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Optimizing Multistate Merger Reviews: Cooperation, Communication, and Coordination

Wendy Arends and Vic Domen

While nothing is certain in life but death and taxes, a proposed merger involving competing parties of a certain size, scope, and market concentration is likely to result in investigations by multiple state attorneys general and the Department of Justice or Federal Trade Commission. From the merging parties’ perspective, a multistate antitrust review comprised of 10 or 20 (or more) state attorneys general may seem like a hydra-headed beast. From the viewpoint of state attorneys general, it is an opportunity to determine if a proposed transaction adversely affects a state’s consumers, its economy, or the state itself. For all involved, a multistate merger review is an opportunity to reach a resolution, whether globally or with individual states, through a more efficient process than if each state worked independently of one another. The parties can optimize the process if they understand the nature of a multistate merger review, and cooperate, communicate, and coordinate with the participating states, the reviewing federal agency, and each other.

The Nature of a Multistate Merger Review

Although states may choose to go it alone with respect to reviewing and investigating a proposed transaction, for states that decide to participate, the multistate merger review process offers certain economies of scale. A multistate review is coordinated through the multistate Antitrust Task Force (ATF) of the National Association of Attorneys General (NAAG) Antitrust Committee, but the ATF itself does not run or direct a multistate review or related litigation. The ATF may receive complaints about alleged anticompetitive conduct or proposed mergers from a variety of sources, however, each state determines whether to review or challenge a proposed transaction. NAAG’s Voluntary Pre-Merger Disclosure Compact (NAAG Compact) is the framework for state attorneys general to share information and coordinate the activities of a multistate merger review, assuming their particular state is a signatory to the NAAG Compact.

After multiple states decide to proceed with a merger review, the participating states follow a multifaceted approach that generally involves: (1) forming a working group of state assistant

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2. In California v. American Stores Co., 495 U.S. 271 (1990), the FTC reached a settlement with the parties involving divestiture of certain grocery store locations. Despite this, the California Attorney General proceeded to challenge the transaction and the Supreme Court held that California had the authority to obtain greater relief than the FTC. The Supreme Court held that state attorneys general were “persons” within the meaning of federal antitrust law and could seek injunctive relief, including divestiture, under Section 16 of the Clayton Act. Id. at 296. This decision confirmed the rights of state attorneys general to challenge mergers and seek remedies in federal court.


4. Nat’l Ass’n of Attorneys Gen., Voluntary Pre-Merger Disclosure Compact (1994) [hereinafter NAAG Compact], https://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premerger-disclosure-compact.pdf; see also ABA State Antitrust Enforcement Handbook, supra note 1, App. A. All states and most territories, except California, have signed the NAAG Compact. As a result, California may be required to issue a separate demand for access to documents.
attorneys general; (2) closely coordinating discovery, experts, and motion practice among the states, and dividing up the workload; (3) entering into a cost share agreement to fund the review; and (4) seeking to coordinate with the reviewing federal antitrust agency (assuming one is involved). 5

After forming a multistate working group, states will initially conduct joint interviews, and the lead states will issue subpoenas or civil investigative demands (CIDs) under their authorizing statutes and seek waivers from the parties to share responses with other interested states. The states may also seek waivers from potentially affected third parties. The multistate working group may decide to retain an economist or industry expert to assist with the review. During a review (or if the review proceeds to a litigated challenge), the working group members are divided into various committees that manage the workload. Depending on the posture of the matter, these might include an executive committee, a discovery committee, a settlement committee, or an expert committee. 6

Should the review proceed to litigation, it is typical for one state to take the lead on drafting a complaint and to circulate it among the multistate working group. The draft complaint and other relevant materials are subsequently sent to the larger group of states and may be sent to all 50 states, the District of Columbia, and the U.S. territories. Individual states then decide whether to join the litigation. Participating states typically provide allegations under state-specific statutes, or common-law causes of action, and a single complaint is filed in federal court alleging federal and state law claims. 7 While states typically bear their own litigation costs, the joint costs of a multistate review or litigation may be funded through a cost share agreement. 8 The participating states agree to fund certain common expenses, such as expert retention, discovery costs, and transcripts. 9

If the DOJ or the FTC is also reviewing a proposed transaction, states will often coordinate with the reviewing federal agency. Joint investigations can provide efficiencies for the participating states, the reviewing federal agency, and the parties. The states benefit from additional resources and expertise, and the federal agency benefits from insights into the local markets at issue. The parties may obtain economies of scale by not having to respond to the reviewing entities with multiple submissions. 10

The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (Merger Protocol) 11 establishes a process to facilitate cooperation in joint enforcement efforts, including the sharing of confidential documents that are obtained through state or federal enforcement actions, as well as coordination on strategic planning, document production, expert witnesses, and settlement negotiations. The Merger Protocol states that,
to the extent that cooperation is “lawful, practicable and desirable,” the DOJ or the FTC and the state attorneys general will work together to review a merger—the goal being to efficiently allocate and use available resources.\textsuperscript{12}

Under the \textit{Merger Protocol}, the investigating federal agency, with the consent of the merging parties, will disclose to the states certain investigatory materials, such as those provided in response to second requests for information, subpoenas, or CIDs. States receiving such materials must agree to take appropriate steps to protect the confidentiality of the materials. Merging parties that submit a filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR), may choose to proceed under the framework of the \textit{NAAG Compact}, which allows a merging party to provide one copy of the HSR filing and all subsequent productions with the specified liaison state or with the Chair of the ATF. The liaison state then distributes copies to the states who have signed the \textit{NAAG Compact}.

The participating states and the federal antitrust agency involved in a joint investigation coordinate, per the \textit{Merger Protocol}, regarding staffing and resources, economic and legal theories, relevant data, documents, and testimony, potential economic and industry experts, and information management strategies.\textsuperscript{13} The \textit{Merger Protocol} contemplates that the federal agency and the states will coordinate to avoid duplicative efforts relating to interviews, data collection, meetings, pre-complaint depositions, and investigational hearings of both the merging parties and of third-party witnesses.\textsuperscript{14}

At the conclusion of a multistate review, it is important to note that each state retains the right to challenge the proposed transaction or request relief, and that this course of action may differ from that of another state or the relevant federal antitrust agency.\textsuperscript{15} While a global resolution of the review may (or may not) be possible, the multistate working group process still offers significant efficiencies to the merging parties.

\textbf{Cooperation with the States: A First Step to Optimizing a Multistate Review}

To the uninitiated, a multistate merger review may be perceived as an annoyance or distraction from getting the deal done, and the parties’ first instinct may be to disregard or challenge a state’s requests for information or to force individual states to separately request documents and information. Delay tactics such as moving to quash a subpoena or demanding that the states work independently are typically counterproductive to optimizing the merger review process. Each of these tactics will lead to an increased amount of resources expended by the parties. Additionally, they may also lead the states to request more information and could increase the number of reviewing states. In some circumstances, the parties’ failure to cooperate with the lead state or other participating states may undermine the ability of the multistate working group to streamline the investigation and might complicate efforts to reach a global resolution of the review.

In order to ensure that the review is conducted as efficiently as possible, it is advisable for the merging parties to cooperate with the reviewing states regarding confidentiality agreements, and to initiate contact with them early on in the review process. While the \textit{NAAG Compact} and the
Merger Protocol state that the reviewing states will not make the parties’ submissions public, neither document overrides a state’s freedom of information act (FOIA) or open records laws.\(^{16}\) For this reason it may make sense to request a “friendly” subpoena from the states.

In the absence of a subpoena or CID, a state’s law may not protect a party’s filings or submissions from disclosure should an individual or entity make an open records request.\(^{17}\) Because of the variations in state law on this issue, it is recommended that the merging parties seek state-specific confidentiality agreements with the participating states. Although negotiating these agreements with multiple states can be a significant undertaking, most states are open to entering into such an agreement, and are familiar with the process and the nuances of their particular law. The negotiations also offer an opportunity for the parties to obtain information about the status of the review and a particular state’s interest in the matter. In the absence of guidance by experienced counsel, this may be an area where the parties may be tempted to delay negotiations or expend significant resources going back and forth with the states on the agreement’s language. These tactics will not lead to a more efficient or expeditious resolution for the parties.

