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### Procedural Fairness in Antitrust Enforcement: The U.S. Perspective

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# Procedural Fairness in Antitrust Enforcement: The U.S. Perspective

Christopher S. Yoo<sup>†</sup> and Hendrik M. Wendland<sup>‡</sup>

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## I. Introduction

The rule of law is one of the founding principles of the United States of America and has shaped U.S. legal thinking and practice in many areas. The basic idea is simple: the people and their actions are not governed and regulated by arbitrary decisionmakers, but by a set of rules that serves as a check against potential abuses of power.

Due process and fairness in enforcement procedures represent a critical aspect of the rule of law. Allowing greater participation by the parties and making enforcement procedures more transparent serve several functions, including better decisionmaking, greater respect for government, stronger economic growth, promotion of investment, limits on corruption and politically motivated actions, regulation of bureaucratic ambition, and greater control of agency staff whose incentives may not align with agency leadership or who may be using an enforcement matter to advance their careers. That is why international legal organizations such

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as the International Competition Network (ICN),<sup>1</sup> the Organization for Economic Cooperation and Development (OECD),<sup>2</sup> the Association of Southeast Asian Nations (ASEAN),<sup>3</sup> the International Chamber of Commerce (ICC),<sup>4</sup> and the American Bar Association (ABA)<sup>5</sup> have all offered frameworks that promote greater fairness and transparency in antitrust enforcement.

Due process and fairness are particularly important in antitrust enforcement. Because the U.S. was the first country to enact an antitrust law, it has enjoyed the greatest opportunity to develop its enforcement practices. As such, after first introducing the key antitrust enforcement institutions, this chapter will explore the manner in which the U.S. implements four key procedural protections to provide insights into ways to improve U.S. law.

## **II. The U.S. Antitrust Enforcement Agencies**

In the U.S., the federal antitrust laws (primarily the Sherman Antitrust Act,<sup>6</sup> the Federal Trade Commission Act,<sup>7</sup> and the Clayton Antitrust Act<sup>8</sup>) are enforced by the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Both agencies share jurisdiction over civil enforcement, including merger review, which is allocated by

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<sup>1</sup> INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2014), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

<sup>2</sup> ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMMITTEE, POLICY ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS (2011), <https://www.oecd.org/daf/competition/48825133.pdf>.

<sup>3</sup> ASS'N OF SOUTHEAST ASIAN NATIONS, ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY (2010), <https://www.icao.int/sustainability/Compendium/Documents/ASEAN/ASEAN-RegionalGuidelinesonCompetitionPolicy.pdf>.

<sup>4</sup> ICC COMM'N ON COMPETITION, INT'L CHAMBER OF COMMERCE, RECOMMENDED FRAMEWORK FOR INTERNATIONAL BEST PRACTICES IN COMPETITION LAW ENFORCEMENT PROCEEDINGS (2010), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf>.

<sup>5</sup> AM. BAR ASS'N, BEST PRACTICES FOR ANTITRUST PROCEDURE: THE SECTION OF ANTITRUST LAW OFFERS ITS MODEL (2015), [https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15\\_lipsky\\_tritell\\_12\\_11f.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf).

<sup>6</sup> 15 U.S.C. §§ 1-7 (2012).

<sup>7</sup> 15 U.S.C. §§ 41-58.

<sup>8</sup> 15 U.S.C. §§ 12-27, 29, 52-53.

industry between the two agencies. The DOJ, however, has exclusive jurisdiction over criminal enforcement.

The DOJ is the federal executive department primarily responsible for the enforcement of the law and administration of justice in the U.S. The Antitrust Division is one of the DOJ's six primary litigating divisions. It is headed by an Assistant Attorney General and supported by six Deputy Assistant Attorneys General, four Directors of Enforcement (collectively called the Front Office), and an Office of Operations. Most of the civil investigations and litigation proceedings are carried out by six Washington, D.C.-based, industry-specific, litigation sections, while criminal investigations are conducted either by field offices in Chicago, New York, and San Francisco, or one of the two D.C.-based criminal sections. The sections are each supported by an Economic Analysis Group (EAG) staffed with expert economists. In both criminal and civil matters, the DOJ can only proceed as a litigant in court.<sup>9</sup>

The FTC is an independent agency headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving seven-year terms, and supported by three primary bureaus. The Bureau of Competition is primarily responsible for the agency's enforcement of antitrust law. The Bureau of Competition is led by a Director and divided into six D.C.-based sections and three regional offices. The FTC can pursue actions either in court or through administrative adjudication, although administrative enforcement is rare.

Both the FTC and the DOJ have access to extensive tools when investigating potential antitrust violations. Initial investigations rely primarily on voluntary procedures, such as requests for access letters, questionnaires, formal surveys, and interviews.<sup>10</sup> Additionally, the FTC and

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<sup>9</sup> 15 U.S.C. § 4.

