argue why that theory is unlikely to hold up on appeal. In contrast, the mere existence of some disputed facts, particularly if not on dispositive issues, is unlikely to sway the Commission not to bring a case, given the "reason to believe" standard.

Although a detailed factual background is generally not necessary (particularly if there does not appear to be a dispute with the staff's characterization of background information), one exception is where the underlying product is complicated and not readily understood by someone unfamiliar with the industry. In these cases, it may be helpful to walk through the basics of how the industry works or the technology of the product in question.

Although the Commission will want to know about any recent developments that might affect its decision, a good white paper avoids presenting theories or evidence that were available to the parties but were not provided to agency staff. New economic models or legal arguments that could have been made earlier may receive less weight because of the staff's inability to fully vet the submission. The most credible white papers provide evidentiary support for their factual assertions (often with a supplementary binder of source material) and avoid presenting arguments or evidence that is inconsistent with what has been told to the Bureau or staff.

Commission offices will accept white papers at any time prior to the vote, but the more time a Commissioner and his or her staff have to review a white paper in advance of the in-person meeting, the better. Apart from the obvious benefits of educating Commissioners sooner rather than later, in some cases one or more Commissioners may be skeptical of the staff's recommendation. In these cases, submitting a white paper quickly—i.e., as soon as possible once the Bureau has forwarded a complaint recommendation—can help arm those Commissioners with the arguments and evidence needed to sway other Commissioners. Under a recent Bureau of Competition policy, complaint recommendations must be no longer than fifty pages. This is probably also a good upper limit on the length of party white papers, although some of the best white papers we have seen were under twenty pages.

Whom to Bring to the In-Person Meeting. Parties will usually find it advantageous to bring one or more senior business people from the company under investigation to meetings with Commissioners. A business person is typically able to answer a broader range of factual questions that the Commissioners may have during the meeting. The most effective meetings are frequently those where the business person, as opposed to his lawyers, does most of the talking. It can be particularly helpful for the business person to start by describing the business rationale for the conduct or transaction in question and its procompetitive justifications. On the other hand, business people should leave legal arguments, such as market definition, to their lawyers.

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Another potential benefit of bringing a business person is to showcase the strength of the party's witnesses at trial. Commissioners often view the business people at the meeting as the party's key witness at trial and attempt to view them through the eyes of a federal judge. An effective presentation can alter the Commission's assessment of the litigation risks, as well as the merits.

There are, however, some risks in bringing a business person to the meeting. For example, a business person might stray from the party's antitrust themes, misstate the evidence, or otherwise appear not credible. This can be a particular risk for executives not familiar with the legal process and for headstrong executives. Also, some meetings can turn into a "mini-deposition" of the business person by a Commissioner and result in unanticipated admissions. In these instances, a weak showing may alter the Commission's assessment of the litigation risk to the party's detriment.

In an unconsummated merger investigation, parties must decide whether to bring a business person from one party—typically the buyer—or both. Having business people from both companies present gives both sides the opportunity to explain why they did the deal, to offer additional corroboration for the parties' views, and to allow the seller to present a failing or flailing firm defense, if applicable. One disadvantage is that the presence of business people from both merging parties may inhibit a discussion of competitively sensitive topics (although one side can always leave the room during the conversation with the Commissioner if needed).

Depending on the case, it may also be useful to bring an economist. The economist, like the business person, should be prepared to answer questions beyond the scope of any prepared remarks. The key for the economist is to remember that, even though a Bureau of Economics representative may be present, the audience is the Commissioner, and none of the current Commissioners is an economist.

Points to Emphasize at the In-Person Meeting. Due to the limited time for the in-person meetings, parties should avoid regurgitating the material covered in their white paper and instead focus on a few key themes.

Given that Commissioners often view a particular proceeding in terms of how it fits within the agency's broader mission, one approach can be to emphasize the longer-term implications of an enforcement proceeding. For example, parties might emphasize the risk of developing adverse case law if the agency loses in court (including, in particular, if a case does not present the right vehicle for litigating a particular issue), inconsistencies with prior enforcement decisions or agency guidance, or, in a conduct case, how a challenge may affect other companies and competition in the industry as a whole. Helping Commissioners understand how the case is inconsistent with its enforcement agenda, rather than simply focusing on the interests of the parties, often can be an effective approach.

Researching the views and interests of the five Commissioners can provide substantial rewards by allowing parties to address certain issues in ways that will appeal to specific Commissioners.[17] For example, if a Commissioner has advanced a framework for analyzing an issue in the case—even if that framework has not been accepted by the rest of the Commission—it can be helpful to explain how the evidence would be analyzed under the Commissioner's preferred approach. This can be highly effective because complaint recommendations typically do not reflect the views of individual Commissioners, but rather present the evidence following the case law and the agency's official guidelines.

