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Hair on Fire: Why Companies Are Less Likely To Feel the Burn Under the DOJ's Newest Change to Antitrust Enforcement

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Abstract

In July 2019, the Department of Justice (DOJ) Antitrust Division announced that in an effort to help companies avoid "'hair on fire' experiences," Division prosecutors are now, despite previous hesitancy, encouraged to offer prosecution alternatives in the form of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to corporate antitrust violators. Alternative prosecution agreements, such as DPAs and NPAs, are contracts between the government and corporate wrongdoers that allow companies to delay or entirely avoid prosecution, provided the company adheres to the contract terms. Additionally, as a part of the policy change, DOJ antitrust prosecutors must evaluate a corporation's preexisting compliance program and determine whether the company should be offered a DPA or NPA. In the less than two years since the policy announcement, the use of DPAs to resolve antitrust cases rose dramatically compared to prior practice; while almost twenty years from the year 2000 through July 2019 saw only four DPAs come from the Antitrust Division, the last of which appeared only weeks before the announcement, the Division has subsequently entered eight to date.

This Comment asserts that acceleration in DPA and NPA use within antitrust enforcement comes at the cost of dangerously neglecting the consumer welfare standard—the standard that dictates antitrust law serves to curb harm to consumers from anticompetitive activity. Alternative prosecution agreements protect large incumbent companies to the disadvantage of smaller players in the market

by insulating them from the reputational damage that would normally follow an antitrust prosecution and by letting them get off easy through simply paying the contractually negotiated fine. Additionally, the policy change does not promote consumers and healthy competition because companies are incentivized to institute corporate compliance programs, which have not been demonstrated to provide adequate persuasions or standards to reduce corporate violations in this context. By reinstituting judicial review over alternative prosecution agreement terms and refocusing deterrent efforts towards culpable individuals, rather than towards the company, the government will be in a much better position to create meaningful change in antitrust enforcement during this pivotal time of Big Tech crackdowns.

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I. INTRODUCTION

When companies faced criminal antitrust charges in the past, the frantic response by their executives used to mirror those running about with their "hair on fire."[1] That panic was understandable.[2] Antitrust prosecutions may result in massive fines, hefty treble payouts, and detrimental reputational damage, turning any fire into one that can "quickly spread . . . and engulf the entire company . . . ."[3] Makan Delrahim, the former Assistant Attorney General of the Department of Justice (DOJ) Antitrust Division, dropped a bucket full of shockingly cool water over the heads of these "hair on fire" corporate executives in a striking policy change.[4] The new policy gives corporate antitrust defendants the option to entirely avoid prosecution.[5] Under the change, not only will any present corporate fires be put out, but it may also result in large companies being able to avoid feeling the heat from antitrust charges ever again.[6]

On July 11, 2019, Delrahim announced that the DOJ Antitrust Division's new policy requires Division prosecutors investigating antitrust violations to immediately begin taking into consideration a company's preexisting compliance program and, based on that assessment, decide whether or not that company may defer or avoid prosecution through alternative prosecution agreements.[7] Such agreements include deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), and they operate as alternative

1. Makan Delrahim, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks as Prepared for Delivery at New York University School of Law Program on Corporate Compliance and Enforcement 4 (July 11, 2019), https://www.justice.gov/opa/speech/file/1182006/download [hereinafter Delrahim, Wind of Change]. Makan Delrahim, the former Assistant Attorney General of the Department of Justice's Antitrust Division, likens the "hair on fire" response to violations by corporations, and his subsequent policy to support compliance programs, to the wisdom of Benjamin Franklin who urged Philadelphians that "an ounce of prevention is worth a pound of cure" by better educating themselves about fire safety. *Id.* at 3–4.

2. *See id.* at 4.

3. *See id.* In stating "the entire company," Delrahim emphasizes that these prosecutions implicate all members of the company—employees and shareholders alike. *Id.*; *see also The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 10, 2022) [hereinafter *The Antitrust Laws*] (noting that treble damages give private parties the right to sue for triple the amount of damages incurred from violations of the Clayton or Sherman Act).

4. *See* Delrahim, Wind of Change, *supra* note 1, at 4.

5. *See id.* at 8.

6. *See id.* at 3–4.

7. *Id.* at 3, 8.

prosecution contracts between the government and the incriminated company.[8] The contracts provide that the company will pay a criminal fine and agree to certain terms, such as implementing or improving a compliance program to deter future antitrust violations, in return for the government to either delay prosecution or not initiate one at all.[9] The DOJ argues DPAs and NPAs "occupy an important middle ground," giving prosecutors an option besides having to completely decline going to trial or pursuing a full-blown prosecution.[10] Since the 2019 policy announcement, DPAs have steadily increased in use—becoming more and more the DOJ's go-to tool for resolving antitrust charges.[11] Crediting compliance programs and encouraging the use of DPAs and NPAs "could be the most significant changes to U.S. criminal antitrust enforcement . . . in 25 years."[12]

The United States' rich antitrust history harkens, in many ways, back to our country's founding.[13] The "industrial liberty" of our corporations is essential for the proper functioning of the economic system, requiring healthy and fair competition to operate.[14] The true heart of antitrust laws is, however, the consumers.[15] Any change in antitrust policy must be made with the

8. *See* Matthew Angelo, Alexandra Babin, Jackie Carney & Ashley Alexander, *Corporate Criminal Liability*, 57 AM. CRIM. L. REV. 513, 530 (2020).

9. *Id.*

10. *See* Delrahim, Wind of Change, *supra* note 1, at 8; *see also* Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 312 (2015) (defining prosecution as "going to trial or accepting some kind of plea agreement" and declination as "walking away and doing nothing").

11. *See* Nick Werle, *Prosecuting Corporate Crime When Firms Are Too Big To Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L. J. 1366, 1416 (2019) (explaining that DPAs were once saved for exceptional circumstances, but are now "the norm"); *see also infra* Section III.B (detailing the steady rise of DPAs in the DOJ Antitrust Division since July 2019).

12. COVINGTON, DOJ TO CREDIT COMPLIANCE PROGRAMS AND CONSIDER DEFERRED PROSECUTION AGREEMENTS IN CARTEL CASES 1 (July 15, 2019), https://www.cov.com/-/media/files/corporate/publications/2019/07/doj-to-credit-compliance-programs-and-consider-deferred-prosecution-agreements-in-cartel-cases.pdf.

13. *See* Barry C. Lynn, *The Big Tech Extortion Racket: How Google, Amazon, and Facebook Control Our Lives*, HARPER'S MAG. (Sept. 2020), https://harpers.org/archive/2020/09/the-big-tech-extortion-racket/?fbclid=IwAR3u3Xytcl4- (arguing that the Boston Tea Party was more than a matter of taxes and that colonists were rebelling against "more than anything . . . the idea of an all-powerful corporate middleman regulating commerce").

14. *See id.* Senator Sherman, an integral player in the development of U.S. antitrust laws, stated: "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances." *Id.* "This is industrial liberty and lies at the foundation of the equality of all rights and privileges." *Id.*

15. U.S. CHAMBER OF COM., *U.S. Chamber Strongly Believes Consumers Need To Remain at the Heart of Antitrust Laws* (July 29, 2020), https://www.uschamber.com/press-release/us-chamber-

consideration of how it will affect the purchasing power of the everyday American and how it may encourage or discourage innovation in the marketplace.[16]

With antitrust back at the front of economic and political discussions thanks to companies like Facebook and Google being slapped with antitrust charges, it is now more important than ever to ensure antitrust policies properly protect consumers.[17] In this Comment, Part II will examine the history and development of antitrust law and the application of DPAs and NPAs at the DOJ, specifically within the Antitrust Division.[18] Part III will delve into the 2019 policy and argue that the policy implementation led to the sharp increase we see today in the use of DPAs in antitrust enforcement.[19] Part IV discusses the three main reasons why the rise in DPAs and the emphasis on corporate compliance programs are problematic when compared against the likely disadvantages for consumers.[20] The first reason the DPA usage rate rise is problematic is that current corporate compliance programs inadequately combat corporate executives' strong self-interest in committing criminal activity in favor of short-term profits; additionally, such programs lack cognizable compliance standards to help deter future antitrust activity.[21] Second, DPA fines are not nearly sizable enough to deter large incumbent companies from choosing to commit antitrust violations and still make a profit, allowing the companies to further entrench their monopoly power over the marketplace.[22] Further, because DPAs are privately negotiated, they help to insulate incumbent companies from the usual reputational repercussions of public

strongly-believes-consumers-need-remain-the-heart-of-antitrust-laws [hereinafter U.S. CHAMBER OF COM., *Heart of Antitrust Laws*].

16. *See id.*; *see also infra* Section II.A (discussing the importance of keeping consumers at the center of antitrust policy); Makan Delrahim, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just., "A Whole New World"*: An Antitrust Entreaty for a Digital Age, Remarks as Prepared for Delivery (Jan. 19, 2021), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-final-address [hereinafter Delrahim, A Whole New World] (taking pride in the work the Antitrust Division does to "ensur[e] such justice and . . . preserve incentives to innovate, work, and start businesses, to the benefit of consumers and laborers").

17. *See* Delrahim, A Whole New World, *supra* note 16, at 2 (indicating that the year 2020, with the emphasis on charges brought against Big Tech, pushed antitrust into the spotlight and shifted the Division "from discussion to action"); *see also infra* Part VI.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Section IV.A.

22. *See infra* Section IV.B.

disapproval following antitrust violations.[23] Third, because DPAs and NPAs lack adequate judicial review, they allow prosecutors, rather than consumers, to decide the industry leaders.[24] Part V argues that these problems are best handled by putting out the fire at the head through a refocusing on prosecution of the individuals at the top responsible for engaging in the violations and by reinstituting robust court review over the DPA process.[25] Lastly, Part V of this Comment touches on the hot topic regarding antitrust charges brought against Big Tech, and Part VI concludes by discussing the likely future of increased antitrust violations under the 2019 policy without implementing proper enforcement measures.[26]

II. BACKGROUND: THE ANTITRUST LAWS AND THE DEVELOPMENT OF DPAS AND NPAS WITHIN THE DOJ

U.S. antitrust law assures "economic liberty."[27] As the processes and laws of prosecuting antitrust violations change over time, the goal of antitrust to protect consumers and the markets in which they spend remains the same.[28] Alternative prosecution agreements, such as DPAs and NPAs, are one of the new ways the Antitrust Division has sought to uphold the enforcement of these principles.[29] Historically, while the DOJ was open to adjusting its leniency policies and using alternative prosecution agreements, the Antitrust Division notably remained reluctant to resolve its cases with NPAs and DPAs until recently.[30]

A. The Heart of Antitrust

Across its 100-year development, antitrust law has held to the same goal: protect healthy competition among industry competitors so that American consumers reap the benefits.[31] Three core foundations structure the antitrust

23. *See infra* Section IV.B.
24. *See infra* Section IV.C.
25. *See infra* Part V.
26. *See infra* Part VI.
27. *See The Antitrust Laws*, *supra* note 3. Congress wrote that the Sherman Act, the United States' first antitrust act, is a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id.*
28. *See id.*
29. *See infra* Section II.B.
30. *See infra* Sections II.C, II.D.
31. *See The Antitrust Laws*, *supra* note 3 (including benefits such as efficiently managed

law for this purpose.[32] First came the Sherman Act of 1890, which prohibits monopolization and unreasonable restraints of trade that harm competition.[33] Second, the Federal Trade Commission (FTC) Act of 1914 "bans unfair methods of competition and unfair or deceptive acts or practices."[34] Although any unlawful activity that violates the Sherman Act also violates the FTC Act, only the FTC can bring actions under this particular Act.[35] Lastly, the Clayton Act of 1914 "prohibits mergers and acquisitions where the effect may be substantially to lessen competition, or to tend to create a monopoly."[36] Importantly, the Clayton Act gives private parties the ability to sue for treble damages if they can prove injury from antitrust conduct that violated this Act or the Sherman Act.[37] Although the DOJ and the FTC mutually enforce the antitrust laws, because the DOJ Antitrust Division has the sole power and discretion to bring criminal proceedings against antitrust violators, this Comment will pertain only to antitrust actions of the DOJ.[38]

The three acts collectively serve the same purpose—preserve competition for the betterment of consumers.[39] This crucial focus on consumers' protection from anticompetitive harm is called the consumer welfare standard and is the prevailing standard to which all antitrust issues should adhere.[40]

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companies, lower prices, and higher quality of products).

32. *Id.*

33. Sherman Act, 15 U.S.C. §§ 1–7. The law "outlaws 'every contract, combination, or conspiracy in restraint of trade,' and any 'monopolization, attempted monopolization, or conspiracy or combination to monopolize.'" *The Antitrust Laws*, *supra* note 3 (quoting Sections 1 and 2 of the Sherman Act). Although the Sherman Act is criminal law, many actions under the Act are brought in the civil courts. *Id.*

34. Federal Trade Commission Act, 15 U.S.C. §§ 41–58; *The Antitrust Laws*, *supra* note 3 (quoting Section 45 of the Federal Trade Commission Act).

35. *The Antitrust Laws*, *supra* note 3.

36. Clayton Act, 15 U.S.C. §§ 12–27; *The Antitrust Laws*, *supra* note 3 (quoting Section 18 of the Clayton Act).

37. *See The Antitrust Laws*, *supra* note 3; *supra* note 3 (defining treble damages as monetary amounts that are triple the amount of damages resulting from the violation).

38. *See* Scott Mah, Jasdeep Kaur, Emily Marshall, Michelle Wadolowski & Emily Wood, *Antitrust Violations*, 57 AM. CRIM. L. REV. 413, 447 (2020); Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 537 (2015).

39. *See The Antitrust Laws*, *supra* note 3.

40. *Antitrust Laws*, U.S. CHAMBER OF COM., https://www.uschamber.com/antitrust-laws (last visited Feb. 10, 2022) [hereinafter *Antitrust Laws*, U.S. CHAMBER OF COM.]. According to the U.S. Chamber of Commerce:

> The consumer welfare standard is a broad standard that values what consumers are willing to pay for, and tethers antitrust analysis to the methodological rigors of economics in terms of theories that can be tested and rejected by empirical

Namely, the consumer welfare standard requires that antitrust litigation by the agencies should "not decide who wins and who loses in the marketplace—consumers do that."[41] As the U.S. Chamber of Commerce reminds, "consumers are at the focus of our antitrust laws . . . . [And] consumers need to remain at the heart of our antitrust laws."[42]

B. DPAs and NPAs

DPAs and NPAs are two forms of arrangements by which the DOJ and the violating company avoid, or attempt to avoid, prosecution.[43] Both agreements are the result of private negotiations between the parties and will contain the facts and allegations of the DOJ's investigation as well as its legal conclusions.[44] With a DPA, the DOJ brings a claim against a violating company and agrees to hold off prosecuting for an arranged period of time so long as the company agrees to and follows the deferral terms stated therein.[45] The government can then later decide to completely drop the charges based on its assessment of the compliance with the agreement, or it can decide to entirely void the agreement for noncompliance, file charges, and continue with a prosecution.[46]

NPAs operate in fundamentally the same manner but with two key

> analysis. Under the standard, antitrust intervention is only justified when the conduct at issue satisfies two tests: First the conduct must distort the competitive process such that equally efficient competitors are incapable of competing. Second, this conduct and distortion must result in harm to consumers.

Antitrust 101: Key Terms and Definitions, U.S. CHAMBER OF COM. (Sept. 20, 2021), https://www.uschamber.com/regulations/antitrust-101-key-terms-and-definitions. *But see The Growing Demand for More Vigorous Antitrust Action*, ECONOMIST (Jan. 15, 2022), https://www.economist.com/special-report/2022/01/10/the-growing-demand-for-more-vigorous-antitrust-action (asserting that the United States may be shifting back to an earlier approach of antitrust that focuses on the size of companies when determining to prosecute in antitrust, rather than on consumer harm or anticompetitive conduct, but acknowledging that judges will likely remain unwilling to reinterpret the meaning of the consumer welfare standard).

