2011

Corporate Governance and Competition Policy.

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INTRODUCTION

Corporate governance law addresses the misaligned incentives between officers and directors of publicly owned companies and their shareholders and how this can lead to the destruction of shareholder value. Antitrust law governs the interaction between corporations and other economic actors in the marketplace, and prohibits and penalizes anticompetitive agreements, unilateral conduct which unreasonably injures competition, and mergers and acquisitions that may substantially lessen competition. This Article explores the puzzling lack of meaningful interaction between these two fields of law, which govern the internal and external operations of key economic players in the economy. While a handful of commentators have lamented the lack of a closer organic connection between these two bodies of law, most do not even notice.[1] This Article goes beyond the conventional disconnect and discusses how to create a more unified approach to two key areas of business law in order to promote the interests of both shareholders and consumers in a more systematic and meaningful way.

This Article concludes by proposing several ways to improve both antitrust and corporate compliance law. Certain of the proposed changes fall on the corporate governance side, including greater duties and liabilities for officers and directors to prevent harmful and illegal conduct that injures shareholders. Other changes fall on the antitrust side of the fence and include a greater skepticism for claims of synergies and efficiencies in certain categories of mergers that have proven time and time again to do nothing to enhance shareholder value except when competition is harmed. The most

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* Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. This article is an expansion of remarks originally presented at workshops at the University of Utah Law School and the Organization for Economic Cooperation and Development, Paris, France, DAF/COMP/M(2010)1/ANN3. Thanks to Frank Ballantine, Theodore Banks, Sam Brunson, James Fanto, Jill Fisch, Andrew Gold, Jesse Markham, Charles Murdock, Arthur Pinto, Steven Ramirez, Edward Rock, Mark Roe, Larry Schor, D. Daniel Sokol, and Maurice Stucke for their comments and advice and Joseph Van Leer for his excellent research assistance.

[1] *But see* Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns*, 51 DRAKE L. REV. 307, 320 (2003) (stating that antitrust law is a "companion piece of federal corporate governance law"); D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. REV. 1713, 1718-19 (2009) (suggesting that there is an indirect link between corporate governance and antitrust).

important proposed change though requires a greater willingness to increase communication and coordination between practitioners and policymakers so that corporate actors can pursue legitimate strategies to build value for shareholders and to prevent unlawful anticompetitive behavior, while avoiding more dubious strategies that currently fall between the cracks in the bodies of law.

I. THE BIRTH OF CORPORATE GOVERNANCE

The Modern Corporation and Private Property is the most influential book in the field of corporate governance.[2] It analyzes how managers and directors of large corporations often act in their own best interests rather than the best interests of the shareholders, who are the real owners of the company.[3] Professor Adolph Berle, a corporate law expert on the Columbia Law School faculty, who also worked for President Roosevelt on the New Deal in numerous capacities, authored this important book in 1932.[4] His co-author, Doctor Gardiner Means, an economist at Harvard University, did much of the empirical work for the project.[5]

The book analyzed how corporations had evolved from the nineteenth century where they were primarily small operations owned and operated by an identifiable number of individuals, often family members.[6] By the early 1930s, corporations were vastly larger and more powerful enterprises with enormous numbers of shareholders who bought and sold their shares on stock exchanges.[7] It was typical that no one shareholder owned more than a tiny fraction of the shares of the company.[8]

Berle and Means introduced the concept of the separation of ownership and management to describe the modern corporation, where the real power lay in the hands of managers and boards of directors who typically owned only small amounts of stock in the company.[9] This change meant

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2 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

3 *See id.* at 121-22.

4 *Encyclopedia of World Biography on Adolf Augustus Berle, Jr.*, BOOKRAGS, http://www.bookrags.com/biography/adolf-augustus-berle-jr/ (last visited July 8, 2011) (providing a succinct biography of Berle's public service).

5 *See* BERLE & MEANS, *supra* note 2, at v-vi.

6 *See id.* at v-viii, 66.

7 *See id.* at v-viii, 47.

8 *Id.* at 47-48. In the United States, modern publicly held corporations are owned by a large group of shareholders and controlled by nonowner managers and directors. JONATHAN R. MACEY, CORPORATE GOVERNANCE 3 (2008).

9 *See* BERLE & MEANS, *supra* note 2, at 68. Berle previously introduced similar themes in an earlier article. *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049-50 (1931).

that ownership changed from active to passive.[10] But it also meant that the form of wealth that ownership conferred was more liquid.[11]

The small number of insiders (managers and directors) had greater knowledge and different incentives than the large number of outsiders (the shareholders) and could operate the company for their own benefit, potentially harming the shareholders and the corporation in general.[12] The actual power within the corporation lay with those who appointed the directors, typically senior management themselves.[13]

The effective result was a self-perpetuating management, which often pursued its own interests rather than those of the true owners of the corporation.[14] Although Berle and Means did not use this term, later writers referred to this as the agency-cost problem.[15] Thus, the field of corporate governance was born to consider appropriate ways to cure or limit the agency cost problem in the modern public corporation.

Berle and Means termed this a problem of economic governance.[16] The book argued for more voting rights for shareholders, more disclosures by management, and other controls for the benefit of the shareholders.[17] The authors also proposed a broader social role for the corporation as a key institution in the modern economy and society.[18]

The influence of Berle and Means cannot be understated. The book is probably the most cited treatise in corporate law and is credited for inspiring much of modern corporate law, securities regulation, the shareholder democracy movement, the market for corporate control, incentive-based

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10 BERLE & MEANS, *supra* note 2, at 66.

11 *Id.* at 67.

12 *See id.* at 69, 121-22.

13 *Id.* at 69-70. Other aspects of the separation of ownership and control came through legal devices like pyramiding, the issuance of nonvoting shares, excessively weighted voting shares, voting trusts, and more real-world concerns where even a minority interest in a large corporation could yield effective control. *Id.* at 70-80.

14 *Id.* at 87-88, 121-22.

15 *See* MACEY, *supra* note 8, at 2; Murray Weidenbaum & Mark Jensen, *Introduction to the Transaction Edition* of ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY, at ix (10th prtg. 2009); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 327 (1976).

16 BERLE & MEANS, *supra* note 2, at 125.

17 *See id.* at 247-48, 317.

18 *Id.* at 355-56; *see also* ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY 117-18 (1959); ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 104-05 (1954) (continuing the theme of societal accountability of public corporations); William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of* The Modern Corporation *'s Last Chapter*, 33 SEATTLE U. L. REV. 849, 849-55 (2010) (noting that *The Modern Corporation* suggests that those in control of corporations serve both the shareholders and the public). *See generally* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolph Berle and* The Modern Corporation, 34 J. CORP. L. 99 (2008) (emphasizing Berle's evolving goals within *The Modern Corporation* and over time beyond shareholder primacy).

pay schemes for executives, and most other legal proposals that address the conflicting incentives between corporate insiders and shareholders.[19]

For example, there is a direct relationship between the concerns of Berle and Means and the two long standing fiduciary duties imposed on corporate directors: the duty of care and the duty of loyalty.[20] "Good faith" is a subset of both duties, as all directors must act in good faith in performing their duties.[21]

The duty of loyalty requires that directors consider the interest of the corporation over any personal interests so that they do not profit improperly at the corporation's expense and avoid self-dealing.[22] This duty essentially aims to prevent conflicts of interest, like self-dealing, between directors and the corporation (which injures shareholders) and other conduct that exacerbates the agency-cost problem.

The duty of care generally requires directors to act in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances.[23] In Delaware and many other states, directors are presumed to make informed, rational decisions in an honest and well-meaning way to further their business.[24] This assumption insulates directors from judicial review of many of their decisions and shields them from personal liability. The presumption rests on the understanding that directors act on a disinterested, informed, and good-faith basis.

Critical to understanding these duties is the business judgment rule. The business judgment rule is a "presumption that the [b]oard acted independently, with due care, in good faith and in the honest belief that its ac-

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19 *See* Kelli A. Alces, *Revisiting Berle and Rethinking the Corporate Structure*, 33 SEATTLE U. L. REV. 787, 787 (2010); Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1207, 1207 (2011); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 471 (1999).

20 *See* 1 DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE 1 (5th ed. 1998). *See generally In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960 (Del. Ch. 1996); JAMES A. FANTO, DIRECTORS' AND OFFICERS' LIABILITY §§ 2:2.3(A), 4:2 (2d ed. 2010); Mark David Wallace, Comment, *Life in the Boardroom After FIRREA: A Revisionist Approach to Corporate Governance in Insured Depository Institutions*, 46 U. MIAMI L. REV. 1187, 1195 (1992). There remains a dispute in the literature regarding whether the duty of good faith is a subset of loyalty rather than care, or whether it is an overarching duty covering both concepts, but it is beyond the scope of this article to resolve this conceptual conundrum.

21 *See Caremark*, 698 A.2d at 967-68; FANTO, *supra* note 20, § 4:2.5.

22 McCall v. Scott, 239 F.3d 808, 824 (6th Cir. 2001).

23 *See* Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985) (en banc) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (en banc)), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695, 713 & n.54 (Del. 2009) (en banc), *superseded by statute*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2010); 1 BLOCK ET AL., *supra* note 20, at 1.

24 *Aronson*, 473 A.2d at 812.

tions were in the stockholders' best interests."[25] Under the business judgment rule, courts will not second guess a board decision or substitute their own views if the decision of the board "can be 'attributed to any rational business purpose.'"[26] The presumption is strongest when the board's decision was approved by a majority of independent, disinterested directors.[27] Thus, a plaintiff has a heavy burden both to plead and to prove that a board breached its fiduciary duty of good faith or due care.[28] Only when this standard is met will a court review the merits of the plaintiff's allegation to determine whether the conduct in question was "fair to the corporation and its shareholders."[29] Even then, in the absence of faulty process, uninformed

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[25] Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996); *see also* 1 BLOCK ET AL., *supra* note 20, at 4-5; Harvey J. Goldschmid, *Outline on the Duty of Care and the Business Judgment Rule*, *in* ALI'S PRINCIPLES OF CORPORATE GOVERNANCE 37, 44 (1994) [hereinafter ALI PRINCIPLES]. Even this is a default rule. In Delaware and certain other jurisdictions, corporations may adopt charter provisions and bylaws absolving directors of breaches of their duty of care but may not protect intentional or criminal conduct. DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 2010). *See generally* MACEY, *supra* note 8, at 19.

[26] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

[27] *See* Grobow v. Perot, 539 A.2d 180, 190 (Del. 1988), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (en banc).

[28] *See In re* Dwight's Piano Co., 424 B.R. 260, 285 (Bankr. S.D. Ohio 2009). The application of the business judgment rule by courts is further complicated by the procedural rules that apply to shareholder derivative suits. A derivative lawsuit is a claim brought by shareholders on behalf of the corporation to redress harm done by the publicly traded company, its officers, or directors. Because such causes of action are deemed to belong to the corporation, the plaintiff normally must make a demand on the corporation (and its board of directors) for permission to sue on behalf of the corporation. The board of directors may accept or reject such demands and the recommendation of the board will be judged under the business judgment rule. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 783-84 (Del. 1981). Not surprisingly most boards reject demands to initiate derivative actions. Bradley T. Ferrell, Note, *A Hybrid Approach: Integrating the Delaware and the ALI Approaches to Shareholder Derivative Litigation*, 60 OHIO ST. L.J. 241, 253 (1999). However, demand may be excused when it is futile. *Zapata*, 430 A.2d at 784 (quoting McKee v. Rogers, 156 A. 191, 193 (Del. Ch. 1931)). This can include situations where the director's duty of loyalty is subject to challenge or where the board has acted outside the confines of the business judgment rule. Even in this situation, the board of directors can convene a special litigation committee to investigate the merits of the plaintiff's claim, report to the board, and recommend whether the case should be dismissed or continued. *See id.* at 785, 788. Most special litigation committees recommend the dismissal of the lawsuit they have investigated. *Cf.* Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1310-12, 1314 (2009) (providing a more positive view of special litigation committees while also noting that most commentators believe that special litigation committees always dismiss derivative lawsuits). The special litigation committee's recommendations are tested by the court first to determine whether the special litigation committee utilized a fair process in its determination. Only then would the court proceed to the "merits" of the case challenging the alleged violation of the board's duties and the harm to shareholders. *See generally* 2 BLOCK ET AL., *supra* note 20, at 1379-1818 (explaining the business judgment rule as it pertains to shareholder derivative lawsuits); FANTO, *supra* note 20, § 5:7 (discussing director decisions on shareholder derivative litigation); MACEY, *supra* note 8, at 133-36 (explaining derivative suits).

[29] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006). *Cf.* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1752-

decisionmaking, or a conflict of interest, the courts have been extremely reluctant to impose liability on corporations or their directors, no matter how disastrous the consequences of the board's decision.[30]

The business judgment rule applies to allegedly poor action, rather than unconscious inaction or an outright failure in board oversight.[31] The board will be legally responsible for its failure to act when it has failed to consider a particular decision or to exercise its judgment at all.[32] Taken as a whole, the directors (and particularly the outside directors) act as agents for the shareholders, but they enjoy substantial protection from legal liability for their decisions (or lack thereof) when their actions (or inactions) were the result of a proper process, good faith, informed decisionmaking, and without an outright conflict of interest.[33] This modern template has arisen out of the concerns first raised by Berle and Means, even if the modern expression of these concerns is different from what the founders of corporate governance themselves advocated for the modern corporation.[34]

II. ANTITRUST AND THE MARKET

In contrast to corporate governance law, which concerns itself with the internal organization of the public corporation, antitrust law is the law of competition between firms in the marketplace (no matter what their internal structure). The Sherman Act and later statutes prohibit three main forms of anticompetitive behavior without regard to whether the market actors are publicly traded corporations, privately owned corporations, partnerships and related entities, sole proprietorships, or actual individuals.[35]

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54 (2010) (providing a study of federal court shareholder derivative actions showing few damage awards, but frequent changes in governance practices).

