Editor's Note: In this issue, we cover topics on the cutting edge of privacy, antitrust compliance, and privilege considerations and then venture farther afield to look at the present through the lens of the past in a review of the Paramount Decrees, and finally travel across the globe with a summary of recent competition law developments in China.

A Once and Future Federal Privacy Law?
As the collection, use, and sharing of personal data grows in amount and complexity, so too has the variety of privacy and security regulations. While companies have attempted to navigate through these regulations, some have been asking Congress to enact comprehensive federal privacy legislation that will provide consumers more rights, businesses more uniform obligations, and the FTC increased regulatory and enforcement powers. Former FTC Commissioner Maureen Ohlhausen and her colleagues Matthew Baker and Jonathan Duzak-Forestier explore the current landscape and the three current major federal privacy proposals, analyzing their potential benefits and potential pitfalls.

Interview with Jim Kohm, Associate Director, Division of Enforcement, FTC Bureau of Consumer Protection
Jim Kohm has been in the Division of Enforcement for over 15 years, currently as its Associate Director. Jim spoke with Source Editorial Board member Lydia Parnes to review his perspectives on enforcement activities during his career, including the recent $5 billion privacy settlement negotiated with Facebook by a team that Jim led.

More Carrot, Less Stick: The DOJ’s Evolution to Incentivize Antitrust Compliance Programs
The DOJ has long relied on blockbuster fines and its Leniency Program to incentivize companies to comply with the antitrust laws. Assistant Attorney General Makan Delrahim recently announced a new policy to incentivize companies through robust antitrust compliance programs. Eric Meiring explores this evolution and its implications for both the DOJ and companies.

Privilege Considerations in Second Requests
The U.S. antitrust agencies have increasingly emphasized the importance of timing and accuracy in complying with second requests during the HSR merger review process. The Antitrust Division, under its Model Timing Agreement from 2018, has placed increased pressure on merging parties to more precisely designate documents as privileged during initial productions or risk longer reviews. Philip Algieri recommends several strategies for satisfying the antitrust agency’s new demands while ensuring an efficient document review and production process.

The Paramount Decrees: Lessons for the Future
In 2019, the Antitrust Division filed a motion to terminate the Paramount Decrees, which have regulated vertical practices in the motion picture industry for the last seven decades. Barak Orbach critiques this decision from the perspective of history, exploring the Decrees’ continued significance, particularly on the topics of interdependence, facilitating practices, conspiracy inference, vertical relations, technological change, and structural and behavioral remedies.

China’s Recent Competition Developments: 2019 in Review
Last year marked a watershed moment for antitrust in China, bringing new interpretations and implementing regulations of the Antimonopoly Law, changes to the merger clearance process, the Social Credit System, and liberalization of investment laws. This occurred against the backdrop of the U.S.-China trade war. Philip Monaghan and Scott Schaeffer untangle this complicated situation and highlight developments that are most likely to impact foreign companies operating in China.
Although some say that the United States does not have a federal privacy law, that is—at best—a half-truth. Almost all companies have some existing federal privacy and data security obligations under the Federal Trade Commission Act and other sectoral-specific federal statutes. Outside of federal law, companies may be subject to the far-reaching EU General Data Protection Regulation (GDPR),1 and to a growing number of state laws, most notably the California Consumer Privacy Act (CCPA). As the collection, use, and sharing of personal data grows in amount and complexity, and consumers and businesses increasingly navigate a variety of privacy and security regulations, there has been a clamor for Congress to enact comprehensive federal privacy legislation that will provide consumers more rights, businesses more uniform obligations, and the FTC increased regulatory and enforcement powers.

To do so, Congress must resolve several controversial issues. Chief among them is how federal privacy obligations would interact with current and emerging state laws in a borderless online marketplace. At the same time, there is wide agreement on some goals for any federal privacy legislation. One is to provide consumers clarity and visibility into data collection, use, and sharing practices, as well as empower consumers with choices and rights regarding these practices. Another is to provide a national, uniform set of protections and consumer rights throughout the digital economy. A final goal is to strengthen the FTC’s enforcement powers, including the ability to impose large fines on companies that violate the new federal privacy obligations.

However, hard choices remain beyond these areas of convergence. Will all entities ultimately be subject to the same obligations or will common carriers and nonprofits, to the extent they currently escape FTC oversight, have different rules? Will the new detailed federal legislation broadly preempt state privacy laws or will states continue to forge their own paths when they do not directly conflict with the federal law? Who will enforce the law—the FTC alone or with the aid of state attorneys general? Will private rights of action be permitted?

This article will discuss current federal privacy law and survey the current three major federal privacy proposals. While it is difficult to predict whether a comprehensive privacy bill will pass, any assessment of what a future privacy bill may contain and its chance of success requires a firm understanding of current law, the points of convergence in the proposals, and the important areas of divergence that Congress will ultimately need to reconcile.

1 The GDPR is a data protection and privacy law in the European Union (EU) and the European Economic Area (EEA). It contains requirements relating to the processing of personal data of individuals and addresses the transfer of personal data outside the EU and EEA. The GDPR aims primarily to give individuals more control over their personal data and to simplify the regulatory environment for international businesses by unifying the regulation within the EU. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.
Current U.S. Consumer Privacy Framework

There are several federal statutes that address privacy concerns. For example, the FTC Act’s prohibition on unfair and deceptive acts or practices\(^2\) protects individual consumer privacy on a general level and has served as the primary basis for enforcement against privacy and security violations online and offline for decades. The FTC also enforces the Children’s Online Privacy Protection Act of 1998 (COPPA)\(^3\) and related regulations,\(^4\) which restricts collection and use of “personal data” pertaining to children under 13 by certain “covered operators” of websites and other online services without prior and “verifiable parental consent.”\(^5\)

Likewise, the Financial Services Modernization Act of 1999\(^6\) (Gramm-Leach-Bliley or GLB) regulates the use and dissemination of consumers’ “nonpublic personal [financial] information” (NPI)\(^7\) by broadly-defined “financial institutions.”\(^8\) Under GLB, the FTC has issued regulations regarding the protection of NPI and has enforcement authority except where it is specifically assigned to other regulators.\(^9\) Although not enforced by the FTC, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulates the use of “Protected Health Information” held by “covered entities” and certain business associates. The Department of Health and Human Service has civil enforcement powers and the Department of Justice can impose criminal sanctions for some violations. Though these examples cover different subject matter, they all share the same basic purpose: to regulate the collection, use, and security of certain types of personal information.

In addition to various federal privacy laws, every state has some form of breach notification law, and, at the time of this writing, approximately 35 have data disposal laws, 30 have statutes that address data security vis-à-vis the government, 25 have similar laws concerning private actors, and 26 have data privacy laws that have been enacted, passed, or are pending.

The most comprehensive state data privacy and security law is the CCPA, which became effective January 1, 2020.\(^10\) The first of its kind for the United States, the CCPA is designed to enhance California consumers’ privacy and control over how companies use their personal data by providing the rights of transparency, access, deletion, and to opt-out from the sale of personal information. To enforce these rights and associated compliance requirements, the CCPA creates two enforcement mechanisms: (1) the California Attorney General can enforce compliance and obtain injunctive relief and civil penalties, and (2) a private right of action for security breaches, which allows impacted California consumers to recover statutory or actual damages for a breach that results from a business’s failure to implement proper information security procedures and mechanisms.

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\(^3\) 15 U.S.C. §§ 6501 et seq.


\(^5\) Id. § 312.5(a)(1).


\(^7\) Id. § 6809(4) (“The term ‘nonpublic personal information’ means personally identifiable financial information—(i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.”).

\(^8\) Id. § 6809(3)(A) (“[A]ny institution the business of which is engaging in financial activities as described in section 1843(k) of title 12.”).

\(^9\) See id. §§ 6801–09, §§ 6821–6827.

\(^10\) CAL. CIV. CODE § 1798.100 et seq.
2019: The Year of Federal Privacy Proposals

Rapidly evolving privacy legislation and regulation, such as the CCPA and GDPR, have forced companies to consider how they collect, process, use, and share personal data from consumers. The CCPA, though limited by its terms to California residents, may have a wide impact outside the state’s borders as Californians engage in online commerce. Other state bills under consideration, such as those in Illinois, New York, and Washington, could have similar effects. The emergence of state privacy laws, existing federal laws that protect sectoral-specific privacy interests, the patchwork of data breach notification statutes, and foreign data privacy collection and transfer restrictions, have created a widespread belief that a comprehensive U.S. federal consumer privacy bill is overdue.

Hard on the heels of GDPR, the CCPA has nudged federal lawmakers into action, prompting them to propose a variety of federal bills. While several earlier bills were introduced, three federal privacy laws proposed in late 2019 have garnered the most attention. Two of these bills were introduced by members of the U.S. Senate Committee on Commerce, Science, and Transportation. The Consumer Online Privacy Rights Act (COPRA) was introduced by Senator Cantwell (D-WA), Ranking Member of the Commerce Committee, on November 26, 2019. Shortly thereafter, the U.S. Consumer Data Privacy Act of 2019 (CDPA) was introduced by Commerce Committee Chairman Senator Wicker (R-MS) on November 29, 2019. Finally, the House released an untitled bipartisan privacy bill drafted by the House Energy and Commerce Committee (E&C Draft) on December 18, 2019.

These bills share a focus on transparency, limits on data use, and individual consumer rights, but differ in their approach on numerous key areas, such as enforcement mechanisms and the hotly contested issue of federal preemption. For example, COPRA would coexist with state privacy laws to the extent that they do not directly conflict with any of its provisions, while CDPA would replace all state data privacy laws. We discuss below how each of the key areas are dealt with in the three legislative proposals.

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14 See, e.g., Online Privacy Act of 2019, H.R. 4978, 116th Cong. (1st Sess. 2019) (includes individual privacy rights, requires comprehensive privacy and security requirements, and proposed a new federal agency—the United States Digital Privacy Agency—to enforce the Act); Designing Accounting Safeguards to Help Broaden Oversight and Regulations on Data Act, S. 1951, 116th Cong. (1st Sess. 2019) (requires data harvesters, like social medial platforms, to inform consumers and financial regulators of the data they collect and if the data is being leveraged by the platform for profit); American Data Dissemination Act of 2019, S. 142, 116th Cong. (1st Sess. 2019) (proposes a national consumer data privacy law that protects both consumers and the innovative capabilities of Internet economies and places much of the regulatory burden on the FTC).
18 In other words, COPRA would set minimum standards upon which states could build—a concept that is sometimes referred to as “floor preemption.”
19 That is, CDPA expressly preempts any and all state laws seeking to regulate the same area.
Principal Federal Privacy Proposals

All three proposals enumerate: (1) the covered organizations to which the requirements and provisions apply; (2) the specific types of personal data covered; (3) the protected individuals and the rights they have with respect to the covered data; and (4) enforcement powers and rule-making.

**Covered Entity.** COPRA applies to any entity or person that (1) is subject to the FTC Act and (2) processes or transfers covered data.\(^{20}\) The E&C Draft's definition of “covered entity” extends the definition out slightly to include common carriers\(^{21}\) and nonprofit organizations,\(^ {22}\) which are otherwise exempt from FTC jurisdiction. CDPA goes further still and extends coverage to “any person who operates in or affects interstate or foreign commerce.”\(^ {23}\) The breadth of CDPA means that, in addition to common carriers (carrying out common carriage activities) and nonprofits, entities like Internet Service Providers, which are not currently considered common carriers, would be included alongside social media and search engines that collect similar types of personal data. COPRA’s limitation to entities subject to the FTC Act is notable given efforts by the Obama-era Federal Communications Commission to reclassify broadband as a common carriage service.\(^ {24}\)

All three bills contain special provisions intended to reduce the burden on small businesses. While the definitions of “small business” are similar under the three proposals, each one treats them differently. Under COPRA and CDPA, a “small business” is any covered entity that did not, in the preceding three calendar years, (1) exceed $25 million in annual revenue; (2) annually process covered data of 100,000 or more individuals, households (COPRA only),\(^ {25}\) or devices; or (3) derive 50 percent or more of its annual revenue from transferring covered data.\(^ {26}\) The E&C Draft’s definition is narrower in that a covered entity may not have processed the personal data of 50,000 or more individuals to qualify, and, like CDPA, does not include households.\(^ {27}\)

COPRA excludes small businesses from its requirements entirely,\(^ {28}\) whereas CDPA only excludes a small business from individual control and data minimization requirements,\(^ {29}\) which are discussed below under “Consumer Rights” and “Data Minimization,” respectively. In an interesting provision that seems to reflect some aspects of COPPA, the E&C Draft provides that small businesses would be able to apply to the FTC for approval of self-regulatory guidelines rather than granting flat exclusions like those in COPRA and CDPA.\(^ {30}\) A small business in compliance with such FTC-approved guidelines would be deemed in compliance with the law,\(^ {31}\) although approval may be withdrawn under certain circumstances.\(^ {32}\)

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\(^ {20}\) COPRA § 2(9).
\(^ {21}\) Common carriers in telecommunications are entities that provide wired and wireless communication services to the general public for a fee.
\(^ {22}\) The E&C Draft § 17(7).
\(^ {23}\) CDPA § 2(8).
\(^ {24}\) The FCC’s effort at reclassification, which was upheld by the D.C. Circuit, was rescinded by the current FCC. See U.S. Telecom Ass’n v. FCC, 359 F.3d 554 (D.C. Cir. 2016).
\(^ {25}\) CDPA does not include “households.” See CDPA § 108(d).
\(^ {26}\) COPRA §§ 2(9)(C), 23; CDPA § 108(d).
\(^ {27}\) The E&C Draft § 13(a)(1).
\(^ {28}\) COPRA § 2(9)(C).
\(^ {29}\) CDPA § 108(d).
\(^ {30}\) The E&C Draft § 13(a)(1).
\(^ {31}\) Id. § 13(a)(5).
\(^ {32}\) Id. § 13(a)(3)(C).
Finally, CDPA and the E&C Draft each require data brokers\(^33\) to register annually with the FTC.\(^34\) The former mirrors the provisions of the CCPA\(^35\) and requires data brokers to provide their name, physical address, email, and website.\(^36\) It also requires them to pay a $100 registration fee and imposes penalties for non-compliance.\(^37\) The E&C Draft requires the FTC to create a centralized web-based registry of data brokers\(^38\) “that process covered information [of more than 5,000 individuals per year].”\(^39\) It must be accessible to the general public to allow consumers to identify the companies that hold their data and how they can exercise their rights to access, correct, and delete data held by brokers.\(^40\) Data brokers must place a “clear and conspicuous notice” to consumers on their website identifying themselves as such.\(^41\) It also requires them to provide more detailed information to the FTC than that required by CDPA, which will be included in the registry.\(^42\) The E&C Draft calls for a $15,000 annual registration fee but is silent on penalties for non-compliance.\(^43\)

**Covered Data.** Under COPRA, “covered data” encompasses information that “identifies, or is linked or reasonably linkable to an individual or consumer device, including derived data,”\(^44\) which is covered data created based on assumptions about an individual, household, or device.\(^45\) For example, a company may employ machine learning algorithms to draw inferences about an individual from collected data, such as preferences, intelligence, or a psychological profile. Notably, de-identified data,\(^46\) employee data, and public records are excluded from covered data.\(^47\) However, by including derived data linkable to a household, COPRA is broader than the typical federal definition of personal data and, in that way, similar to the broader sweep of the

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\(^33\) CDPA defines a data broker as “a covered entity that knowingly collects or processes on behalf of, or transfers to, third parties the covered data of an individual with whom the entity does not have a direct relationship.” CDPA § 2(9). The E&C Draft, on the other hand, has somewhat broader terms: “(A) a covered entity that regularly collects, assembles, or maintains covered information and sells or licenses to a third party or is otherwise compensated for disclosing such information for the third party’s own purposes; and (B) does not include a commercial entity to the extent that such entity processes information collected by and received from a third party concerning individuals who are current or former customers or employees of the third party to provide benefits to the employees or directly transact business with the customers.” The E&C Draft § 17(12).

\(^34\) CDPA § 203(a)–(b); the E&C Draft § 10(c)(1).

\(^35\) CAL. CIV. CODE § 1798.99.80(d).

\(^36\) CDPA § 203(b)(2).

\(^37\) Id. § 203(c).

\(^38\) The E&C Draft refers to them as “information brokers” except in one instance (Section 3(a)(1)(H)). For purposes of comparison we refer to them as data brokers throughout.

\(^39\) The E&C Draft § 10(c)(1).

\(^40\) Id. § 10(c)(2).

\(^41\) Id. § 10(a).

\(^42\) Id. § 10(c).

\(^43\) Id. § 10(d)(2).

\(^44\) COPRA § 2(8)(A).

\(^45\) Id. § 2(11).

\(^46\) De-identified data is defined as information that cannot reasonably be used to infer information about, or otherwise be linked to, an individual, a household, or a device used by an individual or household, provided that the entity (A) takes reasonable measures to ensure that the information cannot be reidentified or associated; (B) publicly commits to process and transfer the data in de-identified form and not attempt to reidentify or associate the data; and (C) contractually obligates any person or entity that receives the information to comply with all the requirements. Id. § 2(10).

\(^47\) Id. § 2(8)(B).
CCPA. Although CDPA uses a similar standard to define covered data (“identifies or is linked or reasonably linkable”), it does not extend the definition to “households” and excludes aggregated data\(^48\) and publicly available information.\(^49\) The E&C Draft defines “covered information” as any information that is “linked or reasonably linkable to a specific individual [or consumer device],”\(^50\) making it similar to CDPA, though it contains exclusions more like those in COPRA.\(^51\)

Notably, all three proposed bills exclude employee data and de-identified data from the definition of covered data, although CDPA also excludes aggregated data.\(^52\) CDPA further excludes publicly available information, which is broader than COPRA’s exclusion of public records. This difference is important in connection with the ability to use personal data from social media posts, many of which are publicly available information\(^53\) but would not qualify as public records.\(^54\) The E&C Draft does not exclude public records or publicly available information from the definition of covered data. However, covered data that is in the public record may be exempted under the section addressing individuals’ rights with respect to their data.\(^55\)

The bills also separately define “sensitive covered data.” While all three proposals include commonly identified sensitive elements similar to those found in the CCPA and GDPR, such as religious, political, or sexual information; health information; biometric information; and financial information,\(^56\) COPRA extends to several other unique elements, including (1) the metadata of private communications; (2) email addresses and phone numbers; and (3) information regarding online activities over time and across third-party websites or online services.\(^57\) All three allow the FTC to designate other covered data as “sensitive” through its rulemaking authority.\(^58\)

Processing or transferring sensitive data requires affirmative express consent under all three bills (though it is referred to as “express, affirmative consent” in the E&C Draft) and each includes a non-exhaustive list of common types of sensitive biometric information.\(^59\) CDPA also enumerates sensitive behavioral qualities from which identity could be established (e.g., sleep or exercise data),\(^60\) whereas COPRA and the E&C Draft only contemplate physical qualities. COPRA, though, provides exclusions with respect to some basic physical characteristics (e.g., height, weight, hair color, and eye color) to the extent that they are not used as biometric information.\(^61\)

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\(^{48}\) Aggregated data means “information that relates to a group or category of individuals or devices that does not identify and is not linked or reasonably linkable to any individual.” CDPA § 2(7)(D).

\(^{49}\) Id. § 2(7).

\(^{50}\) The E&C Draft § 17(8)(A)(i).

\(^{51}\) Id. § 17(8)(A)(ii).

\(^{52}\) “[A]ggregated data’ means information that relates to a group or category of individuals or devices that does not identify and is not linked or reasonably linkable to any individual.” CDPA § 2(7)(D).

\(^{53}\) The term “publicly available information” is defined to be inclusive of public records, and, generally, any information that is “widely available to the general public,” such as on a website or otherwise through the internet. CDPA § 2(7)(G).

\(^{54}\) COPRA defines public records to mean “information that is lawfully made available from Federal, State, or local government records.” COPRA § 2(19).

\(^{55}\) See the E&C Draft § 5(a)(4).

\(^{56}\) See COPRA §2(20); CDPA §2(20); the E&C Draft § 17(22).

\(^{57}\) COPRA § 2(20).

\(^{58}\) Id. § 2(20)(N); CDPA § 2(20)(M); the E&C Draft § 17(22)(B).

\(^{59}\) COPRA §§ 105(c)(1)–(2), 2(3); CDPA § 104; the E&C Draft § 6(d)(2).

\(^{60}\) CDPA § 2(3).