While a confidentiality agreement cannot preempt state law, it may require the state to act in a certain manner within the confines of its law. Certain common provisions include: (1) providing the signatory states materials that are filed with the reviewing federal agency at the same time, and waiver by the merging party of certain confidentiality rights it would otherwise have regarding these materials and all related communications with the federal reviewing agency; (2) providing the signatory states the right to attend interviews, depositions, and presentations made by the parties to the federal agency; (3) acknowledging the right of the signatory states to issue CIDs and voluntary requests for information; and (4) requiring the state, at the end of a review, to return or destroy documents provided by the parties, to provide notices of FOIA or open records requests, return inadvertently produced materials, and protect the confidentiality of nonpublic documents and information to the extent possible under state law.\(^{18}\)

**Communication: A Component of an Efficient Multistate Review**

Once the parties and their counsel reach a decision on the posture of the proposed response to a multistate investigation and move forward with confidentiality agreements, they should establish an open line of communication with the assistant attorneys general responsible for the review, and any staff antitrust attorneys working on the matter. Generally speaking, informal contacts with assistant attorneys general may result in helpful information that can inform the parties’ approach to the review. Initially and throughout the pendency of the review, the parties’ counsel should communicate questions, concerns, and any other issues with the assistant attorneys general or staff antitrust attorney assigned to the review.\(^{19}\)

While a request to meet with the attorney general should be considered as part of a multi-pronged strategy, the parties should ensure that this request is not perceived as trying to go around the assistant attorneys general or staff attorneys. The assistant attorneys general who work on multistate cases often have garnered the respect of their attorneys general. If a meeting with an attorney general is desired, the meeting can be arranged through the assistant attorney gen-

\(^{16}\) See ABA State Antitrust Enforcement Handbook, supra note 1, at 97.

\(^{17}\) See id.

\(^{18}\) See id. at 98.

\(^{19}\) See id. at 70.
eral who is responsible for the matter. It is very likely that the attorney general will include the assistant attorney general in the meeting, and may ask him or her to lead the meeting. 20

Likewise, some parties may opt to contact or attend meetings of the Republican and Democratic Attorneys General Associations (RAGA and DAGA, respectively). These are two partisan organizations that solicit and receive funds from corporations and others that may be parties to a merger review, and parties to a merger review may attempt to lobby members of RAGA and DAGA. While these efforts may be pursued on a parallel path, the parties and their counsel should not pursue contacts with RAGA and DAGA at the expense of the day-to-day requests by the assistant attorneys general participating in a multistate review. The assistant attorneys general and staff attorneys working on a merger review typically maintain a professional and non-partisan approach to their participation in multistate working groups.

As a multistate review moves forward, the staff antitrust attorneys (including the assistant attorneys general) assess the strength of the states’ legal position based on the information and documents produced by the merging parties and third parties. 21 Participating states can help ensure a more efficient review process if they are transparent about the potential legal issues and communicate with the parties about any additional information they may need to further investigate and resolve these issues. This transparency and open line of communication will enable both sides to position themselves for a more efficient settlement process.

Coordination and the End Game: Strategic Settlement Considerations

While the multistate merger review process is relatively streamlined, it is possible that, at the conclusion of the review, the state attorneys general involved in the review may request settlement conditions or seek relief independent of that which is requested by another state or federal government entity. 22 Alternatively, a state or federal government entity may choose to move forward with litigation. Thus, at the outset of a multistate review and as it evolves, the parties need to assess the potential for divergent resolutions among the participating states and federal agency and adjust their focus and strategy accordingly. The states’ willingness to press the parties on local issues and concerns should not be underestimated.

Although the Merger Protocol contemplates discussion among the participating states and the federal antitrust agency regarding the investigation and potential settlements, it recognizes the sovereignty of the states. In addition, participating states may have different perspectives regarding the potential anticompetitive effects at issue due to local market conditions or related factors. Thus, the likelihood that state and federal enforcers will adopt divergent settlement postures is more probable than a disagreement between the participating states and federal agency regarding the general course of the investigation.

Issues may arise when the reviewing federal agency begins or moves forward with settlement discussions without involving the participating states. If the reviewing states are not included in initial or subsequent settlement discussions with the parties, this can lead to states seeking independent relief to address local market concerns that is different than what the federal agency requests. In addition, an agreement by a state that results in less relief than that which is sought by the federal agency can undermine the bargaining position of the DOJ or the FTC. Such a state

20 See id.
21 See id.
22 A notable example of this is the Microsoft case, where a number of states decided to litigate and request a different remedy separate from other states and the federal government. See Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).
settlement can hamper a federal agency’s effort to seek a preliminary injunction against consummation as it did when the DOJ challenged a New York hospital merger involving Long Island Jewish Medical Center.23 The New York Attorney General entered into a settlement that included behavioral remedies while the DOJ challenged the merger in court. The court cited New York’s settlement with the hospitals when it denied the DOJ’s motion for a preliminary injunction.24

Conversely, states may seek more or different relief as compared to the relief sought by the DOJ or the FTC. This was the case in Wal-Mart Stores v. Rodriguez, in which Puerto Rico secured greater relief than the FTC negotiated with the parties.25 The FTC and the parties entered into a settlement that involved divestiture. Puerto Rico sought and obtained a preliminary injunction, blocking the proposed acquisition. Similarly, the DOJ sought relief consisting only of divestiture of a contract and certain assets in one state: FirstGroup plc agreed to sell off a school bus contract and certain assets in Alaska in connection with a review of a proposed transaction involving Laidlaw International, Inc. In contrast, 11 states filed a complaint in federal district court alleging that the merger violated state and federal antitrust laws, and obtained state-specific relief tailored to what they perceived to be the competitive problems in their particular states, including agreements to divest school bus contracts in the various states, making certain facilities available to school districts or competing bidders, and providing advance notice of future acquisitions.26

Finally, there is no state equivalent to the HSR filing fee.27 Therefore, it is not uncommon for the states to seek reimbursement for the fees and costs associated with the investigation and litigation.

Conclusion

While a multistate merger review may consist of 20 or more reviewing state attorneys general, the review process has evolved over the years to become relatively streamlined in terms of its operational procedure from the states’ point of view. The merging parties are encouraged to take advantage of this process rather than forcing the states to work independently of one another. In so doing, the merging parties’ cooperation with participating states may result in additional efficiencies and help to speed up the review.

In addition, working to foster communication with the participating states regarding procedural and substantive issues may also more quickly lead to a resolution phase. Based on the wide variation in potential paths to reach a settlement or resolution, the merging parties will want to analyze the states’ ability and intention to litigate or reach a settlement independent of other states or the relevant federal antitrust agency. This allows the parties to coordinate with one another, and determine how best to engage a particular state in the settlement process. Rather than waiting until states raise concerns at a later stage (which may disrupt a more global resolution), the merging parties may want to consider taking a more proactive approach to communicating about particular issues that may be unique to a state.

24 Id. at 149.
25 238 F. Supp. 2d 395 (D.P.R. 2002), vacated, 322 F.3d 747 (1st Cir. 2003) (vacating the district court’s issuance of a preliminary injunction after the parties entered into a settlement agreement).
27 HSR filing fee revenue is collected by the FTC and is divided evenly with the DOJ’s Antitrust Division. See, e.g., DOJ Antitrust Division, Congressional Submission FY 2017 Performance Budget 13, https://www.justice.gov/jmd/file/821001/download.
**Apple Inc. v. Pepper: Online App Stores Are Retailers, Whether or Not They Are Platforms**

Martin Mackowski, Rob McNary, and Shaina Vinayek

In May 2019, the Supreme Court issued a 5-4 decision in Apple Inc. v. Pepper, one of the Court’s most closely watched recent antitrust rulings. The majority opinion, written by Justice Kavanaugh, takes aim at overly broad restrictions on antitrust standing, holding that iPhone owners who purchased apps from Apple’s App Store are direct purchasers with standing to sue Apple for alleged monopolization under the federal antitrust laws. Many expected that the Supreme Court would also provide further guidance regarding two-sided platforms or broader e-commerce issues, particularly in light of its 2018 decision in Ohio v. American Express Co., the Court’s most recent pronouncement regarding two-sided platforms. But the Court declined to address those issues by limiting its decision to the narrow standing issue before it. How courts will treat other firms operating in the expanding marketplace of multi-sided technology platforms thus remains largely uncertain.