30 *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960-61 (Del. Ch. 1996).

31 *See* David W. Deal, *Directors' Vulnerability to Breach of Fiduciary Duty Claims for Compensation Decisions: Where Have We Been, Where Are We Now?*, 30 OKLA. CITY U. L. REV. 311, 323 (2005); Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 202 (2010) (noting that there needs to be a clear violation of law for directors to be held liable for failed oversight).

32 *See* Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. REV. 441, 463 (2007). In addition to the balance of fiduciary duties and the protections of the business judgment rule imposed by Delaware and the corporate law of other states, Congress has entered the picture in recent years with the Securities Litigation Uniform Standards Act of 1998 and the Private Securities Litigation Reform Act of 1995, which require heightened pleadings standards for securities fraud allegations, automatic removal to federal court, and preemption of more generous state court rules. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

33 *See* FANTO, *supra* note 20, § 2:2.3(A)(3)(c).

34 *See* Wallace, *supra* note 20, at 1195.

35 15 U.S.C. §§ 1-2, 18 (2006).

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in "restraint of trade."[36] As early as 1911, the Supreme Court held that only those agreements that "unreasonably" restrict competition are unlawful under Section 1 of the Sherman Act.[37] Certain agreements are so inevitably destructive of competition that they are per se unreasonable and, hence, unlawful.[38] Examples of such per se unreasonable agreements between competitors include price fixing, market division, and output restrictions, which are normally prosecuted as criminal offenses by the Antitrust Division of the U.S. Department of Justice ("DOJ").[39] All other agreements require a more detailed and complete examination under a full rule of reason analysis to determine whether, on balance, they unreasonably restrict competition.[40] The only legal concern is the net effect on competition, not whether the agreement promotes some other socially useful values.[41]

Anticompetitive behavior by single firms is covered by Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize.[42] In order to unlawfully monopolize, a firm must have monopoly power and engage in unlawful or exclusionary conduct either to acquire or to maintain that monopoly.[43] In order to unlawfully attempt to monopolize, a firm must (1) have specific intent; (2) engage in unlawful or exclusionary conduct; and (3) have at least "a dangerous probability of achieving monopoly power."[44]

The difficult issue for Section 2 analysis is identifying the difference between unlawful and exclusionary conduct on the one hand and hard com-

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36 *Id.* § 1.

37 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911).

38 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

39 *See id.* at 218 (holding that price fixing is per se illegal); Scott D. Hammond, Deputy Assistant Att'y. Gen., U.S. Dep't of Justice, Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf (describing how the DOJ's Antitrust Division imposes sanctions on criminal cartels).

40 *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 5-6 (2006) (ruling that a price-fixing agreement between two firms in a joint venture was not a per se violation of the Sherman Act because they were considered one entity and, therefore, not competitors in the relevant market); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100-01 (1984) (holding that a horizontal price-fixing and output-limiting arrangement was subject to the rule of reason because without it the product would not exist at all); Broad. Music, Inc. v. CBS, 441 U.S. 1, 24 (1979) (holding that a blanket license agreement should be subject to the rule of reason).

41 *See* Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 421-22 (1990); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). *See generally* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009) (arguing that Justice Stevens played a key role in defining a unitary rule of reason).

42 15 U.S.C. § 2 (2006). Section 2 also prevents conspiracies to monopolize and is applied in a manner very similar to Section 1 of the Sherman Act. *See id.*

43 United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

44 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

petition, or competition on the merits, on the other hand.[45] While the courts have struggled with this issue, there appears to be an evolving consensus that the proper approach is something akin to the rule of reason test used in Section 1 analysis.[46] In a number of recent Section 2 cases, the courts have sought to determine whether there is a significant adverse effect on competition and whether that effect is outweighed by efficiency considerations, business justifications, or other procompetitive justifications for the conduct at issue.[47]

Finally, Section 7 of the Clayton Act prohibits mergers and acquisitions of all types if they tend to significantly lessen competition or tend to create a monopoly.[48] Here, the focus is on prediction, incipiency, and blocking acquisitions, regardless of form, if they would create a significant risk of harm to competition in the future. Government guidelines focus on the risks that the transactions will facilitate either outright collusion among the remaining players in the markets or anticompetitive oligopolistic (but nominally independent) price coordination.[49] In addition, the guidelines are equally concerned if a transaction would allow the merged entity to unilaterally raise prices or restrict output.[50] Most significant acquisitions are announced to the federal antitrust agencies in advance, although the transactions can also be challenged after closing.[51] Joint ventures, strategic alliances, and other types of partial mergers can be analyzed under Section 7, although they may also be reviewed under Section 1 of the Sherman Act.[52]

The antitrust laws are rarely concerned with the internal structure of the firms whose conduct is under review. For example, the form of a merger and acquisition is only relevant to the extent that it provides evidence of the likely competitive effect of the transaction.[53] However, a handful of situations exist where the analysis of the form or structure of a corporate actor is necessary for antitrust purposes.[54] As discussed below, Section 8 of the Clayton Act prohibits interlocking directorates under certain circums-

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45 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam).

46 *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 435-37 (2006).

47 *Microsoft*, 253 F.3d at 58-59.

48 15 U.S.C. § 18 (2006).

49 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

50 *See id.* § 6.

51 *See* 15 U.S.C. § 18a(a).

52 *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 160-61 (1964).

53 *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, § 2 ("The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition.").

54 *Cf. id.*

tances, where it is necessary to understand both the competitive relationship of the firms in question and the structure of their boards of directors to determine whether this provision has been violated.[55]

In addition, a corporation's structure and organization are sometimes relevant to understanding whether the antitrust laws even apply. For example, Section 1 of the Sherman Act requires the presence of a "contract, combination . . . or conspiracy" before competitive effects come into question.[56] Some sort of an agreement is required for Section 1 to come into play, with Section 2 of the Sherman Act being the only antitrust provision applying to truly unilateral conduct.[57] The Supreme Court has determined that an agreement for Section 1 purposes means an agreement between two or more economically independent actors.[58] Thus, the Supreme Court has held that a corporation cannot conspire with its own employees, directors, officers, unincorporated divisions, and wholly owned subsidiaries.[59] The lower courts have extended this analysis and held in most circumstances that a corporation also cannot conspire with majority-owned subsidiaries, and sister subsidiaries owned by the same parent cannot conspire where the parent corporation has effective working control.[60]

III. SHIPS PASSING IN THE NIGHT

At the broadest level, corporate governance has focused on behavior and structure within a single firm, and antitrust has focused on behavior and structure between firms in the market. One is almost subatomic in nature, and the other focuses on the interaction between business atoms and molecules. Unlike scientific inquiry, however, the two fields have proceeded without any deep interaction and with little effort to even understand each other's domain.[61]

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55 15 U.S.C. § 19; *see also infra* notes 165-78 and accompanying text.

56 15 U.S.C. § 1. *See generally* ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS (2010) (establishing the current state of antitrust law as it pertains to proving an agreement).

57 15 U.S.C. §§ 1-2.

58 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

59 *Id.* at 769-71.

60 *See* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 27-29 (6th ed. 2007) (noting that lower courts have applied the *Copperweld* analysis to various other fact patterns). *But see* Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2215 (2010) (rejecting the claim that the NFL should be treated as a single economic entity in an antitrust suit challenging exclusive licensing of team merchandise).

61 *But see* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 498 (1992) (representing one of the few scholarly pieces that connects the two fields, and focuses on the boundaries between firms and markets in the analysis).

There are both historical and professional reasons that these spheres of expertise and legal practice have remained separate. Corporate law was created first and, until the Great Depression, was almost entirely a creature of state law.[62] In contrast, antitrust began at the state level, but it rapidly became almost exclusively federal as state antitrust law was proven ineffective in controlling national corporations.[63] There was a partial early convergence when strict anti-cartel rules, but loose merger rules, in the late nineteenth century were partially responsible for the initial wave of mergers that created and strengthened the large national corporations of the Gilded Age.[64] But then paths diverged.

In 1890, when the Sherman Act was passed, "no specialized antitrust discipline or a specialized antitrust branch of the practicing bar or legal academy" even existed.[65] Antitrust law as a discipline did not materialize until the 1920s and early 1930s.[66] By then, additional antitrust statutes had supplemented the Sherman Act, and dozens of antitrust cases had been decided by the courts.[67] The Federal Trade Commission ("FTC") was created in 1914,[68] and the Antitrust Division of the DOJ was formed in 1933.[69] Before the 1920s, American law schools did not even offer antitrust as a separate subject.[70] To the extent antitrust was taught, it constituted only a small portion of courses like Contracts, Corporations, or Business Planning.[71]

Law firms also were slow to recognize antitrust as an independent discipline.[72] Before the 1950s, very few, if any, law firms had a separate antitrust practice, and the American Bar Association did not create its Antitrust

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62 *See generally* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937 (1991).

63 *See generally* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989) (noting that Progressive Era, state developments have been largely neglected by scholars despite the insight such developments provide into early antitrust analysis); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987) (exploring state statutory and common law from 1880-1918); James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93 (1990).

64 *See* TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990, at 2-3, 11-12 (1992); Brian R. Cheffins, *Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century*, 51 AM. J. COMPETITION L. 473, 473-77 (2003).

65 Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 285 (2001).

66 *Id.*

67 *Id.* at 285-86.

68 *Id.* at 286.

69 *Id.*

70 *Id.*

71 Waller, *supra* note 65, at 286.

72 *Id.*

Section until 1952.[73] In contrast, corporate law was a well-established specialty within the bar more than a half-century earlier.[74] While corporate governance law was more a creature of the 1930s, it was quickly absorbed into this existing professional structure of the corporate bar and remained separate from the professional structure and discourse of antitrust.

As a result of the impact of the Berle and Means treatise and other developments in the wake of the stock market crash of 1929 and the Great Depression, corporate governance law became part of the New Deal agenda and began to make its way into the legal structure of both state and federal law in the 1930s and beyond.[75] At the federal level, the Securities and Exchange Commission ("SEC") was created to regulate the offerings of securities to the public and then later the operation of securities brokers and dealers.[76] The majority of corporate governance law, however, remained the province of state law, particularly in Delaware. Corporate governance law relied on more explicit duties of loyalty and care to better align the interests of board members, corporate officers, and shareholders.[77]

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[73] *Id.* at 286-87.

[74] *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 23-24 (1976); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 7-8 (1976) (describing the enactment of Delaware's 1899 General Corporation Law); William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 947 (2005) (highlighting the radical revision of the corporate law at the turn of the twentieth century and juxtaposing that with the current revision of corporate law starting with the Sarbanes-Oxley Act of 2002).

[75] *See* Max Ascoli, *Introduction* to ADOLF A. BERLE, JR., NAVIGATING THE RAPIDS 1918-1971: FROM THE PAPERS OF ADOLPH A. BERLE xv, xix-xx (Beatrice Bishop Berle & Travis Beal Jacobs eds., 1973) (describing how the publicity that Berle gained after the publication of *The Modern Corporation and Private Property* parlayed into Berle becoming an influential member of President Franklin Delano Roosevelt's Brains Trust after the 1932 election and, from this position, influencing economic policy during the New Deal era).

[76] *See* THOMAS LEE HAZEN, FEDERAL SECURITIES LAW 1-2 (2d ed. 2003).

[77] *See, e.g.*, Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (holding that courts should be reluctant to federalize substantial portions of corporate law, "particularly where established state policies of corporate regulation would be overridden," as "[c]orporations are creatures of state law," and investors expect, with a few clear exceptions, that "state law will govern the internal affairs of the corporation" (quoting Cort v. Ash, 422 U.S. 66, 84 (1975)) (internal quotation marks omitted)); Bus. Roundtable v. SEC, 905 F.2d 406, 412 (D.C. Cir. 1990) (invalidating an SEC rule relating to voting rights by class of securities as beyond the powers conferred by federal law); Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984) (en banc) (demonstrating the creation of specific duties in Delaware between corporate boards, directors, and shareholders through a discussion of the business judgment rule), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983) (describing the heightened duties that directors of Delaware corporations owe to stockholders when they are on both sides of a transaction); *see also* MACEY, *supra* note 8, at 51-53, 131-32 (providing examples of corporate directors' numerous duties to shareholders and demonstrating how derivative suits operate as a mechanism for shareholders to ensure that director duties are not violated).

Antitrust was not a significant part of the Berle and Means analysis and prescription or the resulting corporate governance legal regime. This is not particularly surprising. Although Berle was knowledgeable about and interested in antitrust issues,[78] antitrust was at its absolute nadir at the time he was writing his masterpiece on corporate governance.[79] While *The Modern Corporation and Private Property* was published in 1933 during the depths of the Great Depression, the New Deal was following a collectivist path, and antitrust had been preempted almost entirely, and in part actually co-opted, in the service of the de facto cartelization of the U.S. economy under the National Recovery Act ("NRA").[80] What little antitrust enforcement that existed was undercut by lax Supreme Court interpretation of the core anti-cartel provisions of Section 1 of the Sherman Act, also in seeming deference to the special needs and circumstances of the Great Depression.[81] Antitrust law was thus effectively moribund until the NRA was held unconstitutional in 1935.[82]

It was only then that President Roosevelt (out of principle, pragmatism, or perhaps desperation) chose to revive antitrust law and free-market competition as tools to solve the lingering Depression.[83] Robert Jackson, as head of the Antitrust Division of the DOJ, began the cautious revival of

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78 *See, e.g.*, BERLE, *supra* note 75, at 100-01, 158 (discussing different aspects of New Deal antitrust policy); BERLE, *supra* note 18, at 43-52 (drawing links between antitrust and securities policies that promoted the rise of the institutional investor).