\(^{61}\) COPRA § 2(3).
**Consumer Rights.** Consumers are afforded the rights to access, delete, and correct inaccuracies in their covered data under all three proposals, though CDPA is the only bill that gives the covered entity the option to *delete or de-identify.* All three proposals also give consumers the right to obtain the identity of any third party to which a covered entity transferred covered data, along with the purpose for such transfer. Under COPRA and CDPA, requests to delete or correct covered data must be transmitted to any third-party recipients. The E&C Draft, however, does not explicitly extend the rights to delete and correct to third parties (although the bill requires companies to respond to requests received from third parties on the consumer’s behalf). In addition, COPRA and CDPA provide consumers a right of “portability,” meaning consumers may obtain a copy of their covered data from the covered entity.

CDPA and the E&C Draft both contain deadlines for companies to respond to consumer requests: 45 days—and, in the case of the E&C Draft—the possibility of an additional 45-day extension. CDPA is the only bill that limits the number of consumer requests to two in a 12-month period. COPRA does not address timing or frequency other than to state that companies must take the applicable action upon receiving a verified request.

COPRA allows consumers the right to opt-out of having their personal data disclosed, released, shared, disseminated, sold, or licensed to other entities, while CDPA more broadly gives them the right to opt-out of processing and transfer of personal data. The E&C Draft allows consumers to opt-out if they do not want a company to process their covered information for first-party marketing purposes. As discussed above, all three proposals require affirmative express consent before processing or transferring sensitive covered data and a covered entity must provide some easy means by which a consumer may withdraw consent.

Uniquely, the E&C Draft entitles an individual to access their consumer profile or consumer score, the source of their consumer score, and how the score will be used to make decisions about them. A consumer score is a numeric value or categorization used to rate, rank, or seg-

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62 Id. §§ 102(a), 103–104; CDPA § 103(a); the E&C Draft § 5.
63 CDPA § 103(a)(1)(C).
64 COPRA § 102(a)(2); CDPA § 103(a)(1)(A); the E&C Draft § 5(a)(2)(C).
65 COPRA §§ 102(a), 103–104; CDPA §§ 103(a)(1)(B)–(C).
66 The E&C Draft § 5(c)(1)(C)(i).
67 COPRA § 105(a); CDPA § 103(1)(D).
68 Id. § 103(a)(1); the E&C Draft § 5(c)(1)(C).
69 CDPA § 103(a)(2).
70 COPRA § 102(a).
71 Id. § 105(b).
72 CDPA § 104(d).
73 The E&C Draft § 6(c).
74 COPRA § 105(c)(1)–(2); CDPA § 104; the E&C Draft § 6(d)(2).
75 COPRA § 105(c)(3); CDPA § 104; the E&C Draft § 6(e)(2).
76 Defined as “any covered information, including covered information resulting from any form of processing of an individual’s covered information” and inferences drawn therefrom, “used to create a profile about the individual reflecting” certain characteristics of the individual.
77 See id. § (17)(5).
78 Id. § 5(a)(2)(F).
ment an individual or to predict certain characteristics of the individual. For example, a company might use information from a social media profile to create a numeric value for reliability or trustworthiness, and then use that value to determine whether to provide certain services. This provides access rights that are significantly broader than COPRA or CPDA, as the inferred data contained in such scores or reports often covers individual preferences, pre-dispositions, behaviors, attitudes, intelligence, aptitudes, fitness, abilities, interests, reliability, location, movements, or other such characteristics.79

Transparency. The three proposals impose similar transparency requirements on covered entities regarding the content and posting of privacy policies, though with a few notable differences.80 All three require a covered entity to post a detailed privacy policy easily understood and readily accessible by consumers. COPRA, for example, requires the following information to be posted: (1) how to contact the company regarding privacy issues; (2) the categories of data collected and the purpose for collecting it; (3) whether the company transfers covered data and, if so, each category of service provider and third party to which it transfers the data, the identities of the third parties, and the purposes for the transfer; (4) the length of time the company will retain the covered data; (5) the company’s retention, data security, and minimization policies; (6) how individuals can exercise their rights under COPRA; and (7) the effective date of the privacy policy.81

Pursuant to COPRA and CDPA, covered entities are prohibited from making changes to the posted policy that would materially weaken the protection of previously-collected covered data or the consumer’s ability to exercise applicable rights without first obtaining “affirmative express consent” from affected consumers.82 COPRA requires a company to include each category of service provider and third party to which it transfers covered data and also requires disclosure of the specific identity of third-party recipients. CDPA requires a company to disclose the identities of affiliates to which it may transfer data but only the categories of third-party recipients.83 Likewise, the E&C Draft only requires disclosure of the categories of recipients.84 Furthermore, while the E&C Draft’s transparency requirements regarding a covered entity’s privacy policy are substantially similar to those in CDPA, it incorporates language regarding consumer scores,85 as explained above, and requires data brokers and large companies86 to pay a fee and file more detailed privacy policies with the FTC.87

Data Minimization. Similar to principles of data minimization found within GDPR,88 COPRA limits the collection and processing of covered data to that which is “reasonably necessary, proportionate, and limited” to carry out the specific processing purposes and transfers specified in

79 Id. § 17(4), (5).
80 See COPRA § 102(b); see also CDPA §§ 102(a)–(b); the E&C Draft § 3(a)(1).
81 COPRA § 102(b).
82 Id. § 102(d); CDPA § 102(d).
83 See COPRA § 102(b)(3).
84 See the E&C Draft § 3(a)(1)(G).
85 Id. § 3(a)(1)(D)(iv).
86 Id. § 3(a)(2) ("Each covered entity that either has annual revenue in excess of [$250,000,000] in the prior year or that processes covered information of more than [10,000,000] individuals [or consumer devices] in the prior year.").
87 Id. § 3(a)(2), (b).
88 The principle of data minimization involves limiting data processing to only what is required to fulfill the specific purpose for which the data was originally collected.
the privacy policy or for which the covered entity has obtained affirmative express consent.\textsuperscript{89} For example, to fulfill an online product order, data minimization requires a business to collect only the personal information necessary to process the order and deliver the product, such as contact, delivery, and payment information. Collecting personal information wholly unrelated to the order, such as political affiliation, would be improper. CDPA uses similar language, but includes product improvement as an acceptable purpose.\textsuperscript{90} Under the E&C Draft, the FTC would be responsible for drafting rules that require companies to retain data for only as long as “reasonably necessary for the purpose for which the data is processed,” as well as ensure that covered information is only disclosed to third parties under certain conditions.\textsuperscript{91} However, unlike COPRA and CDPA, this proposal does not address data minimization explicitly.

**Data Security.** COPRA and CDPA directly establish a requirement that a covered entity must maintain reasonable data security practices,\textsuperscript{92} whereas the E&C Draft relies on the FTC to issue information security regulations and guidance.\textsuperscript{93} Under COPRA, these practices must include, at a minimum, assessing vulnerabilities, taking preventive and corrective actions to mitigate vulnerabilities (which may include implementing administrative, technical, or physical safeguards), disposing of data when required, and training employees with access to covered data on safe data handling practices.\textsuperscript{94} CDPA requires similar practices, but appears to limit the requirement to sensitive covered data.\textsuperscript{95}

**Duty of Loyalty.** Under COPRA, organizations would be bound by a duty of loyalty, which prohibits covered entities from engaging in deceptive or harmful data handling practices.\textsuperscript{96} Although not explicitly referenced as a “duty of loyalty,” CDPA also prohibits covered entities from engaging in deceptive and harmful data practices by reference to the FTC Act.\textsuperscript{97} The E&C Draft, however, remains silent on any explicit or implicit duty.

**Oversight/Civil Rights.** To oversee compliance and protection efforts, COPRA requires organizations to appoint a privacy and data security officer responsible for implementing a comprehensive data privacy program and conducting annual data risk assessments.\textsuperscript{98} Additionally, companies that use algorithmic decision-making to determine the placement of advertisements for housing, jobs, credit, or educational opportunity based on collected covered data would be required to conduct an annual impact assessment to determine whether the system produces discriminatory results based on protected categories (e.g., race, color, religion, national origin, gender, sexual orientation, disability).\textsuperscript{99} Companies would similarly be required to designate privacy

\textsuperscript{89} COPRA § 106.
\textsuperscript{90} See CDPA §105(a)(1).
\textsuperscript{91} The E&C Draft § 7.
\textsuperscript{92} See COPRA § 107; see also CDPA § 204.
\textsuperscript{93} See the E&C Draft § 9.
\textsuperscript{94} See COPRA § 107.
\textsuperscript{95} CDPA §204(b).
\textsuperscript{96} See COPRA § 101.
\textsuperscript{97} CDPA § 401(a)(1).
\textsuperscript{98} COPRA § 202.
\textsuperscript{99} Id. § 108.
officers and data security officers to oversee compliance with CDPA. The E&C Draft requires all data breaches to be reported to the FTC with supporting information about the company’s security policies.

**New Bureau.** COPRA directs the FTC to establish a new bureau to assist it with exercising its authority under the act. Similarly, the E&C Draft requires the FTC to create a distinct division (in this case, the “Bureau of Privacy”). Its purpose would be to enable the FTC to issue regulations requiring companies to establish privacy programs and implement data security measures that support the size, nature, scope, and complexity of the company’s data activities. CDPA is silent on the matter.

**Enforcement.** All three bills grant enforcement power to the FTC and state attorneys general with similar terms. COPRA, however, is currently the only bill that provides consumers with a private right of action. Enforcement under COPRA would extend to the FTC, the state attorneys general, and consumers. The FTC can initiate or intervene in, and supervise the litigation of, any civil action brought under COPRA. The FTC must “notify the [state] Attorney General of any such action . . . or request that the Attorney General commence, defend, or intervene in any such action” or appeal on the FTC’s behalf. The FTC can impose civil penalties to be used for consumer redress. In addition to FTC enforcement, a state can bring a civil action on behalf of its residents to enjoin violations, enforce compliance, and obtain damages, civil penalties, or other compensation. If possible, the state is required to notify the FTC in writing before initiating a civil action and provide a copy of the complaint.

Finally, COPRA would provide consumers a private right of action to enforce their privacy rights under the statute. Courts may award prevailing consumers statutory, actual, or punitive damages, attorneys’ fees, and any other relief that the court deems appropriate. Although CDPA and the E&C Draft also provide enforcement authority to the FTC and state attorneys general, they do not provide for a private right of action.

**Preemption.** The issue of whether a federal privacy law should preempt all state privacy laws is a significant point of contention, which both COPRA and CDPA address directly. COPRA provides for limited preemption of state laws, displacing them only to the extent that they directly con-

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100 See CDPA § 301.
101 The E&C Draft § 9(a)(4).
102 COPRA § 301(a)(1).
103 The E&C Draft § 14.
104 Id. § 9.
105 COPRA § 301(a)–(c).
106 Id. § 301(a).
107 Id.
108 Id. § 301(a)(3)(B).
109 Id. § 301(b).
110 Id. § 301(c)(2).
111 Id. § 301(c).
112 Id.
113 Id.
114 See CDPA §§ 401–402; see also the E&C Draft § 15.
Conflict with COPRA or a rule or regulation promulgated under it.\textsuperscript{115} This creates potential compliance hurdles for covered entities operating in jurisdictions with conflicting state laws (i.e., state laws that may not conflict with COPRA, but that conflict with each other). CDPA, however, expressly preempts all state laws related to data privacy save for data breach notification laws, creating a more uniform compliance approach to privacy for covered entities.\textsuperscript{116} The E&C Draft does not currently address preemption.

Though COPRA generally preempts directly-conflicting state laws, it specifically preserves certain categories of state laws, such as data breach notification laws, laws protecting civil liberties, and consumer protection statutes of generally applicability (e.g., those that protect against unfair and deceptive practices).\textsuperscript{117} It also prevents preemption of “Federal or State common law rights or remedies, or any statute creating a remedy for civil relief.”\textsuperscript{118} Conversely, CDPA replaces all state laws “related to the data privacy or security and associated activities of covered entities,” other than breach notification laws,\textsuperscript{119} effectively deleting the CCPA and all other state privacy laws and rendering any current enforcement actions thereunder moot.

The Elusive Federal Privacy Law

The net benefit to consumers of any privacy law turns on a number of factors: the breadth of the rights, protections, and remedies it provides; the extent to which the law impairs business operations and negatively affects consumer services and market competition; the extent of the FTC’s enforcement authority; and, finally, the availability of resources to enforce the law.

Consumers may benefit from a uniform federal privacy law with transparency requirements, robust security provisions, ample rights, and strong limitations on the use of their personal data. In addition, a single set of rules that apply independent of location will provide uniformity and simplicity for consumers. Conversely, a patchwork of state privacy laws may confuse consumers while undermining their confidence and certainty as to how businesses handle their personal data. If consumers are inundated with different mechanisms that vary by applicable state law, exercising informed choices will become even more laborious, causing fatigue and indifference.

Moreover, if compliance is overly burdensome for companies due to multiple or even conflicting state laws, an unfettered private right of action, and an unnecessarily broad federal law, it could ultimately harm consumers. Severe restrictions may slow innovation, create barriers to entry, and even cause competitors to exit the market. Alternatively, companies could simply block users who are in states where the cost of compliance with privacy laws and the risk of liability outweigh the benefit of doing business there. Companies might also pass increased expenses on to consumers by making changes that reduce the quality of their services or moving to a fee-based model. Finally, poorly drawn or conflicting laws could negatively impact research that relies on the use of large sets of personal data. This, in turn, would stifle progress and have a significant long-term negative impact on innovation.

Thus, it will benefit all parties for Congress to create a strong unified nationwide standard for consumer data privacy and security that is flexible enough to accommodate rapidly developing

\textsuperscript{115} COPRA § 302(c).
\textsuperscript{116} CDPA § 404.
\textsuperscript{117} See COPRA § 302(b).
\textsuperscript{118} Id. § 302(d).
\textsuperscript{119} CDPA § 404(a)–(b).
technology. To be effective, a new law will need to give the FTC expanded enforcement powers and additional resources. Enabling state officials to enforce the new law along with the FTC would help to mitigate the overtaxing of federal resources.

Difficult choices remain, however, about the extent of federal preemption and private rights of action. Though it is hard to imagine any comprehensive bill forthcoming during an election year, concern about privacy and the threat of conflicting state laws will continue to drive talks in Washington. Unless Congress converges on an approach, a comprehensive federal privacy law will always remain in the future and achieving the goal of improved consumer protections paired with greater certainty for business will remain elusive.

**Postscript**

There is no doubt that the COVID-19 pandemic has affected the public debate on privacy regulation and that these events will influence Congressional efforts to enact a federal privacy law. Perspectives on the benefits and risks of data sharing and the need for a uniform federal approach may change as governments, businesses, and individuals alike focus on stopping the spread of the virus. This article, however, was written prior to the onset of the COVID-19 pandemic and thus does not assess the potential impact that it may have on consumer data privacy.
Interview with Jim Kohm, Associate Director, Bureau of Consumer Protection, Division of Enforcement, Federal Trade Commission

Editor’s Note: Jim Kohm is the Associate Director for Enforcement in the FTC’s Bureau of Consumer Protection. Jim has held several positions in BCP, including Acting Associate Director of the Division of Marketing Practices and BCP Chief of Staff. This past year, he led the team that negotiated the $5 billion privacy settlement with Facebook.

The interview was conducted by Lydia Parnes for The Antitrust Source on January 29, 2020. Lydia is co-chair of the privacy and cybersecurity practice at Wilson Sonsini, a former Director of the Bureau of Consumer Protection, and a member of the editorial board of the Source.

THE ANTITRUST SOURCE: Jim, thank you so much for taking the time to talk to us. Before we move into substance, could you tell us what brought you to the Federal Trade Commission and what your career has been like since you’ve been here?

JIM KOHM: I was teaching in a clinic in legal services for seven years, a job I loved for six of those years. Doug Wolfe, whom I have been working with for over 20 years, was a supervisor with me in that clinic, and as he left for a position at the FTC, I said, “Well, if you really like it, give me a call.” He called six months later and said, “There’s a position open, and it’s really great here.”

I wanted to stop supervising people. I wanted to litigate bigger cases on which I would have more time to think and write. But I was very nervous about coming to the government because I didn’t want to have to deal with a lot of red tape. I met Eileen Harrington, who was a breath of fresh air, an amazing person, and I wanted to work for her, so I came to the FTC.

I’ve had four jobs at the agency. I worked for Eileen for two years as a litigator in the Division of Marketing Practices, and I loved it. I had a huge amount of support.

JIM KOHM: After two years of litigating cases I became an Assistant Director in DMP and then, when Eileen took a sabbatical, I served as Acting Associate Director. When Eileen came back, and then I worked for you, Lydia, for a year as what was technically chief of staff but was in actuality an acting deputy director. Then a position opened up in the Enforcement Division. I have been here 15 years and have loved pretty much every minute of it.

ANTITRUST SOURCE: It is an impressive stretch.

The Enforcement Division has responsibility for a mix of issues. How would you describe the Division’s mission and priorities?

JIM KOHM: We basically have three areas of responsibility. First, we manage over 20 Rules and Guides. That means we stay on top of developments in a variety of different industries and update these Rules and Guides as needed.
This is also the basis of our second mission—bringing de novo cases. Specifically, our internal subject matter jurisdiction is based on our Rulemaking responsibilities. For example, we bring environmental cases because we have responsibility for the Green Guides, Made in the USA cases because we have responsibility for the Made in the USA Enforcement Policy Statement, and we bring energy cases because we have responsibility for the Energy Guide and R-Value Rules.

Finally, we are responsible for order enforcement. Historically, we were not very good at enforcing our orders; there has been an evolution in this area going back to Tim Muris when he was Bureau Director in the 1980s and continuing with Janet Steiger when she was Chairman. As Bureau Director, you saw strong order enforcement as an important priority and tasked me with creating an order enforcement program, which has been very successful.

About half of our litigation involves order enforcement. One of the best things about that responsibility is we’re not limited by subject matter. Right now, we have a trial in Greenbelt, Maryland challenging a huge land scam in Belize; we just filed cases involving dietary supplements in Maine and in Baltimore; and we recently filed a case in Arizona challenging a pyramid scheme. We get to do a bit of everything—and I know we’ll talk more about this later—but we just completed a fairly large privacy case against Facebook.

ANTITRUST SOURCE: Given the breadth of the Division’s responsibilities, as well as your 15-year tenure running the Division, you’ve had the opportunity to work with several different Commissions. Have you seen any significant changes in the Commission’s consumer protection priorities over these 15 years?

JIM KOHM: Yes and no. You once told me—and I think this is absolutely true—that as different political parties come into power and the leadership at the FTC changes, our focus may change a bit, but at least since the 1980s, that change has been within a range that everybody agrees on. At one time we may focus more on environmental claims, and at another we may focus more on pyramid schemes. Some of that may be the result of the agency’s leadership; some may be what’s going on in the marketplace. But, within this range that is broad but defined, we don’t change that much. There’s a lot of agreement on the basics and the basics remain pretty much the same.

ANTITRUST SOURCE: Let’s drill down a little bit. You mentioned that order enforcement is about 50 percent of what the Division does. What factors do you consider when you’re deciding whether to open a particular order enforcement investigation?

JIM KOHM: Order enforcement is much more reactive than the rest of the litigation of the Bureau of Consumer Protection because we don’t determine who violates our orders, and we are in some ways behind the curve. If the agency brings a lot of pyramid cases, for example, we may not be enforcing those until years from now.

What we’re not doing is playing a game of “gotcha.” For example, we would not bring an action against a company that is unintentionally violating an order in a highly technical way. The public doesn’t see all the cases we don’t bring because the law appropriately requires that to be non-public.

If you are violating a core provision of the order, we tend to bring the cases because—whether the cases are gigantic or very small—we want to send the signal that when you’re under order, that order is really important. So while we don’t want to play gotcha we also want to make sure the public knows that when you are under an FTC order, you need to comply with it, and nothing is too little or too big as long as it’s the core of what we’re trying to get at.
ANTITRUST SOURCE: The initial cases—whether they’re litigated or settled—are brought by the other Divisions or regional offices. To what extent do you coordinate with your colleagues when you investigate a company for a potential order violation? Do you involve the staff that brought the underlying case?