41. *Antitrust 101: Key Terms and Definitions*, *supra* note 40.

42. U.S. CHAMBER OF COM., *Heart of Antitrust Laws*, *supra* note 15.

43. *See* Angelo et al., *supra* note 8, at 530.

44. Serena Hamann, *Effective Corporate Compliance: A Holistic Approach for the SEC and the DOJ*, 94 WASH. L. REV. 851, 859 (2019).

45. Angelo et al., *supra* note 8, at 530 (describing it as "operat[ing] like a term of probation before a conviction . . . ."). DPA terms often involve instituting or adjusting a company's compliance program. Hamann, *supra* note 44, at 858.

46. Angelo et al., *supra* note 8, at 530.

distinctions.[47] While DPAs have pending charges against the defendant, which must be filed in federal court and therefore require court approval,[48] NPAs differ in that the DOJ agrees to not prosecute at all, meaning no charges are filed with the court and there is no resulting need for court supervision.[49] Although the DOJ has not clarified when the facts of a case might lead to a prosecutor choosing a DPA versus an NPA,[50] the two share the trait of being "extremely controversial" when offered to corporate defendants.[51]

In many ways, DPAs and NPAs are similar to plea bargaining—another alternative prosecution arrangement the DOJ utilizes.[52] However, while the defendant in a plea bargain agrees to plead guilty in response to threatened litigation, the defendant in a DPA or an NPA will never receive any criminal indictment for their purported wrongdoing if they successfully adhere to the agreement—a let-off that is completely unavailable to the plea-bargaining defendant.[53] Thus, DPAs and NPAs allow for greater leniency than plea agreements because they "avoid[] both an indictment and a criminal conviction."[54]

47. *Id.*

48. Werle, *supra* note 11, at 1408.

49. Angelo et al., *supra* note 8, at 530; *see also* Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, CHAMPION (Sept.–Oct. 2016), at 49 [hereinafter Garrett, *The Changing Face of Corporate Prosecutions*] (clarifying that NPAs are not declinations; rather, the deal is that the DOJ will not prosecute at all if the company complies with the terms as set forth in the agreement).

50. 2020 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS, GIBSON DUNN 3 (July 15, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/07/2020-mid-year-npa-dpa-update.pdf [hereinafter 2020 MID-YEAR UPDATE]; *see infra* note 137 and accompanying text (discussing the effects of exclusion, losing an operating license, or disbarment in greater detail). The DOJ may not, as of yet, have elucidated the public on factors their prosecutors consider when making their decisions between a DPA or NPA; however, past practice shows some overall trends. 2020 MID-YEAR UPDATE, *supra*, at 3. NPAs tend to be granted to cooperating companies; self-disclosing companies; companies committing violations regarding tax, foreign bribes, and sanctions enforcements; and companies that perpetrated "less facially egregious conduct than might merit a DPA." *Id.*

51. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 512–13 (2018) (noting that some of the criticisms include that DPAs and NPAs are overly lenient to corporate defendants, that they are not transparent enough, or that they run against political morality concerns).

52. *See* Angelo et al., *supra* note 8, at 530.

53. *See id.*

54. Diamantis, *supra* note 51, at 512 n.26. Some commentators argue that, more so than plea agreements, DPAs and NPAs allow prosecutors to get companies to cooperate, which results in lower investigation costs to the benefit of both the government and defendant company alike. *See* Alexander & Cohen, *supra* note 38, at 555. Although the government and corporations may get some relief, in the long run, it is likely that costs to the American public will rise overall as incumbent companies will be able to maintain their market advantage and charge higher prices to consumers due to a rise in DPA and NPA usage. *See infra* Section IV.A.

This fact alone makes DPAs and NPAs incredibly appealing to companies because without a criminal conviction, the company does not have to face potentially ruinous criminal liabilities like license revocation or disbarment.[55]

1. The Speedy Trial Act

Alternative prosecution agreements find their constitutional grounds via the Speedy Trial Act under 18 U.S.C. § 3161(h)(2), giving prosecutors the ability to delay prosecutions.[56] In particular, the Act allows government prosecutors to hold off prosecution, and the setting of a date for trial, longer than the federally mandated seventy-day requirement, which starts the day a defendant receives a criminal indictment.[57] This delay only comes pursuant to court approval and an agreement with the defendant "for the purpose of allowing the defendant to demonstrate his good conduct."[58] If the defendant complies with the terms of the agreement and demonstrates the mandated good conduct, the government dismisses the charges.[59]

Historically, the power to defer trial and dismiss charges, which the Speedy Trial Act explicitly grants, came long before the Act's existence.[60] In the early 1900s, arrangements for delayed trials initially emerged as a way to help juvenile or first-time offenders of misdemeanor acts, such as retail theft, so that those deemed "vulnerable persons in society" would not face the stigmatization of a lingering criminal identification.[61] These agreements were commonly integrated with programs that offered counseling and career placement assistance to help ensure such individuals would avoid entrenchment in the criminal life.[62] In 1976, the DOJ actually implemented a similar system, setting standards to defer prosecutions for purposes of directing offenders towards community supervision and services and saving agency and court

55. *See* Wilson Ang, Paul Sumilas & Jeremy Lua, *Deferred Prosecution Agreements—Justice Delayed or Justice Denied?*, ASIA PAC. INSIGHTS 3 (2018), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/asia-pacifi-insights---issue-14.pdf?revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3&revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3.

56. *See* Speedy Trial Act, 18 U.S.C. § 3161(h)(2); Mary Miller, *More Than Just a Potted Plant: A Court's Authority To Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 135 (2016); Werle, *supra* note 11, at 1408 (articulating that DPAs have "statutory basis" because of the Speedy Trial Act).

57. *See* Ang et al., *supra* note 55.

58. *See* Speedy Trial Act § 3161(h)(2); Ang et al., *supra* note 55; Miller, *supra* note 56, at 147.

59. Miller, *supra* note 56, at 138.

60. *See* Reilly, *supra* note 10, at 314.

61. *Id.*

62. *See id.* at 315.

resources to focus on "*major*" cases, while encouraging community and victim restitution.[63]

The legislative history of § 3161(h)(2) of the Speedy Trial Act, passed in 1974, indicates that the initial intent was for the Act to apply to "nonviolent, low-level offenses,"[64] an intent now seemingly forgotten.[65] Congress indicated that ideally the Act would improve the conditions for individual defendants who would receive a kind of probationary supervision, along with counseling and career assistance, reflecting the early history of deferred agreements.[66] Today, DPAs are commonly used in large corporate criminal cases, a far cry from individual offenders of misdemeanor offenses.[67] Further, the DOJ's use of DPAs in antitrust cases, which allows corporations to strike deals with the government to avoid hefty penalties resulting from serious violations, is likely far beyond the intended reach of the Act and certainly beyond the DOJ's original intent behind deferring prosecution.[68]

C. Corporate Prosecution and Lenience in the DOJ in the Past Twenty-Five Years

Leniency policies for corporations are generally implemented in two different ways: lenience is either granted before or after the investigation begins.[69] "Type A" leniency gives leniency to the first individual or corporation to come forward and self-report a violation before an investigation has begun into such crimes, and that entity reaps the leniency benefits including avoidance of criminal charges and protection from costly treble damages related to adjacent civil lawsuits.[70] "Type B" leniency, on the other hand, awards this leniency even after the government investigation has started.[71] Until recently,

63. *See id.*

64. *See* Miller, *supra* note 56, at 138, 153.

65. *See* David Lawlor, *Corporate Deferred Prosecution Agreements: An Unjust Parallel Criminal Justice System*, 46 W. ST. U. L. REV. 27, 29 (2019) (summarizing the legislative history of the Speedy Trial Act).

66. *See id.* at 30; *supra* text accompanying notes 60–63 (detailing the early history of DPAs).

67. *See* Lawlor, *supra* note 65, at 29.

68. *See supra* text accompanying notes 60–63.

69. *See* JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, ch. 5, § 97.06 n.1 (2d ed. 2020).

70. *Id.*; Ryunosuke Ushijima, Michael Considine & Julie Hong, *Minimizing Antitrust Troubles by Implementing Effective Compliance*, THOMSON REUTERS (Sept. 1, 2020), https://www.sewkis.com/wp-content/uploads/PI_Ushijima2.pdf.

71. *See* VON KALINOWSKI ET AL., *supra* note 69.

the Antitrust Division of the DOJ followed closely to a Type A model, granting leniency only to corporations who self-reported wrongdoing before a DOJ investigation was underway.[72]

Specifically, the Antitrust Division's path towards corporate leniency began when it initiated its own leniency policy in 1978, which provided leniency to self-reporting corporations engaging in anticompetitive behavior.[73] In 1993, the Division updated the corporate leniency program, or amnesty program, and asserted that leniency meant a company would not be criminally charged for the reported activity and may, in some cases, completely avoid criminal fines.[74] Under that program, leniency could only be permitted for the *first* company in an antitrust conspiracy to report the violation.[75] This policy served as the main incentivizing vehicle for prompt self-reporting of antitrust offenses for years, and the Antitrust Division has long touted the success of the program, calling it "the Division's most effective investigative tool."[76]

In the early 2000s, the DOJ shifted its attitude towards prosecution alternatives after prosecuting, and consequently bankrupting, the now-defunct major accounting firm Arthur Andersen LLP.[77] Prior to litigation, Arthur Anderson was a thriving international company with $9.3 billion in annual revenue and over 85,000 employees.[78] The DOJ hit the company with charges and a $500,000 fine, but it was not the fine that led Arthur Andersen into "overnight collapse."[79] Rather, its guilty conviction resulted in the automatic revocation of the firm's license, thereby completely restricting the company from accomplishing its main purpose of providing accounting services to public

72. *See id.*

73. *See id.*

74. *See id.* (providing examples that where cartel members reported antitrust violations regarding investigations in rubber chemicals, vitamins, and air transportation, no fines were paid by the reporting members, while members of the same cartel paid fines reaching $500 million).

75. Ushijima et al., *supra* note 70, at 2 (calling the policy an "all-or-nothing" approach taken by the DOJ because only the first company receives such benefits).

76. *See* VON KALINOWSKI ET AL., *supra* note 69 (iterating that the Division specifically points to the success of the program in that leniency program applicants have greatly contributed to the investigations of large international corporations). This "all-or-nothing self-reporting program . . . has, for years, incentivized companies to promptly self-disclose unlawful antitrust conduct." Ushijima et al., *supra* note 70.

77. *See* Diamantis, *supra* note 51, at 513 n.34.

78. *Id.*

79. *See* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 948 (2019) (describing Arthur Andersen as the "paradigmatic warning case" regarding particular consequences resulting from corporate prosecution that results in a "corporate death penalt[y]").

companies—driving Arthur Andersen into bankruptcy.[80] By the time the Supreme Court reversed the conviction in 2005 in a unanimous decision, it was too late to salvage the damage done to the firm.[81] Arthur Andersen had already spiraled out of business since all partnership value was stripped from the company, and 85,000 employees were displaced.[82] The case of Arthur Andersen became the prime warning example for the DOJ,[83] acknowledging that indictment alone can be the death knell of corporations—even large, powerful ones.[84]

After this costly mistake for the economy and the thousands of lost jobs,[85] the DOJ began seriously considering the collateral consequences of corporate prosecution, and in turn, looked to increased use of alternative prosecution arrangements like DPAs and NPAs.[86] The resulting backlash of the Arthur Andersen debacle led to then-Deputy Attorney General Larry Thompson in 2003 encouraging the DOJ to use DPAs and NPAs with greater frequency,[87] specifically advocating the Department to favor entering into DPAs and NPAs rather than plea bargaining in cases where companies voluntary disclosed or cooperated in the investigation.[88] The "Thompson Memo" proved to be the turn in the DOJ's leniency approach and signaled the start of the "DPA era."[89] Indeed, before 2003, the DOJ rarely sought use of DPAs, entering into only

80. *See id.* at 948–49.

81. *See* Diamantis, *supra* note 51, at 513 n.34. The U.S. Supreme Court reversed the Court of Appeals opinion in 2005, holding that the jury instruction "failed to convey the requisite consciousness of wrongdoing" in a federal obstruction of justice statute used against Arthur Andersen and improperly "led the jury to believe that it did not have to find *any* nexus" between the persuasion "to destroy documents and any particular proceeding." *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 706–07 (2005).

82. *See* Diamantis, *supra* note 51, at 513 n.34.

83. *See* Thomas, *supra* note 79, at 948 (calling it the "paradigmatic warning case").

84. *See* Angelo et al., *supra* note 8, at 528 (noting that such concerns regarding corporate prosecution can result in a "corporate death penalty"); *see also* Thomas, *supra* note 79, at 949 (equating collateral consequences of corporate convictions to capital punishment).

85. Lawlor, *supra* note 65, at 31 (writing that 28,000 U.S. employees lost their jobs, sending the DOJ into a "public relations crisis" for the collateral damage of Arthur Andersen's conviction).

86. Diamantis, *supra* note 51, at 513 n.34; Werle, *supra* note 11, at 1377 (noting the DOJ's change, taking collateral consequences into account after the Arthur Andersen case); *see also* Bailey Wendzel, Matthew Angelo, Mariana Jantz & Alexis Peterson, *Corporate Criminal Liability*, 56 AM. CRIM. L. REV. 671, 686 (2019) (asserting that post the collapse of Arthur Andersen, "[a]s a result, the DOJ has increasingly turned to DPAs and NPAs as alternatives to criminal prosecutions").

87. *See* Lawlor, *supra* note 65, at 31.

88. Alexander & Cohen, *supra* note 38, at 538.

89. *See* Garrett, *The Changing Face of Corporate Prosecutions*, *supra* note 49, at 50; Alexander & Cohen, *supra* note 38, at 538 (calling it the DPA era).

seven such agreements; after 2003, the DOJ has on average negotiated thirty DPAs a year, and that average is rising.[90]

D. Early Resistance to DPAs and NPAs and Gradual Change in Antitrust Utilization

Although many other divisions of the DOJ had been steadily increasing their use of DPAs and NPAs, prior to 2019, the Antitrust Division largely avoided them, relying instead on the leniency self-reporting program already in place.[91] In fact, from the year 2000 until the announcement in July 2019 of the new Antitrust Division policy encouraging expanded use of NPAs and DPAs, the Division only entered into four DPAs, one of which came only weeks prior to the new policy.[92] In the years leading up to the 2019 policy change, the leniency program faced criticism as being excessively harsh and misaligned with other prevailing DOJ policies.[93] Because the program followed a Type A format, giving leniency only to the first to report before any investigation, the program rarely allowed companies, even those with preexisting compliance programs, to avoid criminal prosecution under the theory that "a truly effective compliance policy would have prevented the crime in the first place or resulted in early detection."[94]

90. Lawlor, *supra* note 65, at 31; *see also infra* Section III.B (detailing the steady rise of DPAs in antitrust enforcement).

91. *See* VON KALINOWSKI ET AL., *supra* note 69. In fact, from the start of the amnesty program in 1993 until September of 2009, the Antitrust Division only entered into three alternative prosecution agreements, while in the same time period the Criminal Division entered into forty-nine. *See id.* Of the cases that did result in DPAs or NPAs before 2019, most were also involved with the Criminal Division in some respect. *See id.* The year 2017 saw the lowest number of such agreements entered into by the DOJ as a whole since 2009. Angelo et al., *supra* note 8, at 515.