79 *See* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 34-35 (Vintage Books 1996) (1995) (quoting Rexford G. Tugwell, a member of President Roosevelt's Brains Trust, as saying that he and other members of the Brains Trust thought that competition was "wasteful and costly" and sought to limit competition instead of promoting it).

80 *See id.* at 37-39 (discussing how the National Recovery Act created "code authorities" which were similar to trade associations and cartels, which allowed major industries and "manufacturers to agree on common pricing and production policies without fear of antitrust prosecution" (first internal quotation marks omitted)); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 19-20, 35-43 (Fordham Univ. Press 1995) (1966).

81 *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933) (interpreting the Sherman Antitrust Act to allow for consideration of the economic realities of each case in justifying the denial of an injunction against a price-fixing selling agent), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

82 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-42 (1935) (holding portions of the National Industrial Recovery Act unconstitutional); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430, 433 (1935) (holding portions of the National Industrial Recovery Act, a statute created as part of the implementation of the National Recovery Act, and an Executive Order based upon the statute unconstitutional); ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 120 (John Q. Barrett ed., 2003) ("During the NRA experiment, there had been a pretty general suspension of antitrust law activities . . . .").

83 *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 49 (2000) ("By the mid-1930s, the economic planning models that had inspired great hope early in the New Deal had lost their luster. Franklin Roosevelt turned his ear toward advisors who believed that competition was the key to economic restoration.").

antitrust enforcement.[84] This revival then kicked into high gear during the five-year tenure of Thurman Arnold as head of the Antitrust Division from 1938 to 1943.[85]

Under Jackson, Arnold, and their successors, the DOJ brought hundreds of criminal and civil actions in cartel and monopolization cases.[86] This activism expanded into the merger area as well after Congress strengthened Section 7 of the Clayton Act, amending it into its modern form in 1950.[87] As a result of these government-prosecuted cases and numerous additional private cases, antitrust law shifted toward more and more per se rules,[88] presumptions against monopolization,[89] and a nearly absolute prohi-

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84 *See* JACKSON, *supra* note 82, at 120-22 (explaining the tentative return to antitrust law after the Supreme Court declared the NRA unconstitutional).

85 SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 78-110 (2005); Spencer Weber Waller, *The Story of* Alcoa*: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, *in* ANTITRUST STORIES 121, 126-27 (Eleanor M. Fox & Daniel A. Crane eds., 2007) [hereinafter Waller, *The Story of* Alcoa].

86 *See* Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 87 & n.16 (1990) (noting that between the years 1940 and 1944, the DOJ Antitrust Division filed 163 criminal cases, compared to 173 criminal cases between 1890 and 1940).

87 *See* 15 U.S.C. § 18 (1952).

88 *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959) (holding that a conspiracy between manufacturers and distributors not to sell, or to sell only on highly unfavorable terms, was a type of restraint on trade that was per se illegal under Sections 1 and 2 of the Sherman Act); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 3, 5 (1958) (holding that defendant railway's "preferential routing" agreements were among the "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal" per se (first internal quotation marks omitted)); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218-24 (1940) (ruling that a conspiracy between oil companies to raise and maintain spot market prices for gasoline was per se illegal).

89 *See, e.g.*, United States v. Griffith, 334 U.S. 100, 108-10 (1948); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (explaining that once the United States had proven that Alcoa had a monopoly of the relevant market, Alcoa then had the burden of proving that it had not abused its power). *See generally* Waller, *The Story of* Alcoa, *supra* note 85.

bition of significant mergers of any kind.[90] Such limitations had far more impact than the more modest corporate governance constraints of that era.[91]

One snapshot of this period can be found in *The Corporation in Modern Society*, a collection of essays edited by the economist Edward Mason in 1960, written by prominent legal and economic scholars.[92] This collection reflects a time when antitrust rules were strong and corporate governance constraints weak.[93] The primary concerns expressed are the oligopoly status of key U.S. corporations and, more generally, the economic, political, and social power of corporations.[94] Pure corporate governance concerns or agency costs were at most a secondary theme of the book and a direct concern in perhaps two of the chapters in the volume.[95]

Enter the market for corporate control. Professor (now Dean Emeritus) Henry Manne argued in his seminal article in 1965 that overly stringent antitrust rules against mergers did little to protect competition and, primarily, served to entrench inefficient management to the detriment of shareholders, consumers, and competition in general.[96] Manne directly cited Berle and Means and their concern for the detrimental effects of the separation of ownership and management as one of the key bases for his proposals

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[90] *E.g.*, Ford Motor Co. v. United States, 405 U.S. 562, 566-71 (1972) (upholding a district court finding that Ford had violated Section 7 of the Clayton Act, as amended by the Celler-Kefauver Antimerger Act, because Ford's purchase of Autolite substantially lessened competition in the market); Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 581 (1967) (upholding the FTC order divesting Procter & Gamble of Clorox Chemical Co. on the ground that it was a violation of the Clayton Act); United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966) (holding that a merger between Von's and Shopping Bag violated the Celler-Kefauver Antimerger Act); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371-72 (1963) (holding the consolidation of two banks to be a violation of the Celler-Kefauver Antimerger Act); Brown Shoe Co. v. United States, 370 U.S. 294, 345-46 (1962) (upholding an injunction preventing a merger between two shoe companies even though the merged company would have only 7.2 percent of the national retail shoe store market and 2.3 percent of the retail shoe outlet market).

[91] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 (2001) (discussing the "important strain of normative thought from the 1930s through the 1960s that extolled the virtues of granting substantial discretion to the managers of large business corporations").

[92] THE CORPORATION IN MODERN SOCIETY (Edward S. Mason ed., 6th prtg. 1966).

[93] *See* Mark J. Roe, *From Antitrust to Corporation Governance? The Corporation and the Law: 1959-1994*, *in* THE AMERICAN CORPORATION TODAY 102, 102-04 (Carl Kaysen ed., 1996).

[94] *E.g.*, Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 85, 89-90 (Edward S. Mason ed., 6th prtg. 1966).

[95] Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY 25, 39-45 (Edward S. Mason ed., 6th prtg. 1966) (discussing the concept of "shareholder democracy," and corporate power structures in different settings); Eugene V. Rostow, *To Whom and for What Ends is Corporate Management Responsible?*, *in* THE CORPORATION IN MODERN SOCIETY 46, 46-71 (Edward S. Mason ed., 6th prtg. 1966) (discussing historical and modern theories on how corporations should be structured, and how power should be distributed within the corporation).

[96] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 119-20 (1965).

and stated that "the market for corporate control gives to these shareholders both power and protection commensurate with their interest in corporate affairs."[97] Later influential writings by Professor (now Judge) Frank Easterbrook, Professor Daniel Fischel, and others echoed these themes and advocated a robust takeover market as a way to constrain managerial inefficiency, to prevent rent seeking, and to increase shareholder value.[98]

The calling for a well-developed market for corporate control required important changes in both antitrust and corporate governance. At the time of Henry Manne's original article, there were strong presumptions that any merger that increased market concentration to any appreciable degree was unlawful.[99] It got to the point where Justice Potter Stewart noted in frustration that the only apparent consistency in challenges to mergers was that "the [g]overnment always wins."[100]

This situation rapidly changed for antitrust in general and mergers in particular. Most per se rules outside of the cartel area were abandoned in favor of a broader, more economically intensive inquiry under the rule of reason.[101] The plaintiff, rather than the defendant, was more clearly assigned

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97 *Id.* at 112.

98 *E.g.*, MACEY, *supra* note 8, at 118-26; Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 711-14 (1982).

99 United States v. Phila. Nat'l Bank, 374 U.S. 321, 362-63 (1963) (describing "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to §7] was a fear of what was considered to be a rising tide of economic concentration in the American economy" (alterations in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962)) (internal quotation marks omitted)).

100 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

101 *E.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-87 (2007) (explaining that the rule of reason is the most appropriate test to determine a violation of Section 1 of the Sherman Act, and courts should only resort to finding a practice unlawful per se when the result "would always or almost always tend to restrict competition and decrease output" (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)) (internal quotation marks omitted)); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (explaining that the Court interprets Section 1 of the Sherman Act as only outlawing unreasonable restraints and "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful" (citing State Oil Co. v. Khan, 522 U.S. 3, 10-19 (1997))); *Khan*, 522 U.S. at 10-19 (explaining that under the rule of reason analysis, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect" (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982))); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 291 (1985) (rejecting "a broad rule that the conduct of a cooperative venture—including a concerted refusal to deal—undertaken pursuant to a legislative mandate for self-regulation is immune from *per se* scrutiny and subject to rule of reason analysis only if adequate procedural safeguards accompany self-regulation"); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103-04 (1984) (explaining that under both a per se test and the rule of reason test, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition"); Broad.

the burden of proof that a defendant had meaningful monopoly power (or nearly so) and had acted to harm competition without an offsetting business justification.[102]

In the merger area, the change was even more dramatic. The presumption of illegality when industry concentration increased was weakened.[103] Government guidelines required a much greater degree of market concentration and a more rigorous analytical framework before the government would seek to challenge most mergers.[104] The courts, in turn, began to hold the government to these higher burdens of proof, although the guidelines on their face only spoke to questions of prosecutorial discretion and not directly to case law and litigation.[105] The rise of the market for corporate control thus coincided with a weakening of merger control and even calls within the Reagan administration in the 1980s to abolish Section 7 of the Clayton Act entirely.[106]

On the corporate governance side, important changes were happening as well. Increased duties to maximize the value of the corporation emerged once a meaningful bidding process had begun.[107] On the other hand, the courts were much less willing to limit corporations from enacting poison

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Music, Inc. v. CBS, 441 U.S. 1, 7-8, 23-25 (1979) (holding that blanket licenses should be examined under rule of reason analysis); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977).

102 United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (holding that, under Section 2 of the Sherman Act, the Federal Government had the burden of proving that the defendant possessed (1) "monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

103 *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 497-98 (1974) (holding that small increases in market share or market concentration "were not conclusive indicators of anticompetitive effects").

104 U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES §§ 4-10 (1968), *available at* http://www.justice.gov/atr/hmerger/11247.pdf (setting forth standards indicating when the DOJ would likely challenge a proposed merger).

105 *E.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (D.C. Cir. 1990); United States v. Waste Mgmt., Inc., 743 F.2d 976, 982-83 (2d Cir. 1984); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1108 (N.D. Cal. 2004); Fed. Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 (D.D.C. 2004).

106 *See ABA Antitrust Section Examines Deregulation, Enforcement Shifts*, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1224, at 160 (July 18, 1985) (summarizing Commerce Secretary Malcolm Baldridge's call for repeal of Section 7 of the Clayton Act); *Monopolies Subcommittee Receives Views on Division's Enforcement Track Record*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1206, at 455-58 (Mar. 14, 1985) (summarizing testimony before the House Judiciary Committee's Monopolies Subcommittee from the Reagan Administration on why Section 7 should be repealed).

107 *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 46 (Del. 1994) ("*Revlon* reinforced the applicability of enhanced scrutiny and the directors' obligation to seek the best value reasonably available for the stockholders where there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation."); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986).

pills and similar antitakeover devices that protected management.[108] Finally, a number of states enacted antitakeover statutes, most of which survived court challenges.[109]

In more recent times, the corporate scandals of the late 1990s, the new millennium, and the ongoing financial crisis have led to other important changes in corporate governance, often reactive to the crisis or scandal of the moment.[110] The accounting and fraud scandals of the Enron era led to the Sarbanes-Oxley Act and more intensive duties of Chief Executive Officers ("CEOs") and Chief Financial Officers in connection with the preparation and certification of financial statements.[111] The 2008 financial crisis that began with the meltdown of the U.S. subprime mortgage market and then spread throughout the United States and global economies led to a series of financial reform measures enacted in the summer of 2010, all of which contain regulatory, disclosure, and corporate governance proposals of different kinds.[112] As a result, in some areas of corporate governance, the federal securities and regulatory provisions may have a far greater impact on corporate boards and committees than the more-forgiving Delaware corporate law.[113]

At the same time, antitrust law and enforcement appear to be experiencing a mild resurgence. Most commentators consider the Bush-era Antitrust Division to be relatively inactive on antitrust enforcement issues other than criminal cartel enforcement, as well as hostile to most private antitrust suits.[114] In contrast, almost immediately after taking power, the Obama ad-

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[108] *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154-55 (Del. 1990); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354-55 (Del. 1985) (finding no violation of fiduciary duties in a board's maintaining or approving poison pill).

[109] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 82-84 (1987) (upholding an Indiana law providing that the acquisition of controlling shares in a company does not automatically transfer voting rights to the acquiring party unless a majority of all pre-existing, disinterested shareholders agree to the transfer of voting power).

[110] *See generally* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) (explaining the connection between the Enron and WorldCom scandals and the enactment of Sarbanes-Oxley and other corporate governance reform bills).

[111] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (setting out the requirements of corporate responsibility for financial reporters such as CEOs, CFOs, and other executives).

[112] *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).

