ICN Advocacy Workshop
“Competition Impact Assessment of Legislation”

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Scope of Remarks and Disclaimer

- **Scope of Remarks:**
  - Scope of Legislative Advocacy
  - Processes for Evaluating Success
  - Factors Influencing Success

- **Disclaimer:**
  - Personal Views
    - Not the views of the Commission or any Commissioner
Advocacy Directed at “Legislation” and “Regulation”

- National Legislative Body
- National Competition Agency
- National Sectoral Regulators
- State or Regional Legislative or Regulatory Body
- Local Legislative or Regulatory Body
Forms of Advocacy

Formal (Typically Public)
- Testimony (Written or oral)
- Advice Letters
- Amicus Briefs
- Reports
- Analysis & Recommendations
- Conferences and Workshops

Informal (Often Private)
- Consultations with legislators or regulators
- Staff-to-staff cooperation
- Providing specific drafting comments or suggestions on draft laws or regulations

Varied forms of advocacy complicate process of evaluation; “informal” may be more difficult to track and assess.
Sample Areas of Recent US FTC Activity

• **Federal (Proposed Rule Making)**
  – Implementation of Consumer Financial Protection Board (CFPB) Mortgage Disclosure Regulations
  – Federal Energy Regulatory Commission (FERC) – accounting and financial reporting requirements for third party providers of ancillary services
  – Other agencies: FCC (telecommunications); ITC (international trade), CMS/CMMI (Accountable Care Organizations)

• **State and Local (Legislation and Regulation)**
  – Scope of Practice Restrictions on Mid-Level Professionals
    • Legislation; Regulation; State Appointed Boards
    • Dentistry, Nursing, Veterinarians

• Note Mix of consumer protection and competition topics
Measuring Competition
Advocacy Results - Methodology

• **When? Continuing, Short and Long-term**
  – *Continuing*: ongoing dialogue with recipients before & after submission
  – *Short*: Annual Survey & Review
  – *Long*: Five Year Collective Review

• **Why? Purposes of Assessment**
  – Not just to evaluate “success”
  – Evaluate *criteria for selection*
  – Identify *areas of repeated concern*
  – Inform *future advocacy efforts*
  – Assess and build *agency expertise* in specialized areas

• **How? Criteria for Measuring Results**
  – What defines “success”?
    • Adoption/Rejection/Modification of legislation? Too narrow? Agency “influence?”
  – How do criteria vary for different kinds of advocacy?
Challenges to Measuring Effectiveness

- **Defining and Measuring “Success”**:  
  - Whether outcomes are *consistent* with the agency’s position or merely *influenced* by it?
  - Determining the *degree* of agency success  
    - Initial, partial, complete

- **Causation**:  
  - Separating out agency influence from other factors
  - Eliminate “coincidental” alignment of outcome with advice

- **Interpreting “no response” in Surveys**  
  - Some recipients may not have welcomed agency comments
FY 2011 Survey Results (Competition Only)

• **Methodology**
  – Typically staff phone contact/follow-up
  – Prepared for annual FTC Report

• **Advocacy Letters, Briefs & Testimony**
  – Competition – 16

• **Success Rate (Initial, Partial or Complete)**
  – Competition – 10/16 (3 remained pending)
Two Examples from FY 2011

Successful (Partial)

- **Facts:** EPA requires reporting of data regarding greenhouse gas emissions
- **Proposed Action:** Proposed regulation to expand disclosures to cover various inputs to “emission equations”
- **FTC Advice:** Expand definition of “confidentiality” to equation information that could facilitate collusion
- **Regulatory Action:** EPA sought public comment on threat of disclosures to competition; regulation modified only in part (implementation delayed)
- **Possible Reason?**
  - Cost/benefit analysis given EPA’s purposes
  - Perception of limited threat to competition

Unsuccessful

- **Facts:** Florida limitations on scope of practice of Advanced Practice Registered Nurses absent physician supervision
- **Proposed Action:** bill to reduce constraints
- **FTC Advice:** Support
- **Legislative Action:** Bill failed
- **Possible Reason?**
  - Heavy lobbying by physician groups
Five Year Assessment - 2006

- **Methodology** – More Formal and Systematic
  - Surveys, initial + one round of follow-up
    - 45% Response Rate
  - Contacted: requestors, regulators, bill sponsors
  - 12 questions focused on quality and impact of advocacy; also role of press coverage

- See Note of the United States, OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities (2007)
Five Year Assessment – 2006
Principal Findings

- **Comments Received Attention** (94% “considered”)
- **Comments Provided New/Different Information** (54% Agreed)
- **Comments Affected Outcome**
  - > 50% adopted in whole or part
  - > 50% “influenced” outcome
  - When outcome consistent with FTC position, 74% responded that the FTC's advocacy influenced the outcome
- **Work Product Perceived as “High Quality”**
  - 70% agreed - sound analysis and clear reasoning
- **Agency Weighing In Mattered**
  - 81% - origination of comments with agency caused them to give more consideration to the arguments presented
- **Publicity Mattered**
  - Outcome more likely to be consistent with agency position when the matter receives press coverage.
Factors that Can Influence Success

Factors Promoting Success
• From 2006 Survey:
  – Comments actively solicited
  – Press coverage of proposed action
  • NOT of agency position

Factors Impeding Success
• From 2006 Survey:
  – Unsolicited
  – No press coverage of proposed action

Other Possible Factors:
  Comparative Institutional Advantage:
  - Perception of agency’s competition expertise
  - Resources devoted by agency to competition analysis
  Political Context (e.g., lobbying efforts) – “Receptivity”
  - Organized support or opposition to proposed action?
  - Political party alignment with respect to the issue
  Perceived quality of advocacy
  Clarity of cost/benefit analysis
Institutional Benefits of Advocacy Evaluation

• **How can agencies build on advocacy efforts over time?**
  – Advocacy as a study & learning experience
  – Generate Policy Papers Based on Previous Advocacy
    • Review previous, legislation/regulation-specific advocacies
    • Synthesis & analysis of prior advice
    • Arm opponents if anticompetitive legislation/regulation with broader guidance for future, similar legislative/regulatory efforts
    • Preserve agency resources by limiting repetition
  – Publicize advocacy documents
  – Build results of review into criteria of selection
    • More institutional hesitancy to intervene absent invitation
    • BUT, better intuitions about problem areas – e.g. “scope of practice” limitations

• **How can agencies be more proactive in identifying areas of concern?**
  – Workshops and sectoral studies can follow or lead to advocacy
Other Ways to Measure Effectiveness?

• **Improve Survey**
  – Better questions; higher response rate
  – Follow-up independent research

• **Track advocacy recipient communications or outreach to the agency over time**

• **Other Research:**
  – Citations to agency comments and amicus briefs
    • (e.g., FTC amicus filing with ITC cited with approval by federal judge)
  – Identify recipient statements consistent with agency advice
    • Deliberations
    • Letters
    • Speeches
    • Quotes in news articles
The End