Similarly, complaint recommendations often present issues of interest to particular Commissioners. Chairman Leibowitz, for example, often speaks on the health care industry. Commissioner Kovacic is a prolific writer on topics that include the evolution of competition policy, dominant firm conduct, and the energy sector. Commissioner Rosch often discusses the scope of Section 2 of the Sherman Act and Section 5 of the FTC Act, dynamic efficiencies, and behavioral economics. The agency's two new Commissioners—Commissioners

Ramirez and Brill—will no doubt develop their own areas of interest. If a Commissioner has a specific interest in the industry or legal theory at issue, that Commissioner may be particularly well-versed in the case and likely to ask especially probative questions.

Counsel may wish to vary the points they emphasize at each Commissioner meeting in other ways. For litigation-minded Commissioners, an effective approach can be to describe how the case will be tried, the litigation risks to the agency on key issues, and why the Commission's story will not hold up at trial. For Commissioners who are particularly interested in economics, an effective approach can be to have an economist describe not only the results of his or her economic models, but also how the economist views the case generally.

Otherwise effective advocacy at meetings with Commissioners can sometimes be undermined by straying from the party's key themes. Perhaps the most frequent distraction we see is criticism of agency staff. In addition to wasting valuable time at the meeting, this can add unnecessary tension and may result in sympathy for the staff. The Commissioner meetings are also not the time to raise grievances about the scope of the agency's compulsory process or the burden that the investigation imposed on the respondent. These can be legitimate concerns, but they are not relevant to the Commission's decision of whether to vote out a complaint.

Developing a Dialogue with the Commissioner Offices. Parties may have (and, indeed, can create) opportunities other than the white paper and in-person meetings to engage with Commissioner offices, provided they give themselves enough time to develop a dialogue with the Commissioners and their staff. This can be achieved by scheduling meetings promptly. Before the Commissioner meetings, parties may wish to call the assigned attorney advisor from each office to see if the Commissioner would like to see particular issues addressed. Counsel can also ask if a Commissioner would prefer a particular meeting format, such as a formal presentation. This can be a useful way to begin a dialogue with the Commissioner offices.

Particularly when Commissioners request follow-up information, parties may have additional opportunities for advocacy after meeting with the Commissioners. Counsel may want to reach out to each Commissioner office after the in-person meeting to address or clarify any open questions posed during the meeting. It is not unusual to submit supplemental correspondence or engage in discussions with attorney advisors based on specific concerns raised by Commissioners at the meetings. In particularly complicated matters or when one or more Commissioners appear to be leaning towards the parties' view, a supplemental briefing for some or all of the attorney advisors may be useful.

Notwithstanding the many opportunities for advocacy, counsel should be sensitive to the risk of appearing pushy or desperate, as a result of excessive contacts with Commissioner offices or by requesting information that cannot be disclosed. For example, agency officials cannot disclose the identity of the moving Commissioner, the date of the Commission meeting, the date of a vote, or the sources of the agency's evidence. On the other hand, it is perfectly appropriate to ask each Commissioner which way he or she is leaning at any point in the process.

Parties advocating before the Commission sometimes face significant timing constraints. The initial Commission meeting to discuss a particular matter is usually scheduled weeks in advance and is not easily rescheduled. The Commission is unlikely to delay the vote due to an outstanding request for additional information from one or more Commissioners to the parties. Any supplemental material should therefore be submitted promptly to minimize the risk that the Commission vote occurs in the interim.

A difficult question is when parties should attempt to bypass the normal process by contacting Commission offices before exhausting their appeals with the staff and the Bureaus. Escalating a case prematurely to the Commission (i.e., before the Bureaus have made their recommendations) not only can damage relations with the staff and Bureaus, but also can be counterproductive from the standpoint of the Commission, which relies on the Bureaus' recommendations to help formulate its views. Some Commissioners may refuse outright to meet with or otherwise engage with the parties in deference to the staff and the Bureaus. On the other hand, when it is clear that the staff and both Bureaus intend to recommend a complaint and time is of the essence (such as in an unconsummated transaction with tenuous financing), it may be worthwhile to contact Commissioner offices even before the complaint recommendation has reached the Commission.