[113] *See, e.g.*, FANTO, *supra* note 20, § 3.3.2 (noting the way that the 1977 New York Stock Exchange scandal and the string of corporate scandals in the 1990s gave rise to the Sarbanes-Oxley Act, which has a powerful effect on corporations' audit committees in particular).

[114] *See, e.g.*, William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 903-04, 911 (2009). There is a more complex picture at the FTC during this period, which continued to bring a number of high profile civil nonmerger cases. *Id.* at 910-12 (comparing the FTC's record for litigating civil nonmerger cases with DOJ cases during the Bush era, and finding that not only did the FTC start more litigation under the Bush Administration than

ministration announced plans for more aggressive enforcement of the antitrust laws beyond the cartel area[115] and has pursued a modestly expanded array of investigations, cases, settlements, and amicus briefs in its two years in office.[116]

What emerges is a pattern of oscillation. At most times over the past 120 years, the relative strengths of antitrust and corporate law have been like two sine waves that only occasionally intersect; one field was on the rise while the other was on the decline. We are at a rare historical intersection point where both fields are in positions of relative strength. Only time will tell if that is a stable trend or merely another brief intersection as one field is strengthened through legislation and court interpretation, and the other weakened by the same developments. The continuing oscillation is another explanation for the very rare crosstalk between these two fields, both intimately concerned about corporate actors and their interaction in the marketplace.

The current equilibrium, if it holds, is an equally rare opportunity to do better.[117] When antitrust and corporate governance were out of sync, it was

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the Clinton Administration (eight in the former, only four in the latter), but the DOJ has initiated zero cases involving monopolization or attempted monopolization since 1999). One example of the difference in enforcement philosophies between the two agencies during this era was the *Schering-Plough* case in which the FTC lost an attempted monopolization case at the appellate level and unsuccessfully sought certiorari in the Supreme Court alone and against the express opposition of the Justice Department. *See* Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006). Another example is the refusal of the FTC to sign on to the now withdrawn report issued by the DOJ's Antitrust Division proposing overly narrow standards for the imposition of liability for unilateral conduct under Section 2 of the Sherman Act. *See generally* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* http://www.justice.gov/atr/public/reports/236681.pdf; *see also* Pamela Jones Harbour, Jon Leibowitz & J. Thomas Rosch, Comm'rs, Fed. Trade Comm'n, Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice, at 1 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf ("Today the Department of Justice ('the Department') issued a Report that, if adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act. . . . The Federal Trade Commission ('FTC') does not endorse the Department's Report.").

115 Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Vigorous Antitrust Enforcement in this Challenging Era 5-6, 8, 13-14 (May 11, 2009), *available at* http://www.justice.gov/atr/public/speeches/245711.pdf; *see also* Spencer Weber Waller & Jennifer Woods, *Antitrust Transitions*, 32 WORLD COMPETITION L. & ECON. REV. 189, 189-90 (2009).

116 John D. Harkrider, *Obama: The First Year*, ANTITRUST, Summer 2003, at 8, 9, 13 (reviewing the statistics from the DOJ early in President Obama's administration and finding that there is, albeit small, an uptick in antitrust enforcement).

117 There will always be areas of corporate governance like executive compensation, board selection and retention, shareholder voting, accounting rules, and audit procedures that only rarely implicate competition policy. Although beyond the scope of this article, Professor Macey has identified the "cartelization" of stock exchanges, accounting firms, and credit rating agencies as an additional source of poor corporate governance. MACEY, *supra* note 8, at 112-17. By "cartelization," Professor Macey appears to mean increased concentration and the creation of regulatory barriers to entry, rather than a literal private

widely believed that these two bodies of law were substitutes.[118] Today, the better view is that they are complements and should operate in a coordinated and consistent manner to promote the interests of both consumers and shareholders.[119]

IV. TOWARDS A MORE MEANINGFUL INTERACTION

This Part looks at several of the more obvious and important areas where an understanding of agency costs can inform the broader market-competition questions that antitrust law addresses, and vice versa. Woven throughout the discussion is the critical area of corporate compliance law, where the internal structure and operation of corporate entities can affect their ability to comply with antitrust law (and other legal and regulatory schemes) and to detect violations when they occur.

Section A of this Part introduces the general standards for corporate compliance. Section B examines interlocking directorates, the only current area where Congress has directly addressed by statute the intersection between antitrust and corporate governance. Section C looks at cartel policy, where better governance principles and compliance policies can deter and prevent the type of hard-core antitrust violations that constitute criminal violations for the corporation and its officers, directors, and employees. Section D looks beyond historical cartel issues into the murkier areas of the anticompetitive agreements, which are not illegal per se, but are judged on a case-by-case basis under the rule of reason. Section E looks at merger policy, an area where greater attention to corporate governance concerns illustrates certain weaknesses in current antitrust thinking. Finally, Section F analyzes monopolization and attempted monopolization, where the uncertainties of what constitutes market power and its unlawful exercise are sufficiently vague and nuanced that the current regime of the business judgment rule in general seems appropriate.

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conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. *Id.* Congress has recognized at least one piece of this competition and corporate governance puzzle with the passage of the Credit Rating Duopoly Relief Act of 2006, H.R. 2990, 109th Cong. § 2 (2006). The effect of this statute is still uncertain, but the dismal performance of the credit rating industry in the financial crisis of 2008 suggests that neither competition nor corporate governance has improved in this sector. *See* John Patrick Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 COLUM. BUS. L. REV. 109, 120-24 (2009) (arguing that even if credit rating agencies "did not know what they were doing on a fundamental level," it probably would have been "in their interest to issue ratings on novel products anyway").

118 *But see generally* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497 (1992) (demonstrating the similarities between the two fields of law, but also pointing out the distinct differences and why both are important for the economy).

119 *See id.* at 560-61 (arguing that antitrust, in combination with corporate governance law, can work to the benefit of shareholders and corporate goals alike).

A. *Corporate Compliance*

Most courts have refused over the years to require that boards institute compliance programs because "directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong."[120] However, recent decisions signify a shift in such ideology. First, *Graham v. Allis-Chalmers Manufacturing Co.*[121] established a duty to act when directors become aware of "red flags" (e.g., illegal or wrongful activities).[122] This decision was Delaware's first to address the extent to which directors must ensure legal compliance of the company's officers and employees.[123]

A derivative suit alleged that the directors of Allis-Chalmers were liable for their employee's violations by reason of their failure to take action to uncover and to prevent antitrust violations on the part of employees of Allis-Chalmers.[124] The facts demonstrated that the directors had no actual knowledge of any antitrust violations or even reason to know of any potential wrongdoing until government officials announced an investigation of the company.[125] The plaintiffs argued in the alternative that, by virtue of their fiduciary duties, directors were bound to put a compliance system into effect that would bring misconduct to their attention.[126]

The Delaware Supreme Court disagreed.[127] The court reasoned that precedent rejected imposing such a burden and noted that directors could rely on the honesty and integrity of corporate employees in the absence of red flags.[128] Thus, the Allis-Chalmers directors were not liable for the actions of their subordinates.[129]

Allis-Chalmers broke significant ground by recognizing that a director's fiduciary duties could include the duty to monitor; however, it provided little incentive for directors to actually "monitor." It is noteworthy that the court, in creative language, refused to impose a duty "to install and

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120 Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

121 188 A.2d 125 (Del. 1963).

122 *Id.* at 130 (interpreting the U.S. Supreme Court case of *Briggs v. Spaulding*, 141 U.S. 132 (1891), as supporting the proposition that corporate directors may become liable if their subordinates do something "to put them on suspicion that something is wrong").

123 *See* Stephen F. Funk, *In re* Caremark International Inc. Derivative Litigation: *Director Behavior, Shareholder Protection, and Corporate Legal Compliance*, 22 DEL. J. CORP. L. 311, 312 (1997) (describing *Allis-Chalmers* as "the definitive Delaware Supreme Court holding regarding the scope of a corporate director's duty to monitor corporate affairs").

124 *Allis-Chalmers*, 188 A.2d at 127.

125 *Id.* at 128-29.

126 *Id.* at 130.

127 *Id.*

128 *Id.*

129 *Id.* at 131.

operate a corporate system of espionage to ferret out wrongdoing."[130] In other words, there was no duty to institute corporate compliance systems. In 1996, this changed.

In a groundbreaking shift in corporate governance, the Delaware Court of Chancery in *In re Caremark International Inc. Derivative Litigation*[131] expanded a director's duty not only to act when exposed to obvious signs of wrongdoing, but also to be informed and vigilant to uncover wrongdoing.[132] The decision stemmed from a federal investigation of "kickback" payments to physicians in exchange for patient referrals.[133] Caremark eventually entered into a $250 million settlement.[134] At that time, Chancellor Allen, the author of the decision, saw an opportunity to require directors to oversee legal issues.[135]

In approving the settlement, Chancellor Allen demonstrated that directors can no longer assume that the corporation was in compliance with the law if no red flags arose.[136] Rather, they have a "duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance."[137] Chancellor Allen treated this duty as an extension of a director's duty to act in good faith, thereby preventing future courts from second-guessing a director's business decisions.[138]

Under *Caremark*, to show bad faith, plaintiffs must demonstrate that the board failed in a "sustained or systematic" fashion,[139] for example an "utter failure" by the board to develop a reasonable information reporting system.[140] An actual failure to prevent wrongdoing does not, by itself, indicate that a board failed in its duty to monitor.[141] Even a grossly unreasonable failure to act does not meet the bad-faith threshold.[142]

In *Stone v. Ritter*,[143] the Delaware Supreme Court reinforced, but narrowed the *Caremark* decision, placing directors' duty to monitor in line

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130 *Allis-Chalmers*, 188 A.2d at 130.

131 698 A.2d 959 (Del. Ch. 1996).

132 *Id.* at 970.

133 *Id.* at 962 (internal quotation marks omitted).

134 *Id.* at 960-61.

135 Jennifer Arlen, *The Story of* Allis-Chalmers, Caremark, *and* Stone*: Directors' Evolving Duty to Monitor*, *in* CORPORATE LAW STORIES 323, 325 (J. Mark Ramseyer ed., 2009).

136 *Caremark*, 698 A.2d at 970.

137 *Id.*

138 *Id.* at 967.

139 *Id.* at 971.

140 *Id.*

141 *Id.* at 971-72.

142 *Caremark*, 698 A.2d at 971 (noting that the test for liability is "quite high").

143 911 A.2d 362 (Del. 2006).

with the duty of good faith, a subset of the duty of loyalty.[144] Under *Stone*, directors breach their duty to monitor when they either "utterly fail[] to implement any reporting or information system or controls" or if they "consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[145]

Stone stemmed from a derivative suit brought by AmSouth Bancorporation shareholders against the board for allowing employees to violate the federal Bank Secrecy Act's reporting requirements.[146] Although the court affirmed *Caremark*'s good-faith standard, it also identified a scienter requirement, stating that "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."[147]

These key cases and the many that have followed in their wake establish three key principles: (1) a plaintiff must show scienter—that the board acted with the actual or constructive knowledge that its inaction would harm the corporation; and (2) the board is responsible for preventing wrongful or illegal acts; but (3) the board is not responsible for monitoring outcomes of decisions of previous boards.[148] Recent cases indicate courts' greater willingness to infer knowledge of wrongdoing. In *American International Group, Inc. v. Greenberg*,[149] the court inferred the defendants' knowledge from their high-level management positions, concluding that it was unlikely that illegal transactions would have occurred without their knowledge.[150]

The *duty of care* generally requires that directors act in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances.[151] At the same time, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[152] The rule effectively prevents the judiciary from reviewing after the fact most of the merits of a board's business decisions. Accordingly, a plaintiff challenging business decisions made by a corporate board on an informed and good-faith basis bears the burden of rebutting the business judgment rule presumption.[153]

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144 *Id.* at 369-70.

145 *Id.* at 370.

146 *Id.* at 364-66.

147 *Id.* at 370 (citing Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003)).

148 Eric. J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717, 719-20 (2009-2010).

149 965 A.2d 763 (Del. Ch. 2009).

150 *Id.* at 795-99. *But see In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124-26 (Del. Ch. 2009) (adopting a less expansive view of inferring knowledge of wrongdoing).

151 Hanson Trust PLC v. ML SCM Acquisition Inc., 781 F.2d 264, 273 (2d Cir. 1986).

152 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (en banc).

153 *Id.* at 812.

The business judgment rule does not protect all corporate action, however. First, the rule does not apply if a plaintiff can show that directors acted with self-interest (e.g., self-dealing).[154] Second, the rule does not apply where directors abdicate their responsibility or when they fail to act, for example in failing to monitor cases.[155] Third, the rule does not apply to decisions lacking a rational business purpose.[156] Courts make this determination from the vantage point of the directors at the time of the directors' decision, not with hindsight.[157] Fourth, the rule does not protect decisions involving gross negligence.[158] In the event that the business judgment rule does not apply, the board must prove the "entire fairness" of the transaction.[159]

The business judgment rule rests largely on the presumption that directors (business professionals)—rather than courts—boast the business acumen required to sufficiently assess the economic risk associated with their often complex decisions.[160] The rule protects directors from liability for errors or mistakes in judgment, thereby ensuring corporations freedom to make their own rational and informed judgments without fear that the benefit of hindsight will lead to a backlash. Thus, the rule immunizes the substance of a decision derived from diligent and informed analysis.[161] "Process" is essential in determining whether the board acted with due diligence.[162]

When applied to antitrust, this analysis reveals critical, but unresolved issues. First, what is a sufficient monitoring system demonstrating that the board has, in good faith, required monitoring and compliance systems that reasonably can be expected to deter, detect, and prevent serious antitrust violations by the officers, employees, and directors of the corporation? Second, what are the red flags necessary for the board to take further action when unlawful conduct may have occurred? Finally, how do the duties of

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154 *Id.*

155 *Id.* at 813.