The case involves Apple’s control over apps running on iOS, which powers its popular iPhone, and the Apple App Store where iPhone users can find, purchase, and download iPhone-compatible apps. Even though most apps are developed by third parties, Apple earns a commission on every app purchased: 30 percent of the purchase price goes to Apple, while 70 percent goes to the developer. Apple also prohibits third-party developers from selling iPhone apps through channels other than the App Store, including directly to iPhone owners, and generally discourages iPhone owners from downloading unauthorized apps. Apple has the right to cut off sales by a developer who violates the prohibitions, and threatens to void the warranties of iPhone users who download unauthorized apps.

A putative class of iPhone owners sued Apple, challenging the App Store restrictions and claiming direct purchaser standing—a critical status in light of the Court’s prior decisions. Relying on the Supreme Court’s 1977 decision in Illinois Brick v. Illinois, Apple argued that consumers could not sue for antitrust damages because third-party app developers would be the immediate victims of the alleged offense and thus the only ones with standing to sue.

The Supreme Court held that, because iPhone users buy apps from Apple through the App Store, they are direct purchasers for purposes of their suit against Apple. The Court pointed to

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2 In re Apple iPhone Antitrust Litig., 846 F.3d 313, 315–16 (9th Cir. 2017), aff’d sub nom. Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
3 Id. (Many apps in the App Store are free.)
4 Id.
5 Id.
7 Apple Inc. v. Pepper, 139 S. Ct. at 1519.
the bright-line rule of *Illinois Brick*, noting that although indirect purchasers “two or more steps removed from the antitrust violator in a distribution chain may not sue,” the *Apple* plaintiffs, as immediate buyers from an alleged antitrust offender, may sue.\(^8\)

Notably, both the majority and the dissent in *Apple Inc. v. Pepper* argued that their position reflected economic realities and not “formalistic line drawing.” In the majority opinion, the Supreme Court characterized its determination that iPhone owners were direct purchasers who could sue Apple as merely a “straightforward conclusion follow[ing] from the text of the antitrust laws and from our precedents.”\(^9\) The Court rejected Apple’s claim that consumers could not sue Apple because developers, not Apple, set the retail price charged, concluding “Apple’s rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer’s actions?).”\(^10\)

Likewise, according to dissenting Justice Gorsuch, the majority decision “replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That’s not how antitrust law is supposed to work . . . .”\(^11\) The dissent assesses the critical flaw as “exalt[ing] form over substance.”\(^12\) And the dissent claims that the substantive economic determination is where the alleged overcharge is “first felt,” while the majority’s test turns on who happens to be in privity of contract with whom.\(^13\) The dissent concludes that because Apple can evade private liability just by amending its contracts, the majority opinion is “whittling [the *Illinois Brick* rule] away to a bare formalism.”\(^14\)

While the majority opinion is correct that the alleged antitrust violation, not the adjacent transactions, should be the primary focus of the standing analysis, the dissent is also likely correct that any rule that can be evaded by a contractual amendment—without changing the reality of the economic transaction—does not accord with modern antitrust case law. Thus, the form versus substance principle may be less useful as a basis for legal line-drawing than an assessment of economic reality. Nevertheless, *Apple Inc. v. Pepper* elevates who purchases from whom to an issue of “economic reality” sufficient for a final standing determination.

Although some expected *Apple Inc. v. Pepper* to provide further guidance regarding two-sided platforms or broader e-commerce issues, the Court implicitly declined to address those issues by narrowly construing the issue before it and by failing to connect its reasoning with its 2018 decision in *AmEx*. But the Courts in *Pepper* and in *AmEx* were addressing two distinct issues: (1) who has standing to sue for damages in the first instance, and (2) how a “transaction platform” should be analyzed on the merits for purposes of assessing anticompetitive effects.

The Court in *Apple Inc. v. Pepper* emphasized at the outset that the case came before it on appeal from a motion to dismiss and so it was addressing only the one narrow issue before it: “The sole question presented at this early stage of the case is whether these consumers are proper

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\(^8\) Id. at 1521.
\(^9\) Id. at 1520.
\(^10\) Id. at 1523.
\(^11\) Id. at 1526.
\(^12\) Id. at 1529.
\(^13\) Id.
\(^14\) Id. at 1531.
plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were ‘direct purchasers’ from Apple.”

In contrast, the Court in AmEx had to determine whether the plaintiffs had proven—after a seven-week trial—that American Express’s conduct caused anticompetitive effects as required to prove a claim in a rule-of-reason case under Section 1 of the Sherman Act. The Court’s extensive analysis of two-sided platforms was necessary to make that determination given the parties’ competing arguments regarding whether the Court should look at the effects on just one side of the platform or on both sides of the platform to determine whether there was ultimately an anticompetitive effect. A similar consideration of the economics of two-sided platforms was unnecessary to resolve the standing question presented in Apple Inc. v. Pepper.

Thus, while some commentators have noted that the Court in Apple Inc. v. Pepper could have or should have addressed two-sided e-commerce issues more broadly, it is unsurprising that the Court declined to do so. The Court repeatedly has noted that it will not wade into issues that are not before it, particularly those relating to novel concepts or relatively new technologies like those at issue here.

Indeed, neither the majority nor the dissent even mentioned AmEx even though Apple specifically asked the Court to analogize the App Store to the two-sided platform at issue there. Citing AmEx, Apple had argued that “app stores ‘are basically platforms connecting app users (smartphone owners) and app developers.’ They are ‘two-sided’ platforms, where a platform operator, such as Apple, ‘offers different products or services to two different groups who both depend on the platform to intermediate between them.’”

The plaintiffs rejected that characterization, noting that AmEx specifically addressed two-sided transaction platforms and arguing that the App Store was more akin to a traditional retailer:

As this Court explained in Amex, a two-sided transaction platform is “best understood as supplying only one product—transactions—which is jointly consumed” by the parties on both sides of the platform. The App Store is not a “transaction platform” but a retail operation selling apps; the fact that Apple collects payment from customers and renders payment to suppliers does not make it a two-sided transaction platform any more than a corner grocery, which does the same thing.

Indeed, the Court in AmEx had reasoned that the credit card networks at issue thus were not acting as a retailer selling a product or service to consumers. The “product” being offered on each

15 Id. at 1520.
16 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (“Here the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex’s antisteering provisions have an anticompetitive effect.”).
19 Respondent’s Brief at 31–32, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (internal quotations omitted). See generally Andrew Gavil & Jordan Ludvig, The Many Sides of Ohio v. American Express Co., ANTITRUST, Fall 2018, at 8. The plaintiffs went on to emphasize the differences between the App Store and the two-sided transaction platform at issue in AmEx: “The contrast between a credit card network and the Apple App Store is stark. A credit card network is indifferent to the nature of the purchase and sale that gives rise to a financial transaction, and the service provided is the purely financial one of enabling payment—whether for a chair, a milk can, or eight volumes of Gibbon. By contrast, Apple carefully controls the products offered through its App Store as well as limits the prices charged for them to even dollar amounts.” Respondent’s Brief at 31–32 n.12, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (internal quotations and citations omitted).
side of the platform was the transaction itself, “which is jointly consumed by a cardholder and a merchant.”²⁰ The “merchant services” offered on one side of the platform, and the “cardholder services” offered on the other side were “both inputs to this single product.”²¹

The Court in Pepper did not directly weigh in on whether the two-sided platform analysis in AmEx applied. It did, however, consistently characterize Apple as a traditional retailer selling goods (apps) to consumers through an electronic retail outlet (the App Store). For example, in distinguishing Illinois Brick, the Court explained that “iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain [but rather they] purchase apps directly from the retailer Apple, who is the alleged antitrust violator.”²² Indeed, the majority and the dissent collectively used the word “retailer” or “retail” to characterize Apple and the App Store almost 100 times. Neither the majority nor the dissent once described Apple as selling “transactions” as the Court did in AmEx, and the word “platform” is used just once by the dissent in describing the plaintiffs’ allegations.

The impact of these two decisions on future cases involving technology and e-commerce giants that connect consumers with goods or services is thus unclear. The term “platform” is being used to describe a variety of such firms and business models. Many share characteristics with both the Apple App Store’s “retail” sales and the “transaction” service being sold in AmEx. For example, certain ride-sharing, food-delivery, and lodging apps seem more like the credit card networks in AmEx, arguably selling just a “transaction” by matching a consumer looking for a ride, a meal, or a place to stay, on the one hand, with someone offering one on the other hand. But on each of those platforms, as with the App Store, the consumer remits payment to the company facilitating the transaction, which in turn takes its share and then pays the agreed amount to the driver, restaurant, or lodging provider.