92. *Violation Tracker Agency Summary Page*, JOBS FIRST (2020), https://violation-tracker.goodjobsfirst.org/prog.php?agency_sum=DOJ_ANTITRUST (indicating that from the year 2000 through July 2019, when Delrahim announced the new DOJ policy, the Antitrust Division entered into four DPAs). The DOJ entered into a DPA on June 11, 2019, with Heritage Pharmaceuticals, who agreed to pay over $7 million in penalty fines, only a little over a month before the announcement of the new policy in July 2019. *Violation Tracker Individual Record*, GOOD JOBS FIRST (2020), https://violationtracker.goodjobsfirst.org/violation-tracker/-heritage-pharmaceuticals-inc (detailing the $7,325,000 penalty for Heritage Pharmaceuticals Inc.); Press Release, U.S. Dep't of Just., Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false [hereinafter DOJ Heritage Press Release].

93. COVINGTON, *supra* note 12, at 1–2; Ushijima et al., *supra* note 70.

94. *See* COVINGTON, *supra* note 12, at 1–2; *see also supra* text accompanying note 70 (describing Type A leniency programs).

In 2015, the Antitrust Division veered from its longstanding Type A leniency policy and allowed some consideration at the sentencing stage of a corporation's preexisting compliance program to determine fine quantities.[95] Then-Deputy Assistant Attorney General Brent Snyder explained that the shift in policy factored in the compliance efforts of companies that "make[] extraordinary efforts not just to put a compliance program in place[,] but to change the corporate culture that allowed a cartel offense [to] occur."[96] Snyder maintained, however, that preexisting compliance programs at the time of the offense that failed to detect antitrust violations would receive no such benefit at sentencing.[97]

The 2019 policy, on the other hand, marks a dramatic switch to Type B leniency, allowing leniency after an antitrust investigation is already underway based on an evaluation of the company's compliance program at the time of the violation.[98] While this policy places the Division more in line with the DOJ as a whole, at least in its promotion of DPAs and NPAs, it is a significant shift for the Antitrust Division, which had long relied on its Type A leniency policy and disfavored alternative prosecution agreements.[99]

III. CURRENT STATE OF LAW AND RECENT DEVELOPMENTS

The DOJ Antitrust Division's new policy switch to Type B leniency and encouragement of DPAs centers around the goal of incentivizing antitrust compliance through the vehicle of corporate compliance programs.[100] If a company is able to convince antitrust prosecutors that its compliance program is sufficiently "effective," the prosecutors may choose to defer the prosecution.[101] This increased ability for companies to potentially avoid costly prosecution is a huge incentive for corporations to implement strong compliance

95. *See* COVINGTON, *supra* note 12, at 2.

96. *Id.*

97. *Id.* The Deputy Assistant Attorney General also elaborated that "paper programs" are compliance programs that make no significant changes to increase compliance in a corporation except on paper and, as such, would not receive credit. *Id.* Only companies that made some genuine effort to alter their corporate culture were viable under the policy. *Id.*

98. *See* VON KALINOWSKI ET AL., *supra* note 69, at n.158; Delrahim, Wind of Change, *supra* note 1, at 2 (indicating that the change was made after holding a variety of workshops and internal reviews); *see also supra* text accompanying note 71 (defining Type B leniency).

99. *See supra* Part II.

100. *See supra* Section III.A.

101. *See supra* Section III.A.

programs.[102] The policy change has already quickly taken root as evidenced by the sharp rise in DPAs entered into by the Antitrust Division with corporate defendants since the announcement, and there is no indication of its abatement anytime soon.[103]

A. The 2019 DOJ Antitrust Policy

On July 11, 2019, Makan Delrahim announced the new approach to the Antitrust Division's leniency policy as a way to improve the leniency program in recognition of companies that expend great effort in their internal compliance.[104] This significant policy shift came after public workshops and roundtables[105] and mirrors longstanding policy already present in other divisions of the DOJ.[106] Delrahim provided an overview of the new policy and stated:

> [E]ffective immediately, the Antitrust Division will: (1) change its approach to crediting compliance at the charging stage; (2) clarify its approach to evaluating the effectiveness of compliance programs at the sentencing stage; and (3) for the first time, make public a guidance document for the evaluation of compliance programs in criminal antitrust investigations.[107]

Delrahim clarified these points first, with an assurance that the new policy should not be misunderstood "as an automatic pass for corporate misconduct."[108] Rather, he noted that the four "hallmarks of good corporate citizenship" found in the Principles of Federal Prosecutions of Business Organizations must all still be met before the Antitrust Division should apply the new

102. *See supra* Section III.A.

103. *See supra* Section III.B.

104. *See* Delrahim, Wind of Change, *supra* note 1, at 3. In support of the policy change to "recognize the efforts of companies that invest significantly in robust compliance programs," Delrahim cites to the former Deputy Attorney General, Rod Rosenstein. *Id.* In Rosenstein's words, "The fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith." *Id.*

105. *See* VON KALINOWSKI ET AL., *supra* note 69, at n.158; Delrahim, Wind of Change, *supra* note 1, at 2.

106. *See* COVINGTON, *supra* note 12, at 1.

107. Delrahim, Wind of Change, *supra* note 1, at 3.

108. *Id.* at 5.

leniency policy.[109] These four factors are that a company "(1) implement[s] robust and effective compliance programs, and when wrongdoing occurs, they (2) promptly self-report, (3) cooperate in the Division's investigation, and (4) take remedial action."[110]

What is notably different about the new policy is that this four-factor test will allow antitrust prosecutors to enter into DPAs with companies that are not "first-in"—a requirement that previously functioned as the main self-reporting incentive—meaning accused companies that were not necessarily the first to report their role in an antitrust conspiracy can still get leniency in the form of a DPA or NPA.[111] This marks a major change from the previous Division policy of avoiding DPAs "except in extraordinary cases."[112] Delrahim insisted that the 2019 policy would continue to serve as a strong incentive for companies to comply with antitrust laws because the increased recognition by the DOJ of strong, preexisting compliance programs will increase companies' desire and willingness to implement and improve compliance programs in accordance with the DOJ policy.[113] In protection of the first-in approach, Delrahim claimed the Division would continue disfavoring use of NPAs "because complete protection from prosecution for antitrust crimes is available *only* to the first company to self-report and meet the Corporate Leniency Policy's requirements."[114]

The other key difference in the new approach is that antitrust prosecutors *must* now consider "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision."[115] The DOJ has made clear that the mere existence of a program at either time is not sufficient.[116] Rather, prosecutors are now charged with asking three main questions to determine the effectiveness of a corporate

109. *Id.*

110. *Id.*

111. *See* VON KALINOWSKI ET AL., *supra* note 69; Delrahim, Wind of Change, *supra* note 1, at 8.

112. *See* Delrahim, Wind of Change, *supra* note 1, at 8; Mah et al., *supra* note 38, at 450–51 (delineating that extraordinary cases included those where the resulting sentence of a criminal prosecution would have seriously risked the defendant corporation's ability to survive).

113. *See* Delrahim, Wind of Change, *supra* note 1, at 6. "Under this policy, companies are incentivized to eradicate anticompetitive conduct by implementing vibrant and comprehensive compliance programs." Ushijima et al., *supra* note 70.

114. Delrahim, Wind of Change, *supra* note 1, at 8; *see also* VON KALINOWSKI ET AL., *supra* note 69; *see also* Ushijima et al., *supra* note 70, at 2 (agreeing that NPAs are likely to be rare since the Leniency Program remains in place and the DOJ has remained firm in its desire to encourage timely self-reporting).

115. *See* Delrahim, Wind of Change, *supra* note 1, at 7.

116. *Id.* at 8.

compliance program[117] along with considering a nine-factor test to evaluate the program's efficacy.[118] In analyzing to what extent a company meets the standards of effectiveness and the nine factors, DOJ prosecutors have full discretion to make the determinations and then consequently decide the degree of leniency a company will or will not receive.[119]

The DOJ's intended goal in implementing this new program is to provide incentives for companies to give greater focus to complying with antitrust laws, leading to increased "early detection and prompt remediation."[120] Such quick efforts to find and remedy harm reduces the amount of enforcement involved, which according to the DOJ, limits harm to consumers and saves taxpayers from costly litigation—important considerations in both antitrust and agency policy.[121] Overall, the policy change means that antitrust prosecutors can now consider DPAs and NPAs as the proper disposition of an investigation and can review the efficacy of a company's corporate compliance program at the time of violation.[122] Given that DPAs and NPAs offer such favorable outcomes as opposed to prosecution, this change makes it very likely that alternative prosecution agreements within antitrust litigation will increase because, going forward, corporations will staunchly advocate that

117. *Id.* at 7; VON KALINOWSKI ET AL., *supra* note 69. The three "fundamental" questions that the prosecutor must now consider are as follows: "[1] Is the corporation's compliance program well designed? [2] Is the program being applied earnestly and in good faith? [3] Does the corporation's compliance program work?" Delrahim, Wind of Change, *supra* note 1, at 7.

118. Delrahim, Wind of Change, *supra* note 1, at 13. The nine factors include: "(1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods." *Id.* These nine factors have been previously used in other contexts regarding white-collar crimes and are at the prosecutors' discretion to consider. COVINGTON, *supra* note 12, at 3.

119. Ushijima et al., *supra* note 70, at 2. There are three different results based on the corresponding level of the compliance program's efficacy. COVINGTON, *supra* note 12, at 3. There can be "(1) a reduction in its Sentencing Guidelines culpability score; (2) a reduction within the Guidelines fine range or even a reduction below the fine range; and (3) a recommendation of no probation." *Id.*

120. *See* Ushijima et al., *supra* note 70, at 2.

121. *Id.* Such harm to consumers comes under the economic theory that as businesses face higher costs to production, including costs that the company would face under expensive litigation, the marginal price of the product or service they create for consumers would have to rise in order to continue at the same output. *See* ANDREW I. GAVIL, JONATHAN B. BAKER & WILLIAM KOVACIC, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 25 (3d ed. 2017).

122. *See* COVINGTON, *supra* note 12, at 3 (noting that "Division prosecutors are now required to consider . . . DPA[s]" and that one of the results of reviewing a compliance program's efficacy is "a recommendation of no probation").

their compliance programs demand the DOJ provide them with a DPA or NPA when antitrust investigations arise.[123]

B. DPAs on the Rise

Since the announcement of the 2019 policy, there has been a marked rise in the issuance of DPAs by the Antitrust Division.[124] Although NPAs indeed seem to be continually disfavored by the DOJ—the Division appears to have resolved only a single case using an NPA since the policy announcement[125]—the DOJ has negotiated eight DPAs in the same timeframe.[126] This is a significant increase from prior practice.[127] For example, between the year 2003 and 2015, the Division did not enter into a single DPA.[128] In May of 2019, shortly before the announcement of the new policy, the Division entered into its first DPA with a nonfinancial institution.[129] Heritage Pharmaceuticals was the first DPA in a string of generic pharmaceutical antitrust cases brought by the Antitrust Division.[130] After Heritage Pharmaceuticals, and after the 2019 policy announcement, the Division underwent four more DPAs within the

123. *See* COVINGTON, *supra* note 12, at 4.

124. *See infra* notes 126–30 and accompanying text (providing evidence for this rise in numbers).

125. *Data & Documents*, CORP. PROSECUTION REGISTRY, https://corporate-prosecution-registry.com/browse/ (last visited Feb. 12, 2022) (showing that only one NPA action has been taken by the Antitrust Division since the 2019 policy). University of Virginia Law School professor Brandon Garrett created the corporate prosecution registry as a database to track and update federal government actions taken against corporations. *Criminalising the American Company: A Mammoth Guilt Trip*, ECONOMIST (Aug. 30, 2014), https://www.economist.com/briefing/2014/08/28/a-mammoth-guilt-trip [hereinafter *Criminalising the American Company*]; *see also supra* note 114 and accompanying text (describing that the 2019 policy stated the DOJ would disfavor NPAs because of the emphasis the Division relies on its first-in approach to leniency); DOJ Heritage Press Release, *supra* note 92.

126. *See infra* notes 130–35 and accompanying text (four DPAs with generic pharmaceuticals, one with a cancer specialist group, one with a ready-mix concrete company, and two with foreign language service providers).

127. *See* Alexander & Cohen, *supra* note 38, at 572.

128. *Id.* The author collected data from 119 settlements in antitrust and only six (or eight percent) were NPAs, while no settlements were done through DPAs. *Id.* at 572, 592.

129. *See* 2019 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS, GIBSON DUNN 12 (Jan. 8, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-npa-dpa-update.pdf.

130. *See* DOJ Heritage Press Release, *supra* note 92. The Antitrust Division charged Heritage with price-fixing glyburide, a generic drug for diabetes treatment, requiring the company to pay a $225,000 fine, as well as full cooperation in the continuing investigation of the generic pharmaceutical industry in return for a three-year deferral of prosecution. *Id.*; Press Release, U.S. Dep't of Just., Heritage Pharm. Fact Sheet (May 31, 2019), https://www.justice.gov/opa/press-release/file/1188386/download.

same industry.[131]

However, it was not just pharmaceutical companies receiving deferred agreements.[132] Post policy, the Division entered into its second DPA with a cancer treatment center in Florida, settling conspiracy charges regarding illegal agreements not to compete with a rival oncology group.[133] Moreover, the Division proceeded to enter into DPAs with a ready-mix concrete company in Georgia over price-fixing charges[134] and with two separate foreign-language

131. *See* Press Release, U.S. Dep't of Just., Sixth Pharmaceutical Company Charged in Ongoing Criminal Antitrust Investigation (July 23, 2020), https://www.justice.gov/opa/pr/sixth-pharmaceutical-company-charged-ongoing-criminal-antitrust-investigation [hereinafter Sixth Pharmaceutical Company Charged] (noting the long-standing investigation into the generic pharmaceutical industry). The second pharmaceutical firm to receive a DPA was Rising Pharmaceuticals Inc., who agreed to pay over $3 million for fixing prices of Benazepril HCTZ, a generic drug for hypertension. Press Release, U.S. Dep't of Just., Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violation (Dec. 3, 2019), https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act. Sandoz Inc. received the third DPA from the Antitrust Division in the generic drug industry, agreeing to pay $195 million, the largest penalty ever levied in a domestic antitrust case at the time, for price fixing and bid rigging with Rising Pharmaceuticals. Press Release, U.S. Dep't of Just., Major Generic Pharmaceutical Company Admits to Antitrust Crimes (Mar. 2, 2020), https://www.justice.gov/opa/pr/major-generic-pharmaceutical-company-admits-antitrust-crimes. The Division handed out its fourth DPA to Apotex Corp., who agreed to pay a $24.1 million penalty for price fixing pravastatin, a generic drug for cholesterol. Press Release, U.S. Dep't of Just., Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication (May 7, 2020), https://www.justice.gov/opa/pr/generic-pharmaceutical-company-admits-fixing-price-widely-used-cholesterol-medication. The fifth DPA in this series of the DOJ's investigation into the generic drug industry was given to Taro Pharmaceuticals U.S.A., Inc., who admitted to fixing prices in a conspiracy with Sandoz Inc. *See* Sixth Pharmaceutical Company Charged, *supra*. Collectively, the collusive activity of the seven total pharmaceutical companies in the antitrust scheme, five of which entered DPAs, "affected over $1 billion of generic drug sales." Press Release, U.S. Dep't of Just., Generic Drugs Investigation Targets Anticompetitive Schemes (Mar. 24, 2021), https://www.justice.gov/atr/division-operations/division-update-spring-2021/generic-drugs-investigation-targets-anticompetitive-schemes. In total, the companies paid out upwards of $426 million in penalties, with Taro Pharmaceuticals specifically negotiating in its DPA to pay the highest known criminal penalty amount for a domestic cartel to date—a whopping $205.7 million. *Id.*

132. *See infra* notes 133–35 and accompanying text.

133. 2020 MID-YEAR UPDATE, *supra* note 50, at 12; Press Release, U.S. Dep't of Just., Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty (Apr. 30, 2020), https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal (explaining that Florida Cancer Specialists & Research Institute LLC (FCS) paid $100 million in a criminal penalty for agreeing to not compete in chemotherapy and radiation treatment services for cancer patients with another oncology group in southwest Florida).