<sup>10</sup> FED. TRADE COMM'N, OPERATING MANUAL §§ 3.2.3.2, 3.3.6.7.5.1, at 10, 26 (Release 89-1, 1989), *available at* <https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals> [hereinafter FTC OPERATING

DOJ use civil investigative demands (CIDs) when appropriate during initial investigations to preserve confidentiality or to gather information critical to a quick and efficient resolution of the investigation.<sup>11</sup> In later stages of investigations, both agencies may resort to compulsory procedures. In civil cases, the tool of choice for the DOJ is the CID, which can be used to compel the production of documents, answers to written interrogatories, and testimony.<sup>12</sup> The FTC may also employ CIDs, but prefers the use of subpoenas for competition cases, as well as other compulsory techniques, including hearings, access orders, and orders to file special reports.<sup>13</sup> The parties under investigation have a duty to cooperate with the investigation and are prohibited from supplying false or misleading information.<sup>14</sup> In criminal cases, compulsory process takes the form of grand jury subpoenas.<sup>15</sup> Searches of the premises of suspected companies or individuals may substitute for subpoenas *duces tecum* in order to reduce the risk of the company destroying or concealing documents relevant to the investigation.<sup>16</sup>

### III. Restricting Abuse – Four Essential Procedural Protections Under U.S. Law

While the investigatory powers of the agencies are substantial, due process plays an important part in any investigation or litigation. In all cases, the U.S. Constitution guarantees it.<sup>17</sup> In court proceedings brought by agencies, the rules of procedure apply. In administrative enforcement, the Administrative Procedure Act (APA) and agency rules govern. Although the

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MANUAL]; U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-27 (5th ed., 2017), available at <https://www.justice.gov/atr/division-manual> [hereinafter ANTITRUST DIV. MANUAL].

<sup>11</sup> *Id.* at III-38.

<sup>12</sup> 15 U.S.C. § 1312(a) (2012); ANTITRUST DIV. MANUAL, *supra* note 10, at III-45, III-47.

<sup>13</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.7, at 24, § 3.3.6.7.5.3, at 27.

<sup>14</sup> 18 U.S.C. § 1512(c)(2); ANTITRUST DIV. MANUAL, *supra* note 10, at III-81.

<sup>15</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-46.

<sup>16</sup> *Id.* at III-90.

<sup>17</sup> The Fifth Amendment commands that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

general principles of due process are applied consistently, the details can differ according to the nature of the procedure in question.

Procedures at the FTC and the DOJ differ, and thus will be described separately. Both the FTC and DOJ have published detailed guidance documents that describe their internal practices. The relevant FTC administrative staff manual is its *Operating Manual*.<sup>18</sup> The DOJ describes its practices in its *Antitrust Division Manual*.<sup>19</sup> These documents do not bind the agency or create any enforceable rights, benefits, or defenses—substantive or procedural—although the procedural rights that they contain are enforceable to the extent that they describe the constitutional and statutory obligations of the agency.

## **A. Legal Representation**

The right to legal representation for the parties under investigation is an essential part of due process and procedural rights. Both the FTC’s and DOJ’s law and practice recognize a general right of the parties to be represented by counsel. However, both enforcement agencies limit the right to counsel in certain investigations.

### **1. FTC**

The FTC’s *Operating Manual* states that staff will ordinarily contact parties during the course of the investigation to advise them of the general nature of the inquiry, including the statutes and the alleged violations involved, and to request information. If the proposed

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<sup>18</sup> FTC OPERATING MANUAL, *supra* note 10. The FTC website notes that the *Operating Manual* “is currently under review” and that “[m]any parts of the Operating Manual are outdated and no longer accurately reflect Commission practice.” Fed. Trade Comm’n, FTC Administrative Staff Manuals, <https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals> (last visited Feb. 10, 2018).

<sup>19</sup> ANTITRUST DIV. MANUAL, *supra* note 10.

respondent is represented by counsel, any requests for information, documents, access, or interviews should be made through counsel.<sup>20</sup>

Any witnesses compelled to appear in person during the pre-complaint phases of an investigation have the right to be accompanied, represented, and advised by counsel.<sup>21</sup> The regulations prohibit counsel from conferring with witnesses when a question is pending or instructing them not to answer a question unless necessary to preserve protected status.<sup>22</sup> Counsel also has the right to be present at investigational hearings.<sup>23</sup> Witnesses may be represented by counsel distinct from the counsel for the respondent under investigation. Thus, the *Operating Manual* advises FTC staff to contact counsel for the respondent corporation prior to contacting employees.<sup>24</sup> In addition, certain state ethical rules give counsel for the corporation the right to be present during an interview with one of its employees.<sup>25</sup>

Once the FTC initiates a formal administrative proceeding or a civil action in court, the right to counsel is guaranteed by statute.<sup>26</sup> Representation by counsel is presumed in all stages of the proceedings, including the prehearing procedures,<sup>27</sup> filing of motions,<sup>28</sup> requests for witness testimony,<sup>29</sup> and appeals of the initial decision of the hearing officer to the FTC.<sup>30</sup> In

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<sup>20</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.3, at 19.

<sup>21</sup> 5 U.S.C. § 555(b) (2012); 16 C.F.R. § 2.9(b) (2018).

<sup>22</sup> 16 C.F.R. § 2.9(b)(1)-(2).

<sup>23</sup> 16 C.F.R. § 2.7(f)(3).

<sup>24</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.3, at 19.

<sup>25</sup> *E.g.*, CAL. RULES OF PROF'L CONDUCT Rule 2-100 (2017), *available at* [http://www.calbar.ca.gov/Portals/0/documents/ethics/2d\\_RRC/California-Rules-Professional-Conduct.pdf](http://www.calbar.ca.gov/Portals/0/documents/ethics/2d_RRC/California-Rules-Professional-Conduct.pdf); *see also* 28 U.S.C. § 530B(a) (requiring that government attorneys comply with the rules of state in which they are engaging in their duties).