JIM KOHM: At the beginning of an investigation we coordinate quite a bit. The first thing we do is go back to the staff that was initially involved in the investigation. As our investigation progresses, what happened previously is not as legally important so we coordinate somewhat less, with the exception of the Division of Privacy & Identity Protection (DPIP). Because those areas are so technical and policy laden, a DPIP staff attorney is assigned to all of our privacy and data security cases to help us monitor compliance. Additionally, we never want to step on policy through order enforcement, so we will coordinate to make sure that we’re not doing anything that is counter to the policy that has been established in an area where another Division has responsibility. We’re not always aware of that policy, so we coordinate to make sure we’re not doing anything counter-productive.

ANTITRUST SOURCE: That gives us some insight into how you coordinate with other offices in the Bureau when you’re starting an investigation. Does the same type of coordination take place when a company is negotiating the initial order with a region or BCP division? For example, a draft order may include a provision that is ambiguous, or the company may have concerns about how the Commission will view its compliance strategy. Although the company and its counsel are negotiating with lawyers in these other offices, when it comes to enforcement they will be dealing with attorneys in your Division. How should outside counsel approach that?

JIM KOHM: I think there are two ways. First, I understand that there is ambiguity in orders sometimes, but what I would encourage both our lawyers and outside lawyers to do is to excise that ambiguity so that everybody starts on the same page to the greatest extent possible.

That said, we can’t come in on all cases, but when there are big issues that can’t be resolved with the underlying Division, we are willing to attend meetings and explain how we see the order and what we think it means in advance. We can’t do that in every case, and we can’t do it as a substitute for the underlying attorneys, but if there are differences of opinion or ambiguities that you haven’t been able to resolve, we’re available.

ANTITRUST SOURCE: Who usually instigates that? Is it outside counsel who asks to meet with you, or is it the FTC investigating lawyers who suggest including the Enforcement Division?

JIM KOHM: The answer is yes, that it is both, although often when we talk to the FTC lawyers we are able to resolve ambiguity without talking to opposing counsel. Often opposing counsel will ask the underlying attorneys, and if they think it’s appropriate, they will come to us.

It’s not appropriate to call us directly to ask us to come in on somebody else’s case. The way that’s always done is that outside counsel will ask the litigating attorneys, “Can you have Enforcement come?” And if they think it’s appropriate, they’ll ask us, and we would always do what the underlying attorneys want us to do.

ANTITRUST SOURCE: Jim, you mentioned the Facebook settlement earlier. This was an investigation of Facebook for alleged violations of its 2012 consent agreement, and your team negotiated the 2019 settlement.
The settlement in many ways was groundbreaking: it imposed a $5 billion civil penalty and a host of new compliance obligations. Yet the settlement generated a significant amount of criticism. Could you provide your perspective on the settlement and why you believe that the Commission made the right decision in reaching that agreement?

**JIM KOHM:** I think it is a phenomenal decision for the American public. We wouldn’t have negotiated it if we didn’t think that were true, and the Commission wouldn’t have voted it out had they not thought the same.

There are two reasons why it’s so good: one is more factual, the other is more legal. Factually, the penalty is an enormous number that is almost 23 percent of Facebook’s 2018 profits. That was designed not just to deter Facebook from future violations, but to provide general deterrence. The word we’ve gotten back from a lot of chief privacy officers is that’s a scary number, not the $5 billion, but the 23 percent. So the penalty appears to be having a positive effect.

But, more importantly, through the order’s conduct relief we addressed what we saw as the real problem when we actually looked at the documents and what happened. There has been a lot of criticism that Facebook was purposefully violating the order. That’s not what we saw in the documents. What we saw was a company that wasn’t taking privacy seriously. I’m not trying to excuse them; that’s not a good thing, but it requires a different remedy.

In response, we instituted a number of innovative injunctions designed to ensure that the company takes privacy as seriously as we do. For example, now there must be a board committee that is dedicated to privacy; we have removed the CEO from complete control over who’s on that board committee; and the board’s privacy committee has to meet with the assessor every quarter without management present. That makes them responsible under the law and should sharpen their focus.

Additionally, the CEO now has to get documentation that is provided throughout the company and has to certify four times every year, subject to both criminal and civil penalties, that Facebook is complying with the order. And we have now created a web of obligations not only to inspect but then to create a paper trail that is followable on those.

I think what you’re seeing over time is that that the order is forcing the company to take privacy seriously, and will continue to do so. That’s really the best, and only realistic solution to the problem. But the proof will play out over time, and if Facebook fails to change, we will be there with a large club in hand. Short of embedding somebody in the company, we need companies to take privacy seriously.

Even more important legally, this is dramatically more relief, both in terms of money and conduct, than we reasonably could have obtained through litigation. Every litigator at DOJ and internally who has looked at this case came to the same conclusion. The relief the Commission obtained is so dramatically greater than any other likely outcome, it’s hard to dispute. Obtaining less relief at a later point in time and spending considerable resources to do so, seemed irresponsible. I think, both in terms of what is doable and in terms of protecting the public, the order is a landmark in FTC history.

**ANTITRUST SOURCE:** As privacy and data security have become a bigger part of the Commission’s enforcement program, are you doing more in that area from an enforcement perspective?

**JIM KOHM:** Yes, that is true. What I would hope is to do more of that work behind the scenes and not have to bring more cases because companies aren’t violating their orders.
These cases are very different than the fraud cases we bring because our goal is to make sure legitimate companies have the incentives to do the right thing.

If you look at our assessors, they have been terrific in some case and not as great in others. That's largely because they in many ways have to figure out how to do their jobs as they go. In the financial world, there are decades of history of auditing and the development of general accounting practices that have improved over time. We're at the dawn of the age of privacy, which means that assessors, companies, and law enforcers are all learning as we go. We're getting better and better at it, but there is always room for improvement.

ANTITRUST SOURCE: Have there been changes in how the Division goes about compliance reviews more generally, either as a result of the Facebook experience or otherwise?

JIM KOHM: Generally, no. I think we're doing a great job with the resources we have. What we have learned—as I thought when you instituted this program 15 years ago—is that one of the benefits of greater enforcement would be finding the flaws in our orders and using that information to make our orders better. This process is working, and our orders are improving in all areas but particularly in areas that are brand-new.

One of the things we need for privacy and data security orders, because these cases can be so complex and so expensive, are good assessors. As the assessors are learning, we're also learning. So our orders have improved to help make the assessors better, and make us more effective.

But we are still looking at complaints; we're still scouring the compliance reports and talking to the assessors; we're still looking at what white-hat public interest groups are giving us; and we're talking regularly to the companies. So there's quite a bit going on behind the scenes.

ANTITRUST SOURCE: You mentioned the $5 billion civil penalty obtained in the Facebook settlement and the fact that this was also a high percentage of Facebook's profits. The Commission obviously has significant authority in this area, and frequently the maximum possible civil penalty that the Commission could theoretically obtain would be astronomical if, for example, you consider every consumer interaction with a website to be a separate violation. What factors do you consider when you are calculating what you believe to be the appropriate civil penalty?

JIM KOHM: I'm happy to answer the question the way you asked it, which is what I consider. However, ultimately it's what the Commission considers that is important, so I ultimately consider what they tell me to do.

I think intellectually it's much easier to calculate penalties than in reality. Intellectually you want to make sure that a penalty is large enough to create both general and specific deterrence—in other words to deter both the defendant and others from committing future violations. In a theoretical sense that would be the amount that a company profited from the violations times their chance of getting caught. That's a nice economics answer, but those numbers aren't so easy to come by. The chance of getting caught is at best a guess, and profits from the violations are not as easy to calculate as they sound.

So we do the best we can. We look at culpability. We look at revenues and try to make sure that at the very least nobody profits from illegal behavior. And we try to determine what's going to create that deterrence. But it is hardly a science.

The legal factors, which are just factors, require us to—and we should—take into account a company's ability to pay and stay in business. It may be, for example, that two companies that do
the same thing pay different amounts because one has more money and we have to apply the
legal factors.

We’re generally not trying to put people out of business with penalties unless you’re looking at
something that is a complete fraud. The $5 billion was very high, but it was also imposed on a
company that has tremendous revenues.

**ANTITRUST SOURCE:** Let’s shift to another area that the Commission has seemed particularly
interested in lately, and that’s individual liability. Historically, individual liability has been imposed
most often in the fraud context. Do you think that this is changing, and if so, where is the
Commission going to draw the line between alleged violations it believes warrant individual liability
and those that don’t?

**JIM KOHM:** Nothing has changed to date. There is, as you indicated, quite a bit of debate at the
Commission level, and there are different Commissioners with different opinions, and where that
will come out I don’t really know. I think it’s healthy to debate issues that have been ensconced in
the FTC, and sometimes you determine that the old way is still best and sometimes not. That
healthy debate is going on now.

I think traditionally we have sued individuals when we need to do so to obtain complete relief,
and I think everybody agrees on that. The question is, what’s complete relief? In fraud you almost
always need the individual, first because the individual has money that the company can’t pay.

If you look at the Enforcement Division’s two biggest cases, Facebook and VW, in each the
company could pay 100 percent of what we thought was required for restitution in one case and
a penalty in the other. So, there was no need to go after an individual for money.

Complete relief also means protecting the public in the future through injunctions. Therefore,
one way we have traditionally looked at this problem is to determine whether the individual is like-
ly to transfer his or her deception to a new firm. In fraud cases such a transfer is highly likely
because there’s no goodwill in the company, and the defendants, therefore, regularly move from
one company to another. In other cases, where CEOs and officers are unlikely to leave, it’s really
about the company. For example, Facebook has wide brand recognition, as does VW, so personal
liability was less necessary because the companies were unlikely to dissolve and reform simply
to avoid the order. Moreover, the companies’ officers are effectively bound by the firm’s order while
operating for the firm.

There is debate about general deterrence and whether individuals should be sued just on the
basis of general deterrence, and I think there are Commissioners on all sides of that issue. That
debate is healthy, and we’ll see where it comes out. But I think conclusions are far from foregone
at this point.

**ANTITRUST SOURCE:** So the message is: stay tuned on this issue?

**JIM KOHM:** Right. Stay tuned.

**ANTITRUST SOURCE:** Turning to data security, the Commission has announced a number of set-
tlements in this area that include a series of new compliance obligations; you mentioned this when
you were discussing the Facebook order. Could you provide an overview of these requirements
and what you think their likely impact will be on enforcement, if any?

**JIM KOHM:** I think there are three categories. Just to distinguish them, Facebook had a number of
provisions that aren’t in de novo orders, that aren’t for first-time offenders, and were tailored to Facebook’s specific situation—a company that wasn’t taking privacy seriously. Thus, the order provisions were geared toward changing that culture.

In data security cases, we have recently added more specifics to the orders, including safeguards addressing employee training and access to information and monitoring systems. As we discussed before, these provisions reduce ambiguity so people know exactly what we’re talking about. They’re not new, but they should make enforcement and compliance easier because they are very clear about some of the things that need to be done.

The second is changing assessor accountability. I talked about this before. It’s an iterative process where we’re learning. Assessors explicitly now cannot just take management’s word for things. They have to gather evidence; they have to do testing, things we thought should have happened under the old orders but weren’t always. Part of that was based on some assessors using auditing principles from the financial world that just didn’t apply in the privacy and data security context, so we’ve made those responsibilities more specific. Improving assessments is a key to compliance because, as I said before, we rely heavily on assessors.

The last is we have elevated the information flowing to board members, so that we make sure from the top down that everybody knows what’s going on in the company and feels responsible. I think traditionally board members feel extremely responsible about the finances of the company, and that’s partly because that’s what has been ingrained over decades. However, at least for some companies, that is not so ingrained for privacy. I think in 20 or 30 years it will be more like the financial world, but we’re trying to speed up that process through some of our orders. I think all these things will make enforcement a little easier, but more importantly they’ll make compliance clearer.

**ANTITRUST SOURCE:** What tips do you have for outside counsel who come in to meet with you? What works and what doesn’t?

**JIM KOHM:** I’m an old litigator and I have always found that being straight is the best policy. The very best job I saw a lawyer do in front of a Commissioner was an individual who came in and talked to the then-chairman and me, and said: “Look, we screwed up.” By starting that way—when we of course knew they screwed up—he got us listening. He said: “We need to take responsibility for it.” The client was there and echoed the same sentiment. Then the client said, “But here’s what we don’t want to do and here’s why, and here’s what we’re willing to do.” The defendants didn’t get everything they wanted, but they started an honest discussion.

Failing to acknowledge what we already know immediately turns the conversation adversarial, and, in terms of convincing me, you can’t win an adversarial conversation if I’m your adversary. I learned this lesson long ago as a legal services attorney in D.C. Superior Court. There was a judge I used to appear before who liked nothing more than to argue with me. We had become friends, but I could never win an argument with him because in that situation he wore the robe. If your goal is to convince the court, great; go convince the court. But if you’re going to convince me, start with honesty and acknowledging the facts.

Tim Muris once said that BCP was a kind of wonder of the world. I think what he meant by that—if I can put words in Tim’s mouth, which he would never allow—is that we perform at an extremely high level. People here are really good, work really hard, and more importantly we’re getting better every year. We’ve done that for 30 years, and the compound interest of getting better for 30 years is enormous.
One of the things that I get to do which is really fun is stand on the shoulders of giants, people like Bob Pitofsky, Jodie Bernstein, Tim Muris, Lydia Parnes, and Eileen Harrington, as well as all the Bureau Directors I’ve worked for and the colleagues I’ve had, each of whom were, and are, dedicated to moving the ball forward on their watch. When each of us advances the ball, even a little, it’s impossible to look back and not be impressed by the progress. That has created an environment that I am both extremely proud to work in and that has been a joy for over two decades.

So I am extremely thankful to the people behind me, and I am extremely optimistic about the people who are coming after me. I think people don’t always know the level of commitment, and the level of lawyering that occurs here. It’s as good as any place in the world. The public gets an amazing deal. The people here get an amazing deal too because we get the honor of working in this environment. So thank you to you and to all the other people whose shoulders I have been able to ride on.

ANTITRUST SOURCE: Thank you, Jim.

JIM KOHM: I learned from the people before me, and that was big. And there are a lot of people who have been very good to me and made me better than I would have been without them. I am extremely grateful and fortunate to have spent the last two decades at such a special place.

ANTITRUST SOURCE: Thank you so much for your time, Jim, and your kind words.
More Carrot, Less Stick:
The DOJ’s Evolution to Incentivize Antitrust Compliance Programs

Eric M. Meiring

In a recent speech, Makan Delrahim, the Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (the Division), announced a new policy intended to incentivize corporations to design, develop, and institute robust antitrust compliance programs. In the speech, AAG Delrahim announced a fundamental shift in how the Division treats corporations under investigation for committing criminal antitrust offenses: for the first time, a corporation with an effective antitrust compliance program that lost the race for leniency can receive a deferred prosecution agreement (DPA) and a reduced criminal fine. The Division also published novel guidance for companies explaining how it will evaluate the effectiveness of antitrust compliance programs (Guidance).

By titling his speech “Wind of Change,” AAG Delrahim was probably not channeling his inner desire to pay homage to The Scorpions’ 1990 hit of the same name. Rather, this was AAG Delrahim’s magic of the moment, making clear that the new approach marked a definitive break from the Division’s past practice of ignoring companies’ efforts to implement antitrust compliance programs, relying instead on its blockbuster corporate fines and its Corporate Leniency Policy to incentivize compliance.

Although only time will tell what the new model and approach means for companies and how this new approach will affect criminal antitrust enforcement, we can draw on past and parallel experience to get a sense of what companies can expect. This article will explore the Division’s evolution in evaluating and crediting compliance programs, the Guidance, and the implications of the policy shift for both the Division and companies.

Antitrust Compliance Darwinism: The Division’s Protracted Evolution Regarding Evaluating and Crediting Compliance Programs

The All Stick, No Carrot Era (Pre-2014): No Credit for Antitrust Compliance Programs. For decades, the Division did not provide significant incentives for antitrust compliance programs. Instead, it relied on the threat of large corporate fines and its Leniency Program to incentivize compliance.


2 Id.


antitrust compliance programs. Beginning in 1993, the Division instituted its revised Leniency Policy to make it more attractive to companies to self-report criminal antitrust offenses.\(^5\) Under the Leniency Policy, assuming the requisite conditions are met, the first company to self-report a criminal antitrust violation—a naked price-fixing, bid-rigging, or market-allocation conspiracy—is eligible, along with all its cooperating employees, for complete immunity.\(^6\)

Following the success of the Leniency Policy, the Division circumnavigated the globe proselytizing the value of leniency programs as a means to detect and deter antitrust offenses. But in contrast to foreign competition regulators, such as the UK and Canada, the DOJ rarely discussed incentivizing corporate compliance programs for the same purpose.\(^7\) The Division, instead, believed the enticement of leniency was sufficient to incentivize effective compliance programs. Accordingly, from 1993 through 2014, the Division, as a matter of policy, did not credit compliance programs at the charging or sentencing stage—there was no fine reduction and no possibility of a declination, non-prosecution agreement, or a DPA.\(^8\)

This policy of not crediting companies for effective compliance programs put the Division squarely at odds with other criminal litigating components of the DOJ, and in certain cases, may have been contrary to the U.S. Sentencing Guidelines.\(^9\) Indeed, for decades, pursuant to well-established DOJ policy, the Criminal Division has routinely granted declinations, non-prosecution agreements, DPAs, and fine reductions based, at least in part, on a company's compliance initiatives.\(^10\) The lone exception to this DOJ policy was the Division, which, prior to AAG Delrahim's 2019 speech, enjoyed special provisions under the Justice Manual—stating, "credit should not be given at the charging stage for a compliance program."\(^11\) Not only did the Justice Manual state that credit should not be given, it further stated, "antitrust violations . . . mandate prosecutions of corporations notwithstanding the existence of a compliance program."\(^12\) Thus, if a corporation had an effective compliance program, it could potentially avoid criminal charges for committing serious fraud or corruption offenses; yet, the DOJ mandated the prosecution of corporations for antitrust offenses.

Likewise, the Sentencing Guidelines have long provided guidance to companies on what constitutes an effective compliance program and when a corporation should receive credit for having an effective compliance program.\(^13\) Indeed, the Sentencing Guidelines endorse a reduced sentence and criminal fine "[i]f the offense occurred even though the organization had in place

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\(^5\) Id.

\(^6\) Id.

\(^7\) See e.g., Canadian Competition Commission’s Corporate Compliance Programs Bulletin (Sept. 27, 2010), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html.

\(^8\) See Delrahim, supra note 1.


\(^10\) See U.S. Dep’t of Justice, Federal Prosecution of Corporations 3 (1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF. This memo was updated by a series of subsequent memos before the provisions of the memos were incorporated in the Justice Manual.

\(^11\) Id. at 4.

\(^12\) Id. at 7 (emphasis added).

\(^13\) U.S. SENTENCING GUIDELINES MANUAL, supra note 9, §§ 8C2.5 and 8B2.1.
at the time of the offense an effective compliance and ethics program.” Furthermore, the Sentencing Guidelines make clear that the failure to prevent or detect the conduct at issue, including criminal antitrust conduct, does not necessarily mean the compliance program is ineffective. Yet, notwithstanding the Sentencing Guidelines’ and other DOJ components’ recognition that no compliance program can prevent all criminal activity, the Division took the position that an effective compliance program would have prevented the antitrust offense in the first place or resulted in a leniency application. Thus, a company ensnared in a criminal antitrust investigation by the DOJ was not eligible to avoid charges or to obtain a fine reduction.

**The Baby Carrot Era (2014–2019): Reduced Fines for Adopting or Strengthening Compliance Programs During an Investigation.** In 2014, a light breeze of change occurred: the Division announced that it was “actively considering ways in which [it] can credit companies that proactively adopt or strengthen compliance programs after coming under investigation.” Shortly thereafter, the Division announced that it would begin providing a company with a “modest reduction in its fine” where the entity made extraordinary efforts to implement or strengthen its compliance program after coming under investigation. Concurrently, however, the Division reiterated its firm position against crediting a company by reducing the charges or fine based on a preexisting antitrust compliance program. Thus, the Division was still unwilling to give corporations credit under the Sentencing Guidelines for having an otherwise effective compliance program, which would typically result in a larger fine reduction than the “modest” reduction proposed by the Division.

When the Division announced this change, it provided scant guidance about what constituted “extraordinary measures” and refrained from providing detailed information on how it would evaluate antitrust compliance programs. Accordingly, while this minor change was a positive development for corporations under investigation by the Division, corporations remained concerned that their proactive investment in antitrust compliance programs would not be credited if certain actors in the company defied policy and evaded compliance. Fundamentally, this policy shift provided no new incentive for companies to proactively institute antitrust compliance programs.

