

# The Merger Review Process: Cooperation on Data Issues

Michael L. Denger  
Montgomery N. Kosma  
Gibson, Dunn & Crutcher LLP

# Introduction:

## Sharing Data with FTC Staff

- The Appropriate Mindset for the Merger Review Advocate
- Syndicated Data
- Financial Data

# Advantages of Cooperation in Data Sharing

- Common frame of reference
  - Allows constructive discussion regarding conclusions to be taken from the data
  - Helps counsel understand the focus and concerns of FTC staff's merger analysis
- Reduces costs of compliance
  - Limits production of duplicative or unnecessary information
- Reduces merger review time
  - Helps counsel and FTC staff focus on the substantive issues
- Improves credibility of the company

# Syndicated Data: First Steps

- Typically consists of scanner data from services like Nielsen or IRI
- Obtain clearance from data providers to share data with FTC
- Identify in-house “expert” who best understands the scope and limitations of the data
- Understand the scope and organization of data
  - Product/SKU dictionary
  - Geographic regions
  - Store types (grocery, mass merchandise, club, drug ...)
  - Reporting frequency (weekly, monthly)

# Sample Geographic Regions

- National
- Regional (typically, multiple states)
- State
- Locality
- Trading Areas
  - Chain-level
  - Store-level
  - Census-based (Metropolitan Statistical Areas)

# Producing Syndicated Data

- Provide early samples of data in the form used internally by the company
- Describe available data fields and organization (e.g., product dictionary, geography)
- Establish direct communication between FTC economists and in-house and outside experts
- Produce partial data sets iteratively, working with FTC staff to determine what data really is necessary
- Negotiate elimination of duplicative sources
- Prioritize data requests by product type and geography and produce on a rolling basis

# Financial Data: First Steps

- Types of data
  - Sales, cost of goods sold, discounts, imports/exports, manufacturing, etc.
  - Data typically organized by product (brand or SKU), by customer, by plant, etc.
- Identify in-house “expert” who best understands the scope and limitations of the data (e.g., Controller)
- Understand early how data is kept, what information is accessible, what are the standard reports used by management

# Producing Financial Data

- Provide early samples of reports used internally by the company
- Arrange meetings between FTC staff and those knowledgeable about the company's financials
  - Explain the information available and standard reports used by the company
  - Narrow the scope of information requested by FTC to that which is practical and meaningful
  - Determine data formats that can be easily produced by the company and readily processed by FTC staff
- Generate small sample reports based on FTC requests to check agreement on deliverables and data formats



# Meeting Merger Review Goals

- The facts are the facts – identify them early and agree on what data is relevant
- Establish enough trust that economists and accountants can work directly with the company's lawyers and employees without need for FTC lawyers as intermediaries
- Cooperation takes effort but ultimately reduces *wasted* effort, while providing insight into what the FTC staff is after
- Reduction in complexity of merger review means less delays and lower costs