<sup>26</sup> 5 U.S.C. § 555(b).

<sup>27</sup> 16 C.F.R. § 3.21(a) (2018).

<sup>28</sup> 16 C.F.R. § 3.22(c).

<sup>29</sup> 16 C.F.R. § 3.39(b).

<sup>30</sup> 16 C.F.R. § 3.52(g).

administrative adjudications, anyone admitted to the bar of a U.S. state or a Member State of the European Union may serve as counsel.<sup>31</sup>

If the FTC decides to pursue its claim in civil court through an injunction, the right to be represented by counsel is guaranteed by statute, just as in any judicial proceeding.<sup>32</sup> In judicial enforcement actions, counsel must be admitted to practice in the relevant jurisdiction. State rules usually restrict practice in front of U.S. District Courts to attorneys who are members of the bar of a U.S. state.

## **2. DOJ**

The rights of the parties in DOJ proceedings are similar, but not identical, to those that apply in the FTC proceedings. During the preliminary investigation stage, staff relies primarily upon voluntary requests for information.<sup>33</sup> If compulsory process is necessary, a CID deponent may be accompanied, represented, and advised by counsel in confidence at the deposition.<sup>34</sup> In the case of CIDs for documentary material, staff invites counsel for the respondent to discuss ways to resolve any avoidable problems, provide an oral summary of relevant personnel and company records, and to discuss a reasonable response time.<sup>35</sup>

In criminal investigations, grand jury proceedings are confidential, and the person suspected of having committed the crime is not entitled to be present or to have an attorney present.<sup>36</sup> With respect to search warrants, enforcement officials need not wait until counsel is

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<sup>31</sup> 16 C.F.R. § 4.1(a).

<sup>32</sup> 28 U.S.C. § 1654 (2012).

<sup>33</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-27.

<sup>34</sup> 15 U.S.C. § 1312(i)(7)(A).

<sup>35</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-51.

<sup>36</sup> *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979).



present before executing the search,<sup>37</sup> although any counsel present are typically permitted to observe and often coordinate responses, as long as they do not interfere with the search.<sup>38</sup>

After the investigation, the DOJ can enforce the antitrust laws in civil or criminal actions in a U.S. District Court. Both the U.S. Constitution and the applicable statutes recognize defendants' right to counsel during these judicial proceedings.<sup>39</sup> Representation in U.S. District Court is limited to counsel admitted to the bar of some U.S. jurisdiction.<sup>40</sup> Counsel may participate in settlement negotiations and may review consent decrees, but are not permitted to review Competitive Impact Statements (CIS).<sup>41</sup>

## **B. Notice of Legal Basis and Evidence Underlying the Alleged Violation**

Preparation of a meaningful defense against any allegation requires that agency inform the respondent of the legal and factual bases of the investigation and disclose the evidence on which it is relying. Such notice is a necessary prerequisite for the respondent to be able to prepare its arguments and gather evidence to rebut the agency's assertions.

### ***1. FTC***

FTC staff will ordinarily contact proposed respondents during the course of an investigation to advise them of the general nature of the inquiry, including the statutes and the

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<sup>37</sup> United States v. Cates, 663 F.2d 947, 948 (9th Cir. 1981) (holding that the right to counsel does not attach upon issuance of a search warrant); People v. Ferringer, 507 N.Y.S.2d 938 (App. Div. 1988) (same).

<sup>38</sup> TEFPT W. SMITH & JOHN F. HARTMANN, A HOW-TO GUIDE FOR AN EFFECTIVE FBI SEARCH WARRANT RESPONSE PROGRAM 5, 6, 7, 8 (1998), *available at* [https://www.kirkland.com/siteFiles/kirkexp/publications/2509/Document1/MA-9-search\\_dfa.pdf](https://www.kirkland.com/siteFiles/kirkexp/publications/2509/Document1/MA-9-search_dfa.pdf).

<sup>39</sup> U.S. CONST. amend. VI; 28 U.S.C. § 1654 (2012).

<sup>40</sup> U.S. DIST. CT. FOR THE DIST. OF MD., SURVEY OF ADMISSIONS RULES IN U.S. DISTRICT COURTS (2015), [http://www.msba.org/uploadedFiles/MSBA/Member\\_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf](http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Litigation/USDCTMDSurvey0115.pdf).

<sup>41</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at IV-51.

alleged violations involved.<sup>42</sup> If no contact was made during the investigation and if a recommendation for complaint is contemplated, staff should contact the proposed respondents at the conclusion of the investigation and inform them that a recommendation for complaint is being forwarded to the FTC Commissioners unless notification must be avoided to ensure preservation of evidence or other circumstances militate against contact.<sup>43</sup>

As noted earlier, staff rely primarily on voluntary requests for information during the initial stages of any investigation.<sup>44</sup> If compulsory process is necessary, staff must submit a memorandum to the Commission describing with specificity the legal theory of the investigation, the facts known, the information needed, the reasons why the information is relevant to the inquiry, and the cost and burden that production would impose on target companies.<sup>45</sup> The FTC's rules require that every party subject to compulsory process "be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law."<sup>46</sup> Respondents may submit a petition to quash any FTC compulsory measure if they believe the request is unduly burdensome or seeks irrelevant information, in which case the agency must defend the basis for its actions.<sup>47</sup>

If the FTC decides to pursue formal charges in court, notice of the legal and factual basis of the charges and evidence are governed by the U.S. Constitution, federal statutes, and the Federal Rules of Civil Procedure. In particular, the Rules require that the complaint provide a short and plain statement of the claim<sup>48</sup> and that the factual contentions have evidentiary

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<sup>42</sup> 16 C.F.R. § 2.6 (2018); FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.1, at 19.