Other online marketplaces appear to function more like the App Store, selling, for example, concert tickets, cars, or homemade crafts, and effectively maintaining virtual retail store fronts where individuals offer those goods for sale. But those platforms, as in AmEx, require also that both a willing seller and a willing buyer simultaneously choose to use the platform for the transaction at issue.²³

Yet other technology and e-commerce companies use various hybrid business models that can share some characteristics of both the “retail” goods sold in Apple’s App Store and the “transaction” service being sold in AmEx. It is likely, therefore, that the courts will continue to grapple with both the form and economic substance of e-commerce businesses. Further discussions on these important issues and future legal determinations are nearly certain. As the differing analyses in AmEx and Pepper make clear, the outcomes likely will depend on the procedural posture of the cases, the specific issues presented to the Court, and, most importantly, the particular characteristics of the firms and the competitive effects of their conduct.

²⁰ AmEx, 138 S. Ct. at 2286.
²¹ Id.
²² Apple Inc. v. Pepper, 139 S. Ct. at 1520 (emphasis added).
²³ Another important distinction is that not all two-sided platforms are alike. Unlike AmEx, the App Store is not necessary to facilitate transactions between developers and iPhone users. The merits of the case focus on the plaintiffs’ objection to the contractual terms Apple has imposed on developers and consumers to, in effect, interpose itself as an intermediary. Its “platformness” is artificial, and not the result of market forces or indirect network effects. In contrast to credit cards, it is not at all necessary to the “transaction,” which could be accomplished directly between developers and consumers without Apple. Developers can compete with each other and sell directly to consumers without any “platform” acting as a toll bridge between them. See Gavil & Ludwig, supra note 19, at 10.
Interlocking Directorates: What’s on the Horizon

Anthony P. Badaracco and James K. Nichols

Section 8 of the Clayton Act has not been a particularly hot source of antitrust enforcement activity, nor of antitrust articles, in years. Interlocking directorates have been forbidden under the antitrust laws for more than 100 years, but despite a small number of high-profile investigations, no individual or company has had to pay damages or been fined for an interlock. And the law has not changed much over that time. Several decades ago, a Second Circuit panel noted that “the [Federal Trade] Commission has found little occasion, and perhaps little incentive, to take action” against interlocks.¹ The same could be said for the Department of Justice.

But change may be coming. In particular, the leaders of the DOJ’s Antitrust Division have confirmed that the Division is looking in new directions. In May, Assistant Attorney General Makan Delrahim stated that an “area that the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures.”² A few months earlier, at the end of last year, Deputy Assistant Attorney General Andrew Finch stated that the Antitrust Division is “looking at . . . interlocking directorate issues more closely” and that “another issue [the Division] is thinking about” is “whether Section 8 applies to corporate entities created after the statute was passed in 1914, such as limited liability corporations.”³ And last fall, AAG Delrahim testified before a Senate committee that, upon the expiration of the last of the DOJ and FCC restrictions imposed in 2011 on Comcast and NBCUniversal following their merger, the Division will “examine carefully” whether Comcast’s appointment of three senior NBCU executives to Hulu’s board poses competitive concerns, including under Section 8.⁴

We should be clear that no new enforcement actions have been filed. No limited liability company has been found liable under Section 8. And no damages have been awarded. But the recent comments suggest this stasis may not last much longer. The government is signaling that it is prepared to break new ground, and antitrust enforcers are thinking about pursuing interlocks involving entities structured with a corporate form that did not exist when the Clayton Act was passed.

¹ Schechtman v. Wolfson, 244 F.2d 537, 539 (2d Cir. 1957).
A Brief Overview of the History of Interlocks

“An interlocking directorate occurs when a person sits on two or more boards of directors.”5 In many circumstances, this is perfectly legal. Director interlocks are illegal only where two companies are fairly large and compete directly with one another.

The principal statute governing interlocks is Section 8 of the Clayton Act; there are other statutes restricting interlocks in various regulated industries, e.g., the Public Utility Holding Company Act of 1935,6 the Federal Power Act,7 the Investment Company Act of 1940,8 the Federal Alcohol Administration Act,9 the Communications Act of 1934,10 and the Depository Institutions Management Interlocks Act.11 Congress has also turned its attention to interlocks in specific situations, including the passage of the Panama Canal Act of 1912.12

Section 8 provides:

No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are (A) engaged in whole or in part in commerce; and (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; if each of the corporations has capital, surplus, and undivided profits aggregating more than [an amount adjusted annually].13

The statute also provides for a one-year grace period, upon development of a prohibited interlock, during which a director who was eligible at the time of appointment may resign with no violation.14

In addition, the FTC has interpreted Section 5 of the FTC Act15 to enforce the “spirit and policy” of Section 8.16 Occasionally, private parties have also challenged interlocks as facilitating a conspiracy in violation of Section 1 of the Sherman Act.17 Finally, the government has alleged Section 8 violations as part of its allegations that a merger violates Section 7 of the Clayton Act.18

See generally ABA SECTION OF ANTITRUST LAW, INTERLOCKING DIRECTORATES: HANDBOOK ON SECTION 8 OF THE CLAYTON ACT (2011).

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6 15 U.S.C. § 79q(c) (prohibiting public utility holding companies from having any director who is also an officer or director of “any bank, trust company, investment banker, or banking association or firm”).

7 16 U.S.C. § 825d(b) (“[I]t shall be unlawful for any person to hold the position of officer or director of more than one public utility . . . .”).

8 15 U.S.C. § 80a-10(c) (“No registered investment company shall have a majority of its board of directors consisting of persons who are officers, directors, or employees of any one bank . . . .”).

9 27 U.S.C. § 208 (“[[I]t] shall be unlawful for any individual to take office . . . as an officer or director of any company, if his doing so would make him an officer or director of more than one company engaged in business as a distiller, rectifier, or blender of distilled spirits.”).

10 47 U.S.C. § 212 (“[[I]t] shall be unlawful for any person to hold the position of officer or director of more than one carrier subject to this chapter . . . .”).


Courts have identified two primary reasons for the prohibition on interlocking directorates: “to avoid the opportunity for the coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information by competitors.” 19 The idea is that, where competitors’ boards include the same individual, or different people nominated by the same firm, the common person could serve as a conduit for the exchange of competitively sensitive information between the two competitors or could influence the two companies not to compete as aggressively against one another as they otherwise would. “[T]he continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at.” 20

For these reasons, at the time of the Clayton Act’s passage, “[i]nterlocks between large corporations were seen in the public debate as per se antagonistic to the public interest.” 21 As one court explained, Congress prohibited interlocks to “nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.” 22

Both the DOJ and FTC take the position that violations of Section 8 are per se violations, meaning that “parties cannot justify violations . . . based on a lack of competitive injury.” 23 Enforcement actions can be brought by both federal agencies, state attorneys general, and private parties. Private parties, sometimes customers, 24 sometimes competitors of interlocked corporations, 25 and sometimes other third parties, such as investors, 26 do sue. Section 8 provides for a private treble damages remedy, although damages have never been awarded on the basis of a Section 8 violation. 27

Section 8 applies not only to individuals but to firms. So, there is a violation if one firm appoints two different individuals to sit as its agents on the boards of two competing companies. As one court found, “Section 8 would be a formalism if it merely prohibited the same person from being officially named as a director of competing corporations.” 28 This makes sense; otherwise, a corporation “without fear of sanction could have the concededly prohibited interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member.” 29

There are limitations on Section 8’s reach; it applies only where two corporations are engaged in commerce, the two corporations compete horizontally with each other, and one “person” (individual or entity) serves as an officer or a director of the two corporations. Also, each corporation must have capital, surplus, and undivided profits aggregating to $36,564,000 or more (as of

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19 Square D, 760 F. Supp. at 366.
22 Sears, Roebuck & Co., 111 F. Supp. at 616.
23 See Finch, supra note 3, at 14; Rosch, supra note 5, at 17–18.
26 See Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).
27 See Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1573 (10th Cir. 1984) (finding that a private plaintiff can obtain an injunction without proving an interlock’s anticompetitive effects, but dismissing treble damages claim absent proof of injury).
29 SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977).
February 2019; the numbers are adjusted annually), 30 the “competitive” sales of the interlocked firms must total at least $3,656,400 each (adjusted annually), 31 the competitive sales must total at least 2 percent of each firm’s total sales, and the competitive sales must total at least 4 percent of either firm’s total sales. 32 Oddly—this is a good indication of the relatively sparse litigation over Section 8 issues, and therefore the dearth of published opinions—it remains an open question whether those figures include competitive sales outside of the United States. 33

The federal antitrust enforcement agencies do investigate, and sometimes sue, based on interlocks. Often, the result of such investigations is a consent judgment whereby the interlocked director agrees to resign from one or both boards, thereby resolving the interlock. 34 The government may also obtain an injunction to eliminate the interlock and restructure a transaction, but as in any antitrust case, the agency must show a “cognizable danger of a recurrent violation.” 35 This can present pitfalls; there is at least one decision finding that, following a sale of assets where there is no longer a risk of a recurring interlock, there is no basis to award an injunction. 36 As with private plaintiffs, the government has never obtained a fine in a Section 8 case.