**The Large Carrot Era (2019–Present): Compliance Credit at Both the Charging and Sentencing Phase.** The Division’s gradual shift to incentivize compliance appeared to accelerate in 2018 when the Division signaled the final evolution in crediting compliance programs—offering credit for pre-existing, effective compliance programs. In April 2018, the Division hosted a public roundtable on criminal antitrust compliance during which compliance professionals posited that companies would be willing to proactively invest more in antitrust compliance if their efforts were recognized

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14 Id. § 8C2.5(f)(1).
15 Id. § 8B2.1(a).
18 Snyder, supra note 17.
and credited by the Division. Over the course of the following year, Division officials openly considered precisely how, and to what extent, to credit well-tailored antitrust compliance programs in place at the time of an investigation.

AAG Delrahim’s July 2019 announcement that the Division would credit preexisting compliance programs marked the culmination of the Division’s evolution and represented a significant policy shift. For the first time, the Division recognized that employees may commit antitrust violations despite a company’s best efforts at compliance. And the Division further concluded that when violations do happen, the corporation should still receive credit for its well-tailored, and well-intentioned, corporate compliance program.

It is clear that the Division’s evolution is based on the understanding that a strong antitrust compliance program is fundamental to deterring cartel conduct and is concomitant with the Division’s primary goal of deterring criminal antitrust activities. Moreover, the Division’s change to consider DPAs and reduced fines under the Sentencing Guidelines harmonizes its practice with broader DOJ policies. The Division will no longer be exempt from the Principles of Federal Prosecutions of Business Organizations by refusing to consider the adequacy and effectiveness of the corporation’s compliance program at the time of the offense.

The carrot of a DPA, which is a middle ground between a criminal charge and a non-prosecution agreement, is substantial. Essentially, under a DPA, the DOJ will file charges against the corporation, but will never move towards a conviction so long as the corporation satisfies certain conditions, such as paying a fine and restitution. Once the corporation has satisfied the conditions of the DPA, the government then dismisses the charges against the corporation. DPAs are strongly preferred by corporations because no conviction is ever entered, which potentially allows them to avoid potentially disastrous collateral consequences (e.g., debarment, suspension, and dissolution).

Cultivating the Antitrust Compliance Carrot: The Division Promulgates Instructive Guidance for Antitrust Compliance Programs

Beyond enabling companies to obtain DPAs and fine reductions for preexisting compliance programs, the other important aspect of the announcement was that the Division made public its Guidance for evaluating compliance programs in criminal antitrust investigations. The document is instructive for corporations not just during investigations and for making pitches to the Division for reduced charges and fines, but for designing, implementing, and updating existing antitrust compliance programs. This is especially true for companies creating an effective compliance program from the ground up. At the same time, corporations with existing antitrust compliance programs should also analyze the Guidance to review and update their programs to ensure effectiveness.

The Guidance provides detailed questions that illuminate what aspects of a compliance program are necessary for the Division to believe the program is, in fact, effective. While the Sentencing Guidelines have long provided some guidance as to what constitutes an effective compliance program, the Division’s Guidance expounds on the Sentencing Guidelines’ bedrock.

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19 Delrahim, supra note 1.
20 Id.
21 Guidance, supra note 3.
principles and provides a window into the important aspects of an effective antitrust compliance program.

Although the Guidance addresses numerous elements of an effective antitrust compliance program, no one factor is determinative of whether the program is considered effective. Moreover, corporations and compliance personnel should not view the Guidance as a checklist or formula; rather, each company should consider the Guidance and apply solutions based on its unique risk profile, size, resources, and culture.\textsuperscript{22}

The Guidance emphasizes that a company has flexibility in designing their compliance programs so that the program is specifically tailored to the unique risks associated with a particular enterprise. Nevertheless, the Guidance focuses on certain factors that companies and compliance personnel should consider when designing and implementing antitrust compliance programs.\textsuperscript{23} Below are key considerations for each factor relevant to designing an effective antitrust compliance program.

\textbf{The Design of the Program.} To have an effective compliance program, a corporation should—at a minimum—have a written policy or code of conduct containing guidance on antitrust issues that is integrated into the company’s business and is readily accessible to relevant and high-risk employees (e.g., employees with pricing authority or that have occasions to meet with competitors). The company should not only make these materials accessible and easily digestible, but the materials should be periodically updated.\textsuperscript{24}

\textbf{A Culture of Compliance.} This factor focuses on whether and how the compliance program becomes part of the fabric of the company. Senior executives should take ownership in both conveying the importance of compliance and discouraging non-compliance. Those same leaders should be held accountable for their own actions and also when they tolerate lapses by subordinates. Corporations and executives can help ensure a culture of compliance through statements in compliance materials, as well as executives’ attendance and active participation in compliance training.\textsuperscript{25}

\textbf{The Responsibility for Antitrust Compliance.} This factor makes clear that for an antitrust compliance program to be effective, a corporation should appoint a senior-level individual to run the program. That individual should be independent, have direct access to the board of directors or equivalent leadership body, access to senior management, authority to interact with regulators, and sufficient resources and time to administer the program.\textsuperscript{26}

\textbf{Risk Assessments.} One-size-fits-all programs are typically looked at skeptically, especially for larger enterprises. An effective program will be specifically tailored to the risks associated with each line of business. For example, if the company often engages in bidding for new or existing business, the compliance program should provide focused training and controls regarding the bidding process. For larger companies with significant resources, the compliance team should periodically benchmark, and collect data and other metrics to enhance the efficacy of the program.\textsuperscript{27}

\textsuperscript{22} Id. at 2.
\textsuperscript{23} Id. at 3–4.
\textsuperscript{24} Id. at 4–5.
\textsuperscript{25} Id. at 5–6.
\textsuperscript{26} Id. at 6–7.
\textsuperscript{27} Id. at 7–8.
**Compliance Training and Communication.** Sufficient and tailored antitrust compliance training is paramount to any compliance program. For medium to large companies, inadequate or non-existent compliance training may well render a compliance program ineffective. It is important that the training and associated materials are clear, accessible, and reach the appropriate employees. Beyond explaining permissible and impermissible behavior, the training should make clear what employees should do in the event they identify concerning behavior and how to confidentially report the incident. Training and the dissemination of the policies should be conducted regularly, including as part of the employee onboarding process for appropriate personnel.²⁸

**Periodic Review, Monitoring, and Auditing.** A corporation should periodically review its compliance program for its effectiveness by conducting audits and reviews. For example, where possible, a large corporation should conduct routine audits of high risk employees’ communications, documents, and practices. Audits can be done informally through meetings and discussions or through sophisticated screening and monitoring tools.²⁹

**Reporting.** A key component of any antitrust compliance program is the ability for employees to quickly access an anonymous and confidential hotline or other reporting mechanism. It is also critically important that corporations make clear that its employees can report suspected violations without fear of retaliation.³⁰

**Compliance Incentives and Discipline.** Corporations should consider how to incentivize compliance and recognize individuals that support a culture of compliance within the company consistent with other internal rewards (e.g., incentive pay or prerequisites for promotions). Conversely, a corporation should also consider a policy for disciplining individuals who violate the antitrust compliance policy (e.g., reassignment, suspension, or termination).³¹

**Essential Elements.** Each of these factors is instructive and provides guidance to corporations and compliance professionals regarding how to design and implement an effective compliance program. While some companies simply do not have the resources to implement all, or even most, of the considerations posed by the Division, it is important to remember that there are two essential elements of an effective compliance program: the organization must (1) exercise due diligence to prevent and detect criminal conduct; and (2) promote a culture that encourages ethical conduct and a commitment to comply with the law.³² Likewise, the compliance and ethics program should “be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.”³³

**Harvesting the Antitrust Compliance Carrot: Earning Credit for a Preexisting Antitrust Compliance Program**

The central purposes of an antitrust compliance program are to prevent, detect, and mitigate the effects of any anticompetitive conduct. Even if a corporation has followed the Sentencing Guidelines and the Guidance, no program is perfect, and lapses can occur. If a company finds itself under investigation by the Division despite its best efforts to implement an effective compliance program, it can affirmatively use its compliance program to respond, reduce its exposure,

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²⁸ Id. at 8–9.
²⁹ Id. at 10–11.
³⁰ Id. at 11.
³¹ Id. at 11–12.
³³ Id.
and remediate. Specifically, the company can compare its preexisting program and remedial efforts to the Guidance to convince the Division to grant both charging credit (e.g., through a possible DPA) and sentencing credit (e.g., a possible fine reduction and/or no monitoring).

To earn that credit, the company must quickly decide whether to cooperate with the Division in its investigation. The Division is clear that unreasonable delays in reporting are inconsistent with a culture of compliance and could jeopardize a corporation’s ability to avoid a criminal conviction and a fine reduction. Deciding whether and when to cooperate with the Division is complicated and fact-specific. If a company is going to cooperate with an investigation by the Division, however, then it should consider proactively providing the Division with information about its compliance program. Moreover, waiting until the end of the investigation to discuss compliance may be too late because Division prosecutors will “evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company’s antitrust compliance program.”

A corporation should be aware that the Division is evaluating its compliance program from the outset of its investigation. Providing information on policies, procedures, and training early in an investigation is one effective way to demonstrate the culture of compliance within the company. If a company is planning to cooperate with the Division, it should also be prepared to quickly explain to the Division how its compliance program helped identify the conduct and assisted in the reporting of conduct to the Division. Once the investigation has progressed, the corporation should be mindful that the Division will ask witnesses about the compliance program and should therefore prepare its witnesses to discuss it.

At this point, the company should also be remediating the situation by assessing and analyzing how the anticompetitive conduct occurred despite the existence of the compliance program. For example, the company can consider steps to strengthen its training, expand the reach of the program to new employees, business lines, or regions, provide more practical examples, and make difficult concepts easier to digest. Likewise, the company should ensure that senior leaders participate in addressing the issue to prevent reoccurrence. The corporation should present its remediation efforts to the Division, including the enhancements to the compliance program and the involvement of senior leaders in preventing reoccurrence. Remediation efforts are a key component of obtaining credit for preexisting compliance programs because it helps show a culture of compliance and ethical conduct.

If a corporation did not have an effective compliance program at the time of the offense, it can still obtain credit from the Division for its remediation efforts. Although likely it will not be eligible for a DPA or a fine reduction pursuant to the Sentencing Guidelines, it may still be able to get a fine reduction and avoid probation if it institutes an effective compliance program after coming under investigation.

Policy Implications for the DOJ: Will This New Compliance Approach Affect Cartel Detection?
The central purpose of the DOJ’s new policy is to incentivize effective corporate antitrust policies, which helps deter and detect cartel conduct—the central mission of the Division’s criminal program. It is also axiomatic that if more companies have effective antitrust compliance programs,
then fewer companies will participate in cartel conduct, and when they do, the companies will be more likely to self-report the violation to the Division. Furthermore, if a corporation has a culture of compliance and respect for the law, then its internal investigation of potential cartel conduct will be quicker and more complete. The DOJ is thus trading DPAs and fine reductions for less cartel conduct, increased self-reporting, and more effective internal investigations, which theoretically leads to a reduced burden on Division staff and more successful prosecutions.

Indeed, if a company with an effective antitrust compliance program is involved in a criminal antitrust investigation but did not win the race for leniency, then the incentive of a DPA may lead that company to consider early cooperation with the Division. Historically, the Division offered the second company to cooperate with an investigation, even if it only lost the race for leniency by minutes, a significant fine reduction (30% to 35% off the bottom of the Guidelines range), while still requiring a guilty plea that included a large corporate fine. The Division would also criminally charge several executives from the second-in company, many of whom received significant terms of incarceration.35 Even with the incentive of a reduced fine, certain companies undoubtedly chose to delay cooperation to attempt to avoid criminal charges.

While the Leniency Policy is undoubtedly the single greatest tool for uncovering cartel conduct, the second-in company is often just as important. That second-in company typically provides new and corroborating evidence of the cartel and also reduces the Division's reliance on immunized witnesses, both of which make subsequent convictions easier to achieve. Moreover, the second-in company often uncovers unrelated criminal antitrust conduct for which it could receive “leniency plus.”36 Thus, incentivizing more effective compliance policies through increased rewards for second-in companies is yet another opportunity for the Division to uncover more cartel conduct and prosecute more cases.

Conversely, some antitrust practitioners have voiced concern that this new compliance approach could actually result in a reduced number of leniency applicants, which remains the Division’s primary tool for uncovering cartel conduct.37 In recent years there has been a perceived decline in the number of large leniency applications.38 There are many reasons posited for why international cartel prosecutions have diminished, including the costs associated with obtaining leniency in numerous jurisdictions, the expense of follow-on civil litigation, changes in the program that have led to more uncertainty about the criminal and civil exposure of a company and its executives, and increased awareness of cartel offenses due to recent high-profile prosecutions and the proliferation of sophisticated compliance programs.39 Any further potential disincentive for leniency is therefore problematic.


36 “Leniency plus” is when a company self-reports unrelated cartel conduct while concurrently under investigation for other cartel conduct. When that occurs, the corporation can receive immunity for the newly reported conduct and a fine reduction for the original conduct.


38 See Robert B. Bell & Kristin Millay, The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?, ANTITRUST, Fall 2018, at 81–82.

39 Id.
The theory is that the benefits of the Leniency Policy—non-prosecution agreement for the corporation and individuals and no criminal fines—may not sufficiently outweigh the benefits conveyed under the new compliance approach—the potential to earn a DPA and significant fine reduction. This is especially true if one considers the other concerns and costs associated with the Leniency Policy. Thus, if a company can now receive a DPA and significant fine reduction, its executives may not have the same strong incentive as before to run, not walk, to self-report conduct to the Division to enter into the Leniency Policy.

Furthermore, because the Guidance draws heavily on the Sentencing Guidelines, which contemplate reasonable potential delay or lack of self-reporting while still allowing corporations to obtain sentencing credit for having an effective compliance program, the all-or-nothing nature of the Leniency Policy may have created stronger incentives to immediately self-report even unsubstantiated or questionable conduct prior to conducting a complete internal investigation. This is so because some Division investigations, including successful investigations, are triggered by leniency applications that are not perfected due to a lack of evidence from the reporting company. The new compliance approach could thus lead to a reduction in self-reporting, especially when the conduct is unclear or the company does not have access to all the requisite information and witnesses.

The effects of this reduction in the benefit delta between leniency and obtaining compliance credit is currently unknown. It is also too soon to tell whether corporations can routinely meet the Division’s potentially high bar for what is an effective antitrust compliance program. If DPAs and lower fines are the new normal, then query whether certain executives will believe the penalties for non-compliance are such that they take antitrust compliance less seriously. Accordingly, how the Division applies the evaluation of compliance programs in practice will ultimately determine whether this change leads to the detection of more (or less) cartel offenses.

Conclusion

The Division’s decision to offer both charging and sentencing credit to corporations with effective compliance programs is welcome news to corporations around the world. Until the Division starts giving companies credit for effective compliance programs, though, the effect of the change will not be fully known. Regardless, incentivizing antitrust programs is good policy because antitrust compliance programs “act as the first line of defense to anticompetitive conduct.” The primary objective of the Division’s criminal program is to deter and prevent anticompetitive conduct, and this policy change and its accompanying Guidance is likely to generate more robust compliance programs, which achieve the same objective. Moreover, pursuant to the Sentencing Guidelines, a company with an otherwise effective antitrust compliance program should be able to receive credit for its investment. Likewise, with the Division now offering such rewards, companies that do not qualify for these rewards are effectively punished for not having an effective antitrust compliance program.

40 “[T]he organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.” U.S. Sentencing Guidelines § 8C2.5, Application Note 10.

Moreover, while the Division has increased the carrot for companies to proactively implement effective compliance programs, it continues to wield a comparatively big stick against those companies that do not have effective compliance programs. The message from the Division remains clear: if a company does not have, or does not institute, an effective compliance program, then it will face significant criminal fines, a criminal conviction, probation, and potentially even a compliance monitor.\(^{42}\) Therefore, with this new policy, the Division has significantly increased the carrot for corporations to implement effective compliance programs (the leniency program, reduced fines, and potentially a DPA), while continuing to wield a large stick (enormous criminal fines, a criminal conviction, and post-sentencing supervision) for corporations that do not implement effective antitrust compliance programs.

Accordingly, it is imperative that corporations carefully review the Guidance to assess, update, or institute antitrust compliance programs. The Guidance is an important resource for understanding the Division’s expectations for, and how it will assess, a compliance program. Following the Guidance will greatly assist corporations in implementing an effective antitrust compliance program and obtaining both charging and sentencing credit if misconduct occurs.●

\(^{42}\) See, e.g., Delrahim, supra note 1.
Privilege Considerations in Second Requests

Philip Algieri

The process of collecting, reviewing, and producing documents in response to a Second Request can be time consuming and resource-intensive. Of the many challenges involved, balancing the need to quickly and accurately review huge volumes of data while also correctly identifying and cataloging privileged documents, particularly the truly critical or sensitive communications that keep attorneys up at night, has traditionally been one of the most difficult.1

Achieving this goal is complicated by the pressure under which attorneys must operate. While a Second Request’s eDiscovery obligations alone impose an immense burden, attorneys are often simultaneously handling myriad other related tasks that make it even more difficult to focus their time and attention on these issues. Advances in technology-assisted review systems are helpful in this regard, but have typically proven more useful as a means of reducing the size of data sets, discarding non-responsive data, or quickly identifying and prioritizing potentially responsive content. Identifying privileged documents often entails a more labor-intensive combination of technology and human judgment.

Heightened Agency Focus on Privilege

With the antitrust agencies’ increased focus on timeliness and accuracy, exemplified by the release of the Department of Justice’s updated Model Timing Agreement in December 2018 and its accompanying comments, these challenges have become even more acute.2 Through its Model Timing Agreement, the DOJ has further increased incentives to expedite document productions, stating explicitly that it expects “faster and earlier productions of documents” in return for reducing burdens on parties in other areas, such as limiting the number of custodians, seeking fewer depositions, and shortening the timeframe from substantial compliance to a decision.3 At the same time, concerned with what it perceives as “gamesmanship on privilege issues,” the DOJ has included a number of provisions that necessitate even greater accuracy and efficiency in making privilege determinations if parties wish to avoid delays.4

1 The term “privilege” as used in this article refers broadly to any legal principle, such as attorney-client privilege or work product protection, which entitles a producing party to withhold documents from production. See Fed. R. Evid. 502(g) (defining attorney-client privilege as “the protection that applicable law provides for confidential attorney-client communications” and work-product protection as “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”).

2 U.S. Dept’t of Justice, Antitrust Div., Division Update Spring 2019—Merger Review Reviewed, www.justice.gov/atr/division-operations/division-update-spring-2019/merger-review-reviewed. In March 2020, in response to the COVID-19 pandemic and in anticipation of additional time that may be needed to review transactions, the DOJ published an updated Model Timing Agreement that gives the DOJ an additional 30 days for review after compliance with a Second Request (for a total of 90 days instead of the 60 days in the December 2018 model). This change does not affect the provisions related to document productions and privilege logs discussed here.

3 Id.

4 The DOJ also stated in recent comments that it “will soon announce a standard privilege protocol for all parties producing documents.” See id. As of the publication of this article, these guidelines have not yet been finalized and it is not clear which topics will be covered.
Under the DOJ's updated Model Timing Agreement, a party cannot certify compliance for 30 or 45 days (depending on the review process employed and the custodian priority grouping) from the date of its final document production. There is an exception for “de-privileged” documents that were initially withheld and then later determined to not be privileged, which can be produced up to ten or twenty-five days before the compliance date. However, if a subsequent production of such documents for a given custodian accounts for more than five percent of the total documents produced for that custodian across all productions, a party must then wait thirty or forty-five days from the date of that follow-on production to certify compliance (essentially, adding an additional twenty days to the compliance timeline).5

The recently updated Federal Trade Commission Model Timing Agreement is less explicit regarding similar topics and is not radically different from prior versions, but does still highlight the importance of managing privilege effectively from the outset of a matter.6

In short, parties face pressure to be both faster and more accurate than before. The DOJ has explained its rationale for implementing the new provisions as follows:

The Division is committed to eliminating gamesmanship on privilege issues. The Division respects the attorney-client privilege and the work product doctrine, but too often parties game the process, withholding large numbers of documents as privileged, only to de-privilege and produce many of these documents much later in the process, often on the eve of a particular deposition. In the Division’s experience, while some of the de-privileged documents might be close calls, most never should have been withheld in the first place. The new model timing agreement endeavors to protect the Division from this practice of over-withholding. This will require parties to be pro-active, organized, and diligent in their review of potentially privileged materials.7

Context of the 5 Percent Threshold: Culture of Caution

The DOJ likely assumes that if a party makes a good-faith attempt from the outset to accurately identify and withhold privileged documents, there will be fewer documents later reclassified and the 5 percent barrier will not be crossed. However, it may be much easier to exceed this threshold than the DOJ assumes, especially as the new provisions only require one custodian to exceed the limit to trigger the penalties.8

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6 The FTC Model Timing Agreement requires parties to “produce substantially complete document productions” for priority custodians at least thirty days before certifying substantial compliance. Notably, the model agreement does not provide much clarity as to when document productions for a given custodian would be considered “substantially complete.” While the FTC language indicates that only a limited number of documents can be produced inside of the thirty day window, parties must rely on a combination of discussions with FTC staff and past experience to determine where these boundaries lie. Fed. Trade Comm’n, Model Timing Agreement (2018), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf.