<sup>43</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.1, at 19, § 4.14.2, at 9.

<sup>44</sup> *See supra* note 10 and accompanying text.

<sup>45</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.6.7.5.1, at 26.

<sup>46</sup> 16 C.F.R. § 2.6; *accord* FTC OPERATING MANUAL, *supra* note 10, § 3.2.3.2, at 10, § 3.6.7.5.3(1), at 28.

<sup>47</sup> 16 C.F.R. § 2.10.

<sup>48</sup> FED. R. CIV. P. 8(a)(2).

support.<sup>49</sup> The Rules also provide for extensive discovery, including compulsory disclosure of “of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses,” the identity of any expert witnesses along with their written reports, the names and addresses of any witnesses expected to be called, and each document or exhibit expected to be introduced into evidence.<sup>50</sup> Any proposed settlements must be accompanied by a complaint, decision and order, and an analysis of the proposed consent order to aid public comment.<sup>51</sup>

When the FTC initiates an administrative adjudication, the complaint must include a “recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated” and a “clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law.”<sup>52</sup> After the respondent has filed its answer, regulations require that the Administrative Law Judge (ALJ) hearing the matter convene a scheduling conference, where counsel for the parties must be prepared to address their factual and legal theories.<sup>53</sup> Before the commencement of the evidentiary hearing, the ALJ must convene a final prehearing conference, where both parties must “submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition.”<sup>54</sup> Any settlements of administrative

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<sup>49</sup> FED. R. CIV. P. 11(b)(2).

<sup>50</sup> FED. R. CIV. P. 26(a)(1)(A)(ii), (2), (3)

<sup>51</sup> 16 C.F.R. § 2.34(c) (2018).

<sup>52</sup> 16 C.F.R. § 3.11(b)(1) and (2).

<sup>53</sup> 16 C.F.R. § 3.21(b)(1).

<sup>54</sup> 16 C.F.R. § 3.21(e).

enforcement actions must be subject to the same disclosure and public comment process described above.<sup>55</sup>

## 2. *DOJ*

In civil cases, the DOJ is subject to disclosure obligations that are similar to those imposed on the FTC. The DOJ faces even stricter requirements in criminal cases. Staff attorneys wishing to proceed with formal investigations must draft preliminary investigation memoranda, which must include a description of the allegedly illegal practices, the evidence supporting the potential antitrust violation, and any contrary evidence.<sup>56</sup> Staff should also draft an investigation plan laying out candidate theories of competitive harm, any evidence that would support each theory, and the sources from which such evidence could be obtained.<sup>57</sup> These documents, however, are only for internal use. Staff typically communicate with the proposed respondents as the investigation nears its conclusion to inform them of the theories of competitive harm, the nature of the evidence that support them, the agency's economic analysis, and the possible scope of relief.<sup>58</sup>

In civil cases, court actions are subject to the same disclosure requirements as the FTC, discussed above.<sup>59</sup> For civil settlements, the government must file a CIS describing the nature and purpose of the proceeding, the practices giving rise to the alleged violation, the proposed final judgment, the remedies available to potential private litigants, the procedures available for modification of the judgment, and the alternatives considered by the agency.<sup>60</sup> The proposed

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<sup>55</sup> See *supra* note 51 and accompanying text.

<sup>56</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-8.

<sup>57</sup> *Id.* at III-13.

<sup>58</sup> *Id.* at III-111.

<sup>59</sup> See *supra* notes 48-50 and accompanying text.

<sup>60</sup> 15 U.S.C. § 16(b) (2012); ANTITRUST DIV. MANUAL, *supra* note 10, at IV-51 to IV-54.

judgment and CIS are published in the *Federal Register*, and summaries are published in local newspapers.<sup>61</sup>

In criminal cases, the indictment issued by the grand jury provides notice of the charges and the evidence on which the case is based. The Federal Rules of Criminal Procedure and U.S. Supreme Court decisions obligate the government to disclose any evidence favorable to an accused that is material to guilt or punishment<sup>62</sup> as well as any evidence tending to impeach any potential witnesses.<sup>63</sup> Moreover, the defendant has the right to inspect the government's case file.<sup>64</sup> In addition, the *Antitrust Division Manual* (by reference to the U.S. Attorneys' Manual) requires disclosure of exculpatory and impeachment information that broader and more comprehensive disclosure than that required by the Supreme Court.<sup>65</sup>

### **C. Engagement Between the Parties and the Investigative Staff**

Simple notification of the allegations and representation by counsel are not sufficient to guarantee meaningful due process. Rather, the system must provide the parties an opportunity to engage with the agency's investigative staff and decisionmakers. Through that contact, they can react to developments in the agency's investigation and arguments. Because antitrust cases are often particularly complex, the interaction also allows the agency to better understand the industry practices and the market and evaluate the initial allegations in that light.