Applying Section 8

Despite Section 8’s apparently broad reach, there are several types of interlocks held by courts not to be covered at all:

- Those between potential competitors that do not yet actually compete with each other 37;
- Vertical interlocks, i.e., those between suppliers and customers 38;
- Interlocks between banks, and interlocks between banks and competing non-banks 39; and
- Interlocks between sports leagues. 40

There is one question that the circuits have not entirely resolved: the extent to which Section 8 applies to corporations that do not compete but whose subsidiaries do compete. Specifically, the Second Circuit held in *Kennecott Copper Corp. v. Curtiss-Wright Corp.* that Section 8 does not apply to companies whose subsidiaries are competitors, except possibly where the parent com-

31 See id.
33 See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 447 (8th ed. 2017).
37 See Paladin Assocs. v. Montana Power Co., 97 F. Supp. 2d 1013, 1031 (D. Mont. 2000) (“[T]o establish a violation of section 8, a plaintiff must prove the corporations, on whose boards the director sits, actually compete with each other.”); Paramount Pictures Corp. v. Baldwin-Montrose Chem. Co., No. 65-cv-2586, 1966 U.S. Dist. LEXIS 10596, *26 (S.D.N.Y. Jan. 24, 1966) (“Section 8 has no application to corporations which are not or have not been competitors, but may be competitors in the future.”); see also TRW, Inc. v. FTC, 647 F.2d 942, 946 (9th Cir. 1981) (expressing “no opinion about whether section 8 encompasses interlocking directorates between corporations that are merely potential competitors”).
38 See BankAmerica, 462 U.S. at 128; Paramount Pictures, 1966 U.S. Dist. LEXIS 10596, at *25. Section 8 incorporates the market definition analysis typically applied in Section 1 cases, by looking at whether an agreement between corporations “would constitute a violation of any of the antitrust laws.” 15 U.S.C. § 19(a)(1)(B).
39 See BankAmerica, 462 U.S. at 128 (noting that banks are statutorily exempt from Section 8’s coverage).
pany “closely controls and dictates the policies of its subsidiary.”41 Subsequently, the Ninth Circuit explicitly considered that holding and determined that *Kennecott Copper Corp.* does not stand for the notion that a subsidiary's activities can never be considered, but rather only that “[a] parent corporation is not a competitor of another corporation merely because its subsidiary is.”42

Finally, at least one court has found that entities that constitute a single enterprise under Copperweld cannot violate Section 8 by having directors in common.43

**Lessons from Recent Enforcement Actions**

Enforcement actions relating to interlocking board memberships are relatively rare, but there are some notable examples from the last few years.

**Apple and Google (2009).** In 2009, the FTC investigated interlocking board memberships at Apple and Google, resulting in resignations of executives who served on the boards of both companies. On August 3, 2009, Apple announced that Eric E. Schmidt, CEO of Google, a member of the boards of both Google and Apple, was stepping down from the Apple board. On October 12, 2009, Google announced that Arthur D. Levinson, also a member of the boards of both Google and Apple, was stepping down from Google's board.44 Neither the FTC nor the companies disclosed what specific concerns prompted the investigations. At the time, the companies were increasingly shifting from offering complementary products and services to competing directly.45 Google had just released the Android operating system for mobile phones, competing directly with Apple's iPhone and iOS operating system. In 2009, Android was nowhere near the leading mobile operating system that it is today, but major phone makers had announced plans to offer Android-powered mobile phones. Apple and Google had also become competitors in the web browser and media distribution markets.

Following the announcement of Levinson's resignation from the Google board, FTC Chairman Jon Leibowitz issued a statement commending the companies “for recognizing that overlapping board members between competing companies raise serious antitrust issues and for their willingness to resolve our concerns without the need for litigation” and stating that the FTC “will continue to monitor companies that share board members and take enforcement actions where appropriate.”46 The FTC did not take any further action or issue any additional statements on the matter, at least in the public record.

**Tullett Prebon and ICAP (2016).** In November 2015, Tullett Prebon Group Ltd., a securities broker, announced a planned acquisition of ICAP plc’s voice-brokerage business.47 ICAP would hold a 19.9 percent interest in Tullett Prebon and have the right to appoint a member of the Tullett

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41 *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978).


46 Statement of FTC Chairman Leibowitz, *supra* note 44.

The Prebon board. Tullett Prebon and ICAP would continue to offer competing electronic-brokerage services after the transaction. Tullett Prebon announced that ICAP’s former chief operating officer would be appointed to Tullett Prebon’s board and that ICAP would appoint another non-executive director to the board. The DOJ investigated, and on July 14, 2016, announced that Tullett Prebon and ICAP had restructured the transaction to address the DOJ’s concerns that the transaction would violate the rule against interlocking directorates. Under the restructured terms, ICAP does not own any part of Tullett Prebon and does not have any right to appoint a member of Tullett Prebon’s board.

Red Ventures and Bankrate (2017). The Red Ventures case shows that interlocking directorates may be a significant factor in finding a Section 7 violation. In July 2017, Red Ventures announced a planned acquisition of Bankrate. Both are marketing businesses focused on connecting consumers to service providers in a variety of industries. Bankrate operated Caring.com, which connected senior living facilities with potential customers. Red Ventures did not have a competing service—but two of its largest shareholders did. General Atlantic and Silver Lake Partners jointly owned Caring.com’s closest competitor, APlaceforMom.com (APFM). They also held a combined 34 percent stake and two of seven seats on the Red Ventures board and approval rights over two other board seats. Thus, had the transaction gone forward as planned, the owners of APFM would have held two of seven seats on the board of the parent company of its closest competitor. The FTC determined that this would increase the likelihood of, or facilitate, coordinated interaction between APFM and Caring.com in the market for third-party paid referral services for senior living facilities. The FTC required divestiture of Caring.com as a result.

Key Points for Identifying Potential Section 8 Issues as Part of the HSR Analysis

M&A-focused antitrust practitioners should take particular note of the Tullett Prebon and Red Ventures matters because the investigations of interlocking directorates arose from proposed transactions. Interlocking directorate issues could arise even from transactions that, on their face, do not otherwise suggest direct antitrust risk. For example, when a company enters a new industry or market segment through acquisition, it is likely to be viewed as non-problematic from a Section 7 perspective. But if a current director sits on the board of a competitor to the new business line, there could still be an issue, subject to the one-year statutory grace period. Thus, M&A practitioners should always investigate interlocking directorate issues in transactions involving

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52 Section 7, as amended by the Hart-Scott-Rodino Act (HSR), requires parties to transactions meeting certain size thresholds to provide advance notification to FTC and DOJ and observe a waiting period before closing.

companies that could meet the jurisdictional thresholds. Even if an interlock does not cross the relevant thresholds at the time of the transaction, the issue should be flagged and subject to monitoring or restructuring as the businesses develop.

As a practical matter, this likely means that M&A practitioners will need to gather and analyze information not otherwise required for HSR notification or analysis of competitive issues in the underlying transaction. Even a thorough investigation of HSR “associates” is unlikely to reveal all relevant interlock issues.