134. Press Release, U.S. Dep't of Just., Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws (Jan. 4, 2021), https://www.justice.gov/opa/pr/ready-mix-concrete-company-admits-fixing-prices-and-rigging-bids-violation-antitrust-laws (explaining that the Division charged Argos USA LLC with price fixing and market allocation of ready-mix concrete sales, requiring Argos to pay a $20 million criminal penalty and to implement and report on the process of

service providers in Washington, D.C., and New Jersey for impeding bidding on a multimillion-dollar contract with the National Security Agency (NSA).[135]

There is little surprise why DPAs are "explod[ing]" in popularity in the Antitrust Division and across the entire DOJ, where DPAs have been allowed and encouraged in other divisions for many years.[136] One commentator remarked, "[b]oth corporations and the government are virtually required to rely upon [DPAs] in order to circumvent the unfairness created by the combination of respondeat superior liability and the collateral consequences of a conviction, including disbarment and exclusion."[137] In the near future, DPA use is likely to increase to an even greater extent because antitrust enforcement tends to increase following economic declines, which the coronavirus pandemic will be likely to cause.[138] The DOJ already expressly articulated its intent in a joint statement with the FTC in April 2020—that the agencies will be

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an antitrust compliance program in return for deferred prosecution).

135. Press Release, U.S. Dep't of Just., Foreign-Language Training Companies Admit to Participating in Conspiracy to Defraud the United States (Jan. 19, 2021), https://www.justice.gov/opa/pr/foreign-language-training-companies-admit-participating-conspiracy-defraud-united-states. Comprehensive Language Center Inc. (CLCI) and Berlitz Languages Inc. admitted to conspiring to "imped[e], impair[], obstruct[], and defeat[] competitive bidding" on a foreign-language training contract for the NSA and agreed to pay $140,000 and $147,000, respectively. *Id.*

136. Reilly, *supra* note 10, at 320.

137. *Id.* at 320; *see also id.* at 330 (stating that the argument against the doctrine of respondeat superior posits that corporations should not have to be automatically subject to liability for the actions of low-level or rogue employees). Disbarment and exclusion from government contracts for corporations that deal heavily with the U.S. government, which is the largest consumer of goods and services in the world, would effectively be a death knell for any such corporation. *Id.* at 321–22. The author elaborates that the collateral damage to the general public of disbarment or exclusion of a corporation could be severe through the following example:

> Consider . . . a drug and medical device company that engages in misconduct, resulting in the company's disbarment. When the company can no longer receive reimbursements from Medicare or Medicaid, that company's customers will be forced to find the lifesaving and life-sustaining drugs and devices elsewhere. But what if no other company produces the drugs or devices? Or what if other companies step in to fill the market void but cannot ramp up production quickly enough to meet consumer demand? Could it be considered immoral or unconscionable to make completely innocent consumers suffer such collateral consequences—consequences that could even result in death?

Id. at 323.

138. *See* Ushijima et al., *supra* note 70 (pointing out the increase in "aggressive measures" taken by the Antitrust Division after the dot-com crash and financial crisis in the 2000s); *see also* Laurence Bary, Alec Burnside, James Fishkin, Rani Habash, Adam Kidane & Clemens Graf York von Wartenburg, *DAMITT 2020 Report: Antitrust Merger Enforcement Trends amid the Pandemic, U.S. Elections and Brexit*, JD SUPRA (Feb. 5, 2021), https://www.jdsupra.com/legalnews/damitt-2020-report-antitrust-merger-6904162/ (describing 2020 as setting a "record pace" for the rate at which agencies blocked mergers).

vigilant in cracking down on anticompetitive activity regarding the coronavirus—especially as companies may attempt to take advantage of the pandemic.[139]

Because the data shows that usage of DPAs, as opposed to NPAs, is rising and is likely to continue to rise, this Comment will largely focus the remaining discussion on DPAs.[140] This Comment will, however, continue to draw guidance from conclusions and evidence made from the use or potential usage of NPAs given the two agreements' similarities in process and results, ultimately demonstrating that both forms do not appropriately serve the goals of antitrust.[141]

139. *See* Ushijima et al., *supra* note 70; *see also* Makan Delrahim, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just. "Here I Go Again"*: New Developments for the Future of the Antitrust Division, Remarks as Prepared for the ABA 2020 Antitrust Fall Forum: The Future of Antitrust (Nov. 12, 2020), https://www.justice.gov/opa/speech/file/1336536/download [hereinafter Delrahim, Here I Go Again] (highlighting Delrahim's comment, that the Antitrust Division "ha[s] been nimble and able to adapt" in response to the pandemic, noting that whatever the crisis, generally, active policing of illicit activity goes down in the heat of the emergency meanwhile violators exploit the crisis and develop "new schemes to secure a bigger piece of the pie for themselves").

140. *See supra* Section III.B.

141. *See supra* note 47 and accompanying text (identifying that NPAs and DPAs are fundamentally similar); *see also infra* Part IV (arguing that DPAs and NPAs do not properly serve the goals of antitrust).

IV. THE INCREASED APPLICATION OF DPAS AND NPAS THROUGH CREDITING COMPLIANCE PROGRAMS FAILS TO ADHERE TO THE TENETS OF ANTITRUST LAW

The heart of antitrust is to protect competition and thereby protect the consumer from higher prices, lower quality products, reduction of options, and decreased innovation.[142] The increase in use of DPAs due to the 2019 policy hurts consumers by helping to protect the privileged position of incumbent corporations, because those companies are able to financially support expensive compliance programs and the penalty fines DPAs often mandate.[143] Additionally, these companies will also face little public exposure of their wrongdoing because of the secretive nature of DPA and NPA negotiations.[144] Both circumstances allow incumbent companies to protect themselves from the deterrent effects of antitrust enforcement, leading to further consolidation of the industry and a lessening of competition.[145]

The increase in DPA use from the 2019 policy will also hurt consumers because the dependence on compliance programs to reduce or prevent antitrust violations remains without foundation.[146] Data shows that managers at the top of their companies are disincentivized to personally invest in their company's success, and the lack of uniform standards for compliance programs makes it unlikely the policy will decrease antitrust violations.[147] Lastly, the lack of judicial review of DPAs and NPAs allows prosecutors to take full control of the process, making all the decisions regarding whom to prosecute and stripping the power away from the consumers to choose the winners or losers in the marketplace through their spending.[148] Reduced competition in the market limits consumers' abilities to make choices about the products they consume, as well as the prices they pay for those products, and decreases innovation as fewer competitors compete to make new offerings.[149] Such characteristics run afoul of the core values of antitrust law meant to protect consumer welfare.[150]

142. GAVIL ET AL., *supra* note 121, at ch. 1.
143. *See infra* Section IV.A.2.
144. *See infra* Section IV.A.1.
145. *See infra* Section IV.A.1.
146. *See infra* Section IV.B.
147. *See infra* Section IV.B.
148. *See infra* Section IV.C.
149. *See infra* Sections IV.A, IV.C.
150. *See* GAVIL ET AL., *supra* note 121, at 81; *see also supra* notes 40–41 and accompanying text (describing the consumer welfare standard).

A. DPAs and NPAs Protect Incumbent Companies Through Reduced Public Exposure and Reliance on Fines

As the use of DPAs increases, companies are protected from the higher penalty fines of treble damages that result from antitrust prosecutions and also sidestep public acknowledgement of wrongdoing.[151] This is a positive development for large industries, which greatly desire averting these costly and hurtful effects from criminal liability.[152] These companies therefore have significant incentives to be in compliance with the new DOJ policy in order to increase their chances of receiving a DPA and successfully avoiding prosecution.[153] The DOJ's stated intent with the policy is to support companies with compliance programs, and it has made clear that the mere existence of such a compliance program will not be sufficient for receiving a DPA.[154]

Compliance programs, however, are costly to implement.[155] Companies must be able to cover the costs of hiring additional compliance staff, training current employees on compliance, and taking the time and resources to integrate the new or updated compliance program into the firm's overall structure.[156] Appointed monitorships, while recommended to help corporations stay advised on compliance, are also costly and resource-intensive.[157] Additionally, adhering to the multi-factor test in the 2019 policy will likely require the assistance and extra cost of legal advice—a situation which law firms were quick to pick up on following the policy announcement.[158] Already,

151. *See* Alexander & Cohen, *supra* note 38, at 539; *see also supra* note 3 and accompanying text (defining treble damages in the context of antitrust).

152. *See* Alexander & Cohen, *supra* note 38, at 539.

153. *See supra* Section III.A (detailing the new policy and ways for corporations to abide by DPAs and escape prosecution).

154. Delrahim, Wind of Change, *supra* note 1, at 7; *see supra* note 104 and accompanying text (commenting on the DOJ's intent to support compliance programs with the 2019 policy).

155. *See* Ushijima et al., *supra* note 70 (remarking that although improving or implementing the new provisions of the July 2019 DOJ policy "may be time consuming and costly at the outset, the benefits of implementing an effective compliance program are substantial").

156. John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. REG. 1, 18 (2020) (observing that because of these costs, "[t]he potential outlays to resource an effective compliance program may be considerable"); *see also* Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How To Fix Them*, HARV. BUS. REV. (Mar.–Apr. 2018), https://hbr.org/2018/03/why-compliance-programs-fail (arguing that even in estimating that a firm spends millions of dollars in compliance still "deeply underestimate[s] the true costs of compliance," as the procedures in implementing the compliance program alone demand countless employee hours).

157. Hamann, *supra* note 44, at 883.

158. *See* COVINGTON, *supra* note 12, at 5 (encouraging readers to reach out to the law firm Covington & Burling LLP for legal advice related to the new policy change); *see also* Ushijima et al., *supra*

multinational firms are known to contribute several million dollars towards compliance program efforts.[159] In industries that must comply with a high degree of regulation, like financial services, compliance program costs can reach into the hundreds of millions of dollars.[160]

Since DPAs are completely within the prosecutorial discretion of the antitrust prosecutors, the agreements themselves, if public, give little to no guidance to other firms about best practices for compliance in antitrust.[161] In one sense, large firms with high rates of recidivism may be better prepared to understand and avoid corporate misconduct because of their experience in negotiating DPAs and NPAs with the DOJ in the past.[162] Smaller firms will quickly find they have to decide between implementing a program that covers the vague antitrust policy guidelines in the hopes of receiving leniency from a DPA or NPA should they commit an antitrust violation, or whether it is worth spending the cost to do so at all.[163] Similar to larger firms, smaller firms will feel the pressure to invest in compliance; however, larger firms will be in a much better position to avoid "fail[ing] to spend enough" on corporate compliance.[164] Hui Chen, the former compliance expert at the DOJ, and Eugene Soltes, a professor at Harvard Business School with a specialization in corporate misconduct research, argue that although executives are tired of spending exorbitant costs in funding compliance programs with no hard proof of its positive effects, they continue to spend on compliance costs out of fear of the repercussions of not spending enough to avoid liability.[165] In this way, according to Chen and Soltes, executives think of corporate compliance programs as "an expensive insurance policy."[166]

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note 70 (noting that companies would be wise to implement compliance programs in ways most favorable to future DOJ antitrust allegations).

159. *See* Chen & Soltes, *supra* note 156.

160. *See id.*

161. *See* Armour et al., *supra* note 156, at 48; *see also* Section II.B (discussing the lack of uniform standards).

162. *See* Werle, *supra* note 11, at 1377. "Although the decision to cap a firm's punishment is hashed out on a case-by-case basis, many defendants are recidivists, and virtually all regularly engage with other governmental actors, either as government contractors or as objects of regulatory supervision. Such repeat players can reliably predict ex ante whether they are regarded as TBTF [(Too-Big-To-Fail)], and will therefore evade otherwise-appropriate penalties for criminal behavior." *Id.*

163. *See* Armour et al., *supra* note 156, at 19 (explaining that "[f]or a value-maximizing firm, the extent to which such costs are worth occurring is an investment decision: a function of the expected benefit in terms of reduced exposure to penalties").

164. *See* Chen & Soltes, *supra* note 156.

165. *See id.*

166. *Id.*

Executives are especially incentivized to buy a corporate compliance "insurance policy" because rather than simply entering guilty pleas, companies will argue in each case why the government should grant them a DPA or NPA by attempting to prove the efficacy of their compliance programs, and therefore face lower fines.[167] The data shows that this situation is likely already the case given the relative rise in antitrust DPA cases since July 2019 compared to prior years.[168] This means that financially successful incumbent industries are in a far better position to protect their position in the marketplace by their ability to invest in or update their costly compliance programs.[169]

DPAs and NPAs can successfully promote the consumer welfare standard "if, but only if, they optimally deter crime."[170] Unfortunately, the inherently secretive nature of alternative prosecution agreements, which are privately negotiated, protects violating corporations from the scrutinizing public eye, reducing the consumer's ability to make educated decisions in the use of purchasing power and entrenching large corporations' positions in the marketplace.[171] Further, the safety net of DPAs for corporations to evade prosecution and resulting public shame enables such corporations for further antitrust recidivism by encouraging the mere payment of a fine and the corporation's lucrative return to business as normal.[172]

167. COVINGTON, *supra* note 12, at 4 (indicating this will shift the nature of antitrust cases).

168. *See supra* Section III.C (depicting the rise in DPA use since the 2019 policy announcement).

169. *See supra* notes 162–64 and accompanying text (demonstrating incumbent industries will be better able to have higher amounts of retained wealth over other companies).

170. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 230 (2016) (arguing that "[t]he DOJ should take a more regulatory approach to designing [DPA and NPA] mandates").

171. *See infra* Section IV.A.1; Diamantis, *supra* note 51, at 529 (noting the secretive nature of DPAs and NPAs).

172. *See infra* Section IV.A.2.

1. Preserving the Public Reputation

A main benefit of DPAs and NPAs for companies is that they do not require violating companies to publicly disclose wrongdoing.[173] Reputational damage arising from a corporate conviction can serve as a notable deterrent in corporate crime, "reducing overall corporate value and competitiveness."[174] "By design, DPAs and NPAs are negotiated, finalized, and enforced out of public view," and government prosecutors can simply agree to not disclose these agreements and keep them sealed from the public.[175] Even when corporations do accept public responsibility for a crime as part of a DPA or NPA, they still avoid the consequence of the stigma that would otherwise come with a criminal conviction.[176] A corporation with a negotiated NPA, for example, may rightfully and proudly state that the company's misconduct did not lead to prosecution, providing "a small public relations benefit to the company."[177]

As corporate prosecution decreases due to increased use of DPAs and NPAs, the perception of both consumers and corporations alike is that violations of antitrust law are of lesser import to society.[178] As this notion continues, consumers may begin to believe that such behavior is not prohibited criminal activity.[179] A reduction in the "societal condemnation that should accompany criminal prosecution" is problematic for the DOJ and for consumers.[180] This perception hurts any punitive or deterrent value the government attempts to put on antitrust violations and increases the likelihood of similar wrongdoing in the future because of the reduced consequences.[181] Therefore, the DOJ needs to ensure a healthy balance of fairly prosecuting corporations

173. *See* Diamantis, *supra* note 51, at 512.

174. *See id.* at 550 (explaining that "the reputational penalties that affect a corporation after conviction can be just as severe as any formal sanction"). The author also notes that the severity of reputational effects is problematic for corporations because they impact innocent parties like employees or stockholders. *See id.*

175. *Id.* at 529, 529 n.128.

176. *See* Angelo et al., *supra* note 8, at 530–31 (describing that DPAs and NPAs allow corporations to "avoid the . . . potentially devastating collateral consequences of a criminal indictment, trial, and conviction").

177. Werle, *supra* note 11, at 1422.

178. *See* Diamantis, *supra* note 51, at 531 (remarking that when prosecution is kept from the public, it can "undermine what many think is a distinguishing social benefit of criminal law: providing society with a means of expressing its collective condemnation of certain conduct").