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<sup>61</sup> 15 U.S.C. § 16(c); ANTITRUST DIV. MANUAL, *supra* note 10, at IV-54 to IV-55.

<sup>62</sup> FED. R. CRIM. P. 16, Notes of Advisory Committee on Rules—1974 Amendment; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>63</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>64</sup> FED. R. CRIM. P. 16(a)(1).

<sup>65</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at IV-72 to IV-73 (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001 (updated June 2010), available at <https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings#9-5.001>; Christine A. Varney, Memorandum for Antitrust Criminal Division Attorneys on Antitrust Division Criminal Discovery Policy (Mar. 31, 2010), available at <https://www.justice.gov/sites/default/files/atr/legacy/2015/04/24/313434.pdf>).

## 1. *FTC*

The FTC “values open communication with the subjects of [their] investigations.”<sup>66</sup> Staff ordinarily contact proposed respondents during the course of an investigation to advise them of the general nature of the inquiry, including the alleged violations and relevant statutes involved.<sup>67</sup> If no contact was made during the investigation and if a recommendation for complaint is contemplated, staff should contact the proposed respondents at the conclusion of the investigation, informing them that they will have an opportunity to submit their views in writing to the FTC and may also request meetings with Commissioners.<sup>68</sup> This opportunity for the submission and consideration of facts and arguments is statutorily guaranteed,<sup>69</sup> but also encouraged by the agency.<sup>70</sup> Subjects of an investigation and their counsel have several opportunities to discuss their positions with staff lawyers, economists, and senior management through frequent status calls, regular in-person meetings, and the opportunity to submit “white papers” on key issues.<sup>71</sup>

When the FTC uses compulsory measures in its investigation, it “expects all parties to engage in meaningful discussions with staff to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought, in light of the inherent value

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<sup>66</sup> Terrell McSweeney, Comm’r, Fed. Trade Comm’n, Procedural Fairness in Competition Law Enforcement and the FTC Experience, Remarks at King’s College, Centre of European Law 7 (Oct. 23, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/836913/mcsweeney\\_-\\_kings\\_college\\_remarks\\_10-23-15.pdf](https://www.ftc.gov/system/files/documents/public_statements/836913/mcsweeney_-_kings_college_remarks_10-23-15.pdf).

<sup>67</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.1, at 19.

<sup>68</sup> *Id.*

<sup>69</sup> 5 U.S.C. § 554(c)(1) (2012).

<sup>70</sup> McSweeney, *supra* note 66, at 7.

<sup>71</sup> Paul O’Brien, Krisztian Katona & Randolph Tritell, *Procedural Fairness in Competition Investigations*, CPI ANTITRUST CHRON., July 2015, at 3, <https://www.competitionpolicyinternational.com/file/view/7401>.

of genuinely cooperative discovery.<sup>72</sup> For that purpose, there are mandatory meetings with Commission staff to discuss compliance and to address and attempt to resolve all issues.<sup>73</sup>

When the FTC proceeds in court, engagement with the parties is governed by federal statutes and the Federal Rules of Civil Procedure, which provides for multiple opportunities for engagement in status hearings, discovery proceedings, pretrial conferences, settlement negotiations, and trial. In administrative adjudications, staff should inform respondents when the complaint is forwarded.<sup>74</sup> The Administrative Procedure Act requires the FTC to grant every person with an interest the proceeding the opportunity to submit facts, arguments, and offers for settlement or adjustment.<sup>75</sup> The proposed respondent is given the opportunity to submit its views in writing to the Commission and may request meetings with Commissioners.<sup>76</sup> The FTC must give every settling individual and corporation the opportunity to submit a proposed consent decree.<sup>77</sup> In practice, consent decrees are negotiated between parties and staff and are then subject to public comment.<sup>78</sup>

## **2. DOJ**

At the DOJ, staff typically relies upon voluntary requests for information from the potential subjects of the investigation, other companies within the industry, customers, trade associations, and other sources during the preliminary stages of an investigation.<sup>79</sup> When the DOJ proceeds by issuing a CID, it attaches a cover letter inviting the respondent or its counsel to

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<sup>72</sup> 16 C.F.R. § 2.4 (2018).

<sup>73</sup> 16 C.F.R. § 2.7(k).

<sup>74</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.3.6.1, at 19.

<sup>75</sup> 5 U.S.C. § 554(c)(1) (2012).

<sup>76</sup> *Id.* § 3.3.6.1, at 19.

<sup>77</sup> 16 C.F.R. § 2.31(a).

<sup>78</sup> *See supra* note 51 and accompanying text.

