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 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 likely 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 settlements 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.