179. *See id.* at 532.

180. *See* Alexander & Cohen, *supra* note 38, at 539.

181. *See id.* ("[D]eferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the government's law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution.").

and culpable individuals alike to preserve the punitive effect penalties should have on defendants in deterring future corporate misconduct.[182]

Additionally, because DPAs and NPAs avoid prosecution, consumers are further harmed by their reduced ability to bring antitrust violators to court using issue preclusion; the court room also, importantly, is the main setting that publicly demonstrates that such violations do in fact cause injury.[183] If the goal of the 2019 policy is to encourage antitrust compliance to protect consumers, limiting the effectiveness of how a consumer can lawfully take an antitrust violator to court is an injustice to the consumer welfare standard, which puts the focus on the consumers themselves.[184] One commentator notes that, in comparison to plea deals, DPAs and NPAs reduce the deterrent effect of corporate violations because of the accompanying reduction in adverse publicity[185]:

> The rise of these agreements has undermined the general deterrent and adverse publicity impact that results from corporate crime prosecutions and conviction . . . . It could very well be that the rise of these deferred and non-prosecution agreement deals represents a victory for the forces of big business who for decades have been seeking to weaken or eliminate corporate criminal liability.[186]

Because publicity of corporate wrongdoing decreases with the use of DPAs and NPAs, the general public is far less likely to be informed about when and which companies are acting unfairly in the marketplace or are committing other criminal violations, which might affect a consumer's future purchasing decisions or a company's position in the stock market.[187] In this scenario, corporations are subsequently less likely to lose consumers who might

182. *See infra* Section V.A (emphasizing the need to prosecute culpable individuals along with the corporation's entity).

183. *See* COVINGTON, *supra* note 12, at 3 (explaining that "[b]ecause DPAs do not result in final judgments, they will not—unlike guilty pleas—constitute prima facie evidence of a violation in a subsequent related civil class action proceeding").

184. *See* U.S. CHAMBER OF COM., *Heart of Antitrust Laws*, *supra* note 15 (recognizing that the consumers are the heart of antitrust); Diamantis, *supra* note 51, at 530 ("[T]he public misses out on the catharsis of seeing justice done in the face of corporate crime.").

185. Alexander & Cohen, *supra* note 38, at 555.

186. *Id.* at 539.

187. *See* Delrahim, Wind of Change, *supra* note 1, at 4 (noting that corporations involved in criminal antitrust investigations feel "collateral consequences" including "damage to its reputation and standing with customers").

otherwise choose to buy products or services elsewhere, and stockholders may continue to value the company's stock higher than they otherwise would if they were aware of the corporation's misconduct or the depth at which it occurred.[188]

2. Corporate Fines in DPAs and NPAs Enable Antitrust Recidivism and Discourage Innovation

In antitrust, there is an upward trend toward higher and higher fines,[189] and DPAs and NPAs are seeing the same trend.[190] Some commentators are skeptical that the DOJ pursues high fines for deterrent purposes, citing "self-interested reasons" and the rise in viewing prosecutions as a "profit centre" that allows the DOJ to bring in money for the government.[191] Nonetheless, it is more likely that the reason for increasingly high fines is that deterrence has long been considered the appropriate method for imposing corporate criminal liability; monetary sanctions being the primary deterrence instrument.[192] However, because DPAs and NPAs avoid prosecution and the consequential collateral damage, corporations that receive these agreements simply pay the fine, further entrenching incumbent industries who can easily pay off their misconduct.[193]

Moreover, the new policy encouraging DPA and NPA use reflects the DOJ's wish to avoid another Arthur Andersen corporate "death penalty."[194] Unfortunately, the new policy leaves room for only the main deterrent effect of fining corporations for antitrust misconduct, facing heavy criticism by legal

188. *See* Reilly, *supra* note 10, at 355 (quoting a federal prosecutor who commented that "[c]ompanies are *happy* to enter into these deferred prosecution agreements because . . . [t]hey take a bath in the press for a finite period of time [and] [t]he stock markets don't even seem to punish them").

189. *See* Mah et al., *supra* note 38, at 457.

190. *See Criminalising the American Company*, *supra* note 125 (showing a chart that depicts DPA and NPA fines increasing between 2001 and 2014).

191. *See id.* (noting that "[t]he incentives are strongest when enforcement agencies are permitted to retain all or some of the proceeds of enforcement"). Somewhat antithetical to the proposition that DPAs reduce adverse public exposure, the author suggests that prosecutors who may have to face elections encourage media coverage of the high penalties they placed on large corporations. *Id.*

192. *See* Thomas, *supra* note 79, at 926.

193. *See* discussion *infra* Section IV.A.2.

194. *See* Alexander & Cohen, *supra* note 38, at 539 ("DPAs and NPAs are sometimes regarded as enabling some companies to avoid insolvency. This is reflected in the claim that DPAs and NPAs 'rebuild shareholder and public confidence in corporations while allowing companies to avoid certain death by indictment.'"); *see supra* notes 77–90 and accompanying text (discussing Arthur Andersen and the subsequent rise of the DPA era).

theorists.[195] Recidivism rates among corporations, even those under an active DPA, which should serve as a major deterrent to corporate crime given the ability of the prosecutors to void the contract for such misconduct, are upsettingly high, and the ease with which corporations can pay off fines may be fueling the problem.[196] Not only is it rare for prosecutors to pursue breaches under active DPAs, but many large, established corporations, including Pfizer, ExxonMobil, Barclays, JPMorgan, and BP, are repeat offenders who continue to violate laws in quick succession.[197]

The DOJ falls back on the "Too-Big-to-Jail" (TBTJ) problem, worrying that handing out corporate convictions to companies with immeasurable influence over the economy would be worse for the American public than handing out fines.[198] For firms considered TBTJ, however, deterrence no longer holds any effect because they are essentially rendered unaccountable for their crimes when economic penalties fail to discourage their corporate misconduct.[199] Even for firms not considered TBTJ, settlement data shows that corporations on the whole are hit with fines that are either at or below the federal Sentencing Commission's Organizational Sentencing Guidelines.[200] For companies that can afford deferred prosecution or non-prosecution agreement fines, a rise in the use of DPAs and NPAs serves as a valuable buffer of protection from deterrents to criminal convictions,[201] and as long as the DOJ continues to consider some corporations as TBTJ, the 2019 policy cannot be expected to effectively deter criminal antitrust conduct with its overreliance on fines.[202]

195. *See* Alexander & Cohen, *supra* note 38, at 539 (arguing that among legal theorists, little agreement exists about the efficacy, efficiency, and deterrent effect of DPAs and NPAs). One author argues that many defendants are "repeat players" who regularly engage with the government in a contracting or regulatory capacity and therefore "can reliably predict ex ante whether they are regarded as TBTF [(Too-Big-to-Fail)] . . . evad[ing] otherwise-appropriate penalties for criminal behavior." *See* Werle, *supra* note 11, at 1377. Others argue that the reduced effect of penalties from DPAs and NPAs "enabl[e] some companies to avoid insolvency" and "rebuild shareholder and public confidence in corporations while allowing companies to avoid certain death by indictment." *See* Alexander & Cohen, *supra* note 38, at 539.

196. *See* Werle, *supra* note 11, at 1369–70.

197. *See id.*

198. *See id.* at 1370.

199. *See id.*

200. *Id.* at 1375.

201. *See* Alexander & Cohen, *supra* note 38, at 538. *But see* Delrahim, Wind of Change, *supra* note 1, at 4 (explaining that the new policy marks a move away from enforcement as it is "often [] of inherently limited deterrent value").

202. *See* Werle, *supra* note 11, at 1428.

The increase in fines is also problematic in that innocent parties like shareholders and employees are the ones damaged by the monetary penalties.[203] The DOJ even expresses concern regarding whether these collateral consequences might outweigh deterrence in pushing corporate criminal liability.[204] Corporations' continued ability to merely pay off the fines without facing further penalties promulgates the idea that "criminal misconduct is . . . merely a cost of doing business," further hurting any deterrent effect the government wishes to impose.[205] The more firms are able to simply engage in the "cost of doing business," the more high level executives may consider that criminal conduct is profitable for themselves and the corporation.[206] Additionally, increases in reliance on fines alone for deterrence may also cause executives to invest in concealment as opposed to prevention of future misconduct.[207]

One of the main foci of antitrust enforcement is protecting innovation in the market.[208] As DPAs and NPAs increase in frequency in antitrust cases, large incumbent industries are more likely to be able to financially maintain their market position by paying off fines, allowing these companies to make entry significantly more difficult, leading to a further concentration of the industry.[209] With fewer competitors in the market, there is less horizontal competition and less incentive for companies to create new and improved products.[210] The consumer welfare standard encompasses more than just worries about changes in the price of products.[211] Consumer welfare encompasses considerations like quality, variety, and innovation, which a well-functioning competitive system can and should provide.[212]

To solve the problem that corporate fines cause, one study suggests doing

203. Diamantis, *supra* note 51, at 549.

204. *See* Angelo et al., *supra* note 8, at 527.

205. *See* Thomas, *supra* note 79, at 963; *see also* Reilly, *supra* note 10, at 352 (arguing that DPAs should be eliminated in corporate criminal cases because they give the appearance that corporations can "buy[] their way out of a prosecution").

206. *See* Werle, *supra* note 11, at 1370.

207. *See* Diamantis, *supra* note 51, at 549 (according to the author, "[f]ines are, after all, a roundabout way to get at the root of the problem—defective corporate character").

208. *See* GAVIL ET AL., *supra* note 121, at 3 (describing that "[i]n a fundamental way, antitrust law . . . promotes the competitive process that can bring new, less expensive, and more varied products and services to the market").

209. *See id.* at 671–892; *see also supra* Section IV.A (arguing that increased use of DPAs and NPAs will support incumbent industries for financial reasons).

210. *See* GAVIL ET AL., *supra* note 121, at 671–892.

211. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40.

212. *See id.*

away with fines altogether.[213] Interestingly, research conducted by faculty at Oxford University and the University of Washington found that when corporate misconduct hurts investors or consumers, the damage from a drop in the company's share price far exceeds that of a fine.[214] In essence, the research found there to be "little reason" for prosecutors to push large fines when the market already self-regulates.[215] However, given the rise in antitrust fines, it is unlikely the Division would pursue an option that eliminates them, especially after reporting that 2020 saw the highest amount in criminal fines over the past five fiscal years.[216] Rather than eliminating fines within a deterrence process, they should be redirected back towards the decision-makers who entered into the unlawful conduct in the first place.[217]

B. Corporate Compliance Programs Do Not Offer Adequate Incentives or Standards

1. Managers Prefer Self-Interest over Compliance

"[T]op management is the most significant factor affecting corporate compliance."[218] In antitrust, violations are not accidental acts of misconduct committed by stand-alone or low-level employees.[219] A problem with the 2019 policy's increased focus on corporate compliance programs is that it ignores that such programs may not properly incentivize lead decision-makers who decide the degree to which a company will implement or enhance a compliance program.[220]

For companies, compliance programs under the new policy are now the key to avoid hefty penalty costs that would otherwise cause real collateral

213. *See Criminalising the American Company*, *supra* note 125.

214. *Id.* The author indicates that the results of the research demonstrate how the business's underlying value has been damaged by its own misconduct, which leads to higher costs for the company to attain capital and sell its products or services. *See id.*

215. *See id. But see infra* Section V.A. (arguing that the DOJ should instead levy more fines directly against culpable individuals to effectively deter antitrust violations).

216. *See* Delrahim, Here I Go Again, *supra* note 139, at 6 (asserting that the Antitrust Division brought in $529 million in fines in the 2020 fiscal year while under his leadership).

217. *See infra* Section V.A (arguing that fines and other punishments directed at individuals are far more effective at deterring future antitrust violations than those levied on the corporation itself).

218. Diamantis, *supra* note 51, at 555.

219. *See* COVINGTON, *supra* note 12, at 1–2 (explaining that this was one of the reasons why the Antitrust Division used to hold that antitrust violators should almost always receive criminal charges regardless of preexisting compliance programs).

220. *See* Armour et al., *supra* note 156, at 1.

consequences on all employees and interested stakeholders.[221] In the eyes of managers and executives, however, compliance programs are long-term company investments, and their focus is often limited to their personal tenure at the corporation during which they might expect to liquidate stock; this situation encourages a dangerous propensity for executives to make profitable short-term choices with potentially damaging long-term effects.[222] As stock-based pay becomes increasingly common for top-level executives, the pattern reveals that executive employees are disincentivized to pursue hefty compliance programs in favor of their own short-term profits.[223] The problem is, unfortunately, not necessarily remedied by board members.[224] Board members are unlikely to check the behavior of managers if under a stock-based pay setup because board members' motivations to have healthy compliance programs face the same downward pressures.[225]

Ultimately, compliance programs under current corporate compensation trends are likely to remain more like "paper programs"—programs that meet the bare minimum to try and pass any of the vague standards set forth by the DOJ.[226] Coupled with the length of time it takes for detection of violations and subsequent enforcement actions to result,[227] the system has made it easier

221. *See id.* at 13; *see also supra* Section III.A.

222. *See* Armour et al., *supra* note 156, at 1, 4–5 ("Stock-based pay, ubiquitous for corporate executives, creates systematic incentives to short-change compliance."). Among U.S. corporations, stock-based compensation is an incredibly and increasingly common form of payment to senior executives. *See id.* at 6, 20. The idea is to intersect the interests of the executives to the stockholders by directly tying the corporation's stock price to the compensation of the executive, meaning as the stock price improves, so too does the executive's compensation award. *See id.* at 20. This creates a problematic tie between the executive's "time horizon," by which the executive will be incentivized to concern herself only with the stock price during her tenure at the company, and therefore, could make short-term profitable decisions that are harmful in the long run. *Id.* at 5, 20–21; *see infra* note 316 and accompanying text (reporting that many executives are more than willing to break the law for short-term profit).

223. *See* Armour et al., *supra* note 156, at 3–4. The examples of companies such as Volkswagen tampering with their emissions tests, BP cutting costs at the expense of the environment, or Facebook and its questionable use of user data are telling. *See id.* These decisions may have brought short-term profits; however, each company has faced either enforcement or reputational costs with deep downward dives of stock price. *See id.* at 4. "The problems seem not so much to be strategic decisions benefitting shareholders at society's expense, but failures in corporate governance harming both society and shareholders." *Id.*

224. *See id.* at 6.

225. *See id.* "Rather than serving to rein in managers' excesses, boards risk becoming their cheerleaders." *Id.*

226. *See id.* at 21; *see also infra* Section IV.B.2 (discussing the problems of vague compliance standards); *supra* notes 96–97 (discussing paper programs).

227. *See* Armour et al., *supra* note 156, at 5.

for executives to underinvest in corporate compliance, negotiate for the more readily accessible DPAs, pay the lower penalty fine, and still make it a financially beneficial decision to violate antitrust laws.[228]

2. Lack of Cognizable Compliance Standards

The 2019 policy makes a seemingly sensible move towards encouraging compliance programs; understandably, programs designed to root out and stop misconduct should theoretically reduce antitrust violations, protecting consumers.[229] The problem, however, is that despite good intentions, the standards for what actually constitutes an "effective compliance program" remain unclear.[230]

The Antitrust Division stands by its flexible policy of evaluating each violating company on an individual basis and holds that corporate compliance programs should similarly reflect an individualized approach to the company's particular industry.[231] The 2019 policy continues to reflect this approach with "no checklist[s] or formulaic requirements" for Division prosecutors to evaluate a compliance program.[232] In DPAs negotiated with FCS

228. *See supra* Section A.II. *But see* Delrahim, Wind of Change, *supra* note 1, at 3 (summarizing Deputy Attorney General Rod Rosenstein's argument that compliance programs should still be credited even though the company broke the law, inherently meaning the compliance program was not effective in deterring violations). "The fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith." *Id.*

229. *See supra* note 120–21 and accompanying text (iterating Delrahim's opinions for why the policy will benefit the public).