156 *Brehm*, 746 A.2d at 264 n.66 (summarizing the business judgment rule and the relevance of a rational business purpose in decisions by directors).

157 *See* 1 ALI PRINCIPLES, *supra* note 25, § 4.01(c) cmt. c, at 167-68.

158 Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (en banc) (citing *Aronson*, 473 A.2d at 812), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009) (en banc), *superseded by statute*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2010); *see also* Steven A. Ramirez, *The Chaos of* Smith, 45 WASHBURN L.J. 343, 346-49 (2006) (describing the egregiously negligent conduct of Van Gorkom).

159 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (internal quotation marks omitted), *modified on other grounds by* 636 A.2d 956 (Del. 1994).

160 *See* EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 2:10, at 2-36 (2009 & Supp. 2010); Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1439, 1441 (1985).

161 *See* BRODSKY & ADAMSKI, *supra* note 160, § 2:10, at 2-34.

162 *See id.* § 2:10, at 2-37 to -40 (noting that exceptions to the business judgment rule apply when directors fail to engage in required procedures for making business decisions).

care, the requirement of adequate monitoring and compliance systems, and the business judgment rule interact when the board fails to take action and the corporation is subsequently found guilty, is found liable, or chooses to settle allegations of substantial antitrust wrongdoing?

The case law and commentary provide surprisingly few clues.[163] The answer likely differs depending on which area of antitrust and which type of violation is at issue. The following Sections discuss the nature of red flags and board duties for the most common types of antitrust violations. They then suggest that the highest standard should be imposed with respect to cartel-type violations, the lowest for monopolization-type offenses, and an intermediate standard for mergers.

B. *Interlocking Directorates*

The only direct statutory interplay between corporate governance and competition policy can be found in Section 8 of the Clayton Act, which states:

> (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are—
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> (A) engaged in whole or in part in commerce; and
>
> (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws . . . .[164]

This provision is limited to corporations above a certain size whose competitive sales are above a certain threshold.[165] Only interlocking directorates between horizontal competitors are covered by this provision, despite its wording suggesting that interlocking directorates between vertically related corporations would be subject to this provision as well.[166] Section 8 also

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[163] In contrast, the issue has received much more comprehensive treatment in the United Kingdom where the UK competition enforcer, the Office of Fair Trading, has produced an excellent and recent comprehensive study of corporate compliance in competition law. *See generally* OFFICE OF FAIR TRADING, DRIVERS OF COMPLIANCE AND NON-COMPLIANCE WITH COMPETITION LAW (2010), *available at* http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf.

[164] 15 U.S.C. § 19(a)(1) (2006).

[165] *Id.* These limits are indexed to inflation and currently Section 8 of the Clayton Act only applies if the corporations have "capital, surplus, and undivided profits" above $25,841,000 each and where competitive sales are above $2,584,100 and at least two percent of that corporation's total sales or the competitive sales of each corporation are at least four percent of that corporation's total sales. *See id.*; Press Release, Fed. Trade Comm'n, Commission Announces Revised Filing Thresholds for Clayton Act Antitrust Reviews (Jan. 19, 2010), *available at* http://www.ftc.gov/opa/2010/01/hsr-safeharbor.shtm.

[166] *In re* TRW, Inc., 93 F.T.C. 325, 379 (1979), *aff'd in part, rev'd in part sub nom.* TRW, Inc. v. Fed. Trade Comm'n, 647 F.2d 942 (9th Cir. 1981).

does not reach interlocking directorates between bank and non-bank corporations.[167]

Although there are occasionally boundary issues as to whether corporations should be deemed horizontal competitors,[168] or whether the statute reaches situations where the corporation owns competing subsidiaries, the statute is straightforward enough. It thus represents a per se ban on a limited number of types of horizontal interlocking directorates.[169] The statute requires no proof of competitive effects.

As a result, individuals and corporations simply act accordingly in the real world and there is not much litigation.[170] When disputes arise, the usual remedy is the resignation of a director from one of the two competing enterprises or occasionally the divestiture of a business line so the firms are no longer competing and no longer subject to the law's provisions. Sometimes the remedy is embodied in a consent decree depending on the stage of the investigation or litigation.

Most recently, Eric Schmidt, then the CEO of Google, resigned as a director of Apple to address questions about whether his dual service on the boards of both companies violated this provision.[171] Press reports indicate that the FTC is continuing to investigate whether other board-level interlocks between these two actual and potential competitors raise similar issues.[172]

Preventing conflicts of interest and creating proper incentives for directors underlie this entirely sensible, but limited, provision. Interlocking

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167 Bankamerica Corp. v. United States, 462 U.S. 122, 128 (1983); ABA SECTION OF ANTITRUST LAW, INTERLOCKING DIRECTORATES: HANDBOOK ON SECTION 8 OF THE CLAYTON ACT 76-78 (2011); Amy Corton, Bankamerica v. United States—*Legitimizing Bank-Nonbank Interlocks*, 33 EMORY L.J. 1103, 1105 (1984); Arthur H. Travers, Jr., *Financial Institution Interlocks After the* Bankamerica *Case*, 53 ANTITRUST L.J. 1067, 1069 (1984-1985).

168 *See generally* Benjamin M. Gerber, *Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act*, 24 YALE J. ON REG. 107 (2007).

169 *See* William C. MacLeod, *Interlocks at the Federal Trade Commission: Room for Reason in a "Per Se" Statute?*, 53 ANTITRUST L.J. 1077, 1079-80, 1083 (1984-1985); Recent Developments, *Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations*, 54 COLUM. L. REV. 130, 130-31 (1954).

170 Cases involving challenges to interlocking directorates under Section 8 of the Clayton Act are collected in 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 426-31 & nn.604-644 (6th ed. 2007).

171 Press Release, Fed. Trade Comm'n, Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement That Google CEO Eric Schmidt Has Resigned from Apple's Board (Aug. 3, 2009) [hereinafter Feinstein Statement], *available at* http://www.ftc.gov/opa/2009/08/googlestmt.shtm; *Despite Google's Schmidt Resignation from Apple Board, FTC Investigation Continues; Gore Next to Go?*, MACDAILYNEWS.COM (Aug. 3, 2009, 4:37 PM) [hereinafter MACDAILYNEWS.COM], http://macdailynews.com/2009/08/03/despite_googles_schmidt_resignation_from_apple_board_ftc_investigation_cont.

172 *See, e.g.*, Feinstein Statement, *supra* note 171; MACDAILYNEWS.COM, *supra* note 171.

directorates between competitors can pose both competition and corporate governance problems. They can exacerbate the agency cost problems when a director's decisions can benefit his interests in his other role with the competitor rather than serve the best interests of the shareholders at the company where he serves as a director. At an extreme, they can be a direct violation of the duty of loyalty for either or both of the corporations where the director serves.

These concerns must also be balanced against the value of knowledgeable, experienced directors who have the ability to play an important, engaged role as outside directors to minimize the agency costs. This is the avowed goal of corporate governance law in the first place.[173] If the statute operates as intended obviously a certain number of highly qualified directors will be excluded, and publicly traded companies will have to find outside directors from a different and narrower pool of candidates.[174]

On the competition side of the fence, the dangers can be equally straightforward. Interlocking directorates could facilitate outright collusion,[175] but could also be a facilitating mechanism either for the exchange of information or for other means of oligopolistic coordination and tacit collusion. Interlocking directorates can also affect key board-level decisions involving mergers, acquisitions, joint ventures, entry into new markets, innovation initiatives, and other key strategic determinations that can affect the competitive efforts of one, or both, of the affected firms.[176]

The current statute, while not perfect, is nonetheless an appropriate compromise. It can be both over- and underinclusive in particular settings. Section 8 also does not precisely define competing firms, which raises issues for companies with operations in multiple markets and for companies where the boundaries of even specialized operations are evolving rapidly, as in the high-tech sector.[177] However, further precision would probably come at such a high cost that the incremental gains would not be worthwhile for either competition policy or corporate governance. What emerges from this discussion is the real utility that can be gained when Congress, the courts, and commentators thoughtfully address these two separate legal spheres in a unified manner. If the prohibition of interlocking directorates is a qualified success, then the failure to integrate corporate governance and competition policy in more pressing areas of concern is a troubling example of the failure to unify these two areas of the law.

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173 *See* Gerber, *supra* note 168, at 112-15; Brett H. McDonnell, *Bylaw Reforms for Delaware's Corporation Law*, 33 DEL. J. CORP. L. 651, 655-56 (2008).

174 *See* Gerber, *supra* note 168, at 112-13.

175 *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 583-84 (2004) (discussing the historical use of interlocking directorates as a trust facilitating device).

176 *Cf.* Mehdi Farhadi, *How Major Public-Listed Blue Chip Enterprises in Germany Protect Themselves from Hostile Takeovers by Foreign Investors Through Networks of Interlocking Directorates* 3-4, 11 (Mar. 3, 2008), *available at* http://ssrn.com/abstract=1262660 (working paper).

177 *See* Gerber, *supra* note 168, at 118.

C. *Cartels*

Perhaps the most important area of corporate compliance relates to the deterrence, prevention, detection, and response to credible allegations of price fixing, bid rigging, and related cartel behavior. These are the hard-core cartel offenses that are per se unlawful and that the Antitrust Division normally prosecutes as criminal violations.[178] The conspiracy itself is the offense, and no proof of effect is required.[179] In essence, these per se unlawful conspiracies are presumed unreasonable and no rebuttal evidence is permitted as to their intended or actual effect.[180] The Supreme Court has gone so far as to suggest that cartels are "public enemy number one" for antitrust purposes.[181]

Whether or not this is literally true,[182] criminal conviction (and even investigation) holds heavy consequences for the corporations and individuals involved. Section 1 of the Sherman Act makes an antitrust crime a felony.[183] The criminal penalties for a corporation are fines up to the higher of $100 million or double the gain or loss involved in the offense.[184] Fines for cartel offenses have reached as high as $500 million, and there are dozens of fines in excess of $100 million.[185]

For individuals, the monetary penalties are smaller, but the stakes are even higher. Individuals, unlike corporations, are subject to imprisonment, not just heavy fines. A violation of Section 1 can result in a prison term of up to ten years.[186] Virtually every conviction in modern times has resulted in a prison term for corporate employees, officers, and directors, ranging

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178 *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001).

179 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

180 *See* 15 U.S.C. § 1 (2006); *see also* cases cited *supra* note 88.

181 *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (referring to collusion as "the supreme evil of antitrust").

182 *See* Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 497-99 (2009) (noting that the U.S. Supreme Court considers cartels more of a concern than monopolistic behavior).

183 15 U.S.C. § 1.

184 *Id.*; 18 U.S.C. § 3571(d) (2006).

185 *See* Hammond, *supra* note 39, at 5-6.

186 15 U.S.C. § 1.

from relatively low-level employees to Presidents and CEOs.[187] The longest prison term to date has been 46 months.[188]

The criminal prosecution is often just the beginning of the troubles for the firms involved. A conviction or guilty plea in a government criminal case is prima facie evidence of liability in any follow-up civil treble damage litigation.[189] A plaintiff would only need to prove standing, causation, and damages in order to receive treble damages, attorneys' fees, and costs.[190] Many of these actions are filed in the form of a class action, which further raises the stakes. Settlements by codefendants are deducted pretrebling.[191] *In pari delicto* defenses are not allowed.[192] Liability is joint and several.[193] Contribution claims among defendants are not allowed,[194] although contractual judgment-sharing agreements have been allowed.[195] Further, to the extent that an antitrust violation can be deemed an intentional crime or tort, antitrust judgments may not be insurable.[196]

One of the government's most effective anti-cartel tools is the amnesty-and-leniency program, which has been widely copied abroad.[197] Beginning in the early 1990s, the DOJ adopted a set of formal written guidelines setting forth when the government would grant immunity for cartel participants who informed the Antitrust Division of cartel activity and provided

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187 *Cf.* Scott D. Hammond, Dir. of Criminal Enforcement, U.S. Dep't of Justice, Antitrust Div., A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program (Mar. 7, 2002), *available at* http://www.justice.gov/atr/public/speeches/10862.pdf (noting a trend toward more frequently imposed and longer average prison sentences for antitrust offenders, with the average prison sentence in 2002 being fifteen months); THE INFORMANT! (Warner Bros. Pictures 2009) (providing a fictionalized account of an actual international cartel agreement for food additives reaching into higher executive and board ranks of conspirators, which resulted in jail time for those convicted).

188 2 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 15.3, at 15-6 (3d ed. 1997 & Supp. 2010).

189 15 U.S.C. § 16.

190 *See* 15 U.S.C. § 15(a).

191 Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 17.8b, at 1008 (2d ed. 2006).

192 Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 140 (1968), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

193 Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 394 (4th Cir. 1982).

194 Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-46 (1981).

195 Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 749 (2009).

196 *See* JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS § 15.3, at 416 (3d prtg. 1994) ("It appears that all states prohibit indemnity for intentional torts."). Some states would go further and bar insurability of antitrust treble damage verdicts as punitive damages. *See id.* § 7.3, at 249-50, § 15.3, at 417 (noting that jurisdictions are divided over the insurability of punitive damages and that some jurisdictions disallow them unless the punitive liability is "imposed for activity that falls comfortably short of an intentional tort"). *See generally* 17 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 49:115 (4th ed. 2000) (discussing insurance coverage of intentional criminal acts).