Conclusion

To outsiders, the decision-making process at the Commission may seem like a black box. Nevertheless, the basic rules that apply to persuading a Commissioner are much the same as persuading a judge: focus on key themes, know your audience, listen carefully to questions, and provide prompt follow-up. The fact that there are normally five decision makers who do not sit together during your meetings is not without its benefits—you get five chances to make your best case. ■

[1] The FTC challenged the CSL/Talecris and Thoratec/Heartware unconsummated mergers, the Carilion and Dun & Bradstreet consummated mergers, a pay-for-delay pharmaceutical settlement involving Androgel, and certain business practices of Intel. A compilation of the FTC's enforcement actions is available at http://www.ftc.gov/bc/caselist/index.shtml.

[2] The consent decrees were in the Transitions Optical, Boulder Valley, Roaring Fork, Alta Bates, and National Association of Music Merchants conduct cases and the following merger cases: Dow/Rohm & Haas, Getinge/Datascope, Lubrizol/Lockhart, BASF/Ciba, K&S/Dow, Pfizer/Wyeth, Schering-Plough/Merck, Panasonic/Sanyo, SCI/Palm, Watson/Arrow, Agrium/CF, Danaher/MDS, Pepsi Bottling, SCI/Keystone, and Agilent/Varian.

[3] This litigation included the FTC's challenges to consummated acquisitions in the Ovation and Polypore matters, the unconsummated merger between CCC and Mitchell, and the Cephalon pharmaceutical pay-for-delay challenge.

[4] Fed. Trade Comm'n, Performance and Accountability Report, Fiscal Year 2009, at 59 (2009), *available at* http://www.ftc.gov/opp/gpra/2009parreport.pdf (noting that the total number of antitrust enforcement actions increased from 25 in fiscal year 2008 to 26 in fiscal year 2009).

[5] *Id.* (indicating that the number of HSR investigations that resulted in an enforcement action increased from 12 to 13 and that the total number of merger enforcement actions decreased from 21 to 19); *id.* at 56 ("[T]he number of second requests issued as a percentage of reported transactions has increased from 1.3 percent in FY 2008 to 2.2 percent in FY 2009.").

[6] Fed. Trade Comm., The FTC in 2010, at 2 (Apr. 2010), *available at* http://www.ftc.gov/os/2010/04/2010ChairmansReport_screen.pdf.

[7] Press Release, Fed. Trade Comm'n, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), *available at* http://www.ftc.gov/opa/2009/04/part3.shtm.

[8] The views in this article are intended to offer guidance on Bureau of Competition matters but will also apply to many matters originating from the Bureau of Consumer Protection.

[9] Contact with Commissioner offices should be through the attorney advisor from each office assigned to work on the case. The Bureau of Competition can usually provide the name of the attorney advisor in each office that is handling the matter. An alternative approach is to contact the Commissioner office and ask to speak to the attorney advisor that is handling the case.

[10] The Sunshine Act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business," 5 U.S.C. § 552b(a)(2), and prohibits "meetings" without the requisite public notice, unless the meeting qualifies as an exception under the Act, *id.* § 552b(b). As a result, a quorum of Commissioners (typically three) are not allowed to discuss any matter under consideration by the Commission in an informal, closed-door meeting, regardless of whether the parties under investigation are present. *See* 16 C.F.R. § 4.14(b) (defining a quorum as "[a] majority of the members of the Commission in office and not recused from participating in a matter (by virtue of 18 U.S.C. § 208 or otherwise . . . .)").

[11] These meetings are closed to the public under an exemption to the Sunshine Act. *See* 5 U.S.C. § 552b(c)(10). *See also* 16 C.F.R. § 4.15(c).

[12] For a summary of the Commission's notational voting process, see ABA Section of Antitrust Law, FTC Practice and Procedure Manual 63 (2007).

[13] 16 C.F.R. § 4.15(a)(4).

[14] 15 U.S.C. § 45.

[15] FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246 (1980) ("[T]he Commission's issuance of a complaint . . . is not 'final agency action' under § 10(c) of the APA [and] it is not judicially reviewable before administrative adjudication concludes."); Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 779 (D. Del. 1980) ("an agency has full discretion in deciding what information is relevant, and what evidence is sufficient for a 'reason to believe' determination").

[16] Amrep Corp. v. FTC, 768 F.2d 1171, 1177 (10th Cir. 1985). *But see Standard Oil*, 449 U.S. at 247 n.14 ("Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to these burdens.") (dicta).

[17] The FTC's Internet homepage is a good source for the Commissioners' speeches and Congressional testimony, but this should be supplemented by reviewing a Commissioner's published articles and any significant cases in which the Commissioner participated prior to joining the FTC. *See* Fed. Trade Comm'n, Index of Speeches by Individual, http://www.ftc.gov/speeches/speech1.shtm. Commissioners' concurring and dissenting statements are also informative.