8 In other words, delay penalties would technically be triggered if a producing party is in compliance for 19 out of 20 custodians and exceeds the 5% threshold by only a handful of documents for the 20th custodian. As a practical matter, it may not be DOJ’s intent to enforce every minor breach. However, it may be difficult to receive such assurances via written modifications given the DOJ’s guidance in this area: “The Division considers the provisions in the model to be standard provisions, and does not intend to deviate from them under most circumstances. Extended negotiations over deviations also would run counter to the Division’s goal of streamlining and shortening the negotiations over timing agreements. The Division recognizes, however, that the individual circumstances of a transaction may warrant deviation in some cases. Parties should be aware, however, that substantial deviation will require approval from the Deputy AAG in charge of the investigation.” Id. at 5.
More than simply needing to reduce “gamesmanship” to meet these guidelines, parties may find it necessary to revamp their approach to eDiscovery. It is therefore worth re-examining traditional workflows and approaches to better understand where inefficiencies exist and how privilege review and logging can be improved. While this is particularly important when operating under the terms of the DOJ’s Model Timing Agreement, doing so will yield benefits in any Second Request.

Given resource and cost constraints, many law firms rely on large numbers of junior attorneys or external providers to review and produce documents. To avoid mistakenly producing privileged documents and to make sure productions can be completed quickly, these less-experienced reviewers are frequently instructed to take a broad view of privilege, with more experienced attorneys then finalizing these decisions after the non-privileged documents have been produced. In essence, the strategy is to “kick the can down the road” and deal with potentially privileged documents at a later time, often in parallel with the completion of a privilege log.9

In a vacuum, this approach may make sense on any given document. For an individual attorney deciding whether to mark a particular document as privileged, the negative consequences of making the wrong call on that document far outweigh the risk of over-designating.10 As the DOJ has noted, when played out across all reviewers and the full collection of “potentially privileged” documents, this phenomenon can result in large document productions consisting of de-privileged documents being completed just prior to the parties’ certifying substantial compliance.11 Moreover, these less precise approaches can lead to challenges to privilege logs or questions regarding the sufficiency of previous productions, all of which can further increase delays and tie up valuable law firm resources.

This is even more pronounced where a custodian has a low number of responsive, non-privileged documents, in which case a relatively small number of de-privileged documents may exceed 5 percent of the total produced documents for that custodian. This is particularly common for (1) custodians who occupied a role for only a small portion of the Second Request date range and simply do not have a large number of documents to collect or (2) attorney custodians who have a lower number of non-privileged documents to produce.

Lastly, the manner in which many eDiscovery workflows are structured in Second Requests adds to the likelihood of the new delay penalties. Attorneys often initially withhold entire document families from production if any single document contains privileged content, producing these families only after the individual privilege assessments are finalized and logged. This approach is helpful in terms of avoiding both claw backs and messy overlay productions, as the disposition of the entire family is decided at the same time. The subsequent production of these non-privileged family members, never thought to be privileged in the first place, can often on its own exceed the 5 percent threshold.12

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9 Although every firm may not necessarily follow this exact approach, and many will implement firm-specific processes, this is a commonly followed approach.

10 As one court has noted, “There is no reward for doing a good privilege log. It’s painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don’t log a document, not if they come to the partner and say, ‘Really, this one shouldn’t be logged.’” Kilg v. Deloitte LLP, Civ. A. No. 4993-VCL, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010).

11 See DOJ, Voluntary Requests and Timing Agreements, supra note 7, at 4.

12 Assume, for example, a data set in which (1) 10% of responsive documents are privileged; (2) privileged documents and their non-privileged family members are initially withheld from production; and (3) roughly one-third of these withheld families consist of non-privileged documents that will ultimately be produced, all of which are reasonable assumptions. Even if every single privilege decision was later confirmed as correct, the production of the non-privileged family members alone would exceed the 5% threshold and trigger delays.
**Impact on Behavior**

I am aware of no publicly available data regarding the extent to which the DOJ’s Model Timing Agreement is being used or its impact on parties’ behavior, including whether the penalties discussed here are potentially discouraging its use. However, there has been an enhanced focus on privilege issues from the agencies in general (including greater post-production scrutiny on privilege logs), as well as a preference to stick to the form language of the model agreement when it is used.

As a result, it is increasingly important for antitrust counsel to fully understand both the added burden involved in meeting these updated requirements and the potential costs to their clients for failing to do so, when determining whether to enter into a timing agreement (especially in matters before the DOJ). Parties may find that the typical cost/benefit analysis has shifted and decline to enter into a timing agreement in situations where they formerly would have. Conversely, if parties do enter into one that incorporates the new provisions, they will need to understand how best to meet these requirements.

**A Way Forward**

Even with the advent of new technologies that can substantially reduce data populations, it is likely not an option for most law firms to completely eliminate their reliance on those junior associates or external vendors that do much of the heavy lifting. Nor is the culture of caution surrounding privilege likely to drastically change anytime soon, especially in the context of high-stakes Second Requests.

Instead, tackling this problem and meeting heightened expectations requires practitioners to develop better methods of identifying potentially privileged documents and then correctly reviewing and logging them in a compressed timeframe. These tasks can then be allocated to more skilled or experienced attorneys who, trained on the specific privilege concepts inherent to Second Requests and armed with more useful insight into the data sets under review, are able to make final, accurate decisions earlier in the process. The remaining team members are then freed up to focus on other tasks, thus maintaining productivity while minimizing the risk of over-designation.

**Understanding Privilege in Second Requests**

Implementing these improvements requires in-depth knowledge of eDiscovery workflows as well as a nuanced understanding of how to approach privilege in the context of Second Requests. Communications relating to both the merger itself and the merger clearance process often involve a multitude of parties (acquirer, target, M&A counsel, antitrust counsel, economists, bankers, deal advisors, PR firms, etc.) that present privilege issues not found in other contexts. In addition to implicating joint defense, common interest, and attorney work product privileges, the decision of whether privilege applies can change based on the date of the communication, the changing role of each party involved, the combination of parties involved, and the document’s subject matter.

Developing a comprehensive understanding of the different parties that affect privilege decisions, including the role each plays and how privilege will be applied in different situations, prior to beginning the document review process becomes incredibly important. Doing so enables attorneys to better identify the most likely privileged documents in advance and make more informed decisions during review, facilitating a quicker and more accurate eDiscovery process. This is especially helpful in a situation where it is not an option to simply classify everything as privileged and try to clean up the mess later on.
Most attorneys supervising a document review understand this at some level. They will often create a list of law firms, in-house counsel, and economists for their teams and cover some basics relating to the different types of privilege during training. They may also run some basic search terms in an effort to pre-identify potentially privileged documents. This is likely sufficient in a typical document review. However, this approach can fail to account for scenarios that occur in many Second Requests and require more upfront planning and coordination.

The following describes a few of the most common of these situations. Understanding and addressing each can be crucial to a party’s ability to correctly identify privileged materials, limit the extent of over-designation, and adhere to expedited production schedules.

It is important to note that case law regarding privilege is sparse and/or unsettled in many of the areas discussed here. Parties will need to reach their own conclusions on where the dividing line is found in each. The key point is that these scenarios are common to Second Requests and should ideally be identified and discussed in advance to ensure some level of accuracy and consistency.

- **Board Members.** Emails relating to a pending transaction and touching on potentially privileged topics will often involve members of a company’s board of directors, who frequently use their primary company or personal email address for these communications. In such instances, it is common for attorneys to come across seemingly unrelated third-party email domains and quickly assume a document is not privileged.

  Practitioners should seek to compile the necessary background information on the company’s board in advance and educate reviewers on how to approach situations in which they may be involved. In addition, once this information is known, various analytical tools can be used to pre-identify communications involving these individuals and assign them to more experienced resources.

- **M&A versus Antitrust Counsel.** The distinction among different practice groups can be used to structure more efficient workflows and enable quicker and more accurate decisions. This is particularly true where the same law firm provides both M&A and antitrust counsel to a party and blanket rules cannot be created for the disposition of documents based solely on the firm involved. While documents involving antitrust counsel will be presumptively privileged in most situations, the analysis of documents involving M&A counsel can be much more nuanced. Although internal communications between counsel and client are very likely to be privileged, reviewers will also come across a large number of documents between M&A counsel for both parties in which they discuss the terms of the transaction or share draft merger agreements, many of which are non-privileged arm’s-length negotiations. M&A counsel for the two parties may also be involved in communications regarding antitrust issues or other topics that fall under the terms of a Joint Defense Agreement or otherwise fit under the common interest rule.

  In addition to generally being aware of each of these situations, practitioners can reduce errors and inconsistency by using information relating to an attorney’s role, the participants in the communication, and the date it took place to more accurately identify and categorize these documents. Further, mapping out each of these scenarios in advance and creating baseline rules for how to approach different situations can significantly improve reviewer efficiency and accuracy.

- **Documents Prepared at the Request of Counsel.** When antitrust attorneys ask clients to prepare certain information or analyses to assist in their advocacy, they’ll typically recommend that in-house counsel stay involved in these efforts and that any communications or documents are clearly identified as being prepared at the request of counsel. In practice, many of these tasks
are delegated to non-attorneys who forget to include counsel on their communications or fail to label these documents correctly. To an unaware reviewer, these can easily look like ordinary course business communications, especially when they are mixed in with large volumes of day-to-day non-privileged communications involving the same employees.

Attorneys can take a few steps to address this challenge. One is to make sure they more strongly emphasize to clients the importance of including attorneys on these communications and then labeling them properly. Ideally, this can minimize the number of documents that are likely to be missed in the first place. Knowing that some number of documents will still slip through the cracks, counsel should work with their clients to understand who else might have helped in these efforts. Reviewers can then be trained on how to spot these communications and use the collected information to better search for and flag relevant documents during the applicable time period.

● Discussions Between Merging Parties. The merging parties and their law firms will communicate on a host of different topics both before and after the signing date. Some of these communications will be arm’s-length negotiations relating to the transaction. Others will relate to fairly clear-cut joint defense/common interest topics and are easily identified as privileged. There are then a number of other topics that fall into a grey area.

For example, parties may communicate regarding draft press releases or public statements, post-signing integration plans, or non-antitrust regulatory filings, each of which requires additional consideration prior to beginning the review. Counsel should think through these issues, specifically which types of party-to-party communications are likely to be privileged and, early in the process, establish ground rules regarding how to approach them. Without doing so, it can prove very difficult to maintain consistency across different decision-makers.

● Non-Attorney Advisors. It is common for merger-related communications to involve other external advisors, such as economists, bankers, public relations firms, accountants, or M&A consultants, in addition to outside counsel. Depending on the circumstances, the role of those advisors, and the subject matter of the document, privilege may or may not be waived by their presence. While each law firm may take a slightly different approach to these decisions, it is important to identify these companies upfront, ascertain the role they played, and establish some baseline rules to follow in terms of when documents will be privileged. Without this, reviewers will almost surely take an all-or-nothing approach—either assuming privilege is waived in all instances in which a third party is involved or taking an overly cautious approach and blindly treating all documents with counsel as privileged. In addition to establishing advanced guidance, this information can also be used as a quality control input, verifying that no documents involving these advisors are mistakenly overlooked.

● Privilege in Non-U.S. Jurisdictions. Many non-U.S. jurisdictions apply a more narrow form of the attorney-client privilege, and in some cases (in particular, in Europe) exclude communications from in-house counsel to the business from the scope of privilege. As a result, parties in cross-border merger investigations may be compelled to produce evidence to a non-U.S. agency that would qualify as privileged under U.S. law. Thankfully, the FTC and DOJ have stated that such disclosures would likely not be considered “voluntary” and therefore do not constitute a waiver of the attorney-client privilege, preventing the U.S. agencies from obtaining information that

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13 See Case C-550/07-P, Akzo Chemicals Ltd v. Comm’n, 2010 E.C.R. I-8301 (holding that in-house counsel are not independent from their employers to the extent required for legal professional privilege to apply in EU competition law proceedings).
would otherwise be protected. However, guidance from FTC/DOJ suggests that to prevent waiver or the accidental sharing of privileged information among agencies, parties should identify and mark all such materials as privileged under U.S. law when producing them in another jurisdiction.

This step can add another layer of complexity to privilege review in cross-border investigations. In these situations, it may be more efficient to begin flagging such documents during the Second Request process, rather than revisiting the subject later. One approach that can work particularly well is to focus on identifying documents involving outside counsel that would typically be privileged in non-U.S. jurisdictions, as these often comprise a smaller portion of all privileged documents and can be more easily identified via analytical tools. The inverse of this set of documents could then be produced outside the United States with the appropriate identifiers. While the best approach will depend on the parties’ specific circumstances, including the jurisdictions involved, painstaking and duplicative work can be avoided if these issues are considered at the outset of the eDiscovery process.

Corporate Structures and Prior M&A Activity. Parties faced with a Second Request often have complicated corporate structures and are regularly involved in M&A activity. In many situations, an acquired company will continue to operate under its original name or use its existing email domains while IT systems are being integrated. This can present difficult privilege scenarios. If reviewers are unaware of these corporate relationships, they may mistakenly assume they are coming across unrelated third parties that waive privilege. Simply knowing about these corporate relationships and past acquisitions may not be enough. If the transactions occurred during the Second Request date range, the data set under review may contain a mix of pre- and post-merger communications between the two companies. Although ordinary course pre-merger communications between two independent companies are likely not privileged, those relating to the transaction may implicate some of the issues discussed above, while post-merger the acquired company would now be viewed as the “client” for purposes of privilege.

Working with a client to understand its past transaction history can make it significantly easier for reviewers to understand these corporate relationships and to sort through these issues ahead of time. Once this information is known, rules can then be established for how to approach privilege decisions involving related entities.

While this list is not exhaustive, it is indicative of the types of issues that arise on many Second Requests. Understanding the nuances of each is therefore key to establishing clear and workable rules that can ensure privilege is protected while minimizing the number of de-privileged documents.

14 See Alden F. Abbott & Ashley Gum, U.S. Privilege Following Akzo Nobel v. European Commission, Federal Trade Comm’n (Oct. 3, 2018), www.ftc.gov/news-events/blogs/competition-matters/2018/10/us-privilege-following-akzo-nobel-v-european; (“But this alone should not suggest that the FTC intends to disturb longstanding U.S. application of the attorney-client privilege, even where a company might produce arguably privileged material in a DG Comp investigation.”); U.S. Dep’t of Justice & Fed. Trade Comm’n, Updated Model Waiver of Confidentiality for International Civil Matters 2 (2013) [hereinafter Updated Model Waiver], www.justice.gov/atr/file/705856/download (language in DOJ/FTC’s standard waiver suggesting that productions to non-U.S. antitrust agencies will not be considered waiver and “the FTC/DOJ will treat such information as inadvertently produced privileged information.”).

Building a Better Framework

While the situations outlined here can make privilege determinations more complex, they become especially problematic if not planned for in advance. Fortunately, many of these issues are common across Second Requests, regardless of industry or company size, and standard eDiscovery processes can be created to address them.

As a starting point, it can be beneficial to brief eDiscovery providers on substantive issues and overall strategy in greater detail. Their personnel often have the technical or process expertise to address these challenges, but their effectiveness may be limited if they lack a complete understanding of counsel’s strategies and objectives. For example, while minimizing over-designation or late productions is important for every custodian, counsel may understand that there are certain custodians, such as likely deponents, for which the agencies will expect particularly clean productions and be less tolerant of mistakes. By understanding these nuances, eDiscovery providers can adjust their own approaches or develop strategies to better align with counsel’s objectives.

Further, practitioners should seek to do the following at the outset of each Second Request when preparing for eDiscovery:

- Identify and compile the information, including companies, law firms, dates, attorney names, and key events, that will affect privilege determinations in the areas discussed here. Ideally, standardized information sheets and methods of collecting this data can be created to streamline this process and ensure thoroughness.
- Determine how each of these situations should be handled and the factors that will affect privilege decisions, including when questions should be escalated to more senior attorneys. Without proper guidance, attorneys will take different positions on the applicability of privilege, especially as there are not always clear-cut answers to be found in existing case law. Thinking through these issues beforehand and creating a process will help ensure consistency and prevent over-designation.
- Leverage eDiscovery technology to identify documents that are likely to implicate these privilege issues and assign them to a dedicated team that is well-versed in these areas. If the issues are understood and the necessary information has been collected, a relatively well-designed combination of domain analysis, date filters, text searches, and other analytical tools can often be used to locate the most critical documents in a data set.
- Provide comprehensive training to the individuals conducting the document review on these privilege scenarios and how to use the information provided to make more informed decisions. Without proper guidance, it is very likely attorneys will take an overly cautious approach in each of these areas and struggle to maintain consistency with one another.
- Track, on a daily basis, the privilege percentages for each custodian to identify any trends or red flags. While this is essential when operating under a DOJ Timing Agreement and the 5 percent threshold is in danger of being approached, it is critical to ensuring an efficient privilege review on any Second Request. By closely tracking this information, parties can quickly adapt to changing circumstances, including rearranging workflows to complete privilege assessments for certain custodians, and in particular those that have been identified as likely deponents, at an earlier point in time and avoid delays in certifying compliance.

Conclusion

With data volumes growing at an exponential rate, and increased expectations from the antitrust agencies regarding the eDiscovery process, managing privilege in Second Requests is an
increasingly challenging task. Approaches that were effective (but inefficient) in the past may no longer be viable options. By following the steps outlined here and creating a framework for addressing the privilege situations common to Second Requests, practitioners can better allocate resources and more confidently identify privileged materials earlier on, even when faced with extremely large volumes of data or utilizing high numbers of less experienced attorneys. In addition to the obvious benefits of accuracy and consistency, this also enables parties to expedite productions while avoiding delay penalties or post-compliance challenges.
Antitrust judgments resolving conspiracy cases occasionally include restrictions on facilitating practices—actions and arrangements that intensify interdependence by blunting incentives to compete. The imposition of such remedies is consistent with a long line of precedents. Interdependence (“conscious parallelism”), a situation in which competitors act on a mutual understanding that they would benefit from restrained competition, is not unlawful in and of itself. But evidence showing both interdependence and facilitating practices may establish the existence of an unlawful conspiracy agreement under Section 1 of the Sherman Act. Thus, in their essence, restrictions on facilitating practices are similar to merger remedies addressing coordinated effects.

In United States v. Paramount Pictures (1948), the Supreme Court concluded that vertical integration and a set of vertical practices facilitated a horizontal conspiracy in the motion picture industry. Accordingly, the Supreme Court ruled that the appropriate remedy should include divestitures of certain vertically integrated assets and restrictions on certain distribution practices. The Paramount consent decrees (the “Paramount Decrees” or “Decrees”) implemented this ruling and have continued to regulate the motion picture industry over the seven decades since.


3. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (noting that vertical agreements “may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel”); Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 612 (1914) (holding that information exchange is a facilitating practice that permits the inference of a conspiracy agreement); Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 49–50 (1st Cir. 2013) (stating that allegations of facilitating practices are sufficient to plead a conspiracy claim); Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (“[A] horizontal price-fixing agreement may be inferred . . . when . . . interdependent conduct is accompanied by circumstantial evidence . . . such as defendants’ use of facilitating practices. . . . Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”); In re Flat Glass Antitrust Litig. (II), No. 11-658, 2012 WL 5383346, at *3 (W.D. Pa. Nov. 1, 2012) (stating that “facilitating practices, such as information exchange” may serve as plus factors); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 418 (S.D.N.Y. 2003) (stating that facilitating practices may constitute plus factors); Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253, 1274–75 (N.D. Ga. 2002), aff’d sub nom. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) (noting that “facilitating devices’ are not necessarily sufficient under the law to constitute a ‘plus factor’”).