<sup>79</sup> *See supra* notes 10, 33 and accompanying text

telephone the antitrust investigator to attempt to resolve any avoidable problems created by the CID and to discuss a reasonable response time.<sup>80</sup> Respondents may also petition a court to quash a CID, which allows courts to review whether the request is unduly burdensome and whether the information sought is relevant.<sup>81</sup> Courts reviewing the adequacy of the CID disclosure have taken into account correspondence and conversations between the Government and the recipient prior to issuance of the CID.<sup>82</sup>

As the staff nears the conclusion of its investigation, it should afford respondents the opportunity to meet with staff to present their views of the case.<sup>83</sup> Parties who may be sued or recommended for indictment are usually also afforded an opportunity to meet with a senior Antitrust Division official prior to a decision whether or not to file suit or seek an indictment.<sup>84</sup> In criminal cases, the DOJ's manual provides that the staff and chief of the field office afford counsel for the potential defendant the chance to meet.<sup>85</sup> In merger investigations, it is common for potential respondents to request a meeting with the Director of Enforcement and the appropriate Deputy Assistant Attorney General.<sup>86</sup>

Should a civil matter proceed to trial, defendants are entitled to the full protections of the Constitution, federal statutes, and the Federal Rules of Civil Procedure. As noted earlier, the DOJ must publish the documents associated with any proposed settlements and the CIS in the *Federal Register*, publish summaries of those documents in local newspapers, and accept public comment

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<sup>80</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-52.

<sup>81</sup> *Id.* at III-77.

<sup>82</sup> *Material Handling Inst. v. McLaren*, 426 F.2d 90, 92 (3d. Cir. 1970).

<sup>83</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-111.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* III-119.

<sup>86</sup> *Id.* at III-116.



on the proposed settlement.<sup>87</sup> It must also file a response to those comments with the district court and publish its response in the *Federal Register*.<sup>88</sup>

The process of engagement is different in criminal cases. When the DOJ decides to initiate a grand jury proceeding or execute a search warrant in a criminal case, often no prior engagement with the parties is sought in order to avoid the risk of destruction of evidence.<sup>89</sup> Once a grand jury has been convened, engagement by the defendants is defined by the U.S. Constitution, federal statutes, and the Federal Rules of Criminal Procedure. For example, it is common for respondents who believe that a subpoena is unduly burdensome to negotiate with the government to narrow its scope.<sup>90</sup> In addition, most criminal cases settle with a plea bargain,<sup>91</sup> which necessarily requires substantial engagement with the parties. Some defendants may concede its role in the antitrust violation in order to take advantage of the leniency program.<sup>92</sup> Defendants are generally afforded a meeting with the Front Office to discuss leniency requests.<sup>93</sup>

#### **D. Internal Checks and Balances and Judicial Review**

Internal and external checks and balances are a key component of any legal system that strives to provide due process in antitrust proceedings. Even superb procedural protections are unlikely to be meaningful if they cannot be controlled through internal and judicial oversight. Internal checks and balances on decisionmaking within the agency are the first step in such a

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<sup>87</sup> See *supra* note 60-61 and accompanying text.

<sup>88</sup> 15 U.S.C. § 16(d) (2012); ANTITRUST DIV. MANUAL, *supra* note 10, at IV-54.

<sup>89</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-90.

<sup>90</sup> *Id.* at III-86 to III-87.

<sup>91</sup> SEARLE CIVIL JUSTICE INST., TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING 29-31 (2015), [http://masonlec.org/site/rte\\_uploads/files/Full%20Report%20-%20SCJI%20NPA-DPA%2C%20April%202015%281%29.pdf](http://masonlec.org/site/rte_uploads/files/Full%20Report%20-%20SCJI%20NPA-DPA%2C%20April%202015%281%29.pdf).

<sup>92</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-95.

<sup>93</sup> *Id.* at III-101.

review system, but control by an independent judge that is free from any bias must follow this internal review.

## **1. FTC**

The *FTC Operating Manual* provides guidance on general FTC practice and foresees numerous internal checks and balances. For example, when staff seeks to initiate an investigation in non-merger civil cases, it must seek approval by the Assistant Bureau Director, who then prepares his recommendation and forwards the request to the Evaluation Office for review by the Evaluation Committee.<sup>94</sup> The Evaluation Committee then reviews the proposal and sends its advisory recommendation to the Bureau Director, who makes the final determination on the initiation of each matter.<sup>95</sup> All enforcement recommendations are also reviewed by the Bureau of Economics<sup>96</sup> and cleared with the Department of Justice.<sup>97</sup>

When an investigation requires expansion from the initial phase to a full investigation, renewed review by the Evaluation Committee and approval by the Bureau Director is required.<sup>98</sup> If the full investigation requires the adoption of investigative resolutions to issue CIDs or subpoenas, additional approval by the moving Commissioner for the matter is required, and each subpoena or CID must be signed by a Commissioner.<sup>99</sup>

If staff prepares a memorandum recommending an administrative complaint, this memorandum is sent to the Commission via the appropriate Assistant Director and the Bureau

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<sup>94</sup> FTC OPERATING MANUAL, *supra* note 10, § 3.2.2.1.3, at 17. For a general description of the review process, see *id.* § 2.5.2.7, at 7. For a description of the Evaluation Committee, see *id.* § 2.5.2.3, at 5-6.

<sup>95</sup> *Id.* § 2.5.2.7, at 8, § 3.2.2.1.3, at 17

<sup>96</sup> *Id.* § 2.5.2.8, at 8.

<sup>97</sup> *Id.* § 3.2.2.1.3, at 9.

<sup>98</sup> *Id.* § 3.3.5.1.3, at 17.

<sup>99</sup> *Id.* § 3.3.6.7.1, at 24, § 3.3.6.7.3, at 24.