230. *See* Armour et al., *supra* note 156, at 15 (noting that even among compliance professionals, there remains little knowledge about effective corporate compliance).

231. *See* Brent Snyder, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just., Compliance Is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce, New York 4 (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download (outlining Brent Snyder, former Deputy Assistant Attorney General's, speech on "what makes an effective compliance program" and providing that the Division is not likely to issue a "one size fits all" approach to determining effective compliance because "[n]ot all effective compliance programs are built alike"). Indeed, the DOJ continued to emphasize a reliance on a "tailored" approach to analyzing a corporation's compliance in its update in June 2020 concerning the evaluation of compliance programs. *See* EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, U.S. DEP'T OF JUST. CRIM. DIV. 1, 3 (updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter EVALUATION OF CORPORATE COMPLIANCE PROGRAMS]; *see also* DOJ UPDATES GUIDANCE REGARDING ITS "EVALUATION OF CORPORATE COMPLIANCE PROGRAMS," GIBSON DUNN 1, 4 (June 3, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/06/doj-updates-guidance-regarding-its-evaluation-of-corporate-compliance-programs.pdf (stating that the update is not a "game-changer" and "amplifies DOJ's core themes: tailored, company-specific compliance programs").

232. *See* Delrahim, Wind of Change, *supra* note 1, at 7.

and Apotex, for example, neither agreement "set forth particular requirements the compan[ies'] compliance program[s] must satisfy."[233] Instead, the 2019 policy merely directs prosecutors to reflect on three questions regarding the efficacy of a corporation's compliance program: "[1] Is the corporation's compliance program well-designed? [2] Is the program being applied earnestly and in good faith? [3] Does the corporation's compliance program work?"[234] Even with the inclusion of the nine different elements that are meant to identify an effective compliance program, there are still no discernable numerical or statistical standards by which a corporation could seek to measure their own internal efficacy.[235] The nine factors include:

> (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[236]

What these questions and factors indicate is that, although they are supposed to identify aspects of a program that, if included, may deem a program effective, there are no real cognizable standards to measure whether the program is actually serving its true purpose of deterring violations.[237] Unfortunately, even if corporations featured the sixth factor, for instance, in their programs, current data suggests that many corporations utilize ineffective evaluative methods to help them know where to even begin on revising their compliance program.[238] For example, the most commonly used metric to

233. *See* 2020 MID-YEAR UPDATE, *supra* note 50, at 8, 12.

234. EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 231, at 1–2 (referring to them as "fundamental" questions).

235. *See* Delrahim, Wind of Change, *supra* note 1, at 13.

236. *Id.*

237. *See* Armour et al., *supra* note 156, at 15 (noting that just because a corporation may have a feature in their compliance program that would allow it to be seen as an effective program does not mean the program itself is effective).

238. *See* Chen & Soltes, *supra* note 156; *see also* Delrahim, Wind of Change, *supra* note 1, at 13 (explaining that the sixth factor entails "monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program").

determine the efficacy of compliance training, the DOJ's fifth factor, is to analyze completion rates.[239] Although a 90% completion rate may inform the employer that a majority of their employees received information on being compliant, there remains no measure of that training's quality nor ability by employees to use that information to stay compliant.[240] The nine factors therefore, while helpful in narrowing what entails an effective compliance program, do not sufficiently provide cognizable standards that companies can use to concretely apply to their programs so as to be definitively compliant.[241]

Corporations continue to use metrics such as program completion not because they believe them to be effective at measuring success, but because they are incentivized to merely measure efficacy by whether a particular feature of a program exists.[242] Although corporations may be incentivized to institute programs to measure how effective their compliance programs are with the use of the sixth factor, a survey by Deloitte and *Compliance Week* in 2016 found that only one-third of corporations that do evaluate their compliance programs are "confident or very confident" that they are using the right measures to do so.[243] Thus, the three fundamental questions and the nine factors of effective compliance programs continue corporations' reliance on a "check-list" approach to compliance, rather than clarifying actual standards by which to evaluate a successful reduction in antitrust violations.[244] Checklist approaches to compliance promote ineffective compliance programs that should be designed to deter and stop antitrust violations, which is why

239. *See* Chen & Soltes, *supra* note 156. This survey was conducted by *Compliance Week* and Deloitte. *See id.*; *see also* Delrahim, Wind of Change, *supra* note 1, at 13 (listing the fifth factor as "compliance training and communication to employees").

240. *See* Chen & Soltes, *supra* note 156 (arguing that because of the inability of completion rates to adequately measure an effective program, compliance metrics should be tied in greater degree to employees' understanding of compliance policies or measuring behavioral changes).

241. *See supra* notes 237–40 and accompanying text.

242. *See* Chen & Soltes, *supra* note 156 (arguing that companies' heavy reliance on completion rates as a metric for success is not because it is actually effective "but because their objective is merely to demonstrate to regulators that they've accomplished the task").

243. *See id.*; *see also* Hamann, *supra* note 44, at 876 (reporting 14% of corporate compliance executives were "not confident," 45% were "somewhat confident," 27% were "confident," and 5% were "very confident").

244. *See* Chen & Soltes, *supra* note 156 (stating corporate managers may problematically believe that if they can answer each question put out by the DOJ to evaluate an effective compliance program, they will meet the DOJ's expectations and consider their program to be adequate and without further need of review). *But see* EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 231, at 1–2 (explaining that the DOJ continues to hold to the three fundamental questions to evaluate effective corporate compliance and reiterated in its June 2020 update that its elaboration on the questions should not be treated as a checklist).

requiring court approval of compliance measures could help solve these issues.[245]

C. The Startling Lack of Judicial Review of DPAs and NPAs

The 2019 policy marks a monumental shift in the approach to corporate compliance crediting within the Antitrust Division.[246] Corporations are now incredibly incentivized to implement or update their compliance programs in regards to antitrust, likely following closely to the nine guidelines provided,[247] in the hopes of receiving a lighter punishment from the DOJ should antitrust charges be incurred.[248] As discussed previously, the largest corporations will be best able to fund and support compliance programs, further entrenching their place in the economy and hurting the core values of antitrust to protect consumers' choices.[249] The resulting increase in compliance programs is likely to undermine the consumer welfare standard in other manners as well; notably, the overreliance on prosecutorial discretion in the DPA process allows the government, rather than consumers, to decide which companies thrive.[250]

1. The Rise of Coercive Prosecutorial Discretion

Under the 2019 policy, corporate compliance programs are reviewed and monitored by government prosecutors.[251] Allowing DOJ prosecutors essentially full control over the DPA process increases government oversight of business and runs counter to the core reason for antitrust by "allow[ing] policymakers, not consumers, to pick winners and losers in the marketplace."[252]

245. *See infra* Section V.B (advocating for a resurgence of judicial review).

246. *See supra* Section II.D.

247. *See* Delrahim, Wind of Change, *supra* note 1, at 13 (laying out the nine elements that demonstrate "an effective antitrust compliance program"); *see also supra* notes 214–16 (arguing why companies are likely to treat guidelines as strict compliance rules).

248. *See* Ushijima et al., *supra* note 70 (arguing "the failure to implement an effective compliance program is imprudent at best and potentially devastating at worst"); *see also* COVINGTON, *supra* note 12, at 5 ("[O]ne thing is clear: companies would be well served to reassess their antitrust compliance programs because for any company that has the misfortune to find itself implicated in a cartel case and facing a Division prosecution, the potential rewards of having a strong compliance program—and risks of having an inadequate program—have never been greater.").

249. *See supra* Section IV.A.

250. See *infra* Section IV.C.1.

251. *See supra* note 119 and accompanying text.

252. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (arguing that the "[n]ew antitrust

The 2019 policy encourages the increased use of DPAs, and in current DOJ and courtroom practice, these agreements are undertaken almost solely via the prosecutor's discretion.[253] This discretion leaves the decision regarding compliance provisions in deferred agreements completely in the purview of antitrust prosecutors.[254] Although DPAs are filed with the court, case law allows there to be no substantive court review over the agreement, and NPAs already do not receive any judicial review.[255] The problem is that because of the inherently "secretive" nature of DPAs and NPAs, which are negotiated entirely behind closed doors and outside any substantive courtroom review, the 2019 policy lacks any outside oversight to ensure the prosecutors' provisions adhere to the consumer welfare standard.[256] While courts could serve as the fair moderators between the parties, they unfortunately are reticent and have outrightly rejected to take on this responsibility.[257]

In the case of *United States v. Fokker Services B.V.*,[258] for example, the D.C. Circuit declined to hold that courts have the authority for "meaningful[] intensive review" over DPAs under the Speedy Trial Act.[259] In *Fokker*, the United States charged Fokker Services with evading export laws that generated $21 million by aiding Iran shortly after the events of 9/11.[260] At the trial level, the court rejected the DPA and held that having the company pay a $21 million fine, matching dollar-for-dollar the revenue the company illegally brought in, did not fit the gravity of the offense considering the fact that senior management knowingly participated in the export evasion conspiracy and yet not a single individual faced prosecution.[261] In the appeal to the D.C. Circuit,

standards [which push for increased government oversight over business] unnecessarily harm[s] our national economy, [by] unfairly target[ing] companies that earn success in the market").

253. *See supra* note 119 and accompanying text; Section III.A.

254. *See* Angelo et al., *supra* note 8, at 529 n.106 (emphasizing that DOJ prosecutors often negotiate terms that require "significant internal business reforms" among other remedial measures and penalties).

255. *See* Hamann, *supra* note 44, at 859 (noting that DPAs receive no "meaningful judicial scrutiny"); *see also infra* notes 258–65 (detailing the case of *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016)).

256. *See* Diamantis, *supra* note 51, at 529.

257. *See infra* notes 258–65 (concerning controlling case law where the court refused to exert substantive review over DPAs).

258. United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016).

259. *See* Werle, *supra* note 11, at 1409.

260. *See* Lawlor, *supra* note 65, at 34.

261. *See Fokker Servs.*, 818 F.3d at 737–38; Lawlor, *supra* note 65, at 34–35. Had Fokker Services been prosecuted, the company would very likely have been disbarred from government contracts, which was the foundation of Fokker Services' business model. Lawlor, *supra* note 65, at 35. Instead,

the court overturned the lower court's ruling, arguing that the language of the Speedy Trial Act that requires DPAs to have "approval of the court" meant only that courts were to ensure prosecutors were not relying on DPAs to avoid trial time limits.[262] The D.C. Circuit further stated that this language does not stretch to allow judges to substantively review DPA provisions because it would unduly cross into the Executive Branch's discretion regarding whether to seek prosecution or enter into DPAs with the corporations it investigates.[263] The result is that the D.C. Circuit has pulled courts almost entirely out of the DPA process by declaring that courts cannot reject DPAs over any substantive concerns regarding prosecutors' choices of terms.[264] As the D.C. Circuit stated, "courts 'play no role in monitoring the defendant's compliance with the DPA's conditions. [Instead], the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions.'"[265]

As detailed previously, the ability to avoid prosecution is itself enough of an incentive for corporations to sign on to deals as set forth by DOJ prosecutors.[266] Even otherwise innocent corporate parties may feel the pressure to settle and accept unfair DPA terms to avoid the financial and reputational costs associated with a DOJ investigation.[267] The sole power of DOJ prosecutors to determine whether a corporation has breached the DPA terms further strengthens the bargaining power prosecutors have over defendants to compel

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the company was merely hit with a fine that matched the revenue Fokker Services made in the illicit activities and a requirement to engage in an eighteen-month long compliance program. *Id.* at 34–35. The judge at the trial level levied strong words in opposition to the DPA terms arguing they were "disproportionate to the gravity of Fokker Services' conduct in a post 9/11 world" and would "promote disrespect for the law." *Id.* at 34. Unfortunately, the D.C. Circuit disagreed and held "a district court should not reject a consent decree simply because it believes the government could have negotiated a more exacting decree, or because it believes the government failed to bring the proper charges." *Fokker Servs.*, 818 F.3d at 743 (internal quotation marks and citations omitted).

262. *See Fokker Servs.*, 818 F.3d at 743; Ang et al., *supra* note 55, at 4.

263. *See Fokker Servs.*, 818 F.3d at 743–44; Ang et al., *supra* note 55, at 4; *see also* Lawlor, *supra* note 65, at 36–37 (quoting the court that the Speedy Trial Act does not allow district courts "free-ranging authority to scrutinize the prosecutor's discretionary charging decisions").

264. *See* Arlen, *supra* note 170, at 218–19.

265. *Id.* at 219 (quoting United States v. Fokker Servs., B.V., No. 15-3016, D.C. Circuit (April 5, 2016)).

266. *See supra* note 133 and accompanying text (laying out the reasons a corporation would want to avoid prosecution).

267. *See* Reilly, *supra* note 10, at 320–23, 350; *see also Criminalising the American Company*, *supra* note 125 (making the case that the risk of indictment resulting in potential loss of operating licenses is so paramount to a company's functioning that even if a corporation would otherwise have a good chance of winning a case, it is likely to settle).

them into accepting unwieldy or overburdensome DPA provisions.[268] In one extreme instance, a U.S. prosecutor required the defendant company in the DPA to donate $5 million to a New Jersey law school which, unsurprisingly, ended up going to the prosecutor's own alma mater.[269] Prosecutors therefore wield enormous, inordinate influence over the provisions of the agreement, allowing the Division to input and enforce their own policy goals.[270]

Prosecutors, however, may not be the proper party to have the final say on what corporate reform may or should look like, nor should they be overtly directing compliance reform by pushing policy goals in the first place.[271] First, because the DOJ is an executive agency, DOJ prosecutors may be faced with political pressures not otherwise subjected on nongovernmental actors.[272] This creates serious concerns about potential underenforcement of the massive corporate entities who can afford to employ top lobbyists to advocate on their behalf within the political process.[273] The nine-factor test in the 2019 policy—with its focus on character evaluations—makes it easier for prosecutors to use their discretion as they see fit regarding whether or not to offer a corporation a deferred agreement and how that agreement will appear.[274] As

268. *See* Reilly, *supra* note 10, at 327, 353 (arguing it may be "strategically wise" for companies under DOJ review "to do or say whatever has to be done" to try to receive a deferred agreement).

269. *See* Arlen, *supra* note 170, at 213. Former U.S. Attorney Christopher Christie negotiated the terms of the DPA with Bristol Myers that led to the $5 million endowment of a chair in business ethics at his alma mater, Seton Hall Law School. *See id.* At the time, Christie argued the provision merely required the corporation to donate to a New Jersey-based law school, and it was Bristol Myers' choice to donate to Seton Hall. *See id.* at 213–14. Regardless of the true motivations behind the choice of Seton Hall, one commentator aptly points out this story displays the gratuitous amount of power given to prosecutors handling DPAs, as the mandate to donate to a New Jersey law school "at best, appears grounded in an idiosyncratic conception of the public good and, at worst, is an example of the use of prosecutorial authority to serve personal aims." *Id.* at 214.

270. *See* Angelo et al., *supra* note 8, at 529 n.106 (arguing DOJ prosecutors exercise a significant power disparity over corporate defendants to their advantage); *see also* Arlen, *supra* note 170, at 192 (arguing that the large grant of discretionary power to prosecutors, which allows them to input their own ideologies onto defendants, violates the rule of law); Werle, *supra* note 11, at 1412 (equating the power imbalance between prosecutors and corporate defendants over settlements as equivalent to extortion).

271. *See* Angelo et al., *supra* note 8, at 546; Arlen, *supra* note 170, at 193 (arguing prosecutors should not use their discretion to push their own goals and ideas about what best serves the public interest).

272. *See* Diamantis, *supra* note 51, at 560.