On November 22, 2019, the U.S. Department of Justice’s Antitrust Division filed in the District Court for the Southern District of New York a motion to terminate the Paramount Decrees. The Division recognized that the Decrees banned practices that facilitated a horizontal conspiracy. It maintained, however, that: (1) the “Decrees successfully dismantled and ended the motion picture horizontal distributor cartel of the 1930s and 40s,” and (2) “changes in the motion picture industry, antitrust jurisprudence, and economic understandings warrant immediate termination of the [Decrees].”

The Division’s approach in this instance is, unfortunately, misguided. Its claims about the industry rest on a sloppy compilation of factual statements, and its claims about antitrust jurisprudence and modern economics reflect antipathy for behavioral remedies, as well as skepticism that vertical arrangements may be anticompetitive.

The story of the Paramount Decrees offers lessons for present debates about the future of antitrust law that could benefit contemporary assessments of remedies such as restrictions on facilitating practices and divestitures. The story could also benefit assessments of antitrust policy in periods of rapid technological change, vertical arrangements, and conspiracy inference.

Hollywood’s Golden Age: Interdependence and “Coopetition”

In the second quarter of the 20th century, the motion picture industry was one of the fastest growing sectors in the United States. Through technological and operational innovations, the industry turned moviegoing into America’s favorite pastime. Companies in the industry competed against each other and faced threats of entry but did not face any meaningful competition from alternative entertainment outlets, as home video technologies were not yet commercially viable.

This period is known as Hollywood’s Golden Age.

Within the industry, a group of eight film distributors established themselves as industry leaders and operated as an oligopoly. These eight distributors were household names in the 1930s and 1940s: Paramount Pictures, Warner Bros., Loew’s (then the parent company of MGM), Twentieth Century-Fox, RKO, United Artists, Columbia, and Universal. Five of these distributors, known as the “majors,” integrated production and distribution and held equity in movie theaters.

The other three distributors, known as the “minors,” acquired equity in theaters in the 1920s but divested these investments in the early 1930s. Two minors integrated distribution and produc-

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8 Supporting Memorandum, supra note 7, at 7–10.

9 Id. at 2.

10 Id. at 5–6.

11 See Color and Sound on Film, FORTUNE, Oct. 1930, at 33.

12 See THOMAS CRIPPS, HOLLYWOOD’S HIGH NOON (1997).


15 The minors included United Artists, Universal, and Columbia. 1947 Paramount, 70 F. Supp. at 60 (Finding 58).
tion and specialized in low-budget productions. One minor, United Artists, specialized in the production of high-quality films. The company was able to gain a position in the high-end segment because of the stature of its founders, superstars who resented working with the vertically integrated studios.\textsuperscript{16}

Together, these eight distributors dominated the motion picture industry during Hollywood’s Golden Age. In the mid-1940s, they collected close to 95 percent of licensing that the U.S. exhibitors paid to U.S. distributors.\textsuperscript{17} The majors owned or held equity in about 17 percent of theaters in the United States, including 70 percent of the first-run theaters in the 92 largest U.S. cities.\textsuperscript{18} Seven distributors still operate today as subsidiaries of media conglomerates.\textsuperscript{19}

A key characteristic of the oligopoly was the heterogeneity of the distributors and their products that undermined their ability to fix prices.\textsuperscript{20} Instead, the distributors engaged in “coopetition”: while competing over market shares and revenues, they also cooperated in certain areas to promote their joint interests, principally self-regulation, lobbying, and exclusion of competition from other companies.

The distributors’ cooperative ventures were often negotiated through their trade association, the Motion Picture Producers and Distributors of America (MPPDA),\textsuperscript{22} which was “the expression and fulfillment of [their] cooperative impulses.”\textsuperscript{23} In 1923, shortly after the distributors formed MPPDA, the association introduced a template exhibition agreement that standardized distribution practices.\textsuperscript{24} This model agreement produced efficiencies by reducing transaction costs associated with the booking of films and simplifying the process of dispute resolution. Nonetheless, some elements of the model agreement were anticompetitive.\textsuperscript{25} For example, in the 1920s, the agreement contained mandatory arbitration clauses that were unfavorable to independent exhibitors. Holding that these arbitration clauses violated antitrust law, the Supreme Court noted that arbitration could serve “the needs of the motion picture industry; but, when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal.”\textsuperscript{26} In another decision, the Supreme Court held that the credit rules for exhibition


\textsuperscript{17}Michael Conant, Antitrust in the Motion Picture Industry 44–47 (1960).

\textsuperscript{18}1947 Paramount, 70 F. Supp. at 68, 70 (Findings 126 and 148).


\textsuperscript{21}For the notion of coopetition, see Rockwell D. Hunt, Co-opetition, L.A. Times, Nov. 20, 1937, at 4 (“[T]he maintenance of competition does not presuppose the absence of cooperation, nor does the existence of cooperation demand the overthrow of competition.”); Adam M. Brandenburger & Barry J. Nalebuff, Co-opetition (1996); Pierre Roy & Said Yami, Coopetition within an oligopoly: impacts of a disruptive strategy, in Coopetition: Winning Strategies for the 21st Century 185 (Said Yami et al. eds., 2010).

\textsuperscript{22}MPPDA was commonly known as the “Hays Office,” for the leadership of the association’s first president, Will Hays. See Raymond Moley, The Hays Office (1945).

\textsuperscript{23}Id. at 37.


\textsuperscript{25}See, e.g., United States v. First Nat’l Pictures, 282 U.S. 44 (1930) (holding unlawful a provision stating that distributors would refrain from entering into licensing agreements with purchasers of theaters unless they satisfy certain conditions).

\textsuperscript{26}Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930).
agreements that the model agreement standardized also violated antitrust law. In 1932, pressured by antitrust actions challenging the legality of the standard exhibition agreement, the distributors modified the agreement to be optional rather than binding. Their adherence to the optional agreement, however, continued to be relatively uniform.

Film scholars have struggled to characterize the complex relationships among the distributors that consisted of interdependence, mobility of executives across companies, collusive arrangements, and parallel vertical practices. Economist Mae Heuttig described these relationships as “a maze of intricate relationships,” in which “[n]o one aspect is intelligible except as part of the whole.” Economist Robert Brady observed that the industry was “governed by . . . management groups” that functioned as “a semicompulsory cartel . . . of the type that typically stops short of the more readily indictable [antitrust] offenses.” Together, Brady argued, the distributors operated as “a type of monopoly that is difficult to define, . . . hard to trace and appraise, and . . . varies endlessly in methods of application and degrees of effectiveness.” Likewise, film historian Tino Balio argued that the distributors operated as “a mature oligopoly,” in which the majors had “a sort of symbiotic relationship” with the minors that supplied “low-cost pictures.”

The Paramount Decrees

Paramount and the Paramount Decrees concluded an epic trustbusting campaign that sought to remove barriers to competition in the motion picture industry. This campaign (1) marked the reinvigoration of antitrust enforcement in the late 1930s, (2) addressed the organization of the motion picture industry during Hollywood’s Golden Age, and (3) still represents the most ambitious effort to reform markets through antitrust enforcement to date.

The Supreme Court issued the Paramount decision in May 1948. It took the government almost four years to negotiate and litigate the Decrees with all of the distributors. The Decrees included structural and behavioral remedies. The structural remedies required the majors to divest their interests in movie theaters and prohibited them from expanding into exhibition. The behavioral remedies sought to establish a “competitive bidding” process, which the Supreme Court interpreted to mean entering into licenses on a “theatre by theatre and picture by picture” basis. To this end, the Decrees forbade the distributors from setting admission prices and from engaging in “block booking” (the licensing of a bundle of films), “circuit dealing” (the licensing of films to chains rather than individual theaters), and “overbroad clearances” (exclusive licenses for

28 See Some Angles to Uniform Contract, VARIETY, Nov. 22, 1932, at 34; Optional Standard License Agreement, VARIETY, Nov. 22, 1932, at 34; Lewis, supra note 24, at 294–98.
29 See, e.g., Conant, supra note 17; Mae D. Huettig, Economic Control of the Motion Picture Industry: A Study in Industrial Organization (1944); Daniel Bertrand Et Al., The Motion Picture Industry—A Pattern of Control (1941).
30 Huettig, supra note 29, at v.
32 Id. at 125.
36 The first decree was approved in November 1948 and the last decree was approved in February 1952. See supra note 6.
37 1948 Paramount, 334 U.S. at 161.
Although the Decrees applied only to the Paramount defendants, their behavioral remedies have served as interpretations of antitrust law. Thus, in practice, the Decrees have regulated vertical relations in the motion picture industry over the past seven decades.

The Division’s Rationales for Termination

The Division’s decision to terminate the Paramount Decrees was hardly surprising. Under the leadership of Assistant Attorney General Makan Delrahim, in April 2018 the Division launched an “initiative to terminate legacy antitrust judgments” that “no longer protect competition.” Legacy judgments are old decrees that remain in effect because they have no sunset provisions and, therefore, their termination requires approval by the issuing court. Over 1,300 legacy judgments had been issued from the early days of the Sherman Act to 1979, when the Division concluded that perpetual decrees were not in the public interest. Although many legacy judgments concern companies and industries that no longer exist, there are some that still govern the operation of ongoing businesses. The Paramount, ASCAP, and BMI consent decrees are probably the most well-known examples.

Announcing the decision to move to terminate the Paramount Decrees, AAG Delrahim stated that the Decrees “long ago ended the horizontal conspiracy among movie companies . . . and undid the effects of that conspiracy on the marketplace.” He further stated that the Decrees “have served their purpose, and their continued existence may actually harm American consumers by standing in the way of innovative business models for the exhibition of America’s great creative films.” More broadly, in public speeches, AAG Delrahim has opined that antitrust should focus on enforcement, not regulation, and that behavioral remedies tend to be ineffective.

While good intentions stand behind the move to terminate the Paramount Decrees, the Division’s analysis is flawed. First, although the Division recognized that the Decrees addressed facilitating practices, it portrayed the distributors’ conspiracy as a product of an explicit agreement. Several old judicial opinions point out that Paramount’s determination that a conspiracy among the distributors had exist-

38 The decrees banned minimum resale price maintenance, which in the 1930s and 1940s was used to undermine the appeal of inexpensive theaters. Since the 1970s, exhibition agreements typically include restrictions on minimum admission prices (“per capita requirements”) and the ban on minimum resale price maintenance is treated as a ban on interference with pricing decisions of exhibitors. See General Cinema Corp. v. Buena Vista Dist. Co., 681 F.2d 594 (9th Cir. 1982); Barak Orbach & Liran Einav, Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry, 27 INT’L REV. L. & ECON. 129 (2007).


40 April 25, 2018 Press Release, supra note 39; see also U.S. DeP’t of just ice, Antitrust Division Manual III-149-to-150 (5th ed.).

41 The ASCAP and BMI decrees concern the licensing of public performing rights in the music industry. In June 2019, the Division opened a review of these decrees to determine whether they “should be maintained in their current form, modified, or terminated.” Press Release, U.S. DeP’t of Justice, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019). See also Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. DeP’t of Justice, Sign of the Times: Innovation and Competition in Music, Remarks as Prepared for the National Music Publishers Association Annual Meeting (June 13, 2018).

42 Motion to Terminate Press Release, supra note 7.

43 Id.

ed in the 1940s did not mean that this conspiracy existed thereafter.\textsuperscript{45} The Division misread these decisions, concluding that they held that \textit{Paramount} or, at the very least, the \textit{Paramount} Decrees dismantled the “cartel.”\textsuperscript{46} Thus, without any evaluation of past or present effects of the Decrees on interdependence in the industry, the Division argued that there is “no reason to believe” that the distributors “would or could re-establish the industry-wide horizontal conspiracy or cartel that was the basis for the original enforcement action by the United States and the resulting Decrees.”\textsuperscript{47}

Second, the Division mistakenly argued that consent decrees cannot ban vertical arrangements, because, today, the legality of vertical arrangements is evaluated under the rule of reason.\textsuperscript{48} Under this approach, consent decrees cannot ban vertical arrangements that facilitate horizontal conspiracies or horizontal arrangements that are evaluated under the rule of reason. In practice, however, antitrust consent judgments often ban arrangements that are evaluated under the rule of reason.\textsuperscript{49}

To be sure, there are good reasons to evaluate legacy antitrust judgments, modify some, and terminate others. The \textit{Paramount} Decrees are no exception. The emergence of the digital economy and decline of brick-and-mortar retailers (such as movie theaters) demand an evaluation of whether and how the Decrees affect innovation and entry. But the Division failed to explain its assertion that termination of the Decrees would “lead to business practices and innovations that benefit consumers.”\textsuperscript{50}

\textbf{The Reinvigoration of Antitrust Enforcement}

Until 1935, antitrust enforcement meant big political promises, symbolic trustbusting campaigns, and a little enforcement stick.\textsuperscript{51} In January 1935, the Justice Department announced the “most far-reaching antitrust action in many years,”\textsuperscript{52} charging three distributors and five film executives with a conspiracy to coerce a St. Louis exhibitor to sell its theaters to one of them.\textsuperscript{53} The action, known in the industry as the \textit{St. Louis Trust Case}, was approved by President Roosevelt and intended “to show industry and the nation at large that the anti-trust laws have survived the New Deal.”\textsuperscript{54}

\textsuperscript{45} See, e.g., \textit{Theatre Enterprises}, 346 U.S. at 543–44; Buckhead Theatre Co. v. Atlanta Enters., Inc., 327 F.2d 365, 369 (5th Cir. 1964).

\textsuperscript{46} Supporting Memorandum, \textit{supra} note 7, at 12, 16.

\textsuperscript{47} \textit{Id.} at 3.

\textsuperscript{48} \textit{Id.} at 22–23.

\textsuperscript{49} See, e.g., \textit{In re} Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1190 (9th Cir. 2015) (describing a consent decree ordering a trade association to cease and desist from “urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information [concerning pricing practices] between or among [members of the association]”); Press Release, Fed. Trade Comm’n, FTC Enters Global Settlement to Resolve Reverse-Payment Charges Against Teva (Feb. 19, 2019) (announcing a consent decree resolving a set of reverse settlement agreements); Press Release, U.S. Dept of Justice, Justice Department Reaches Settlement with Nexstar Media Group Inc. in Ongoing Television Broadcaster Information Exchange Investigation (Dec. 13, 2018) (announcing a consent decree banning certain forms of information exchange).

\textsuperscript{50} Supporting Memorandum, \textit{supra} note 7, at 22.


\textsuperscript{52} \textit{U.S. Government Starts Anti-Trust Suit Against Producers in St. Louis}, \textit{Film Bull.}, Jan. 8, 1935, at 2.


\textsuperscript{54} See \textit{St. Louis Probe as Test If Trust Laws Live}, \textit{Motion Picture Daily}, Jan 8, 1935, at 1; see also \textit{St. Louis Grand Jury Quiz Based on “Freezing” Films}, \textit{Motion Picture Herald}, Jan. 12, 1935, at 11.
Although the government failed to secure criminal convictions,\(^{55}\) the *St. Louis Trust Case* nonetheless marked a change in the direction of antitrust enforcement and was followed by a barrage of antitrust investigations and lawsuits. The motion picture industry was the subject of several high-profile investigations and lawsuits.\(^{56}\)

In April 1938, Thurman Arnold, the “most aggressive and effective trustbuster of all time,”\(^{57}\) became the Assistant Attorney General in charge of the Antitrust Division. Shortly thereafter, the Division instituted four trustbusting actions against the distributors and large theater chains, alleging that the companies engaged in monopolistic and collusive practices in violation of the antitrust laws.\(^{58}\) The four lawsuits were litigated all the way to the Supreme Court, resulting in landmark decisions written by Justice William Douglas: *Paramount* (1948), *Griffith* (1948), *Schine Chain Theatres* (1948), and *Crescent Amusement* (1944).\(^{59}\) The *Paramount* lawsuit charged the eight distributors, their affiliated companies, and 134 individuals with a conspiracy to exclude competition. *Griffith*, *Schine*, and *Crescent* concerned powerful regional exhibitors that allegedly orchestrated conspiracies among the distributors to exclude competition from small exhibitors. The stated objective of these lawsuits was the “[r]estoration of free enterprise and open competition amongst all branches of the motion-picture industry.”\(^{60}\) To advance this goal, the government sought and secured sweeping structural and behavioral remedies.

### Technological Change and Market Power

Antitrust law is a byproduct of the transformation of the economy at the turn of the 19th century. The Second Industrial Revolution (1870–1914) combined two threads of disruptive innovations: (1) new technologies that enabled mass production and mass distribution, and (2) institutional arrangements that enabled the formation of large companies. In many industries, the ability to operate at large scale inspired races for domination. Firms that harnessed efficiencies sought to expand quickly to establish their market positions. Important to the understanding of the *Paramount* Decrees, large-scale supply chains became a core element of the economy and necessitated vertical arrangements. In the motion picture industry, before the age of home video technologies, the supply chains consisted of three key segments: production, distribution, and exhibition.

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\(^{55}\) *St. Louis Jury Acquits Big Film Firms of Conspiracy to Break Anti-Trust Law*, N.Y. TIMES, Nov. 12, 1935, at 1. For the perceived significance of the case, the government proceeded in a civil lawsuit, forcing the defendants to enter into consent decrees. *See Anti-Trust ‘Settlement’, VARIETY*, May 6, 1936, at 7; *U.S. Anti-Trust Suit Against Three Leading Film Concerns Settled, WALL. ST. J.*, May 1, 1936, at 5; *U.S. Stakes All on St. L., VARIETY*, Nov. 27, 1935, at 5.


\(^{58}\) *See Third Movies Suit Is Aimed at South*, N.Y. TIMES, Aug. 11, 1939, at 2 (announcing the Division’s action against the Crescent Circuit and certain distributors); *U.S. Cracks Down on Indie, HOLLYWOOD RPT’R*, Aug. 7, 1939, at 1 (announcing the Division’s action against the Schine Circuit and certain distributors); *More U.S. Suits to Follow, VARIETY*, May 3, 1939, at 3 (announcing the Division’s action against the Griffith Circuit and certain distributors); *Justice Department Statement on Suit Against Leading Movie Interests, N.Y. TIMES*, July 21, 1938, at 6 (announcing the Division’s action against distributors).


\(^{60}\) *Justice Department Statement on Suit Against Leading Movie Interests*, supra note 58.
Congress passed the Sherman Act and, subsequently, the Clayton and Federal Trade Commission Acts, responding to concerns that the new business titans, then known as “trusts,” unfairly excluded competition and harmed small businesses. Much of the development of antitrust law in the 20th century surrounded beliefs that business size and vertical arrangements harmed competition. Numerous antitrust cases from the past century addressed the effects of large corporations on “independent” companies, i.e., firms that were not affiliated with big companies.

The motion picture industry was one of the many new industries that formed in the Second Industrial Revolution. In many ways, the industry epitomized social and economic tensions that industrialization created.61

The first generation of movie entrepreneurs developed and commercialized moving picture technologies.62 Inspired by the common business models of the era, these entrepreneurs treated movies as inexpensive and relatively homogeneous commodities.63 They established the “one reel” model—short films that targeted the working class and kids.64 One-reel films typically presented sights from remote places (known as “scene pictures”) and simple plots ending with a chase (known as “chaser pictures”).65 They neither featured professional stage actors nor disclosed the identity of the creative talent. One-reel films played in inexpensive facilities, such as vaudevilles and nickelodeons. Vaudevilles, also known as “variety theaters,” were inexpensive theaters that offered programs of a variety of types and styles—musicians, singers, comedians, dancers, trained animals, acrobats, lecturers, one-reel films, and so forth.66 Nickelodeons were facilities that played one-reel films, which gained their name for the common admission fee they charged.67

In the era of one-reel films, industry leaders actively suppressed efforts to introduce alternative business models, insisting that “the single reel photo-drama [was] the keystone of the motion picture industry” and that multi-reel films had no prospects.68 They were able to suppress innovation through their control over essential patents. In 1908, a group of moving picture pioneers formalized their cooperation and created a patent pool, the Motion Picture Patents Company (MPPC),

６1 Orbach, Interstate Circuit, supra note 20.

６2 See Terry Ramsay, A Million and One Nights: A History Of The Motion Picture (1964); Robert Grau, The Theatre of Science: A Volume of Progress and Achievement in the Motion Picture Industry (1914).