Also relevant to M&A practitioners is that the question of Section 8’s application to LLCs remains unresolved. Strictly speaking, Section 8 applies only to corporate directors—not LLC managers or equivalent positions—and LLCs are treated differently from corporations for the purpose of many procedural and technical aspects of the HSR regulations. AAG Delrahim noted, however, that while “courts have not directly addressed” the application of Section to LLCs, the DOJ “believe[s] the harm [to competition from an interlock] can be the same regardless of the forms of the entities.” Thus, if an LLC acquires another company and that results in an LLC member or manager holding a directorship (or equivalent position) with a competitor, that could raise concerns at the DOJ or FTC even if it is technically not a Section 8 issue. Indeed, Section 7 gives the agencies authority to challenge transactions where the effect “may be substantially to lessen competition,” and there is nothing to say that concerns about interlocking management would not inform the analysis.

Recent Comments from DOJ Leadership

It is worth quoting at length from AAG Delrahim’s May 1, 2019 address:

A different, related area that the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures. Section 8 of the Clayton Act generally prohibits a person from simultaneously serving as an officer or director of competing corporations that meet a size threshold unless certain de minimis exceptions apply.

This prohibition addresses the concern that a director or officer could exchange competitively sensitive information and coordinate business decisions between competitors. For officers and directors who find themselves in violation of Section 8, the statute provides them a one-year grace period to resign from their positions. The Division regularly encounters potential Section 8 violations and it is top-of-mind when reviewing transactions that involve interlocking directorates.

The use of the term “corporation” in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as limited liability companies or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional “corporation.” To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities.

Of course, we are familiar with the arguments both for and against interpreting the statute to apply to LLCs. It is not clear from our review of the legislative history that Congress intended to limit the appli-

54 The DOJ’s review of the Tullett Prebon-ICAP transaction, which involved non-U.S. companies, suggests that the DOJ has determined there is no ambiguity with respect to Section 8’s application to foreign corporations. DOJ Tullett Prebon Press Release, supra note 49.

55 For example, a person “controls” a corporation by holding 50% or more of the voting securities or by having the contractual right to appoint 50% or more of the directors. 16 C.F.R. 801.1(b)(1)(i); 16 C.F.R. 801.1(b)(2). A person “controls” an unincorporated entity by having the right to 50% or more of the profits or assets upon dissolution. 16 C.F.R. 801.1(b)(1)(ii).

56 Delrahim, supra note 2, at 4.
cation of Section 8 solely to corporations. Moreover, whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too. We are thinking about how to bring this thinking to Section 8 as well.57

On December 13, 2018, Deputy Assistant Attorney General Finch offered more of the Division’s perspective:

- The Antitrust Division is “looking at . . . interlocking directorate issues more closely,”
- The competitive risks of interlocks are “especially important in concentrated markets,”
- “As today’s tech platforms start competing against traditional industries and each other in new ways, this can create Section 8 . . . issues. Changes in technology and business strategy can cause two companies to become competitors in markets where they previously did not compete,” and
- “Changes in technology and business strategy can cause two companies to become competitors in markets where they previously did not compete.”58

Finally, before these two statements, in October 2018 Senate testimony, AAG Delrahim was asked to react to the then-recent appointment of three senior NBCUniversal executives to Hulu’s board of directors. Those appointments were made shortly after the expiration of the final DOJ and FCC restrictions imposed in 2011 on Comcast and NBCUniversal following their merger. (Comcast had obtained clearance to merge with NBCUniversal only by agreeing to relinquish management rights arising from its minority stake in Hulu, among other concessions.) Delrahim responded by confirming that the Antitrust Division will “examine carefully” whether those appointments pose competitive concerns—including Section 8 issues.59 That may not sound like much on its own, and in fact the competitive concerns specific to those board appointments are mooted by the announcement this May that Comcast will sell its interest in Hulu to Disney, with Comcast relinquishing its board seats and giving full operational control of Hulu to Disney immediately.60 Even so, Delrahim’s comment sparked interest because it suggested that the Division is focusing attention on interlocks—a suggestion that would soon be confirmed by the subsequent statements by DAAG Finch and AAG Delrahim.

The FTC has chimed in as well. In a blog post dated June 26, 2019, the Bureau of Competition offered a reminder that “there are unexpected restructuring and acquisition circumstances through which companies and their boards can wake up one morning to find themselves in a potentially problematic interlock situation.”61

Practice Pointers
Despite the recent commentary suggesting that new enforcement activity is coming, at the time of writing, no actions have been filed. But readers should be aware that the senior leaders at the

57 Id. at 4.
58 Finch, supra note 3.
59 Delrahim, supra note 4.
DOJ and FTC are thinking about the competitive harm caused by interlocks and that Section 8 is currently a live concern for U.S. antitrust enforcers.

Moreover, the recent comments suggest agreement at the federal enforcement agencies that interlocks between limited liability companies and other forms of corporate organizations that did not exist in 1914 pose the same threat of competitive harm as those between corporations. That raises other questions, too. What about limited partnerships that are large enough to meet the statutory thresholds? Or private equity firms with board appointment rights at portfolio companies that compete with each other?

We will not speculate about where the law and its enforcement will go next. But we do offer the following suggestions to practitioners:

- At any company large enough to meet the thresholds, ensure that corporate compliance policies include an antitrust component that sets out the Section 8 rules;
- Check each year for Section 8 compliance by surveying all directors and officers about service on other boards and tracking responses;
- Be aware of subsidiaries and affiliates’ businesses, and as the firm moves into new markets, whether by acquisition or organic product development, look for any new interlocks that arise as a result;
- Engage key employees in tracking new entrants into the firm’s product markets (think of the Apple-Google interlock, discussed above) to avoid missing an existing interlock with a company that has only recently become a competitor;
- In any transaction where board seats may change, include a Section 8 compliance check in the closing checklist; and
- Be aware that, even where there is no technical Section 8 violation, conflicts may arise from dual board service, potentially implicating some of the other statutes discussed above.
Without Burdening Legitimate Business Activity: Recent Proposals to Improve the FTC’s Investigative Process and Transparency

Svetlana S. Gans and John E. Villafranco

The Federal Trade Commission’s mission is to “[p]rotect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”1 The last clause of the mission statement—without burdening legitimate business activity—is getting renewed attention of late.

Chairman Joseph Simons has engaged the agency in a period of self-reflection through thoughtful public hearings on whether FTC law, enforcement priorities, and policies should be adjusted in light of the broad-based changes to the economy.2 One particular topic for examination is “whether the agency’s investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct.”3 Suggestions from public commenters have ranged from enhancing FTC Commissioner oversight to ensure the continued integrity of the investigatory process, to reducing investigatory burdens that disadvantage small companies.4 Important themes cited in submitted comments include enhanced agency transparency—in the investigatory and settlement negotiation processes and after a case has been closed5—as well as greater overall efficiency.6 Proponents of increased transparency have noted how such transparency would aid companies involved in the investigation process by providing

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3 See Notice of Hearings and Request for Comments, 83 Fed. Reg. 38,307, 38,310 (Aug. 6, 2018) (requesting public comment on “[w]hether the agency’s investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct” as an issue of particular interest to the Commission).
6 Id.
insight into the agency’s practices. They also have explained that additional information, such as more facts about why an investigation was closed, would help other companies understand how to implement practices compliant with the FTC’s expectations.

Others in the Commission are also echoing the calls for greater agency efficiency. For example, FTC Commissioner Christine Wilson noted that, while civil investigative demands (CIDs) are central to the staff’s ability to investigate, the agency should be sensitive to their costs and exercise its subpoena powers wisely. And, as the Office of General Counsel explained: “The FTC’s ability to obtain information through subpoenas and civil investigative demands (CIDs) is critical to the task of investigating potential law violations. The FTC uses this authority deliberately and responsibly, avoiding unnecessary burdens on businesses and individuals and consistent with our obligations to enforce the law.”

This article will consider recent proposed efforts to improve FTC processes with the objective of reducing regulatory burden and enhancing efficiency in consumer protection matters. It will also provide tips on working effectively with agency staff, recognizing that efficiency is a two-way street.

**Increased Transparency and Communication**

In response to the FTC’s request for public comments concerning the agency’s investigation, enforcement, and remedial processes, many commenters asserted that the FTC would benefit from increasing transparency around investigations, arguing that transparency in the investigatory process would allow for companies to better understand the expectations of the Commission, prior to, during, and after an enforcement proceeding.

Specific proposals to improve transparency include (1) publishing data on CIDs; (2) providing additional business guidance; (3) issuing a monetary remedies policy statement; and (4) making assessment reports publicly available.