273. *See id.* at 560–61. *But see* Reilly, *supra* note 10, at 347. Former U.S. Deputy Attorney General Larry Thompson argued that most government prosecutors are fair in their decisions about whom to prosecute, however, they may be tempted to push prosecutions of high-profile cases for their own acknowledgement. *See id.*

274. *See supra* text accompanying note 236; Diamantis, *supra* note 51, at 546–47.

it stands, "nothing prevents DOJ leadership from approving a weak settlement when it perceives that doing so would be politically expedient."[275]

Second, it is not the role of antitrust prosecutors to become industry regulators.[276] The job of the antitrust prosecutor is to make sure that marketplace participants are acting fairly so as to protect competition in an industry—not to control how that industry operates.[277] The increase in DPA use under the 2019 policy unduly allows DOJ prosecutors to control corporations' behavior through demanding particular compliance actions according to the DPA's terms; this pushes antitrust into a regulatory role and redirects enforcement onto innocent actors where it is not needed.[278] This trend is likely to continue to increase as DPA use rises, further fortifying prosecutors' power over the marketplace.[279] Both points push against the consumer welfare standard because the goal of antitrust is to preserve marketplace competition so that *consumers* can fairly decide "winners and losers," not prosecutors.[280]

Lastly, prosecutorial discretion without court oversight hurts consumers in the long run because it overrides judicial precedent and diminishes the ability of corporations to determine the nuances of what does and does not qualify as an antitrust violation.[281] Antitrust law stands on the backbone of the three

275. Werle, *supra* note 11, at 1411.

276. *See* Reilly, *supra* note 10, at 342. Reilly argues the DOJ has shifted its focus to reforming corporate cultures as opposed to working on indictments or prosecutions. *See id.* Reilly additionally declares that "federal prosecutors have fashioned a new role for themselves in policing, *and supervising*, corporate America." *Id.*

277. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40.

278. *See supra* notes 266–68 (regarding the undue prosecutorial coercion on the guilty and innocent alike); *see also Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (arguing that increased government oversight of business in antitrust policy "turn[s] antitrust into a super regulatory power" and gives antitrust prosecutors significant influence over deciding outcomes within particular industries in the economy).

279. *See* Reilly, *supra* note 10, at 347. Mark Mendelsohn, the former Deputy Chief of the DOJ Fraud Section, commented that "[i]f the Department only had the option of bringing a criminal case or declining to bring a case, [it] would certainly bring fewer cases." *Id.* The 2019 policy opens up the third door and allows prosecutors to avoid the choice between prosecution or declination. *See supra* Section II.B. Commentators argue that alternative agreements have, in a sense, replaced declinations because it "provid[es] prosecutors with an opportunity to extract a pound of flesh when previously they would have had to settle for nothing." Reilly, *supra* note 10, at 346. Larry Thompson, the former U.S. Deputy Attorney General, defends "that most government officials are fair and high-minded" when it comes to deciding how to handle defendants, but acknowledges that "even the most sensible" prosecutors face temptation. *Id.* at 347.

280. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40.

281. *See* Alexander & Cohen, *supra* note 38, at 556 (arguing that the rise of DPAs "has reduced the predictability and consistency" in antitrust law because DPAs do not result in any court rulings concerning the law).

major acts: the Sherman Act, the FTC Act, and the Clayton Act;[282] these laws have evolved over time and their interpretations are guided by court rulings.[283] DPAs, however, bypass the court system and leave behind no legal precedent.[284] Though DPAs are generally made publicly accessible for review, any guidance corporations may receive as to the bounds of activity the DOJ may or may not pursue from the corporation's analysis of the DPA document is not legally binding.[285] As DPAs rise in use, the decreasing deprivation of enforceable standards aggravates corporations' compliance efforts to avoid agency investigation in the first place.[286] Corporate compliance additionally suffers as corporate reform terms in DPAs are ironed out in back-room meetings out of the public eye, making it harder to formulate a cognizable, defined standard for compliance, or to form a better understanding of which reforms are actually effective.[287]

282. *See supra* Section II.A.

283. *See* Mah et al., *supra* note 38, at 414 (recognizing that the common law approach to antitrust is driven by case-by-case adjudication).

284. *See* Reilly, *supra* note 10, at 318.

285. *See id.* at 318–19 (indicating that because DPA terms are not legally binding in their interpretation as applied to other parties, the DOJ has no obligation to treat like violations in a consistent manner).

286. *See id.* at 318 (remarking that the increasing lack of judicial precedent further complicates corporate compliance efforts).

287. *See* Diamantis, *supra* note 51, at 561; *see also id.* at 543–44 (arguing DPAs slow the development of corporate compliance because it makes it harder to track public records of corporate recidivism rates).

V. HOW TO HELP RESOLVE THE ISSUES OF THE 2019 POLICY BY PUTTING OUT THE FIRE AT THE HEAD, AND WHERE ANTITRUST IS STARTING NEW FIRES

If the DOJ is really looking to put out the "fires" on the heads of corporations, the agency needs to go to the source of where these violations occur.[288] In doing so, the Antitrust Division should return to a focus on prosecuting individuals—those key corporate members who personally feel the deterrent effects of incarceration threats and hefty fines far more than the corporation itself, which cannot be jailed and can simply pay off the fine.[289] The courts should consider overturning *Fokker Services* and reinstituting lively judicial review over the DPA process, returning to the consumers the purchasing power to determine winners and losers in the marketplace.[290] Now is the perfect time to readjust antitrust measures as companies like Facebook and Google, who are facing anticompetitive investigations, are thrusting antitrust into the public sphere, and those charges could have significant impacts on our society.[291]

A. Reviving Prosecutorial Focus on Individuals

Both the reduction in reputational harm to companies from increased use of alternative prosecution agreements and the overt reliance on fines fail to adequately deter future antitrust violations.[292] Makan Delrahim, in announcing the 2019 antitrust policy, explained that "[t]he most effective deterrent to corporate criminal misconduct is identifying the people who commit crimes and sending them to prison,"[293] however, this has not been recent DOJ practice.[294] Revamping the DOJ's focus on individual prosecution would resolve the current lack of effective deterrence methods within the 2019 policy by increasing managers' compliance and breaking down the perception that large corporations can simply pay off fines and avoid the consequences of their

288. *See* Delrahim, Wind of Change, *supra* note 1, at 3–4 (referring to the "hair on fire" corporations when they realize they are implicated in antitrust investigations).

289. *See supra* Section IV.A.2; *see also infra* Section V.A.

290. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (discussing who gets to choose the winners and losers in the market); *see also infra* Section V.B.

291. *See* Delrahim, A Whole New World, *supra* note 16, at 2; *see also infra* Section V.C.

292. *See supra* Section IV.A.

293. Delrahim, Wind of Change, *supra* note 1, at 4.

294. *See infra* notes 299–313 and accompanying text.

antitrust misconduct.[295]

Following the financial crisis of 2007–2008, federal prosecutors increasingly began focusing their efforts on the entire corporation itself rather than investigating individual executives and employees.[296] Prosecutors responded to the crisis in this way partially because of the strong public disapproval regarding scandals involving large corporations in the early 2000s.[297] New York federal judge Jed Rakoff spoke strongly against this trend away from individual prosecutions, arguing that refusal to bring due justice on culpable individuals regarding the financial crisis might "be judged one of the more egregious failures of the criminal justice system in many years."[298]

Despite this impassioned speech, prosecution of individuals within corporate criminal cases remains weak.[299] From 2001 to 2014, only 34% of companies involved in DPA and NPA settlements had individuals that faced prosecution across a study of 306 DPAs and NPAs with corporate violators.[300] In corporate DPAs and NPAs, almost two-thirds do not also have charges pressed against culpable employees, and even among those prosecuted, over 40% of the individuals did not face any kind of incarceration.[301] Individuals who are actually prosecuted are, interestingly, often not high-ranking executives in the firm.[302] In fact, only 126 of the 414 individuals (or 30%) prosecuted between 2001 and 2014 were presidents, vice presidents, CEOs, or CFOs.[303]

In 2015, then-Deputy Attorney General Sally Yates communicated the DOJ's intent, in what is now known as the "Yates Memo," to increase scrutinization again of culpable individuals by holding them personally accountable for violations of corporate misconduct.[304] Yates advocated that "one of the

295. *See supra* Section IV.A.2.

296. *See* Angelo et al., *supra* note 8, at 514.

297. *See id.*; *see also supra* notes 60–65 and accompanying text (discussing the early intent of DPAs was for individuals, not large corporations). Interestingly, the DOJ's approach to DPAs in the 1970s was reserved for individual defendants as opposed to corporations, and for smaller cases as opposed to the massive corporate cases, displaying a clear and wide removal of DPAs modern usage from their original intended use. *See supra* notes 60–65 and accompanying text.

298. *See Criminalising the American Company*, *supra* note 125.

299. *See infra* notes 300–03 and accompanying text.

300. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 131 (2020) [hereinafter Garrett, *Declining Corporate Prosecutions*].

301. Garrett, *The Changing Face of Corporate Prosecutions*, *supra* note 49, at 49–50.

302. *See* Garrett, *Declining Corporate Prosecutions*, *supra* note 300, at 131.

303. *Id.* (delineating that, of the 414 individuals, there were 13 presidents, 59 vice presidents, 26 CEOs, and 28 CFOs).

304. *See* Werle, *supra* note 11, at 1410.

most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[305] Initially, Yates's call to action led to an increase in individual prosecutions that continued into the Trump Administration.[306] However, overall, since the time of the Yates Memo, individual prosecutions have actually declined.[307] The decrease may be due to the growing trend towards use of alternatives to prosecution[308] but is also likely linked to then-Deputy Attorney General Rod Rosenstein's announcement in 2018 of the DOJ's relaxation of the Yates Memo in favor of quicker investigations and resolutions.[309] In Rosenstein's update to policy, only individuals considered to be top priority are to be charged.[310]

Intriguingly, in antitrust litigation, prior to Rosenstein's policy change, the year 2016 saw a majority of individuals prosecuted in criminal antitrust cases (61%) facing some amount of incarceration.[311] In 2018, the same year as Rosenstein's announcement, only 35% of prosecuted individuals in antitrust violations received prison sentences.[312] Within DPAs, most contain a condition that requires companies to release pertinent information regarding individual offenders; however, there appears to be little enforcement of these

305. *Id.* (quoting Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to Assistant Att'y Gen., Antitrust Div. et al. 1 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download).

306. *See* Angelo et al., *supra* note 8, at 514–15.

307. *See id.* at 515. Garrett analyzed the rates of individual prosecutions post-Yates Memo and found that overall, the rate decreased. Garrett, *Declining Corporate Prosecutions*, *supra* note 300, at 131–33. In his analysis, he factored out declinations where no individuals were charged as well as the large number of NPAs entered into with the Swiss Bank which resulted in no charged individuals, and still found that individual prosecutions declined since the Yates Memo. *See id.*

308. *See* Angelo et al., *supra* note 8, at 515; Werle, *supra* note 11, at 1407. The author argues that one structural explanation for the discrepancy between large corporate criminal cases and the low rate of individual prosecution in DPA is that the lack of judicial review by the court allows prosecutors and Too-Big-To-Jail defendants to negotiate settlements that meet their own self-interested ends as opposed to that of the public interest, resulting in "a dynamic vulnerable to tacit collusion." Werle, *supra* note 11, at 1407. To remedy this problem, the author suggests a legislative proposal to insert "robust judicial review" back into the DPA settlement process for increased accountability, and mandating that prosecutors thoroughly investigate individual misconduct "before obtaining the political benefit of a headline-grabbing corporate settlement." *Id.*; *see supra* Section IV.C (discussing the lack of judicial review in alternative prosecution agreements).

309. *See* Garrett, *Declining Corporate Prosecutions*, *supra* note 300, at 134.

310. *See id.* Rosenstein defended the policy change arguing that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." *Id.*

311. Mah et al., *supra* note 38, at 453.

312. *Id.*

provisions to bring such individuals to court.[313]

Currently, the 2019 policy and the DOJ policy-wide approach make no concerted effort to increase individual prosecutions.[314] This means that with the increase in use of DPAs under the 2019 policy, the threat of criminal punishment of individuals remains small, implicitly encouraging corporate managers to take risks and engage in potentially criminal activities that may benefit the corporation and mostly themselves.[315] Disturbingly, over one-third of managers admit that they would take such risks when asked in a 2016 survey of almost 3,000 executives; 42% reported that they could justify unethical behavior for the sake of meeting financial targets.[316]

Consequently, the 2019 policy could be modified to encourage increased prosecution of culpable individuals and to require the guilty party or parties to take on some or more of the liability of corporate fines.[317] This would serve as a strong disincentive for future misconduct by employees who make the corporation liable for violations in the first place under the doctrine of respondeat superior.[318] Increasing individual prosecutions might help to defeat the idea that corporations can "essentially buy[] their way out of a prosecution"[319] and may reintroduce the catharsis the public receives in seeing justice brought.[320] As most alternative prosecution agreements have fines, to properly serve a deterrent effect, "they must pose a credible threat to the

313. *See* Werle, *supra* note 11, at 1410–11.

314. *See* Delrahim, Wind of Change, *supra* note 1, at 4–5. Although Delrahim indicates that the Division pursues hefty fines and jail time for individuals, the only direct reference concerning individuals as applied to the 2019 policy mentions that in tandem with the "hallmarks of good corporate citizenship[,] . . . . [c]ompanies should want to work with us to . . . help us hold accountable the individuals who created [the] liability." *Id.*

315. *See* Reilly, *supra* note 10, at 346; Werle, *supra* note 11, at 1370 (noting that managers of TBTJ firms may find situations where criminal conduct is profitable for both the firm and for themselves). Werle argues culpable individuals should face nonmonetary sanctions for corporate misconduct rather than punishment of just the firm alone. Werle, *supra* note 11, at 1370.

316. Chen & Soltes, *supra* note 156.

317. *See* Armour et al., *supra* note 156, at 50. "Average fines for corporations convicted of a federal crime are in excess of twelve million dollars, and when disgorgement, forfeiture, restitution, and liabilities in follow-on civil lawsuits are included, a corporation's total financial liabilities following prosecution can easily be ten times this amount." *Id.* "Making directors personally liable in this payment, even with a small probability, would likely outweigh the current incentives for underinvestment in compliance . . . ." *Id.*; *see also supra* Section V.A (arguing that the 2019 policy should reencourage a focus on individual prosecutions to promote the consumer welfare standard).

318. *See supra* note 137 (bringing up an argument against respondeat superior liability).

319. *See* Reilly, *supra* note 10, at 352; *see also supra* Section V.A.2.

320. *See supra* note 184 and accompanying text.

individuals making decisions relevant to the commission of corporate crime."[321]

Therefore, the 2019 policy should be updated to revamp its focus on individual prosecutions if the deterrent goals of the Antitrust Division are going to make any real change in recidivism rates.[322] Namely, jail time can serve as a particularly sharp incentive for compliance.[323] John C. Coffee, a professor at Columbia University,[324] advocates that "increasing the likelihood of prosecution" would powerfully serve to curb misconduct.[325] Coffee contends that the psychological response to the very thought of incarceration among white-collar criminals is of such a degree that "significant deterrence" can be achieved even with the threat or imposition of short jail sentences.[326]

For large incumbent corporations, individual prosecutions of culpable employees are especially important given the heightened lack of any deterrent effect that fines would likely produce within DPAs or NPAs under the current 2019 policy.[327] Prosecutors must pursue individuals violating antitrust laws if they are to make inroads to deter anticompetitive crime and make the threat appear credible again so that managers will take compliance more seriously for the benefit of both competition and consumers.[328]

The main argument against increasing the focus on prosecuting individuals is that executives are likely to become more risk-averse, avoiding business opportunities that could lead to personal liability.[329] However, in the context of antitrust litigation, failures in compliance oversight and a knowing engagement in cartel offenses are offenses that likely do not fall within the realm of ordinary business decisions that the business judgment rule protects.[330] This

321. *See* Diamantis, *supra* note 51, at 549.