６3 See, e.g., The Charm of Variety, MOTION PICTURE WORLD, July 31, 1909, at 151 (criticizing the “uniformity” of movies enforced by the industry); Larger Programs to Select From, MOTION PICTURE WORLD, May 27, 1911, at 1173 (observing that “the trend is to spread out in quantity instead of to concentrate on quality”); Facts and Comments, MOTION PICTURE WORLD, Aug. 5, 1911, at 270 (criticizing “the policy of the competing groups of manufacturers” that intended to kill “competition of quality”).


６5 Zukor, supra note 64.


６8 William N. Selig, Present Day Trend in Film Lengths, MOTION PICTURE WORLD, July 11, 1914, at 181. See also Carl Laemmle, Doom of Long Features Predicted, MOTION PICTURE WORLD, July 11, 1914, at 185.
then known as the “Motion Picture Trust.”69 In August 1912, the Justice Department filed a trust-busting action against MPPC, which concluded in October 1915 with a court judgment ordering the dissolution of MPPC.70

The second generation of motion picture entrepreneurs introduced a new business model: feature films for shared consumption in attractive facilities. “Feature films” were multi-reel movies of superior quality and meaningful product differentiation.71 They were considerably longer and more sophisticated than the one-reel films. Feature films were produced on expensive sets with large creative and technical crews, used professional actors who were promoted as “movie stars,” and were heavily advertised. “Shared consumption” was the social convention that people preferred watching movies with others and moviegoing served a variety of social functions. The “attractive facilities” were designated movie theaters.

Adolph Zukor, the founder and legendary president of Paramount Pictures, was also the originator of the feature film model and its key elements.72 To enter the market controlled by MPPC, Zukor formed a company that integrated the production and distribution of feature films. The company’s distribution arm instituted programs of releases, initially marketed as “30 Famous Features a Year.”73 The concept of programs—the licensing of bundles of movies—was not new.74 The distribution of one-reel films was primarily accomplished through daily programs.75 Zukor’s scheme, however, which became known as “block booking,”76 was different. He required exhibitors to commit to annual programs of feature films, thereby reducing their capacity to license films from other distributors. The advantage of block booking was that it allowed production companies “to know what amount could be spent in producing a picture without gambling too much.”77

Vertical integration with exhibition began and evolved as an arms race. From 1912 to 1917, Zukor’s enterprises gained control over the production and distribution of feature films in the United States. In 1917, a powerful theater chain—the First National Exhibitors’ Circuit—acquired production and distribution capacity to reduce dependence on Zukor’s enterprises.78 Zukor initially opposed vertical integration with exhibition, believing that it would harm competition and degrade quality. In a highly publicized essay, Zukor wrote that “[t]he evil of producing and exhibiting coali-

72 Adolf Zukor, *Famous Players in Famous Plays*, MOTION PICTURES WORLD, July 11, 1914, at 186 (describing his idea to depart from “the old routine” and “engage the highest salaried, the most highly respected, the most artistic in the world to pose in their greatest successes before the camera, and to follow that film with those of others in their theatrical triumphs”); Zukor, *Origin and Growth*, supra note 64; Douglas Gomery, *What Was Adolph Zukor Doing in 1927?*, 17 FILM HIST. INT. J. 205 (2005).
73 Zukor, *Famous Players in Famous Plays*, supra note 72; Zukor, *Origin and Growth*, supra note 64.
74 LEWIS, supra note 24, at 146–53.
75 HAMPTON, supra note 64, at 49–82.
76 LEWIS, supra note 24, at 142–80.
77 Zukor, *Famous Players in Famous Plays*, supra note 72; Zukor, *Origin and Growth*, supra note 64.
tions is one of the gravest perils that has ever confronted the motion picture industry.” 79 Ultimately, however, Zukor’s enterprises expanded into exhibition to secure venues for their films. 80 From that point and until the implementation of the Paramount Decrees, success in the industry required vertical integration of production, distribution, and exhibition, or trade relationships with firms that integrated production, distribution, and exhibition. Throughout Hollywood’s Golden Age, Paramount’s exhibition arm was the largest circuit in the United States.

By the end of the 1920s, through growth, consolidation, and integration, the eight distributors established themselves as industry leaders.

Cycles of Expansions and Contractions
Over the past century, the exhibition segment of the motion picture industry has experienced three periods of expansion and three periods of contraction. The first period of expansion was from the advent of the feature film to the Great Depression. The second expansion was from the end of the Great Depression to the commercialization of television in the late 1940s. The third expansion was from the emergence of multiplexes in the mid-1960s to the rise of the digital economy in the early 2000s.

Correspondingly, the first contraction period was during the Great Depression, from 1931 to 1933, and was mitigated by public excitement about talkies. The second contraction was from 1947 to the mid-1960, when broadcasting and cable television created competition to movies and movie theaters. The third contraction began in 2003 with the growth of streaming services and video on demand and has been moderate thus far.

![Figure 1: Moviegoing Box Office Revenues in America, 1929-2019](image)

* Dataset created and maintained by the author.

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80 Douglas Gomery, The Movies Become Big Business: Publix Theatres and the Chain Store Strategy, 18 CINEMA J. 26 (1979); Zukor, Origin and Growth, supra note 64; Paramount May Control Chain of Theatres Over the Country, VARIETY, Jan. 11, 1918, at 1.
As shown in Figure 1, in 1938, when the government filed the lawsuit against the distributors, the average American watched about 34 movies per year. Movie attendance continued to grow, peaking in 1945, when the average American watched about 36 movies per year. In 1948, when the Supreme Court handed down Paramount, the average American watched about 23 movies per year. Movie attendance continued to decline until the mid-1960s. In the mid-1950s, the government reduced and subsequently eliminated admission tax that was imposed in 1932. This move contributed to a temporary increase in box-office revenues.\(^{81}\) From 1966 to 2003, movie attendance per capita fluctuated around five movies a year. The rise in box-office revenues at the turn of the 20th century is attributed to the relocation of theaters to malls that were popular in the 1990s. Since 2003, the industry has been experiencing a steady decline in attendance per capita. In 2019, the attendance per capita rate was 3.8 movies per year.

Setting aside the Great Depression, from the introduction of feature films to the mid-1940s, technological and operational innovations generated persistent growth in movie attendance and revenues. Since the mid-1940s, in the eras of home and personal video technologies, innovation has been used to preserve the viability of cinematic exhibition. Thus, contrary to dark predictions, VCRs and DVD players did not kill the motion picture industry. Rather, through innovation and heavy investments in production and exhibition, the industry was able to maintain attendance rates.

Across the boom and bust cycles, the repeated need to make big capital investments to adapt to new technologies has been particularly unfavorable to small companies. Their decline was inevitable. In the era of home video technologies, the demand for “B movies,” inexpensive pro-

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\(^{81}\) See Houses Softpedal Tax Policies, VARIETY, Apr. 7, 1954, at 7 (reporting that exhibitors increased admission prices after the federal government cut tax on tickets); Money for Movies, N.Y. TIMES, Aug. 2, 1953, at X1 (reporting that the tax relief was intended to help the industry that was adjusting to television).
Productions that used to be popular, drastically shrank. Likewise, certain forms of exhibition, such as second-run theaters, drive-ins, and adult theaters, vanished. The rapid development of streaming technologies in the 21st century has required all companies to reevaluate their reliance on cinematic exhibition. Trends in the utilization of screens illustrate this pattern. As shown in Figure 2, in the age of home video technologies, exhibitors have increased the number of screens and the revenues per screen plummeted.

The Division’s move to terminate the *Paramount* Decrees rests on the belief that, in our era, the Decrees no longer serve consumers and could impede technological change. This belief and its underlying premises are quite speculative.

**Vertical Arrangements**

Scholars associated with the Chicago School of antitrust have insisted that the vertical arrangements that the distributors employed in the 20th century were procompetitive. These assertions follow dubious reasoning: vertical arrangements are essential to the functioning of supply chains and, therefore, are unlikely to be anticompetitive. The Division’s motion to terminate the *Paramount* Decrees builds on this logic. But, of course, despite the many virtues of vertical arrangements, under certain and common conditions, vertical arrangements may suppress competition. The history of the motion picture industry illustrates this point.

In the 1910s and 1920s, vertical arrangements facilitated the development of the market for feature films. Subsequently, certain vertical practices served the expansion of markets. For example, systems of “runs” and “clearances” allowed the industry to use intertemporal pricing, offering first runs in upscale theaters for high prices and subsequent runs in less expensive theaters for lower prices. Likewise, circuit dealing—the licensing of multiple films to theater chains—was more efficient than the licensing on the basis of movie by movie, theater by theater. However, these practices were also used to exclude competition.

**Vertical Agreements.** Before the implementation of the *Paramount* Decrees, the distributors’ vertical restraints weakened the ability of independent companies to compete with the Distributors and their affiliated theaters. Common vertical restraints that were used to exclude competition included block booking, long clearances (stipulated periods between runs of the same picture within a particular area), high minimum admission prices for subsequent runs, and bans on double features (the offering of two movies for the price of one). Block booking depleted the exhibition capacity of exhibitors and curbed incentives to license movies from independent distributors. Long clearances and high admission prices for subsequent runs undermined the attractive-

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85 *Orbach, Interstate Circuit, supra note 20, at 1462–63.

86 *Id.*
ness of inexpensive theaters that competed with upscale theaters. Bans on double features harmed independent distributors, whose films often served as the second movie in double feature offerings.

During Hollywood’s Golden Age, arrangements between powerful exhibitors and the distributors often included exclusionary vertical restraints. In these arrangements, the distributors added to their licensing agreements a set of vertical restraints, some of which excluded competition in exhibition while others excluded competition in distribution. In effect, these arrangements were trades in exclusionary restraints. For restraints that harmed its rivals, each party “paid” with restraints that harmed the other party’s rivals. Importantly, the negotiations for these arrangements included, at least in some instances, direct or indirect horizontal coordination.

*Interstate Circuit* (1939) illustrates the architecture of trades in exclusionary restraints. Interstate Circuit was a partially owned subsidiary of Paramount that owned first and subsequent run theaters across Texas. It was managed by exhibition professionals, who were known in the industry as “partners” of Paramount. In consultation with Paramount, Interstate Circuit managers negotiated a deal under which the distributors added to their licensing agreements restrictions on minimum admission prices and bans on double features. The restrictions on admission prices benefited Interstate Circuit by forcing rivals to increase their admission prices while the bans on double features benefited the distributors by eliminating demand for features of rival distributors. To persuade the distributors to adopt restraints that harmed trade partners (small exhibitors), Interstate Circuit orchestrated a cartel among the distributors. *Crescent*, *Schine*, and *Griffith* concerned similar arrangements of trades in exclusionary restraints.

**Vertical Integration.** Discussions of the motion picture industry during Hollywood’s Golden Age typically state that the majors owned theaters, and neglect to mention that some of the vertically integrated theaters were only partially owned by the majors. Such simplified descriptions mischaracterize the industry structure. The Division’s motion to terminate the Paramount Decrees fails in this aspect as well.

The affiliation relations between the distributors and exhibitors, which the Division describes as “vertical integration,” included diverse forms of equity holdings and contractual arrangements. In the 1930s and 1940s, these affiliations divided the industry into two groups of firms: (1) the distributors and their affiliated companies, and (2) independent companies in which the distributors did not hold equity and with which the distributors did not have partnership relations. About half of the affiliated exhibitors were partially-owned subsidiaries, which were jointly-owned with third parties or by two distributors.

Simply stated, the affiliations were on a continuum stretching from small passive investments, to partial ownership without control, to partially-owned and controlled subsidiaries, to wholly-owned subsidiaries. Additionally, pooling agreements, where two or more affiliated chains entered

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88 Schine, 334 U.S. 110; Griffith, 334 U.S. 100; Crescent, 323 U.S. 173.

89 See Orbach, *Interstate Circuit*, supra note 20, at 1463–66 (describing why and how the majors moved from complete to partial vertical integration).

90 Supporting Memorandum, supra note 7, at 22–23.

91 In *Paramount*, the Supreme Court noted that the “majors . . . had interests in somewhat over 17 percent of the theatres in the United States—3,137 out of 18,076 [theatres].” 1948 *Paramount*, 334 U.S. at 167. The Court further noted that 41% of the affiliated theaters were jointly owned by the Distributors and third parties. Another 7% of the affiliated theaters were jointly owned by two Distributors. Id. at 150, n.9.
into formal cooperation agreements, were also common.\textsuperscript{92} Further, large independent exhibitors often had informal affiliations with one or two distributors through trading relationships, interlocking directorates, and mobility of executives across firms.

As the Division correctly observed, “vertical integration can create efficiencies that lower costs and encourage innovation that often results in better products and lower prices for consumers.”\textsuperscript{93} Strategic theater ownership by distributors has been used to enhance efficiencies. For example, in the early 1990s, Disney acquired an iconic movie palace, renovated the theater, and has been using it as a venue for its premieres.\textsuperscript{94} Likewise, in 2019, Netflix acquired capacity to exhibit its productions in landmark movie palaces.\textsuperscript{95} Large scale vertical integration of exhibition, however, proved cost-ineffective.\textsuperscript{96} The Distributors invested heavily in vertical integration with exhibition from the late 1910s to the early 1930s. Their exhibition arms, however, produced huge losses. Thus, in the early 1930s, the minors exited exhibition and the majors replaced vertical integration with diverse forms of affiliations.\textsuperscript{97} These affiliations facilitated exclusion of competition.\textsuperscript{98}

**Interdependence and Conspiracy Inference**

Throughout the history of the feature film industry, the overwhelming majority of antitrust actions against film distributors involved alleged conspiracies to exclude competition through vertical restraints. In these cases, the government and private plaintiffs argued that powerful exhibitors used their dominant positions to persuade distributors to limit the access of small exhibitors to high-budget films, including likely blockbusters. *Theatre Enterprises*, *Schine*, *Griffith*, *Crescent*, and *Interstate Circuit* are antitrust landmarks that examined such alleged conspiracies.\textsuperscript{99} Even today, lawsuits alleging that unlawful conspiracies explain the inability of small exhibitors to secure films because of such conspiracies are still common.\textsuperscript{100}

Alleged conspiracies to exclude small exhibitors are often consistent with competitive independent conduct. When a distributor faces a choice between an upscale theater and a lackluster theater, it would prefer to license its promising films to the upscale theater. Under such conditions, the parallel unwillingness of distributors to license their promising films to less successful theaters is not indicative of conspiracy in the meaning of Section 1 of the Sherman Act. That said, not all alleged conspiracies to exclude small exhibitors follow this pattern. Small chains of upscale theaters that compete with theaters of the national circuits typically fail to secure persistent sup-

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\textsuperscript{92} Id. at 66–68 (Findings 112–119).

\textsuperscript{93} Supporting Memorandum, supra note 7, at 22.


\textsuperscript{96} See Orbach, *Interstate Circuit*, supra note 20, at 1463–66.

\textsuperscript{97} Id.

\textsuperscript{98} Id.


ply of high-budget films. The persistent inability of small exhibitors to compete with theaters of national chains should raise concerns that today’s conspiracy inference standards are inadequate. Understanding the mechanisms that have shaped business norms in the motion picture industry over the past century could provide further insight into this problem.

The fundamental lesson, which is intuitive, is that long-term interdependence and long-term trade relations considerably reduce the scope and intensity of coordination needed to form and maintain cartels. In such situations, which are prevalent in many industries, limited coordination may suffice to form and maintain concerted action.

**Competition Policy in Eras of Technological Divides**

In periods of rapid technological change, the distribution of welfare gains and losses is heavily skewed: successful entrepreneurs and their backers capture a portion of the gains and accumulate wealth, while large segments of the population experience losses arising from automation and displacement of old technologies. This pattern forms because the diffusion of access to and skills compatible with the new technologies is gradual and uneven. The resulting economic disparities created by technological divides, in turn, contribute to beliefs that companies and individuals that accumulate wealth in the process of creative destruction are responsible for the woes of those who were adversely affected in the process. In America, trustbusting impulses have emerged as byproducts of such public sentiments.

The history of the motion picture industry illustrates this phenomenon. The industry was born out of and has evolved through technological shocks that devastated businesses that specialized in older technologies and were unable to adapt to new ones. For example, the feature film model was a disruptive innovation that wiped out the one-reel film industry, placed vaudevilles on a path to extinction, and led to a drastic contraction of the “legitimate theater” industry. Tens of thousands of small businesses that operated in these industries went bankrupt. Likewise, the introduction of the talkies in 1927 evaporated the demand for silent films. Production companies and exhibitors that were unable to afford sound technologies went bankrupt. Musicians who played in silent movie theaters and actors with foreign accents lost their jobs overnight. In the same fashion, the emergence of the digital platforms in the 21st century required producers, distributors, and exhibitors to adjust to new realities. For exhibitors, the brick-and-mortar retailers of movies, this adjustment has been particularly challenging.

**Conclusion**

Today, when antitrust seems to be at an historical inflection point, the history of antitrust in the motion picture industry could inform present debates about the future of antitrust law. In the second quarter of the 20th century, eight film companies used an intricate maze of vertical and horizontal arrangements, which collectively intensified interdependence and facilitated exclusion of competition. The Paramount Decrees imposed restrictions on these facilitating practices. Over

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101 Charles B. Weinberg et al., Technological Change and Managerial Challenges in the Movie Theater Industry, J. CULTURAL ECON. (forthcoming).

102 Color and Sound on Film, supra note 11.

the past seven decades, the Decrees have governed the distribution of movies to cinematic exhibition.

In the process of formulating the decision to terminate the Paramount Decrees, the Division solicited public comments as to whether the Decrees should be terminated or modified. The Division received 82 comments. One comment supported terminating the Decrees and 81 comments opposed terminating the Decrees. The Division's dismissive approach to the objections was not accompanied by an adequate analysis.

There may be reasonable disagreements over the effectiveness of the Paramount Decrees. There may also be good reasons to believe that any effectiveness of the Decrees has declined over time. Such concerns deserve serious evaluation, which the Antitrust Division has failed to present. In the absence of any meaningful analysis, the concern is that ideological objections to behavioral remedies and outdated beliefs about vertical arrangements drove the Division's decision, not evidence and analysis.

In the digital age, movie exhibition, like other forms of brick-and-mortar retailing, cannot survive in its traditional form. While the extinction of exhibition is possible, the emergence of new forms of exhibition is more likely. Thus, today, the protection of the ability of entrepreneurial exhibitors to secure films and the protection of the access of new production companies to brick-and-mortar exhibition is probably as important as it was in the late 1940s, when the commercialization of television devastated the industry.

Postscript
This article was written before the COVID-19 pandemic broke out. The pandemic forced consumers in the United States and around the world to stay at home, avoid trips to non-essential brick-and-mortar businesses, and increase reliance on digital technologies. On the other side of the crisis, the story of the Paramount Decrees may be an account of a 20th century business model that the pandemic wrecked. But the core elements of this story might still be valuable for the assessment of important antitrust themes: interdependence, facilitating practices, conspiracy inference, vertical relations, technological change, and remedies.

104 Supporting Memorandum, supra note 7, at 28–30.
105 Weinberg et al., supra note 103.
China’s Recent Competition Developments: 2019 in Review

Phil Monaghan and Scott Schaeffer

With years-long trade tensions between China and the United States, companies conducting business in both countries face new and escalating uncertainties (uncertainties now magnified exponentially by the unpredictable implications of the COVID-19 pandemic). Trade and export controls in one country can conflict with competition policy in the other. Requirements are evolving quickly; new measures are introduced regularly. Even with the countries’ recent Phase I trade agreement, these complex and shifting conditions can lead to confusion about on-the-ground competitive conditions and the laws framing them.

The year 2019 saw China and the United States whipsaw between claims of a trade agreement and accusations of unlawful market behavior. The countries engaged in tit-for-tat actions meant to punish foreign companies perceived as threats to national interests or domestic industries. And they did so even as China eased its traditional restrictions on market access and explored new methods to exert control over market behavior. Against this backdrop, China’s courts and enforcers have been grappling with the reach and the meaning of the country’s antitrust statute, the Antimonopoly Law (AML), which is only eleven years old and is expected to undergo its first major revisions in 2020.1

In this article, we seek to untangle this complicated situation and highlight some of the most notable developments and rulings from 2019 that are likely to impact foreign companies operating in China.

