

AMERICAN ANTITRUST INSTITUTE

“TEN RULES OF EFFECTIVE PUBLIC INTEREST MERGER ADVOCACY”
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DAVID BALTO
LAW OFFICES OF DAVID BALTO

I am pleased to participate in this important program on public interest advocacy on mergers. Advocacy before the antitrust agencies on proposed mergers is becoming increasingly important. In the Obama Administration, the FTC and DOJ have become more receptive and attentive to complaints brought by consumer groups and public interest advocates. However the merger review process is highly technical and sophisticated and public interest advocates must recognize the unique nature of the process and the institutions.

I began with three observations about advocacy before the antitrust agencies.

1. **Customers are key.** The views of customers are tremendously important. The FTC statistics show that the agency is twice as likely to oppose a merger where there are customer complaints. As public interest advocates you have an important message to convey.
2. **How does the merger harm competition.** The key inquiry by the agencies is how does the merger make the market worse? The agencies’ staff perceive their power to challenge a merger in an extremely limited fashion. A merger can be challenged solely if it has the potential effect of “substantially lessening competition.” In the agencies’ views that means the merger must make competition significantly worse by giving the merged firm the power to raise price, reduce output, or reduce innovation either alone or in conjunction with other firms acting in a coordinated fashion. What this essentially means is even though a market may not be behaving competitively that will not lead to a merger challenge. It must be that the merger must make competition worse in some significant fashion and your role is to explain how the merger makes things worse.
3. **Create a continuing dialogue with the agency.** The key to effective advocacy is to have a continuing dialogue with the agency outside the context of an individual merger investigation. It is important to continually communicate with the antitrust enforcement agencies on competitive developments in the markets you are interested in. You will develop a strong reputation and credibility that will help you when you advocate against a merger.

We frequently represent third parties and public interest groups in advocating against mergers. You can find some of our materials at www.dcantitrustlaw.com, and by clicking [here](#).

To assist you in your advocacy here are my 10 rules for effective public interest merger advocacy.

1. **Put yourself in the staff's shoes.** They have a tremendous burden in a merger investigation – to review a tremendous amount of information in an incredibly short period of time. They effectively have to prepare a case for litigation. They are very risk averse. They won't necessarily know who you are. They will probably have less knowledge of the industry than you possess. They will not necessarily know (or care) about other cases brought by other parts of the FTC or DOJ or any other regulatory agency. It is critical for you to see the issues from the staff attorneys' perspective.
2. **Recognize the timing of the process and advocate early.** There are two stages to the merger review process. An initial 30-day stage in which the staff determines whether to conduct an extensive investigation and a more lengthy period known as a "second request." There is no time limit to the second stage but it typically takes between 6-9 months. Once the second request is issued the parties cannot consummate the merger until they "substantially comply" with the second request (the second request is a voluminous request for information and documents).

It is critical for you as an advocate to come in during the initial 30-day period and set out your concerns over the merger. Your early presentation can help set the tone for the investigation and alert the staff to your concerns. The staff begins to develop its paradigm for analyzing the merger during that initial 30-day period. In addition you need to go in during the 30-day period in order to help the staff fashion its second request. If you wait until after the 30-day period the staff may miss your issues. And the staff may not issue a second request if it is unaware of your concerns.

In addition you need to recognize other critical stages of the investigation. There are several layers to the bureaucracy at the DOJ and FTC and each layer makes a recommendation. You need to try to influence officials at each stage and know when recommendations are made. The staff will not disclose the timing information to you, so you need to go and ask questions to make sure that you do not miss the opportunity to advocate to people higher in the organization hierarchy.

3. **Recognize the limits of confidentiality.** The staff is prevented from disclosing any information about the investigation to you. Get ready to have a lot of one way conversations with little response. This can be tremendously frustrating. The staff will not typically disclose information to you about what the merging parties are arguing, the staffs' theories, or the status of the investigation.
4. **Know what type of information to provide.** The staff will be trying to determine whether or not they have a case that they can win in court. The agencies will be most persuaded by information that is credible and well supported, especially concerns that are supported by economic evidence or documents. Consumer opinions are tremendously

important and you should gather information from consumers raising concerns about the merger. The agencies will typically ask you for the names of specific customers how might complain. Market studies or any economic analysis may be helpful. The agencies will be interested in potential industry experts who can assist them in analyzing the merger. Evidence from past regulatory proceedings can be helpful.

Different types of evidence can be suggestive of potential anticompetitive effects. History matters so if past mergers led to higher prices or diminished service or quality is obviously relevant. In addition the agencies are interested in natural experiments -- comparisons between one market and another where different levels of competition exist.

5. **Know how to influence senior officials.** It is not sufficient simply to rely on contacting the staff attorneys. You should contact the senior officials early on and create a dialog with them. They are the ultimate decision makers. They will be willing to engage with you because they are more conscious of public interest and political concerns.
6. **Mention other anticompetitive conduct in the market.** Other anticompetitive conduct will inform the assessment of the level of competition. Even if the other anticompetitive conduct will not necessarily lead to a merger challenge, often merger investigations lead to other investigations and potential enforcement actions against anticompetitive conduct.
7. **Don't forget the state attorneys general.** State attorneys general are often partners with an FTC and DOJ investigations. The FTC and DOJ care about the opinions of the states and the states can effectively be advocates on your behalf. In addition the states may be more candid on some of the confidential issues such as timing, or the arguments of the merging parties, than the FTC or DOJ.
8. **Use Congress – the merging parties will.** Congressional hearings and congressional letters can be tremendously important in trying to oppose a merger. A Congressional hearing can provide a public airing of competitive concerns from a merger. In addition, Congressional letters of concern can help spur enforcement -- for example, the letters of the Senate Judiciary Committee in the ATT T-Mobile merger and Senator Franken's letter in NBC Comcast provided a detailed approach to the competitive problems raised in these mergers.
9. **Figure out your end game.** You should determine what you want from the merger, whether it is a remedy, litigation or some type of regulatory action. The vast majority of problematic mergers result in some kind of consent decree requiring a divestiture and/or other relief to address the competitive problems in the merger. It is very important to focus on remedy issues throughout the investigation so that you can secure a remedy that effectively protects competition.
10. **Cultivate an ongoing relationship with the agency.** You should determine who are the people in the agency who focus on the markets you're interested in. Contact them

whenever you see competitive developments of interest. That way they will look to you as being an industry expert when mergers occur.