197 *See* Hammond, *supra* note 39, at 3.

truthful cooperation going forward.[198] Under the amnesty-and-leniency program, corporations and individuals receive immunity from criminal prosecution if:

> 1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
> 2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
> 3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
> 4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
> 5. Where possible, the corporation makes restitution to injured parties; and
> 6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.[199]

If a corporation qualifies for leniency, then directors, officers, and employees of the corporation, like the corporation itself, will not be charged criminally if they admit their wrongdoing with "candor and completeness" and continue to assist the Division throughout the investigation.[200]

Immunity from criminal prosecution will not shield the corporation from private-damage suits. In fact, it normally makes settlement of subsequent private litigation for cartel overcharges almost inevitable since the corporation has confessed its guilt and provided assistance to the DOJ in the prosecution of the other cartel members. In order to enhance the incentives to take advantage of the amnesty-and-leniency program and to turn against other cartel members, Congress subsequently passed legislation providing that cooperating firms normally would only be liable for single damages for private litigation in connection with the cartel activity subject to a grant of immunity under the amnesty-and-leniency program.[201] As a result of the combined incentives of the amnesty-and-leniency program, the vast majority of recent large domestic and international cartel cases have originated from cartel members who have defected and disclosed the cartel to the Antitrust Division pursuant to the program.[202] At least thirty foreign jurisdictions have adopted similar programs, further increasing the incentives to

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198 *See generally* U.S. DEP'T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (1994), *available at* http://www.justice.gov/atr/public/guidelines/0092.pdf; U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993) [hereinafter CORPORATE LENIENCY POLICY], *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf.

199 CORPORATE LENIENCY POLICY, *supra* note 198, § A. Alternative discretionary conditions for granting immunity are set forth in Section B of the policy. *Id.* § B.

200 *Id.* § C.

201 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 (2006) and accompanying note). Limitation of liability to single damages is contingent on "satisfactory cooperation" by the corporation. *See id.* § 213(b).

202 *See* Hammond, *supra* note 39, at 3.

turn in fellow cartel members in exchange for immunity or leniency, while complicating the process of coordinating the different procedural and substantive requirements of each program.[203]

The growth of amnesty-and-leniency programs is just part of the growing international consensus that price fixing, bid rigging, and related offenses should be deemed hard-core cartel offenses, should be illegal under national or regional law, and should be vigorously investigated and punished by the relevant competition authority. For example, the more than thirty nations of the Organization for Economic Cooperation and Development ("OECD") recognized that "hard core cartels are the most egregious violations of competition law" and that "[e]ffective action against hard core cartels is particularly important from an international perspective."[204] The 1998 OECD recommendation advises member countries to ensure that their competition laws effectively halt and deter hard-core cartels by providing for "effective sanctions and adequate enforcement procedures and institutions to detect and remedy hard core cartels."[205]

Most of the major competition law jurisdictions now take a similar tough stance on cartel activity. Although the European Union does not criminalize cartel activity or impose individual liability, it does impose fines of up to 10 percent of the worldwide annual turnover of the enterprises involved.[206] These fines have often equaled or exceeded the criminal fines imposed by the United States in connection with the same cartel operating in both jurisdictions.[207] Although penalties and the level of enforcement differ, an increasing number of countries, including Canada, the United Kingdom, Ireland, Brazil, and Australia, are enacting and enforcing criminal price-fixing provisions[208] and/or are seeking to create meaningful private rights of actions for the victims of price fixing and related cartel activity.[209]

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203 *See* J. Anthony Chavez, *International Cartel Enforcement: Creating a Fear of Detection*, *in* 2 ANTITRUST INSTITUTE 2010: DEVELOPMENTS & HOT TOPICS 929, 964-65, 975-78 (Practising Law Inst. ed., 2010).

204 ORG. FOR ECON. COOPERATION & DEV., RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS 2 (1998), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf.

205 *Id.* at intro.

206 Council Regulation (EC) No. 1/2003 of 16 December 2002, art. 23,2003 O.J. (L 1) 1, 17 (implementing the rules on competition set out in Articles 81 and 82 of the Treaty).

207 *Compare* 2 WALLER, *supra* note 188, § 16.2, at 16-15 (noting that the European Union has imposed fines in the hundreds of millions of Euros for illegal cartels), *with supra* note 185 and accompanying text (noting that the United States has imposed dozens of fines over $100 million for illegal cartels).

208 Chavez, *supra* note 203, at 965.

209 *See, e.g., Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 3, 10, COM (2008) 165 final (Apr. 2, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF.

The criminal penalties levied against corporations and other business entities, imprisonment of key corporate officers and employees, potential disqualification of directors, and overall financial consequences as well as collateral debarments from doing business with certain public sector customers, are all frequently material to the financial performance of the corporation and may be required to be reported to the SEC and disclosed to the public. This in turn raises additional concerns under federal securities regulation and increases the potential for shareholder derivative and class-action litigation.

This suggests that there are unique red flags associated with the role of corporate boards in connection with cartel-type activity. First, the decision to apply for leniency is normally a board decision. Second, for a board to consider, and then to reject, the idea of applying for unconditional amnesty would be condoning a criminal felony; this action would automatically constitute a breach of the board's fiduciary duty. The business judgment rule would not protect such a decision.[210] Board members would be exposed to significant liability in shareholder derivative litigation and, conceivably, as aiding and abetting the conspiracy in the underlying antitrust violation. In addition, rejecting a chance at unconditional amnesty is to risk another member of the cartel having the opportunity to seek amnesty, receive the benefits, and place the first corporation in the difficult position of almost certainly having to defend both criminal and civil litigation, with a different cartel member obliged to truthfully and fully cooperate with the government at every step of the process.

But this first scenario of outright rejection of an opportunity for amnesty is both extreme and unlikely. Intermediate scenarios include situations where it becomes publicly known that another member of the industry in the United States or abroad has sought or received amnesty in connection with cartel activity. Once again, it is probably too late to take action, although the possibility of a discretionary amnesty application (or application in another jurisdiction) is still available. However, in the real world, amnesty is probably too late and the board's choices are limited to contesting liability if the facts and law warrant, or seeking a guilty plea with a reduced sentence and fine as the only practical alternative.

Other real world variations of potential red flags for board consideration include: the execution of a search warrant or dawn raid of company premises, the receipt of a grand-jury subpoena, the receipt of a civil investigative demand, press reports of grand-jury or civil-antitrust investigations, the filing of a civil class action, individual treble damages, or civil governmental cases, a history of prior antitrust violations, the receipt of a demand

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210 *See* 1 ALI PRINCIPLES, *supra* note 25, § 4.01, at 144 ("[A] director or officer violates the duty to perform his or her functions in good faith if he or she knowingly causes the corporation to disobey the law."); FANTO, *supra* note 20, § 2.23(c), at 2-52 to -53 ("[T]he business judgment rule offers no protection to directors who make a decision knowingly to violate the law.").

letter threatening litigation, disturbing results from an antitrust audit or other internal investigation or compliance program, the surfacing of an internal whistleblower, customer complaints of anticompetitive conduct, and so on down to unsubstantiated rumor and innuendo. In most of these variations, it is likely that a corporate board was not aware of the cartel activity or the corporation's participation in the cartel until it was too late. But the question for corporate governance, corporate compliance, corporate responsibility, and director liability is what should the board have known, and when should they have known it.

Even in the absence of these legal and regulatory red flags, there are business, economic, and industry factors that should trigger a corporate board to at least reflect on whether something more needs to be done. Antitrust economists are in broad agreement that some of the industry dynamics that are prone to collusion include: a small number of players, a homogenous product, price transparency, widespread exchange of information among competitors, heavy contacts between competitors in a trade association or other context, and/or signaling through the press and public announcements about future pricing and production.[211] When such factors are part of the daily life of the corporation and its competitors, willful ignorance should not be a shield for liability.

Cases like *Caremark* and *Stone* establish that a corporation should have meaningful, effective compliance programs, and the board should be aware of those programs and involved such that the compliance program functions properly. No case suggests that the mere fact that illegal activity occurred, by itself, constitutes a breach of the board's duties toward the shareholder no matter how dire the consequences to the corporation or the shareholders. And yet, something more than setting up a compliance program in good faith and then ceasing to pay attention is required.

However, the danger is that the current legal structure creates incentives to engage in what Professor Daniel Sokol has dubbed "cosmetic compliance."[212] The risk is that the corporations will engage in just enough compliance efforts to avoid legal liability without actually detecting anything, lest the board then be required to actually do something about it in order to avoid liability.[213]

The federal, criminal sentencing guidelines provide some additional guidance.[214] These sentence guidelines were mandatory at one time, but now serve as voluntary guidelines to reduce sentencing disparities for fed-

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211 *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 180-93 (2d ed. 1994).

212 D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Public and Private Enforcement*, 77 ANTITRUST L.J. (forthcoming 2011-2012) (manuscript at 30) (on file with author).

213 *Id.* (manuscript at 46).

214 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)-(b) (2010).

eral criminal offenses.[215] They indicate that the existence of an effective compliance and ethics program (or lack thereof) will affect the culpability score of the corporate defendant, which will in turn impact the amount of the applicable criminal fine for all federal corporate criminal convictions, including antitrust.[216] In addition, courts normally require the maintenance of an effective compliance and ethics program as a term of a corporate defendant's probation.[217]

In order to qualify as an effective compliance and ethics program, the organization must: "(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[218]

Due diligence in this context means that the board of directors, as the governing authority of the corporation, "shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program."[219] After establishing and promoting the program, the organization must also take reasonable steps to make sure that the program is being followed, including monitoring and auditing. This requires periodically evaluating the program, creating mechanisms for the anonymous and/or confidential reporting of violations, and taking reasonable steps to respond appropriately to criminal conduct.[220] Together, these requirements lay out a roadmap, but not an instruction manual, for corporate boards that are serious about effective compliance in the cartel context and other areas of federal criminal law for corporations.

There also is the possibility of director disqualification. While SEC regulations bar any unfit person from serving in an executive position in a publicly held company,[221] no such explicit statutory authority exists in the antitrust area in the United States. However, director disqualification for competition law violations is governed by statute in the United Kingdom and elsewhere.[222] In the 2002 UK Enterprise Act, there is the possibility of

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215 United States v. Booker, 543 U.S. 220, 245-46 (2005) (5-4 decision).

216 U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1).

217 *Id.* § 8B2.1(b)(7).

218 *Id.* § 8B2.1(a)(1)-(2).

219 *Id.* § 8B2.1(b)(2)(A).

220 *Id.* § 8B2.1(b)(5)(B)-(C), (b)(7); *see also* Rosa M. Abrantes-Metz et al., Antitrust Screening: Making Compliance Programs Robust 3-10 (July 26, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1648948 (suggesting statistical techniques for screening company data).

221 Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 77t(e), 78u(d)(2) (2006).

222 Company Directors Disqualification Act, 1986, c. 46, § 9, sch. 1 (U.K.); Canadian Business Corporations Act, R.S.C. 1985, c. C-44 (Can.); *see also* Jassmine Girgis, *Corporate Directors' Disqualification: The New Canadian Regime?*, 46 ALTA. L. REV. 677, 685 (2009). *But see generally* Johannes Schmidt, *The Case for a European Competition Disqualification Order*, 8 ZEITSCHRIFT FÜR WETTBEWERBSRECHT (ZWeR) 378 (2010), *available at* http://papers.ssrn.com/sol3/

the Office of Fair Trading ("OFT") applying for a Competition Disqualification Order, in addition to the other penalties provided for when a violation of the UK or EU competition rules occurs.[223] Here, too, the ultimate test is whether the director is unfit to manage a company.[224]

The OFT recently has issued revised guidelines indicating when they are likely to use these provisions in the future.[225] Normally, the OFT will require a prior definitive decision that a competition violation has occurred,[226] although it has the power in exceptional circumstances to proceed even in the absence of a prior violation.[227] The guidelines also suggest it will normally seek director disqualification only for the more serious competition violations.[228]

While the director disqualification process is likely to be used for situations where the director has actively participated in the violation, the more interesting sections of the guidelines pertain to those directors who "ought to have known" about the violations.[229] While no bright-line rule is possible, the OFT will take into account such factors as the director's role, position, knowledge, skill, experience, responsibilities, and available information, as well as the relationship between those factors and the persons responsible for the violations.[230] While this is not inconsistent with the general guidelines provided by cases like *Caremark*,[231] it is more specific, more focused on competition issues, and represents a middle ground between draconian personal liability and virtual immunity under the U.S. business judgment rule.

There are no equivalent statutes or guidelines in the United States for competition offenses. Seeking such a statutory amendment would be helpful, but it appears to be politically unrealistic. Even in the absence of specific statutory authority, there is the possibility of barring certain directors, officers, and employees from the company or industry for varying lengths of time as part of court judgments and consent decrees for fraud and serious

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papers.cfm?abstract_id=1761509 (commenting that director disqualification for antitrust violations has not yet been codified as statute in the EU).

223 Enterprise Act, 2002, c. 40, § 204 (U.K.).

224 *Id.*

225 OFFICE OF FAIR TRADING, DIRECTOR DISQUALIFICATION ORDERS IN COMPETITION CASES: AN OFT GUIDANCE DOCUMENT § 4.2, at 7 (2010) [hereinafter OFT GUIDELINES], *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf.

226 *Id.* § 4.6, at 8.

227 *Id.* § 4.7, at 8.

228 *Id.* § 4.11, at 9.

229 *Id.* §§ 4.22 to .23, at 11-12.