Key Antitrust Developments

Resale Price Maintenance. In June 2019, the Chinese Supreme Court published a groundbreaking decision on resale price maintenance (RPM), a practice through which a manufacturer and a distributor agree on the minimum prices at which the distributor will resell the manufacturer’s products. The Court ruled in Yutai v. Hainan Provincial Price Bureau that China’s antitrust enforcers need not prove anticompetitive impact in RPM cases, establishing a rebuttable presumption that the practice is unlawful.2

Specifically, the Chinese Supreme Court concluded that antitrust enforcers are entitled to a presumption of anticompetitive impact, even though RPM may also have procompetitive effects.


It explained that because China’s markets are not perfectly competitive—and thus the country cannot rely on market forces to correct the anticompetitive consequences of RPM—China’s antitrust enforcers must be able to target potential anticompetitive effects arising from RPM arrangements. Requiring the agencies to conduct comprehensive investigations with sophisticated economic analysis in every RPM case would greatly increase costs and undermine the efficiency of agency enforcement.

At the same time, however, the court explained that RPM is not per se unlawful. Companies targeted by regulatory enforcement actions are entitled to rebut the presumption of harm in two ways. First, they can demonstrate that the RPM agreement does not actually harm competition. Alternatively, they can prove that the challenged conduct falls under an exemption to the AML, which exempts actions that promote certain public interests, including the protection of international trade or foreign economic cooperation, and the enhancement of the competitiveness of small enterprises. The opinion does not explain what types of evidence are sufficient to prevail using these rebuttals, although it is likely that companies will need to advance sophisticated legal and economic proof together with underlying evidence. And because most RPM cases will be evaluated during administrative investigations by China’s antitrust enforcer, the State Administration for Market Regulation (SAMR) may evaluate the sufficiency of a company’s proof without ever formally advancing its own. In general, it seems clear that companies should continue to approach RPM with great caution—it remains in practice one of the most serious violations of the AML—and the safest course is to avoid it.

It is also important to note that the presumption of unlawfulness in RPM cases extends only to administrative action by China’s antitrust enforcers. Private plaintiffs bringing RPM claims must still prove an anticompetitive impact resulting in actual losses to recover monetary damages.

**Abuse of Dominance.** In April 2019, SAMR fined Eastman Chemical roughly $3.6 million for abusing its dominant position in the market for alcohols used in latex paints. Eastman had entered supply agreements that obligated customers to purchase 60 to 80 percent of their annual needs from Eastman for a minimum of two to three years. SAMR considered the contracts unlawful because they limited customers’ product choices and prevented other firms from entering the alcohol market, foreclosing around 20 percent of the total market, a very low bar by the standards of other jurisdictions. But SAMR stressed that Eastman’s foreclosure deprived competitors of a sufficient number of customers to whom they could make direct sales, forcing them to rely instead on sales to intermediary dealers—who, while part of the same relevant market, have less stable demand. The decision is noteworthy because minimum purchase agreements are not explicitly mentioned in the AML. Indeed, the Eastman case appears to be the first time a minimum purchase agreement has resulted in fines, confirming SAMR’s willingness to pursue any conduct that it believes is inconsistent with the AML, whether expressly prohibited or not.4

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**New Antitrust Regulations.** On September 1, 2019, three regulations meant to implement China’s AML took effect: (1) the Interim Regulation Prohibiting Monopoly Agreements; (2) the Interim Regulation Prohibiting Conduct Abusing Market Positions; and (3) the Interim Regulation Preventing Conduct Abusing Administrative Rights. The regulations clarify procedural and substantive elements of the AML.

- **Monopoly Agreements (Collusion).** The first regulation covers anticompetitive agreements and other concerted practices. It makes clear that many forms of conduct—including price fixing, agreements to restrict output or production, market division agreements, agreements prohibiting competitors from purchasing new technologies and equipment, agreements prohibiting the development of new technology, and direct and indirect forms of RPM—are considered the most serious, hardcore violations of the AML. The regulation also specifies which factors SAMR will evaluate when determining whether concerted practices (what we would likely consider parallel conduct subject to the rule of reason in the United States) exist, including whether there is unity of conduct, a meeting of the minds, information exchanges, market structure, the existence of reasonable explanations for the conduct other than collusion, and the state of competition in the market, among other things.

- **Abuse of Market Position (Dominance/Monopolization).** The second regulation generally deals with single-firm conduct and clarifies how dominance is determined. Specifically, it indicates that market shares can be measured with reference to sales value, sales volume, or other data. For industries related to the Internet or intellectual property, for example, SAMR can consider business models, user numbers, network effects, foreclosure effects, data control, and countervailing buyer power when assessing market power. Importantly, the regulation also offers detail on what constitutes abusive conduct, including excessive or predatory pricing, refusal to deal, exclusive dealing, discriminatory practices, and tying.

- **Administrative Abuses (State Monopoly).** The third regulation is aimed at competition abuses by Chinese government agencies. While SAMR is not empowered to sanction other public agencies, it can issue guidance and recommendations for how to rectify offending behavior. Such abusive conduct may include restrictions on the free movement of goods, services, and investments, as well as exclusivity or exclusionary practices.

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6 Id. Arts. 7–12.
7 Id. Arts. 6, 13.
9 Id. Art. 6.
10 Id. Art. 11.
11 Id. Arts. 14–19.
13 See, e.g., id. Art. 20.
14 Id. Arts. 4–9.
**Trends in Chinese Merger Clearance.** China’s rise to antitrust prominence has given it leverage in merger reviews on a par with the United States and Europe, and it now represents a major merger control jurisdiction for companies seeking global merger clearance. With the AML now in its eleventh year—and undergoing major revisions for the first time in 2020—certain trends in Chinese merger clearance are apparent. They underscore that unconditional clearance in other jurisdictions does not mean easy success in China.

Key trends seen in 2019 include:

- **Length of Review.** Chinese merger clearance generally takes longer than in other jurisdictions, especially when potential competition concerns exist and remedies are necessary. It can be months before SAMR even “accepts” a merger filing, thereby starting a review clock that can easily run for six months, assuming the case is not on an expedited “simplified” track. In the ASE/SPIL case (2017), for example, China’s Ministry of Commerce (MOFCOM)—the relevant antitrust regulator at the time—accepted the case roughly four months after the parties filed their initial notification. It then took almost a year for MOFCOM to complete its review and approve the transaction with remedies. Other cases in which SAMR required remedies are similarly lengthy. Indeed, each conditional clearance in 2019 took well over six months. 17

15 On January 2, 2020, SAMR introduced draft amendments to the AML, including a significant increase in fines for gun jumping, failure to notify, and breach of restrictive conditions; new powers allowing SAMR to update merger control thresholds from time to time; and new tolling standards that will allow SAMR to suspend the merger clearance clock if parties submit new documents or data, among other things. On January 7, 2020, SAMR also issued new proposed merger control regulations, which are intended to streamline merger clearance reviews, clarify procedures, and consolidate a number of existing merger rules and regulations. Notable proposed rules include stricter divestiture requirements and a higher bar for certain forms of simple case reviews.


Behavioral Remedies. While regulators in the U.S. and EU—in the past, at least—have expressed a preference for structural remedies, which require the parties to divest or otherwise modify their assets before a transaction is cleared, China regularly utilizes behavioral remedies, which can influence the parties’ post-transaction operations. Examples of Chinese behavioral remedies include (1) supply and price commitments for Chinese (or indeed global) markets; (2) continued product interoperability; (3) licensing of standard essential patents on fair, reasonable, and non-discriminatory terms; (4) bundling prohibitions; and (5) guaranteed access to and use of technology or digital platforms. These behavioral remedies allow SAMR to address competition concerns and achieve industrial policy objectives.

Hold Separates. A quasi-behavioral remedy unique to China and employed with some regularity (particularly recently), even when no other antitrust regulator imposes conditions, is a “hold separate.” Hold separates can prohibit operational integration of certain business units until years after the deal closes, thereby aiming to ensure continued competition in the relevant product market. In some instances, SAMR must approve integration at the end of the hold-separate term, which generally runs between two and three years but can stretch as long as five years. Recent examples include the Cargotec/TTS (2019; two-year term), II-VI/Finisar (2019; three-year term), and Zhejiang Garden Biochemical/Royal DSM (2019; five-year term) transactions. There have been a total of eight hold-separate remedies over the last eleven years, with three in 2019 alone, which may signal an increased reliance on the remedy going forward.

Stakeholder Interests. In analyzing mergers, SAMR turns to and relies on the input of various stakeholders, including customers, competitors, trade associations, and a range of government agencies and decision makers to perhaps an even greater extent than regulators in the U.S.
and EU. While merging parties can attempt to preempt negative feedback by engaging with customers and trade associations, and by arguing there are no anticompetitive effects, SAMR often sides with stakeholder feedback and looks for remedies that satisfy the concerns of stakeholders (including where the concerns are not well grounded in any theory of anticompetitive harm).

- **Mergers Between Chinese State-Owned Enterprises.** In October 2019, the Chinese government approved the merger between China Shipbuilding Industry Corp. (CSIC) and China State Shipbuilding Corp. (CSSC), both state-owned enterprises and the largest shipbuilding companies in China. The merger is notable because China formed CSIC in 1999 by spinning it off of CSSC. At the time, the government was seeking to stimulate domestic competition. Now, the government’s focus seems to have shifted to creating huge “national champion” companies (a trend that can only be expected to continue in the post COVID-19 world). Indeed, the combined firm is now the world’s second-largest shipbuilder. The CSIC-CSSC merger continues a trend of mega mergers between China’s state-owned enterprises, including those between (1) CNR and CSR, which resulted in the world’s largest train maker; (2) China Ocean Shipping Company and China Shipping Group, which resulted in the world’s largest shipping fleet; and (3) ChemChina and Sinochem, which will result in the world’s largest industrial chemicals firm.

### New Controls of Market Behavior

**China’s New Social Credit System.** For years, China has been working toward the implementation of a Social Credit System (SCS), through which it intends to monitor, influence, and publicly report companies’ compliance with laws and other government requirements. Low ratings would lead to severe sanctions, curtailing a company’s ability to operate effectively in the country. This possibility is noteworthy today because China is aiming for a complete roll out of the SCS by the end of 2020. Once fully implemented, the SCS is likely to increase the importance (and burdens) of compliance and reporting efforts.

The SCS is intended to promote integrity and credibility in the Chinese economy, but also to enhance China’s soft power, international influence, and control over market behavior. The rollout

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of the SCS coincides with a relative opening up of the Chinese market, including relaxation of joint venture and investment requirements, as discussed further below. Some observers suggest that the SCS is the reason for this opening up, providing the government with another means to influence market behavior.25

The SCS aims to centralize every company’s compliance with Chinese laws, regulations, and government requirements, no matter which Chinese agency is responsible for monitoring and enforcing the relevant provision. To simplify a bit, government authorities set topic-specific requirements—generally market rules and regulations—that firms must satisfy in order to receive a good rating. Companies are then monitored for compliance through self-reported data, traditional government inspections, next-generation technologies related to big data and artificial intelligence, and third-party input from companies like Alibaba and Tencent. Based on that information, companies are rated for compliance with each set of topic-specific requirements, and the collection of ratings is centralized and accessible across agencies.26

Companies that breach a government requirement will receive a rating downgrade and, over time, will experience greater restrictions on their business activities. If negative ratings accumulate, or in the event of serious misbehavior, a firm can even be blacklisted. In that situation, the SCS imposes joint sanctions. This means that the company not only could be subject to sanctions from SAMR under the AML, but could also be subject to restrictions and negative treatment from all other government agencies, including the loss of preferential tax treatment or financial subsidies, restrictions on government procurement and bidding activities, or more frequent government inspections, audits, and supervision, among other things. There are dozens of memorandums of understanding between government authorities intended to facilitate joint sanctions, as well as individual agency regulations explaining how they will report violations of relevant laws, as discussed at greater length below.27

While the SCS is principally intended to help implement and enforce existing laws and regulations—underscoring the importance of robust compliance and reporting mechanisms—it can also impose new requirements. Companies may, for example, be negatively impacted by the behavior of business partners, requiring careful selection and monitoring of suppliers and distributors. Requirements related to continuing supply to Chinese customers during the U.S.-China trade dispute may also play a role, potentially putting multinational companies in a tough situation.

SAMR Regulations Add Teeth to the Social Credit System. On July 10, 2019, SAMR issued draft regulations entitled “Administrative Measures for Lists of Parties with Seriously Illegal and Dishonest Acts.”28 The regulations are meant to support the SCS and enhance social supervision, increase the consequences for unlawful actions, and publicize misbehavior.29 Specifically, the regulations contain a lengthy list of actions that result in inclusion on a serious offender list, ranging

26 Id. at 10–19.
27 Id. Arts. 1 & 2.
29 Id. Art. 6(1)–(36).
from failure to execute an administrative sanction to repeat trademark infringement. Notably, companies that engage in unfair competition or monopolistic practices—and which cause serious harm as a result—will be included. So will companies that are found to endanger China’s national interests, or the interests of Chinese consumers, by engaging in collusion or fraud, among other things. Such provisions arguably could be used as a lever in the ongoing trade dispute between China and the United States.

Inclusion on SAMR’s serious offender list will carry several important consequences. Companies will be impacted when seeking to register and secure licenses or certifications. They will be considered a high credit risk under the SCS, becoming the object of increased regulatory attention, additional supervision, and more frequent inspections. And listed entities may experience harsher administrative punishments for future violations. If an entity voluntarily corrects its illegal behavior and eliminates any adverse impact from its actions, it can apply for removal from the list after one year. Alternatively, if the listed entity does not commit any further acts that would qualify for listing, it can apply for removal after three years. A party included on the serious offender list can also seek administrative reconsideration or institute administrative proceedings.

Trade and Foreign Investment Developments Likely to Impact Competition

China’s Unreliable Entities List. It was a year for lists. Similar to the SCS and SAMR’s serious offender list, China is creating a separate “Unreliable Entities List,” which will name any enterprise, organization, or individual that damages the interests of Chinese companies or threatens China’s national security. The Unreliable Entities List appears to be a response to the May 16, 2019, addition of Huawei and several affiliates to the United States’ “Entity List,” which is maintained by the U.S. Department of Commerce’s Bureau of Industry and Security (BIS). The effect of Huawei’s addition to the Entity List was dramatic: U.S. and non-U.S. persons that handle U.S. origin goods are prohibited from supplying to Huawei such goods or any other items subject to the Export Administration Regulation. This measure impacts suppliers’ sales to Huawei and the development of new products and technology for Huawei.

The stated reason for the BIS measure is that Huawei has been involved in activities determined to be contrary to the national security and foreign policy interests of the United States, including alleged sales of U.S. goods to Iran. Similar considerations led BIS to add ZTE, another large Chinese technology company, to the U.S. Entity List in 2016. Unlike ZTE, however, there is currently no indication or any upcoming settlement of the pending Huawei enforcement matter.

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31 Id. Art. 6(18).
32 Id. Art. 6(20).
33 Id. Art. 14.
34 Id. Art. 18.
35 Id. Art. 9.
36 Id. Arts. 11–13.
39 The United States granted a temporary general license covering specified activities, including the continued operation of existing networks and equipment, support for existing consumer electronic devices, and cybersecurity research and vulnerability disclosure, among other things. 15 C.F.R. § 744, Supp. 7 (2020).
40 Addition of Entities to the Entity List, supra note 37, at 22,961–62.
In a tit-for-tat move, on May 31, 2019, China’s MOFCOM announced the creation of its own Unreliable Entities List aimed at combating “unilateralism,” “trade protectionism,” and discriminatory actions meant to block supplies to Chinese enterprises. Although MOFCOM did not explain the penalties or procedures governing the list, or which entities and individuals would be included, the Ministry announced that the list will cover foreign entities or individuals “that do not comply with market rules, violate contracts, block or cut supplies to Chinese firms [for] non-commercial purposes, and seriously damage the legitimate rights and interests of Chinese enterprises.”

Government commentary following the initial announcement suggests that companies included on the list “will be restricted in terms of sales, investments and business licenses,” while “relevant individuals” will see “their travel, activities and employment in China” “rejected.” At a minimum, MOFCOM can be expected to warn the Chinese public against doing business with entities designated as “unreliable.”

The Unreliable Entities List and its attendant policies will be based on principles taken from China’s Foreign Trade Law, the AML, and the National Security Law, among others. MOFCOM seems particularly concerned with national security, but this is an expansive notion including economic development, technological progress, and resource security. MOFCOM also views the list as a means to protect international trade rules, supply chain stability, and the global economy.

While details are still emerging, it seems likely that companies with operations in both the United States and China will need to navigate compliance with U.S. export control and trade restrictions as well as China’s requirements of continued supply. Failure to comply with China’s requirements of continued supply may result in an inability to conduct business in China, enforcement pursuant to the AML, and implications for merger review. Failure to comply with U.S. restrictions, where applicable, exposes U.S. and non-U.S. companies to potential criminal or civil fines, the most draconian of which is to suffer the same fate as Huawei—losing export privileges and the ability to procure U.S. goods. Together, actions by both China and the United States could escalate trade tension and threaten to pull apart the supply chains currently linking the two economies.

A Wave of New Foreign Investment Laws. Against the backdrop of the still-simmering U.S.-China trade dispute, China has promised a more open market, a more level playing field, and a more predictable business environment. A number of new measures, most coming into effect in January 2020, reflect this commitment.

First, on October 22, 2019, China issued Regulations on the Optimization of the Business Environment, intended to create a “stable, fair, transparent, and predictable” business environment. The regulations, which came into effect on January 1, 2020, reiterate China’s commitment to equal treatment for foreign-invested firms, increased protection for intellectual property rights, streamlined administrative approvals, and enhanced antitrust enforcement against all types of...
anticompetitive conduct, among other things. While the regulations generally do not offer detail about how these principles will be achieved—calling on government at all levels to improve or establish policies and mechanisms—they do indicate that firms can submit complaints directly to China’s State Council, the country’s chief administrative authority, if government rules do not comply with applicable standards of fair competition.47

Second, China’s new Foreign Investment Law, which also took effect on January 1, 2020, streamlines and consolidates the country’s foreign investment regime and attempts to make China a more welcoming destination for investment, with better protections for foreign entities and standardized management of their investments.48 In many industries, foreign-invested enterprises will be treated just like domestic entities when it comes to market access, standard setting, government procurement projects, and technological cooperation, among other things.49 The law also aims to protect foreign investors from forced technology transfers, the exploitation of trade secrets, and the expropriation of investments.50

Third, China liberalized its other foreign investment restrictions. Each year, China issues two lists: one identifies sectors in which foreign investment is prohibited or heavily restricted, referred to as the “negative list”; the other identifies sectors in which foreign investment is encouraged, often through tax, tariff, or land use incentives. The 2019 lists reflect an easing on foreign investments in several industries, including the agriculture, mining, oil and gas, infrastructure, transportation, entertainment, telecommunications, and manufacturing industries, all of which saw restrictions come off the negative list.51 That list now covers 40 sectors, down from 48 in 2018.52 At the same time, the encouraged industries list added dozens of new sectors in which China hopes to bolster foreign investment.53 Many of those sectors relate to manufacturing, with a particular emphasis on high-technology industries like 5G components, cloud computing, aerospace materials, and artificial intelligence.

Finally, China has relaxed its joint venture requirements, which have traditionally required foreign firms to form a joint venture before they can access the Chinese market, often with a local partner owning a majority of the venture. According to reports, South Korean carmaker Hyundai is acquiring full ownership of one of its car making operations in China, buying the shares of its

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47 See, e.g., id. Arts. 4–8, 62.
49 Id. Arts. 4, 15–16.
50 Id. Arts. 20–27.
Chinese partner.\textsuperscript{54} JP Morgan also won a bid that would allow it to take a majority stake in its asset management joint venture.\textsuperscript{55} And PayPal recently secured approval to acquire 70 percent of GoPay, making GoPay the first foreign-invested payment platform in China.\textsuperscript{56}

**Conclusion**

As China’s AML continues to mature, courts are grappling with novel applications of its provisions and SAMR is working to clarify its scope and meaning. Those efforts alone are noteworthy, but the fact that they are occurring against the backdrop of the ongoing U.S.-China trade war—which continues to simmer despite the countries’ Phase I agreement—and at the same time as China is revolutionizing the manner in which it monitors competition and grants access to its markets, made 2019 a watershed year. Foreign companies have more protections and greater clarity than ever, but gains remain relative. These companies continue to face many uncertainties and challenges, requiring robust compliance efforts and close attention to developments in China. 2020 promises to be equally unpredictable, with proposals for major revisions to the AML already announced and the COVID-19 outbreak upending, and in many cases paralyzing, business and government functions around the world. Be sure to stay tuned.