322. *See Criminalising the American Company*, *supra* note 125 ("If the main aim is deterrence, companies may be the wrong targets for prosecution.").

323. *See supra* notes 321–22.

324. *Criminalising the American Company*, *supra* note 125.

325. Werle, *supra* note 11, at 1382.

326. *Id.*

327. *See id.* at 1366 (stating that "prosecutorial strategy should credibly threaten culpable managers with monetary and nonmonetary penalties" in TBTJ firms); *see also* Section IV.A.2 (describing the ways in which large firms face little pressure to be compliant with their ability to easily pay off fines meant to be deterrents to corporate misconduct).

328. *See* Werle, *supra* note 11, at 1371–72.

329. *See* Armour et al., *supra* note 156, at 49.

330. *See id.* (making clear that in this context "[t]he goals of the business judgment rule would be preserved"); *see also* Hamann, *supra* note 44, at 864 (describing that the case law of *In re Caremark International Inc. Derivative Litigation* from 1996, which requires directors to adhere to the oversight of compliance efforts under the fiduciary duty of loyalty, opens up individual executives to liability

means that managers considering violating antitrust laws should already feel considerable exposure to personal liability—a pressure that is unlikely to be less significant than one managers would feel should the DOJ place an increased focus on individual prosecutions and threaten incarceration and individual fines.[331]

Consider the current antitrust charges against Google from a financial perspective.[332] Google has $120 billion under its belt, which it can easily use to pay for expensive corporate compliance programs and any fines levied against it for antitrust violations.[333] Financial incentives and deterrence methods will not resolve the discrepancy between a company like Google and any smaller business that would try to be their competitor.[334] Prosecuting Google executives with monetary and nonmonetary punishments, however, is likely to do far more to deter future antitrust misconduct by Google, helping to ensure that competition remains healthy by allowing the smaller competitors the opportunity to compete.[335] Improving competition increases the chances for consumers to have access to a greater variety of products,[336] and individual prosecutions help defeat the idea that corporate compliance unfairly protects large corporations, thereby satisfying the consumer welfare standard.[337]

B. Reinstituting Judicial Review

To mitigate the rise of ultimate prosecutorial power over closed-door settled DPA terms, the courts should overturn *United States v. Fokker Services B.V.* and reinstate judicial review into the DPA process.[338] Substantive

for failures in compliance). The business judgment rule helps protect a board of directors from lawsuits challenging every decision they make on behalf of the corporation so long as the board acts with good faith and within the bounds of their duty of care and duty of loyalty. *See* Adam Hayes, *Business Judgment Rule*, INVESTOPEDIA (Mar. 25, 2021), https://www.investopedia.com/terms/b/businessjudgmentrule.asp. Essentially, the court assumes board members act in the best interests of shareholders and understands that they occasionally may make poor business decisions in good faith. *See id.*

331. *See supra* notes 329–30 and accompanying text.

332. *See* Brent Kendall & Rob Copeland, *Justice Department Hits Google with Antitrust Lawsuit*, WALL STREET J. (Oct. 20, 2020, 8:08 PM), https://www.wsj.com/articles/justice-department-to-file-long-awaited-antitrust-suit-against-google-11603195203.

333. *See id.*

334. *See id.*

335. *See supra* notes 321–22 and accompanying text (arguing significant deterrent effects by prosecuting executives rather than merely fining the company).

336. *See supra* Section II.A.

337. *See* Werle, *supra* note 11, at 1371–72.

338. *See* Lawlor, *supra* note 65, at 39 (arguing courts should expand the interpretation of the Speedy

judicial review vitally helps assure that prosecutors are appropriately exercising their discretion in fairly deciding which companies receive alternative prosecution agreements and what the terms of those agreements are.[339] By stripping substantive court review, *Fokker Services* allows DPAs to "erode[] the most elementary protections of the criminal law . . . turning the prosecutor into judge and jury, thus undermining our principles of separation of powers."[340] The *Fokker Services* court argued that the lower court ruling improperly created "an unwarranted impairment of another branch in the performance of its constitutional duties"; however, it made no consideration of the fact that another separation of powers issue similarly exists when all power is divested away from the Judicial Branch to the Executive Branch in negotiating DPAs.[341]

Alternatively, Congress could amend its own legislation to alter the Speedy Trial Act and explicitly grant courts the supervisory role over a DPA's substantive terms—a move many judges have advocated for in the past in regards to corporate DPAs.[342] Unlike DOJ prosecutors, courts are specifically designed to be protected from temptations of self-serving DPAs or from pressures within the political process.[343] Importantly, judges serve as neutral third parties, supporting the idea that our legal system treats and prosecutes corporations in the same manner as individuals.[344] One may argue that judges are no better, or perhaps even worse, than prosecutors at making decisions regarding the fairness of DPA terms within complex antitrust cases because they may lack expertise in antitrust law or corporate reform.[345] However, the court system is specifically designed to handle this issue.[346] Judges are not required to be personally, thoroughly versed in every area of the law or of a particular

Trial Act increasing the courts' role over monitoring DPA agreements); *see also supra* notes 258–65 and accompanying text (discussing the details of *United States v. Fokker Services*).

339. *See* Alexander & Cohen, *supra* note 38, at 547.

340. *Id.* at 538.

341. United States v. Fokker Servs. B.V., 818 F.3d 733, 750 (D.C. Cir. 2016).

342. *See* Werle, *supra* note 11, at 1417. *But see* Lawlor, *supra* note 65, at 40 (noting that amending the Act would be tricky because it would require explaining to politicians why the courts should take over control of DPAs despite increased risks of another Arthur Andersen incident).

343. *See* Diamantis, *supra* note 51, at 560.

344. *See* Lawlor, *supra* note 65, at 28 (describing that when judges exercise their constitutionally granted authority of judicial review it "protect[s] the integrity of the [judicial] system, which bolsters society's confidence in a fair criminal justice system").

345. *See* Diamantis, *supra* note 51, at 563 (noting judges may lack this experience, but it is also problematic that antitrust prosecutors themselves enter into DPAs and NPAs with companies demanding corporate reform without expertise in that field either).

346. *See* Arlen, *supra* note 170, at 228.

industry for them to be able to provide an in-depth review of every case they are confronted with.[347] For this very reason, judges may rely on the advice of experts in making decisions while better avoiding the bias that can be exerted on prosecutors by corporations because of their role in the executive branch.[348]

Either way, by reintroducing substantive judicial review, the use of DPAs, as encouraged by the 2019 policy, would better adhere to the consumer welfare standard by more fairly determining antitrust violators and re-establishing the continuation of common law standards for the benefit of corporate compliance.[349] When prosecutions are handled by the court system, the sentence goes into the public record, giving corporations valuable insight about which reforms to institute that effectively will or will not end up facing DOJ scrutiny.[350] Importantly, protecting a fair judicial process in the DPA system serves the consumer welfare standard by improving the public's access to the DOJ's interpretation of antitrust compliance, as well as properly putting the power to choose industry leaders back into the hands of consumers.[351]

C. Big Tech Is Seeing Sparks

Antitrust law is forcing its way back into the modern spotlight.[352] On October 6, 2020, Congress published a 449-page report following a 16-month investigation concluding, with bipartisan support, that our largest tech companies have improperly leveraged their monopoly power to control the

347. *See id.* (noting that a judge often has to review cases handling complex issues she may not be familiar with).

348. *See* Diamantis, *supra* note 51, at 563; *see also supra* notes 248–49 (discussing the political influences on government prosecutors). On his way out the door as the Assistant Attorney General of the Antitrust Division, Makan Delrahim advocated that Congress should consider creating a specialized court to handle antitrust matters because many judges lack expertise in antitrust law, leaving prosecutors with the job of educating courts and making it difficult for corporations to choose the best antitrust compliance strategies, "thereby undermining the deterrence goals of antitrust enforcement." Delrahim, A Whole New World, *supra* note 16, at 8.

349. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (delineating the importance of determining the winners and losers in the marketplace); *see also supra* notes 284–87 and accompanying text (discussing the lack of defined standards due to DPAs avoiding the court system and how they do not add to established common law).

350. *See* Diamantis, *supra* note 51, at 561–62.

351. *See id.*; *see Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (noting the harm to consumers when the government exerts undue control over antitrust).

352. *See* Kendall & Copeland, *supra* note 332 (commenting that the newest action against Google has "the potential to shake up Silicon Valley and beyond"); *see also* Delrahim, A Whole New World, *supra* note 16, at 2 (declaring that "antitrust is at the forefront," and it is "[s]purred by the social, political, and economic crises of our time").

market.[353] The report implicates the powerhouse companies of Facebook, Amazon, Apple, and Google alike.[354] Exactly two weeks later, the DOJ took up the helm and charged Google for violating federal antitrust law—the first antitrust case taken against Big Tech since Microsoft in 1998, over twenty years ago.[355]

Known as the "gatekeeper of the Internet," Google faces charges for unlawfully holding onto monopoly power by negotiating exclusive deals that required its search engine to be the default on billions of phones and completely restricting preinstallation of rival search engines.[356] As a company with a $1 trillion market value and a long-lasting control of over 80% of all domestic search queries, Google wields significant influence, creating the avenue for it to enter into exclusive contracts with mobile phone manufacturing companies.[357] According to the claim, Apple receives over $8 billion from Google every year to have Google appear as the iPhone default on Safari, Apple's internet browser, which Google can afford to pay by using the very revenues it receives from the advertising that appears when a user uses its search engine.[358] The Department states strongly that, "[b]y restricting competition in search, Google's conduct has harmed consumers by reducing the quality of search (including on dimensions such as privacy, data protection, and use of consumer data), lessening choice in search, and impeding innovation."[359] Companies like Google and Facebook are finally being brought to court over concerns of misusing user data and acting as the final arbiters of

353. *Google, Antitrust and How Best To Regulate Big Tech*, ECONOMIST (Oct. 7, 2020), https://www.economist.com/business/2020/10/07/google-antitrust-and-how-best-to-regulate-big-tech [hereinafter *How Best To Regulate Big Tech*]. The initiative behind the report was led by Democrat House Representative David Cicilline; Republican House Representative Ken Buck supported the report, stating it "accurately portrays how Apple, Amazon, Google and Facebook have used their monopoly power to act as gatekeepers to the marketplace." *Id.*

354. *See id.*

355. *See American Trustbusters Take on Google*, ECONOMIST (Oct. 21, 2020), https://www.economist.com/business/2020/10/21/american-trustbusters-take-on-google.

356. *See* Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [hereinafter Justice Department Sues Monopolist Google]. Interestingly, this case is surprisingly similar to the successful suit brought against Microsoft in the late '90s, which found Microsoft had engaged in anticompetitive practices by requiring default preinstallation with no ability to remove the preinstalled product, essentially foreclosing opportunities to rivals. *See id.*

357. *See id.*

358. *See American Trustbusters Take on Google*, *supra* note 355; Kendall & Copeland, *supra* note 332.

359. Justice Department Sues Monopolist Google, *supra* note 356.

content, "publishing" only what they see fit for users to consume.[360] Now is the time for the Antitrust Division to seriously review the implications of the 2019 policy and how it will handle cases that could shape our country's economic future.[361]

VI. CONCLUSION

In 1912, before his presidency, Woodrow Wilson warned Americans that monopoly power threatened their ability to be "masters of [their] own opinions."[362] Now, over one hundred years later, the conversation has shifted back to the forefront of Americans' minds.[363] Despite the push for prosecuting Big Tech for antitrust violations, it remains to be seen how the DOJ will end up prosecuting such cases, if it does so at all.[364] With the rise in DPA use, it becomes very likely that charges against large firms like Google "could end in an unremarkable settlement, with Google making token changes to its behaviour and paying a fine that looks hefty until you consider its annual net

360. *See* Delrahim, A Whole New World, *supra* note 16, at 2 (mentioning the "historic lawsuit[]" against Facebook, which "reflect[s] sustained, bipartisan interest in antirust issues"); Armour et al., *supra* note 156, at 3–4 (arguing Facebook is another example of a company choosing short-term gains over compliance by taking their "casual approach" over being proper stewards of personal data); *Social Media's Struggle with Self-Censorship*, ECONOMIST (Oct. 22, 2020), https://www.economist.com/briefing/2020/10/22/social-medias-struggle-with-self-censorship (arguing social media sites are essentially "publishers" of the content on their platforms); Lynn, *supra* note 13. One commentator speaks out strongly against the consolidation of power social media companies wield over consumers, arguing: "We live in the world they manufacture for us." Lynn, *supra* note 13. "Their vision for what we should do, where we should go, how we should think, and who we should be is now our vision, too." *Id.* "As their manipulation machines increasingly deliver different information to each member of the public, it becomes harder for people to engage in debate and have any chance at bringing these companies under control." *Id.*

361. *See* Lynn, *supra* note 13. "These companies (Amazon, Google, and Facebook) are the most powerful middlemen in history." *Id.* "Each guards the gate to innumerable sources of essential information, services, and products." *Id.* "Yet thus far no governmental entity in the United States has signaled any intention of limiting the license these corporations enjoy to serve only the customers they choose to, at whatever price they decide." *Id.*

362. *Id.* In speaking about the crippling effects monopolies exerted over Americans, Wilson remarked:

> I cannot tell you how many men of business, how many important men of business, have communicated their real opinions about the situation in the United States to me privately and confidentially. They are afraid of somebody. They are afraid to make their real opinions known publicly; they tell them to me behind their hand. That means we are not masters of our own opinions.

Id.

363. *See id.*; *see also supra* Section V.C (detailing the recent charges against Big Tech).

364. *See American Trustbusters Take on Google*, *supra* note 355.

profit of $34 billion."[365]

The long-anticipated charges against some of the world's largest companies, after getting away with anticompetitive activity for years, demonstrates we were woefully overdue for bringing healthy competition back to the economic system.[366] As the Antitrust Division gets more and more comfortable with DPAs,[367] however, the 2019 policy may have unduly set up the DOJ to handle Big Tech with a mere slap on the wrist.[368] Instead, the Division should allow a controlled burn of the tech industry to reign in the likes of Google and Facebook while creating opportunities for new competition to finally grow.[369] If the DOJ refocuses on charging individuals and reinstituting judicial review, the Antitrust Division will have a far better opportunity to make real change to deter antitrust violations in the future and protect the heart of antitrust—the consumers.[370]

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365. *Id.* (arguing that settlement is probable because the Division is only charging Google for unlawful antitrust violations in the text search market, not including video or images searches, making the case more difficult to prove because Google's market share will appear lower); *see also How Best To Regulate Big Tech*, *supra* note 353 (stating the case "is likely to end in a forgettable settlement").

366. *See American Trustbusters Take on Google*, *supra* note 355 (noting, as William Barr stated: "If we let Google continue its anticompetitive ways . . . Americans may never get to benefit from the next Google"); *see also* Lynn, *supra* note 13 (contending that a "[w]ell-structured market . . . provides the most basic stuff of democracy").

367. *See supra* Section III.B (demonstrating that the DOJ is using DPAs at an unprecedented rate).

368. *See* Reilly, *supra* note 10, at 318 (asserting that DPAs do an injustice to our justice system and that we must end the "failed experiment" of allowing corporations to enter into these agreements); *see also supra* Section VI.A.2 (illustrating how corporations can violate antitrust laws to their own benefit).

369. *See Antitrust Laws*, U.S. CHAMBER OF COM., *supra* note 40 (suggesting that, in healthy competitive economies, consumers have greater access to better products at lower prices because innovation is able to thrive).

370. *See* Garrett, *The Changing Face of Corporate Prosecutions*, *supra* note 49, at 63 (contending that how the DOJ chooses to proceed exerts significant influence over whether antitrust actions have any real deterrent effect in the future); *see also* U.S. CHAMBER OF COM., *Heart of Antitrust Laws*, *supra* note 15 (commenting on the heart of antitrust).

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