Director.<sup>100</sup> In addition, the recommendation for complaint will be sent to the Bureau of Economics for its concurrence or comment.<sup>101</sup> Moreover, in its administrative enforcement actions, the FTC strictly separates the adjudicatory decisionmaker from the staff investigating the violation. The initial decision is made by a duly qualified Administrative Law Judge (ALJ), by the Commission, or by one or more members of the Commission sitting as an ALJ.<sup>102</sup> ALJs are selected through a competitive examination.<sup>103</sup> They are also are not subject to supervision or evaluation by anyone in the agency.<sup>104</sup> Their compensation and advancement is decided by the Office of Personnel Management, an agency outside the FTC,<sup>105</sup> and they can be removed or disciplined only by the Merit Systems Protection Board for good cause.<sup>106</sup> Communication between the ALJ and investigative or prosecuting staff and outside third parties are forbidden unless it is made on the public record.<sup>107</sup> These protections are intended to ensure ALJs are as impartial as possible.

The ALJ's decision shall show on the record "each finding, conclusion, or exception presented" and shall include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."<sup>108</sup>

Respondents may appeal ALJ decisions to the full Commission.<sup>109</sup> When this occurs, the Commissioners accepts briefs from both the FTC staff and the accused company.<sup>110</sup> In the past,

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<sup>100</sup> *Id.* § 4.14.2, at 9.

<sup>101</sup> *Id.* § 4.14.3, at 9.

<sup>102</sup> 16 C.F.R. §§ 3.42(a), 3.51(a) (2018).

<sup>103</sup> 5 C.F.R. § 930.201(b).

<sup>104</sup> 5 U.S.C. § 4301(2)(D) (2012); 5 C.F.R. § 930.206.

<sup>105</sup> 5 C.F.R. § 930.205.

<sup>106</sup> 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211(a).

<sup>107</sup> 5 U.S.C. §§ 554(d), 557(d); 16 C.F.R. § 4.7(b).

<sup>108</sup> 5 U.S.C. § 557(c)(A)-(B).

<sup>109</sup> 5 U.S.C. § 557(b); 16 C.F.R. § 3.52(b)(1) (2018).

<sup>110</sup> 16 C.F.R. § 3.54(c)-(d); FTC OPERATING MANUAL, *supra* note 10, § 10.25.3, at 34.

some Commissioners who served as the ALJ on a particular investigation have recused themselves from voting on the appeal.<sup>111</sup>

This fairly strong separation of authority between investigatory and prosecutorial staff from adjudicatory staff guarantees an internal check through institutional design by honoring the principle that no one should be a judge in his or her own cause. The fact that ALJs are rendered independent of the agency to the greatest extent possible is designed to insulate them from identifying with the agency's success.

In addition, any settlements are subject to external review by the public. Specifically, proposed administrative settlements must be shared with the public, along with an analysis of the proposed consent order to aid public comment prepared by FTC staff.<sup>112</sup> The FTC must accept comments from the public and may modify its decision based on those comments.<sup>113</sup>

After this internal decisionmaking process, administrative adjudications are appealable to the courts under the APA.<sup>114</sup> Courts review agency factual findings to ensure they are supported by "substantial evidence."<sup>115</sup> The U.S. Supreme Court has interpreted this provision as requiring more than a scintilla of evidence supporting the agency's conclusion.<sup>116</sup> In addition, courts must base their evaluation of the substantiality of the evidence "on the record considered as a whole."<sup>117</sup> Courts also set aside agency actions that failed to follow legally required

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<sup>111</sup> J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, So I Serve as Both a Prosecutor and a Judge, Remarks Before the American Bar Association Annual Meeting 15 (Aug. 5, 2010), *available at* [https://www.ftc.gov/sites/default/files/documents/public\\_statements/so-i-serve-both-prosecutor-and-judge-whats-big-deal/100805abaspeech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/so-i-serve-both-prosecutor-and-judge-whats-big-deal/100805abaspeech.pdf).

<sup>112</sup> *See supra* notes 51, 78 and accompanying text.

<sup>113</sup> 16 C.F.R. § 2.34(d)-(e).

<sup>114</sup> 5 U.S.C. § 702 (2012).

<sup>115</sup> 5 U.S.C. § 706(2)(E).

<sup>116</sup> *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938).

<sup>117</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

procedures.<sup>118</sup> For example, a Commissioner must issue a CID pursuant to a Commission resolution, and a staff attorney seeking to initiate an investigation through these measures must therefore seek at least formal approval.<sup>119</sup> A violation of such statutory rules would result in an overturning of the decision.

In addition to reviewing an agency’s factual findings and procedural compliance, the APA requires that courts review agencies’ decisionmaking processes to ensure that they are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>120</sup> The courts have implemented this statutory mandate by ensuring that the agency has taken a “hard look” at the issue<sup>121</sup> and that the decisionmaking process has permitted all of the issues to be “thoroughly ventilated.”<sup>122</sup> Under hard look review, agencies may base their decisions on economic models so long as those models are supported by “empirical confirmation of accuracy” or the agency offers “a complete analytical defense of [the] model to respond to each objection with a reasoned presentation.”<sup>123</sup> The fact that courts apply a deferential standard of review to an agency’s use of an economic model does not relieve the agency from the obligation to “explain[] the assumptions and methodology used in preparing the model”<sup>124</sup> and show “a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results” as well as “evidence that the agency is conscious of the limits of the model.”<sup>125</sup> Courts will reject any economic model that bears “no rational relationship to the

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<sup>118</sup> 5 U.S.C. § 706(2)(D).