**Publish Data on Civil Investigative Demands**

Several of the comments argued that it would be useful to the public if the FTC published more data regarding consumer-protection related CIDs—specifically, how many CIDs are issued, pursuant to which resolutions, and how many remain open at the end of each year. Commenters stated that providing more insight into the CID process, including how and why an investigation is initiated or closed, would help companies better understand the Commission’s reasoning for its efforts, increasing both Congressional and consumer confidence in the agency. As it currently

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7 See, e.g., Lawson et al., supra note 5, at 7–9; Dixon, supra note 5, at 13; Harris et al., supra note 5, at 4–5.
8 Id.
11 See, e.g., Lawson et al., supra note 5, at 13; Harris et al., supra note 5, at 4–5.
12 See, e.g., ACT | The App Association, supra note 4, at 2.
stands, consumers or petitioners who submit complaints to the FTC rarely know the outcome of their efforts.13 The FTC has often noted to Congress its need for additional resources to more effectively carry out its authority under the FTC Act.14 Some commenters opined that increased transparency would allow Congress to better assess the FTC’s use of resources.15 Such information would also provide Congress with confidence in knowing that the resources they allocate are being put to good use, and that the FTC would efficiently steward any additional resources it received.

Indeed, Chairman Simons and the Bureau of Competition recently launched a data project that tracks the duration of merger reviews and identifies causes of merger review delays to provide better information and accountability to the public.16 The data project tracks several merger review milestones including “when clearance is requested and obtained, when second requests issue, quick look submissions completed, important dates contained in timing agreements and when they trigger, dates of divestiture proposals, the certification of substantial compliances, and others.”17 Because merger review submissions cannot be publicly released due to HSR confidentiality requirements, the FTC intends to release aggregated data and analyze trends internally to improve accountability.18 A similar data tracking project could be developed within the Bureau of Consumer Protection.

**Issue Additional Business Guidance**

In addition to transparency in the CID process, commenters stated that the FTC should provide more industry guidance on emerging legal issues.19 With the vast majority of the FTC’s enforcement actions (and, in areas like privacy and data security, all or virtually all enforcement actions) being resolved via settlement, rather than litigation, companies have to rely on consent decrees for guidance on how to best comply with FTC’s expectations. Although these consent decrees can be helpful, their provisions usually reflect “fencing in” relief primarily applicable to a specific respondent rather than general Commission enforcement policy. More pointed guidance, especially as it applies to new media and technology, would help companies with their compliance efforts. According to one commenter:

> When the Commission seeks to broaden its policy interpretations, or enforce preexisting policies in novel ways or in new areas, issuing some form of public guidance well prior to pursuing enforcement actions serves an important and valuable notice function, enabling responsible companies to take measure of their own practices and to make adjustments as needed to conform with the FTC’s policy directives. This approach benefits not only companies subject to FTC oversight, but the Commission

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15 See ACT | The App Association, supra note 4, at 2.
17 Id.
18 Id.
19 See, e.g., Lawson et al., supra note 5, at 1–4 (suggesting that the Commission “use guidance as its primary tool for announcing new policy or enforcement positions”).
as well, because with relatively little expenditure of resources the Commission—through issuing guidance—can prompt voluntary changes in business practices. Subsequent enforcement actions could then be limited to firms that disregard the FTC’s public guidance.20

Providing guidance is especially important at a time where the digital landscape is rapidly changing; guidance can provide companies quicker insight into how the FTC is thinking about a certain novel topic rather than companies having to wait for an enforcement action to inform an opinion of the agency’s position.21 The FTC has done commendable work in the area of social media and influencer marketing, for example, by issuing warning letters, updated Enforcement Guides, and a blog post explaining legal requirements.22 These guidance documents provide important transparency regarding the agency’s expectations.

In 2017, the FTC launched its Stick with Security initiative to provide companies with more guidance concerning the measures companies should take to secure data, which was based in part on lessons learned from investigations that staff closed without taking action.23 While the FTC did not “disclose the identities of the targets of those matters unless there had been a public closing letter,” the agency issued the guidance believing “there is more we can do to explain for other companies the general principles that informed our thinking when we decided to close those investigations.”24 The FTC could expand this initiative to highlight compliance principles stemming from closed investigations in other areas, such as advertising and financial practices.

Provisional Guidance on “Reasonable” Data Security Practices
Commenters have suggested that the FTC provide additional guidance regarding “reasonable” data security practices.25 In 2015, the agency released Start with Security: A Guide for Businesses, which provided data security best practices based on 50 of the agency’s data security settlements.26 Specifically, the guidance provided ten suggestions for businesses, such as recommending “control access to data sensibly” and “apply sound security practices when developing new products.”27

Although the agency’s 2017 Stick with Security series provided more insight on reasonable data security practices from recent law enforcement actions and closed investigations,28 the agency has not updated its guidance—for example, the 2012 Privacy Report29—to reflect more recent

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20 See id. at 1.
21 Id.
22 See id. at 1–2.
25 Dixon, supra note 5, at 6.
27 Id.
data security enforcement or the increasingly complex online data landscape. Guidance in this area will help clarify the expectations for companies that collect and use consumer data. One commenter noted that clearer standards could be based on “FTC cases, industry best practices, NIST guidance, existing security audit knowledge, and other existing security tools.”

Additional guidance on the data security practices the FTC finds reasonable is especially important and timely in light of the Eleventh Circuit decision in LabMD striking the agency’s cease-and-desist order because it lacked sufficient clarity and precision to be enforceable. Given that the majority of FTC data security orders contain similar provisions, additional clarity would help define the type of data security practices the FTC considers reasonable.

**Issue a Monetary Remedies Policy Statement**

At present, the FTC’s methodology for calculating monetary remedies is not transparent. Companies involved in proceedings where the FTC seeks monetary remedies are left to guess at how the FTC approaches such calculations.

In 2003, the FTC issued a Policy Statement on Monetary Remedies in Competition Cases, outlining an analytical framework for the use of monetary remedies in federal court. In 2012, the Commission rescinded the Statement believing it created “an overly restrictive view of the Commission’s options for equitable remedies.” Instead, the Commission majority stated that the agency “will rely upon existing law, which provides sufficient guidance on the use of monetary equitable remedies,” and “will exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement.” In the lone dissent, then-Commissioner Maureen Ohlhausen stated that the withdrawal ran “counter to the goal of transparency, which is an important factor in ensuring ongoing support for the agency’s mission and activities. In essence, we are moving from clear guidance on disgorgement to virtually no guidance on this important policy issue.”

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30 Dixon, supra note 5, at 6.
31 LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018).
32 Commenters also asked the agency to define in more detail what constitutes an unfair practice. Dixon, supra note 5, at 5 (“If the Commission were to use its existing authority to define in more detail what constitutes unfairness, it would go a long way to establish clearer standards for companies and produce better results for consumers. The specifics in the consent decrees in these cases do not yet accomplish these objectives.”). One commenter also advocated for the codification of the unfairness standard. See Berin Szóka, Comments of Tech Freedom Response to Issue 11, 16 app. at i (2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0058-d-0024-155097.pdf.
35 Id.
On the consumer protection side, the clarity fares no better. Courts have questioned the FTC’s efforts to calculate damages, highlighting the need for additional guidance on how the agency calculates monetary remedies. Commenters have noted that the Commission has not provided sufficient guidance on whether equitable monetary relief should consider the value consumers received from the product or service at issue and whether sales to consumers who were not affected by the challenged conduct should be included, among other questions.

The ABA Antitrust Law Section has likewise called on the FTC to issue a policy statement setting forth the theories on which the agency seeks monetary relief. Such a statement could provide greater clarity on how relief is tethered to the alleged violations of law and consumer harms. This guidance would provide the FTC with a standard baseline, while giving companies more assurance of the FTC’s process. A monetary remedies policy statement can be a central output of the Remedies Task Force recently created by Chairman Simons.

Make Assessment Reports Publicly Available

Consent decree compliance has been a particularly relevant point of discussion during the FTC’s recent Congressional hearings, specifically concerning privacy and data security matters. Commenters have proposed that the FTC make audit reports of companies under consent decrees publicly available. Audit reports, they argue, will not only provide another avenue of accountability for the FTC in its enforcement efforts, they also will hold companies under consent decrees accountable for their actions, potentially avoiding repetition of past wrongs.