230 *Id.* § 4.22, at 11. In addition, the guidance indicates that the OFT normally would not seek disqualification of any director of a company that has benefitted from leniency. OFT GUIDELINES, *supra* note 225, §§ 4.12 to .13, at 9. The OFT reserves the right to seek disqualification if the director was personally involved in the offense, opposed the amnesty application, or failed to cooperate with the resulting investigation. *Id.* §§ 4.14, at 9-10, 4.20, at 11.

231 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970-72 (Del. Ch. 1996).

regulatory violations.[232] From time to time, guilty pleas in antitrust cases have included similar language, but no systematic practice or plan appears to be at work.[233] The adoption of formal or informal versions of the UK statute and OFT guidelines would go a long way to filling the void left by state and federal law when corporate boards have failed to act because they failed to notice that anything was amiss until it was too late. As Judge Douglas Ginsburg and Professor Joshua Wright further note, increasing personal responsibility (rather than corporate fines) may be the only way both to increase deterrence and to minimize agency costs.[234]

Another key is the creation of a meaningful compliance program both for antitrust and other legal and regulatory risks.[235] Although, in theory, having a compliance program and then violating it could cut against a corporation or director, it does not work that way in practice. Both the U.S. Sentencing Guidelines and the OFT director disqualification guidelines provide benefits and protections to corporations that have such programs and do not impose special burdens on the officers and directors who create or supervise those good-faith compliance programs.

The ultimate questions are: What types of cartel red flags should a board ignore at its peril? When ought a board to know that something is amiss? What should be the penalties if they violate these duties? No bright-line rules emerge for the honest and well-meaning board member who has not actually participated in the violation. The case law, however, leaves much to be desired, and comparisons with foreign practice and other areas of U.S. law enforcement and regulatory experience require particularization for the competition area.

At a minimum, directors need to be aware of the per se illegality and penalties for price fixing, bid rigging, market division, customer allocation, and similar cartel activity. No officer or director can participate in such

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232 *See* 15 U.S.C. §§ 77t(e), 78u(d)(2) (2006). Courts have imposed such penalties, but not in all cases. *See* SEC v. Farrell, No. 95-CV-6133T, 1996 WL 788367, at *8 (W.D.N.Y. Nov. 6, 1996) (considering, but declining to grant, petitioner's request to permanently bar director from industry); SEC v. Florafax Int'l, Inc., Litig. Release No. 10,617, 31 SEC DOCKET 1038, 1040 (Nov. 27, 1984) (imposing three-year bar on consent without admitting liability); Plaintiffs' Motion to Enter Revised Permanent Injunction and Final Order as to Defendant Tarzenea Dixon at 3-4, Fed. Trade Comm'n v. Your Money Access, LLC, No. 2:07-CV-05147-ER (E.D. Pa. Dec. 22, 2009), 2009 WL 5177847 (permanently enjoining a defendant individual from payment processing, including Automated Clearing House ("ACH") debits and credit card transactions); Consent Decree at 6, United States v. DC Credit Servs., Inc., No. 02-5115 (C.D. Cal. July 8, 2002), *available at* http://www.ftc.gov/os/2002/07/dcsconsent.pdf (permanently enjoining defendant from debt collection and assisting in debt collection activities).

233 *See, e.g.*, *In re* Hoechst Celanese Corp., No. 9216, 1991 WL 639945, at *20 (F.T.C. Aug. 23, 1991).

234 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L. 3, 19-20 (2010).

235 Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 690-91 (2009) (describing the history and development of corporate compliance programs for antitrust violations and other legal issues).

activity, cover up such activity, or knowingly allow any person to do so on behalf of the company. Board members must create meaningful corporate-compliance programs, relying on trained professionals, to deter, prevent, and detect such activity and ensure that compliance programs are instituted and taken seriously at every level of the corporation. Training must be regular and ongoing at all levels of the corporation. Compliance audits, screening techniques, and revisions to the compliance program will be required from time to time. Whistleblowers must be encouraged and not punished. Credible complaints of wrongdoing, from any source, must be taken seriously. Prompt action by the board will be required if credible allegations of violations appear from any of these sources.

When board members show such vigilance, then they should be protected from personal liability—and the corporation from shareholder litigation—when genuinely unexpected violations are shown to have occurred. When board members do not act diligently, then officers, directors, and corporations should not be able to hide behind overly generous protections from state corporate law doctrines that were designed to address more mundane duties and harms.

D. *Governance and the Rule of Reason*

Corporate governance issues affect a host of other issues also governed by Section 1 of the Sherman Act. Any agreement that unreasonably restricts competition is unlawful under Section 1.[236] As discussed above, only a handful of agreements are per se unreasonable and are normally prosecuted criminally. The rest are judged under a broader rule of reason analysis on a case-by-case basis and are the subject of civil litigation if challenged by either the government or private parties.

Corporate governance issues arise as to both whether there is even an agreement between two economically independent economic actors and whether any such agreements unreasonably restrict competition. For example, most sports leagues are comprised of individual franchises owned by competing owners or groups.[237] These economically independent (but interdependent) teams compete both on and off the field economically, but cooperate in the creation and maintenance of the league itself. As a result, most sports leagues are subject to normal antitrust review unless protected by a statutory or judicial immunity.[238]

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236 15 U.S.C. § 1 (2006).

237 Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 541 (2006).

238 Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (holding that particular practices of the NFL were immune from antitrust laws under the labor exemption); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100-01, 103 (1984) (holding that the NCAA television rules should be

In contrast, several professional sports leagues have organized themselves as single entities owning all franchises and player rights in order to avoid even constituting a "contract, combination . . . or conspiracy" within the meaning of Section 1 of the Sherman Act.[239] The most prominent of these peculiar structures for a sports league premised on competition between teams was Major League Soccer, which switched to a more traditional ownership structure several years after its creation over concerns that the relative lack of success of the business model outweighed the minimal risks associated with being subject to Section 1 of the Sherman Act.[240] Similar issues were raised in the recent *American Needle, Inc. v. NFL*[241] Supreme Court decision, where an arrangement between NFL Properties and its licensing operations was held to be an agreement within the meaning of Section 1 since it involved decisions by economically independent actors.[242]

Corporate governance can also affect not only whether Section 1 of the Sherman Act applies, but also which test a court will apply in judging the legality of the agreement. The Supreme Court was clear in its unanimous decision in *American Needle* that some types of agreements are necessary in order to create professional sports and other joint enterprises in the first place.[243] As a result, some form of the rule of reason must be applied to such agreements and most will be held not to unreasonably restrict competition after a full examination of the pro- and anticompetitive aspects of the particular agreement.[244]

These types of corporate governance issues came to the forefront of antitrust in the Visa/MasterCard litigation brought by both the federal government and massive private treble-damage antitrust class actions.[245] While

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judged under the rule of reason); Radovich v. NFL, 352 U.S. 445, 452 (1957) (holding that the NFL enjoyed no special antitrust immunity); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208-09 (1922) (holding that professional baseball was not interstate commerce and therefore beyond the scope of the commerce clause and the Sherman Act); Fishman v. Estate of Wirtz, 807 F.2d 520, 543 (7th Cir. 1986) (holding that certain actions of the late owner of the Chicago NBA franchise violated the Sherman Act).

239 15 U.S.C. § 1.

240 *See* Chris Sagers, American Needle, Dagher, *and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, ANTITRUST SOURCE, August 2009, at 3, 5 & n.24, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug09_Sagers8_12f.authcheckdam.pdf.

241 130 S. Ct. 2201 (2010).

242 *Id.* at 2212-13 (noting that each of the thirty-two NFL teams is a "substantial, independently owned, and independently managed business").

243 *Id.* at 2214 ("Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary.").

244 Waller, *supra* note 41, at 705-06; Herbert Hovenkamp, *American Needle* and the Boundaries of the Firm 7-10 (Aug. 15, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616625.

245 LLOYD CONSTANTINE, PRICELESS: THE CASE THAT BROUGHT DOWN THE VISA/MASTERCARD BANK CARTEL 92-93 (2009).

the governance arrangements within and between Visa and Mastercard have been characterized as cartels,[246] the reality is more complex.

Both Visa and Mastercard were created as networks owned and operated by the member banks.[247] Both associations had boards of directors heavily weighted toward the largest banks issuing that particular credit card, which were often the same set of banks.[248] Each association had bylaws that permitted banks to issue both Visa and Mastercard cards, but prohibited banks from issuing any other credit cards, such as Discover or American Express.[249] The Antitrust Division challenged this governance structure as a civil rule-of-reason violation of Section 1 of the Sherman Act and sought injunctive relief.[250] The Second Circuit ultimately held Visa and Mastercard's practices unlawful under the rule of reason.[251]

In addition to complying with the terms of the judgment in the government case, Mastercard also fundamentally altered its ownership and governance structure through a subsequent initial public offering ("IPO") of stock.[252] At least part of the strategy behind the Mastercard IPO was an attempt to further reduce antitrust exposure by changing the fundamental nature of the entity from a cooperative enterprise run by competitors into a single economic actor owned by its shareholders, with the former member banks having no day-to-day control over network policies and operations.[253]

The IPO established a relatively unusual governance structure, which gave member banks more economic exposure than voting rights, "flipping the usual dual-class voting structure upside-down."[254] Despite these helpful changes, numerous other policies and pricing decisions of the Visa and Mastercard networks have also been the subject of continued private antitrust challenge.[255]

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246 *See, e.g., id.* at 11-13.

247 *Id.* at 11.

248 *See id.* at 11-13.

249 *See* United States v. Visa U.S.A., Inc., 344 F.3d 229, 235-36 (2d Cir. 2003); CONSTANTINE, *supra* note 245, at 11-13.

250 *See* CONSTANTINE, *supra* note 245, at 91.

251 *Visa*, 344 F.3d at 238, 243-44.

252 Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137, 144-45 (2007).

253 *Id.* at 150; Joshua D. Wright, *MasterCard's Single Entity Strategy*, 12 HARV. NEGOT. L. REV. 225, 231-32 (2007).

254 Fleischer, *supra* note 252, at 138. The IPO also established a charitable foundation that holds a significant block of Mastercard stock, which Professor Fleischer contends both provides takeover protection and also gives the member banks continuing influence without antitrust exposure. *Id.*

255 In addition to the government case discussed above, Visa and Mastercard have been subject to substantial private treble damage antitrust litigation relating to the interchange fees they charge merchants, requirements that merchants accept both credit and debit cards, and separate policies that required merchants not to impose their own fees for processing credit or debit transactions or providing discounts for cash purchases. The largest of these private cases settled for approximately $3 billion. *See* CONSTANTINE, *supra* note 245, at 220. For an overview of these antitrust issues, see Adam J. Levitin,

The importance of corporate governance and antitrust was also illustrated in a far less well-known case.[256] The company now known as Verisk was formed originally as Insurance Service Office, Inc. ("ISO"), a captive entity of the insurance industry and mutually owned by the leading competing firms in the industry.[257] ISO drafted standardized language for commercial general-liability insurance contracts and performed statistical and other data analyses to aid its owners, the insurers, in underwriting insurance policies.[258] As a matter of corporate governance, a board of directors comprised of eighteen insurance executives and three noninsurers managed the ISO.[259]

The antitrust concerns arose out of the insurance crisis of the 1980s, when insurance premiums skyrocketed and state and local governments found it impossible to obtain certain types of insurance that had been previously available.[260] Insurance companies and other parts of the industry insisted on more restrictive terms limiting existing coverage in different ways.[261] Prior policy terms were no longer made available.[262]

A coalition of state attorneys general and private parties sued U.S. and foreign primary insurers, reinsurers, retrocessional insurance companies, and ISO for entering into a group boycott and other unlawful agreements under the Sherman Act.[263] This litigation ultimately went to the Supreme Court, which led to the establishment of important law as to the scope of the antitrust exemption for both the insurance industry and the international applications of the Sherman Act.[264]

As a result of the antitrust litigation, ISO entered into a consent decree with state attorneys and certain private plaintiffs in 1995 and was demutualized, creating a new ownership and governance structure that was indepen-

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Payment Wars: The Merchant-Bank Struggle for Control of Payment Systems, 12 STAN. J.L. BUS. & FIN. 425, 459-62 (2007); Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY. BUS. L.J. 265, 327-31 (2005); Steven Semeraro, *Credit Card Interchange Fees: Three Decades of Antitrust Uncertainty*, 14 GEO. MASON L. REV. 941, 976-82 (2007); Steven Semeraro, *The Antitrust Economics (and Law) of Surcharging Credit Card Transactions*, 14 STAN. J.L. BUS. & FIN. 343, 352-53 (2009).

256 *See generally* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

257 *See id.* at 772; *About ISO*, ISO.COM, http://www.iso.com/About-ISO/Overview/About-ISO.html (last visited June 26, 2011). Questions of antitrust liability are complicated in this context by the existence of the McCarran-Ferguson Act, which creates an exemption for the business of insurance (but not boycotts) where regulated by state law. *See* 15 U.S.C. § 1012 (2006); ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 133 (2007).

258 *Hartford Fire*, 509 U.S. at 772.

259 *See id.* at 774.

260 *See id.* at 773-76; Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 Emory L.J. 1155, 1157-59 (1990).

261 *Hartford Fire*, 509 U.S. at 770-72.

262 *See id.* at 775-76.

263 *See id.* at 769-74.