<sup>119</sup> 15 U.S.C. § 49(1), 16 C.F.R. § 2.7(a) (2018).

<sup>120</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>121</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969)).

<sup>122</sup> *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976).

<sup>123</sup> *See Am. Pub. Gas Ass’n v. FPC*, 567 F.2d 1016, 1037, 1039 (D.C. Cir. 1977).

<sup>124</sup> *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983).

<sup>125</sup> *See Sierra Club v. Costle*, 657 F.2d 298, 333, 334 (D.C. Cir. 1981).

reality it purports to represent”<sup>126</sup> or “generate[s] apparently arbitrary results particularly where . . . the agency has failed to justify its choice.”<sup>127</sup>

## 2. *DOJ*

The DOJ’s *Antitrust Division Manual* outlines a similar series of internal checks and balances on agency decisionmaking. For example, staff attorneys who believe they have developed a sufficient factual and legal basis to initiate a preliminary investigation must consult with an economist in the EAG and seek approval by the relevant section chief or field office chief.<sup>128</sup> The memo recommending the preliminary investigation is cleared with the FTC and circulated to all chiefs and assistant chiefs.<sup>129</sup>

When a staff member is deciding whether to issue CIDs, issue a second request for information during a merger clearance, or open a grand jury investigation, the *Antitrust Division Manual* advises them to consult with the section or field office chief and the relevant EAG chief to discuss the results of the investigation.<sup>130</sup> Requests for CIDs and second requests must be approved by the relevant section chief<sup>131</sup> and obtain clearance from the FTC.<sup>132</sup> All recommendations for compulsory process must also be processed through the relevant Director of Enforcement and the relevant Deputy Assistant Attorney General, and require the approval of the Assistant Attorney General.<sup>133</sup>

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<sup>126</sup> See *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999).

<sup>127</sup> See *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001).

<sup>128</sup> ANTITRUST DIV. MANUAL, *supra* note 10, at III-8, III-36.

<sup>129</sup> *Id.* at III-10, III-36.

<sup>130</sup> *Id.* at III-154.

<sup>131</sup> *Id.* at III-58.

<sup>132</sup> *Id.* at III-42.

<sup>133</sup> *Id.* at III-20; see also *id.* at III-38 (providing specific guidance on second requests); *id.* at III-58 to III-59 (providing specific guidance on CIDs); *id.* at III-82 (providing specific guidance on opening grand jury investigations).

Staff that would like to bring an enforcement action in court must confront additional internal checks. For civil actions, staff must notify the assigned Deputy Assistant Attorney General, other Deputy Assistant Attorneys General in charge of litigation, the Director of Enforcement in charge of Litigation, and the Office of Operations.<sup>134</sup> For criminal actions, staff must obtain approval of the appropriate section or field office chief, and the Deputy Assistant Attorneys General for Operations and for the Criminal Division, with the final decision resting with the Assistant Attorney General in charge of the Antitrust Division.<sup>135</sup> As noted earlier, the DOJ must also submit any proposed settlements to the court along with a CIS and publish those documents in the *Federal Register* and summaries of those documents in local newspapers.<sup>136</sup> The DOJ must also file responses to those comments with the district court and publish that response in the *Federal Register*.<sup>137</sup>

With respect to judicial oversight, unlike the FTC, the DOJ cannot enforce the antitrust laws administratively and must instead bring all of its cases in U.S. District Court. The adjudicatory decisionmaker is therefore a judge who is completely independent of the agency. The facts that the DOJ bears the burden of proof and is subject to the same procedural rules applicable to all judicial proceedings permits courts to oversee much of the DOJ's actions without according any deference to agency decisions. Courts also review proposed settlements to ensure that they are in the public interest.<sup>138</sup> All final judgments issued by District Courts may be appealed to the U.S. Courts of Appeals.<sup>139</sup>

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<sup>134</sup> *Id.* at III-43, III-44, III-114, III-116.

<sup>135</sup> *Id.* at III-123 to III-125.

<sup>136</sup> *See supra* notes 60-61, 87 and accompanying text.

<sup>137</sup> *See supra* note 88 and accompanying text.

<sup>138</sup> 15 U.S.C. § 16(e)-(f) (2012).

<sup>139</sup> 28 U.S.C. § 1291.

#### **IV. Conclusion**

A properly functioning system of antitrust enforcement depends on more than just well-designed substantive principles. It also requires enforcement procedures that enhance accuracy, ensure fairness, promote confidence in the overall system, and prevent abuses of power. U.S. law attempts to accomplish these goals by giving parties notice of the legal and factual basis of the claims, encouraging engagement with enforcement staff, and providing for an extensive set of internal checks and balances and external review by the public and the courts, all supported by broad legal representation.

At the same time, the situation in the U.S. shows that procedural rules must have some flexibility to accommodate the institutional differences between the FTC and DOJ. Although the FTC and DOJ follow the same baseline of procedural protections, they sometimes implement them in slightly different ways. The comparison suggests enforcement authorities may enjoy some degree of latitude in fashioning enforcement procedures that adhere to the principles of due process.