As commenters noted, audit reports are available via Freedom of Information Act requests but they are often heavily redacted, preventing companies and consumers from gaining information about a company’s specific efforts. The challenge here would be balancing the public interest in holding companies accountable with the legitimate confidentiality concerns of companies reporting compliance. Too much disclosure would almost certainly create a disincentive for companies to report their compliance activities fully and completely to the FTC’s Division of Enforcement.

Adopt Policies to Make the CID Process Less Burdensome

Several commenters asked the FTC to continue CID process reform. In April 2017, Acting Chairman Ohlhausen created Working Groups on Agency Reform and Efficiency to improve processes and focus resources. The groups were charged with considering factors intended to

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38 Lawson et al., supra note 5, at 10–11.


40 See Dixon, supra note 5, at 16.

41 Id.

42 Id.

43 See, e.g., Lawson et al., supra note 5, at 5–7; Szóka, supra note 32, at 3–6.

improve efficiency and reduce regulatory burden. In creating the groups, Ohlhausen noted that it was the Agency’s “duty” to carry out its mission “in the most effective and efficient way possible.”

Later that year, the Commission announced further reforms to address CIDs in consumer protection matters to:

1. Provide plain language descriptions of the CID process and develop business education materials to help small businesses understand how to comply;
2. Add more detailed descriptions of the scope and purpose of investigations to give companies a greater understanding of the information the agency seeks;
3. Limit the relevant time periods to minimize undue burden on companies;
4. Reduce the length and complexity of CID instructions for providing electronically stored data; and
5. Increase response times for CIDs to improve the quality and timeliness of compliance by recipients, where appropriate.

The agency also committed to adhere to its stated practice of communicating with investigation targets concerning the status of investigations at least every six months after they comply with a CID.

Despite these reform efforts, commenters asserted that the CID process is often over-inclusive, requiring immense company resources to develop a response and burdening the FTC with more information than is helpful or likely necessary. This process is especially burdensome on small businesses, which often do not have the resources to engage outside counsel or the internal resources necessary to comply with FTC requests.

**Tailoring FTC CID Requests**

Commenters stated that the FTC CID process should be more tailored to the potential harms the FTC has identified, which would make it easier for companies to comply and focus the FTC’s limited resources on efforts that will actually produce targeted investigative outcomes. The FTC should also limit its CID requests to those individuals who are most likely to be involved in any alleged wrongdoing and to information that is directly implicated in the potential harms, rather than seeking “all documents” that “refer or relate” to a certain issue.

**Setting a Benchmark for the Time Period for CID Requests**

Commenters also have asserted that FTC CIDs seek information for a longer time period than is necessary to properly determine whether wrongdoing has occurred. Establishing a reasonable

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46 Id.
47 Id.
48 Lawson et al., supra note 5, at 7.
49 ACT | The App Association, supra note 4, at 2.
50 Lawson et al., supra note 5, at 6–7.
51 Id.
52 Id.
relevant time period will allow companies to be more targeted in their responses, giving the FTC a better understanding of the exact issues it is looking to address.

Part of this effort also involves setting reasonable presumptive time periods. As one commenter noted, the FTC’s Model Second Request for antitrust merger investigations currently incorporates a default two- or three-year period, depending on the circumstances. The FTC, in 2017, announced a similar three-year period for consumer protection CIDs. Taking further steps to emulate the Second Request presumptive two- or three-year period would be welcome. If an investigation likely requires information for a longer time period, the FTC could extend that period as necessary. Commenters also asked the Commission to increase response times “where the agency has requested a large volume of materials and the respondent is producing materials on a rolling basis.”

Limiting Privilege Log Requirements

Commenters stated that the FTC should adopt a policy against requiring respondents to produce a full by-document privilege log, especially when an investigation does not have a direct connection to information that is likely to be privileged. Compiling privilege logs can be a burden, some with limited usefulness to the FTC if the information provided is not pertinent to the agency’s investigation.

Tips for Efficient Investigations and Results

Though several commenters have asked for agency investigative and transparency reforms, improved efficiency depends not only on the agency but on the parties’ cooperation with agency officials. If parties drag their feet in responding to information requests and submitting timely white papers, agency investigations will be slower. The following lists a few tips on working with the FTC staff efficiently and effectively.

- **Be Responsive and Diligent.** If you receive a CID, do not sit on your hands until the deadline is looming. Reach out within your company right away to ascertain the types and quantities of documents at issue and to drill down on the facts. According to Chairman Simons:

  A poor practice is not providing the staff information or access to documents in a timely manner—in other words, jamming the staff. This goes along with creating an atmosphere of distrust. . . . Meet with the staff early and be diligent in responding to their concerns. When the staff raises a concern with you, address it. Ignoring it is not likely to make the concern go away.

  Also, diligently build in time to fully inform staff, management, and the Commissioners. Submit white papers at least a week before your meeting(s). This is especially true at the Commission level. Often times, Commissioners receive white papers within 24 hours of meetings, providing little time to analyze the issues from the respondents’ perspective.

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53 Id. at 6.
55 Lawson et al., supra note 5, at 6.
56 Id. at 6–7.
● **Extensions for Responding to CIDs Are Often Granted.** It is a good idea to come to the meet and confer with a proposal for a rolling production and why the deadlines you propose are reasonable. Also, providing staff with at least some of the information on the CID return date demonstrates good faith.

● **Be Prepared for Common Questions.** Be prepared to discuss the organization of the company, location of relevant documents, and principal custodians. Also, be prepared to identify custodians who should be excluded, and explain why.

● **Be Knowledgeable About Your Company Data.** Take full advantage of the required meet-and-confer process by learning about the type and scope of responsive data that your company possesses. Come to the meet and confer prepared to discuss the substance of the case. Know how and where your company documents are stored, including electronic data. This is your opportunity to educate the staff about the information that your company possesses to potentially narrow the scope of the information request.

● **Be Respectful of the Process.** Do not skip over the agency staff directly to their Division management, Bureau management, an individual Commissioner, or the Chairman. The first question you will receive will be, “What did Staff say?” Staff is the first-line decision-maker in the process—whether it is on a simple matter such as a production extension, or on a more complicated one such as the final terms of a settlement agreement. As Commissioner Wilson recently stated, “Chain of command matters and generally works.”

● **Don’t Raise Novel Issues with Management.** In a similar vein, don’t “save” all of your best (or novel) arguments for management. According to Chairman Simons:

> Failing to make all your arguments to the staff, and then running to the Bureau Director to try to get the investigation closed when he is hearing your arguments for the first time, is a bad idea. The Bureau Director will have no idea what the staff thinks of those arguments because the staff hasn’t heard them before either. This does happen, and it creates a big mess. It’s the worst when you get to the Bureau Director’s meeting, and the staff is completely uninformed, they don’t have your documents, they haven’t heard your arguments, and they’ve been unable to test them.

● **Be Respectful of Staff and Management (Including Commissioners).** One would think this is common sense, but there have been several instances where company representatives disrespected staff, management, and even Commissioners at meetings. Being condescending never pays off.

The Bureau of Competition recently issued several practice tips that are equally applicable to working effectively with the Bureau of Consumer Protection. One blog post provided key tips on effective written advocacy that include clarity, brevity, and timeliness. Another blog post focused on the importance of not misrepresenting key facts of your case:

> We welcome zealous representation of clients. We expect that counsel practicing before the Commission will “play hard” on behalf of their clients. But Commission rules require fair play, so that Commission decisions are made on the basis of sound evidence. It is better to acknowledge and

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58 See Wilson, supra note 9.

59 See supra note 57.

address difficult facts, or to concede that your information may not be perfect, than to conceal or misrepresent the facts or overstate your knowledge.61

An additional blog post focused the importance of companies taking their compliance reports seriously.62 In sum, working effectively with agency staff boils down to treating people as you want to be treated in return.

Conclusion
The FTC’s mission statement envisions a balancing between protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices while, at the same time, taking steps to ensure that the regulatory burden does not bog down legitimate business activity. An investigation, by its definition, predates any determination of wrongdoing and should be undertaken in the most efficient manner possible. To its credit, the Commission is well-aware of this balancing requirement, as is most apparent from agency statements. This ongoing assessment should continue and efforts should be made to act on credible recommendations intended to improve the process. Parties can also do their part to make agency investigations more efficient, such as by diligently producing documents and being responsive to agency staff.