264 *See id.* at 784.

dent from the insurers.[265] The new board would consist of eleven members with seven noninsurers, three insurers, and one management director.[266] The new independent board would elect the future noninsurer directors and the insurer directors would elect the future insurance directors.[267] Furthermore, the insurance industry was barred from group participation in the affairs of ISO for a five-year period.[268]

Later renamed Verisk, the company continued to do business with the industry on a contractual basis for both drafting standard-form contracts and undertaking data analysis and research.[269] Freed from the conflicting incentives and cumbersome governance structure, the company prospered, deepened its product offerings, entered new markets, made a number of acquisitions, and transformed itself into a far more profitable and dynamic entity. By the end of 2008, the firm had annual revenues of $894 million, with revenues for the first half of 2009 over $500 million, in comparison to $220 million at the time of the consent decree.[270] Profits increased substantially over the same period as well.[271] This in turn led to a successful IPO in October 2009,[272] showing by example that good competition policy and good corporate governance can go hand-in-hand.

E. *Mergers and Acquisitions*

In terms of the duties of the board, mergers fall somewhere closer to the need for vigilance against cartel activity and the reality of a relatively backseat role in terms of guarding against unlawful monopolization and abuse of dominance. It is the traditional province of the board to carefully review any significant acquisitions outside the ordinary course of business.[273] The board is also required to authorize any change in control of the

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265 Settlement Agreement at 10-12, 15-16, Attachment I, *In re* Ins. Antitrust Litig., MDL No. 767 (N.D. Cal. Jan. 12, 1995), *available at* http://www.abanet.org/antitrust/at-committees/at-state/pdf/settlements/us-district/9th-circuit/insurance.pdf.

266 *Id.* at 15-16, Attachment I.

267 *Id.* at Attachment I.

268 *Id.* at 10-12.

269 *See* Verisk Analytics, Inc., Registration Statement (Form S-1), at 49-52 (Aug. 12, 2008).

270 *See* Verisk Analytics, Inc., Amendment No. 7 to Registration Statement (Form S-1), at 25 (Sept. 29, 2009); Press Release, Verisk Analytics, Inc., Insurance Services Office Proposes Change to For-Profit; Part of Managed Evolution to Better Meet Customer Needs (Sept. 25, 1996), *available at* http://www.verisk.com/Press-Releases/1996/INSURANCE-SERVICES-OFFICE-PROPOSES-CHANGE-TO-FOR-PROFIT-PART-OF-MANAGED-EVOLUTION-TO-BETTER-MEET-CU.html.

271 Verisk Analytics, Inc., Registration Statement, *supra* note 269, at 22-23.

272 *See* Verisk Analytics, Inc., Amendment No. 7, *supra* note 270, at F-7; Phil Wahba, *UPDATE 2-Verisk IPO Raises $1.88 bln, Prices Above Range*, REUTERS (Oct. 6, 2009), http://www.reuters.com/article/2009/10/07/verisk-idUSN05331611200910 07.

273 FANTO, *supra* note 20, § 5:3.1, at 5-5.

corporation.[274] In addition to questions of fairness and valuation of any acquisition, the board would normally be informed of any significant legal risks, including antitrust issues, in the proposed merger or acquisition and would take those considerations into account in making its overall determination to approve or reject the transaction.[275]

The antitrust remedy for an unlawful merger normally is the prospective blocking of the merger prior to closing or a restructuring to eliminate the effect on competition.[276] Under this scenario, the planning and organization of the transaction obviously entail costs to the corporation, as do the premerger notification and investigation of the transaction. Even the abandonment of the merger in the face of an inevitable antitrust challenge or an unsuccessful court challenge, however, does not involve imprisonment, criminal or civil fines, or even treble damages under most normal circumstances. While treble damages are theoretically possible for any person who has been injured in his business or property as a result of an antitrust violation, it is difficult to define who could be so injured by a merger that was never consummated. The federal government, state attorneys general, and private parties do, however, retain the right to challenge an unlawfully anticompetitive merger after consummation, despite the attendant disruptions and costs of unscrambling the omelet.[277] But again, such litigation is rare, almost never successful by anyone other than the federal government, and the possibility of damages is remote.

Antitrust analysis for mergers and acquisitions is complicated and contingent on questions of market definition and market power, often technical theories of anticompetitive harm, the likelihood of market entry to offset potential harm, likely efficiencies, and, occasionally, whether one or both of the merger parties constitute "failing firms."[278] This is normally beyond the expertise of the board and often dependent on market facts outside the control of corporation or even its merger partner.

However, there is mounting evidence from the corporate finance community that suggests entire categories of deals are fraught with peril and more likely to destroy, rather than enhance, shareholder value.[279] A growing body of both empirical and theoretical literature has questioned the premises and results of an unconstrained market for corporate control being

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274 *See* Shail Pandit, Do Bad Boards Allow Bad Acquisitions? 1 (Feb. 10, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340514.

275 Moore Corp. v. Wallace Computer Servs., Inc., 907 F. Supp. 1545, 1558-59 (D. Del. 1995) (holding that the defendant board made reasonable investigations, including predictions about antitrust concerns, before rejecting tender offer).

276 *See* 15 U.S.C. § 18a(f) (2006).

277 *See* California v. Am. Stores Co., 495 U.S. 271, 278-85 (1990).

278 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, §§ 4-11.

279 *See, e.g.*, Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 328-29 (1986) (using the free cash flow theory to predict the outcomes of mergers and takeovers).

necessary or sufficient to solve the agency cost problems of corporate governance or create greater efficiency warranting deferential antitrust review of these same mergers.[280] Certain of this literature comes from the corporate finance and accounting fields.[281] Other relevant sources come from the growing field of behavioral economics, as applied to antitrust and finance.[282] Together, these sources and studies strongly suggest that certain categories of mergers destroy shareholder value and do little, if anything, to create meaningful efficiencies or to enhance market competition.[283] At a minimum, corporate governance and antitrust policy should be harmonized to strongly scrutinize and question transactions that work at cross-purposes to both bodies of law.

The corporate finance literature has suggested that certain identifiable categories of mergers typically destroy, rather than enhance, shareholder value.[284] Noted finance Professor Michael Jensen observed relatively early on that value-destroying mergers are more likely when "managers of firms [have] unused borrowing power and large free cash flows."[285] This is yet another illustration of the problem of agency costs and the tendency for managers to invest in below-average or even value-destroying mergers, rather than other investments and payouts that are more beneficial to shareholders.

Professor James Fanto has summarized numerous studies from the corporate finance literature to conclude that megamergers of roughly equal firms financed through stock-for-stock mechanisms are another type of transaction that is particularly suspect for its potential to destroy shareholder value.[286] While the ill-fated AOL-Time Warner merger is the poster child for this type of transaction and unfortunate outcome,[287] it is hardly alone.

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280 *See, e.g.*, James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 333-51 (2001) (proposing an enhanced standard to govern directors in a mega-merger); Sara B. Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757, 758-60 (2005).

281 *See, e.g.*, Dinara Bayazitova et al., Which Mergers Destroy Value? Only Mega-Mergers 30 (Mar. 6, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1502385.

282 *See* Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 285, 295-96 (2010); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1553-70 (2011); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Behavioral Economics: Observations Regarding Issues That Lie Ahead, Remarks at the Vienna Competition Conference 12-14 (June 9, 2010), *available at* http://www.ftc.gov/speeches/rosch/100609viennaremarks.pdf.

283 *See* Jensen, *supra* note 279, at 328.

284 *See id.* at 328-29.

285 *Id.* at 328.

286 James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333, 1347-57 (2001).

287 *See* Tim Arango, *How the AOL-Time Warner Merger Went So Wrong*, N.Y. TIMES (Jan. 11, 2010), *available at* http://www.nytimes.com/2010/01/11/business/media/11merger.html; Andrew Edgecliffe-Johnson, *Ex-Time Warner Chief Apologises for 'the Worst Deal of the Century'*, FIN. TIMES

Professor Fanto has identified numerous mergers such as Travelers-Citicorp and US West-Qwest as further examples of this trend.[288] Professor Fanto also notes that mergers dependent on poorly articulated synergies are also particularly suspect for their value-destroying tendencies.[289]

More recent studies have confirmed these dismal conclusions.[290] A 2005 study by Professors Sara B. Moeller, Frederik P. Schlingemann, and René M. Stulz found that "from 1991 to 2001 (the 1990s), acquiring firms' shareholders lost an aggregate $216 billion, or more than 50 times the $4 billion they lost from 1980 to 1990 (the 1980s), yet firms spent just 6 times as much on acquisitions in the later period."[291] Most of the studies suggesting that mergers in general may create value focus on short-term changes in stock valuations of the acquired and acquiring companies following the public announcement of the transaction.[292] These studies' results are not surprising, since the acquired corporation's stock is likely to increase in value, given that the acquisition price is frequently a premium of the current stock price. This increase is often greater than any decrease of the acquiring company's stock price, a phenomenon that has led certain finance scholars to conclude that mergers (properly controlled for other variables) are both efficiency enhancing and value enhancing.[293]

Longer term studies of the actual performance of the deal over time reach very different conclusions.[294] At a minimum, there is no significant support for the claim of broad efficiencies in the overall market for mergers.[295] Too many mergers and acquisitions end badly to take comfort in an unregulated market for corporate control as the answer to either the agency cost problem in corporate governance or the pursuit of an efficient competitive market for antitrust purpose. Nor do these studies cast any doubt on the more particularized claims of Professor Fanto and others that stock-for-

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(Jan. 5, 2010), *available at* http://www.ft.com/cms/s/0/719fb8c2-f999-11de-8085-00144feab49a.html#axzz1NOSTd52q.

288 Fanto, *supra* note 280, at 265-66; Fanto, *supra* note 286, at 1359 & n.81.

289 *See* Fanto, *supra* note 280, at 279.

290 *See, e.g.*, Bayazitova et al., *supra* note 281, at 17.

291 Moeller et al., *supra* note 280, at 758. The study further notes that "acquiring-firm shareholders gained $24 billion from 1991 through 1997 before losing $240 billion from 1998 to 2001." *Id.* at 758-59. The authors conclude that "[t]he large losses from 1998 through 2001 cannot be explained by a wealth transfer from acquiring-firm shareholders to acquired-firm shareholders." *Id.* at 759.

292 *See, e.g.*, Moeller et al., *supra* note 280, at 761-63; Bayazitova et al., *supra* note 281, at 30.

293 *See, e.g.*, Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. ECON. PERSP. 21, 22-23 (1988).

294 *See generally* Anup Agrawal et al., *The Post-Merger Performance of Acquiring Firms: A Re-Examination of an Anomaly*, 47 J. FIN. 1605 (1992).

295 *See* DAVID J. RAVENSCRAFT & F. M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY 193 (1987); Dennis C. Mueller, *The Finance Literature on Mergers: A Critical Survey*, *in* COMPETITION, MONOPOLY AND CORPORATE GOVERNANCE: ESSAYS IN HONOUR OF KEITH COWLING 161, 177-78 (Michael Waterson ed., 2003); F. M. Scherer, *A New Retrospective on Mergers*, 28 REV. INDUS. ORG. 327, 341 (2006).

stock megamergers of equals remain the category of corporate transactions most likely to produce massive wealth destruction for shareholders.

Studies by the Federal Reserve Bank and other business scholars have suggested that there may be slightly different results for financial and banking mergers versus those in the industrial sector.[296] An analysis by Federal Reserve Bank staff of over 250 prior studies suggests that mergers in the finance and banking sector increased market power, produced no meaningful cost efficiencies, produced some efficiency in payment systems, and increased some systematic risk.[297] Even in the banking sector, however, sound governance mechanisms can be helpful in preventing bank executives from pursuing value-destroying acquisitions.[298]

Corporate governance principles, as well as behavioral economics, go a long way to explaining why corporations would consistently engage in behavior that is so harmful to shareholder interest. The central insight, originating with Berle and Means, is that the incentives of officers and directors are not well-aligned with those of shareholders.[299] Many scholars have focused on the incentives and rewards for corporate decisionmakers (the officers and particularly the CEO) to explain suboptimal decisions and the continued biases toward mergers even when they are not value enhancing.[300] Studies from the 1980s through the present show a tendency of management to pursue acquisitions opposed to the interests of shareholders in order to enhance their employment security, to build empires, or simply to expand the perquisites of office.[301]

A variant of this explanation focuses on CEO autonomy, hubris, overconfidence, and narcissism as key explanations of the pursuit of mergers that will, predictably, end poorly.[302] Similarly, weak corporate governance,

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296 *See* Allen N. Berger et al., *The Consolidation of the Financial Services Industry: Causes, Consequences, and Implications for the Future*, 23 J. BANKING & FIN. 135, 145 (1999); Jason Karceski et al., *The Impact of Bank Consolidation on Commercial Borrower Welfare*, 60 J. FIN. 2043, 2044 (2005).

297 *See generally* Berger et al., *supra* note 296.

298 Jens Hagendorff et al., *Bank Governance and Acquisition Performance*, 15 CORP. GOVERNANCE: INT'L REV. 957, 961 (2007).

299 BERLE & MEANS, *supra* note 2, at 119-25; *see also* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 87 (3d ed. 2009) ("The major problems in corporation law deal with the relations between 'outside' investors, who lack power, and 'insiders,' who control the company's assets . . . .").

300 Yaniv Grinstein & Paul Hribar, *CEO Compensation and Incentives: Evidence from M&A Bonuses*, 73 J. FIN. ECON. 119, 142 (2004).

301 Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 BELL J. ECON. 605, 606-09 (1981); Randall Morck et al., *Do Managerial Objectives Drive Bad Acquisitions?*, 45 J. FIN. 31, 31-34 (1990); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 199-200 (1986); Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals"*, 20 J.L. ECON. & ORG. 60, 63-65 (2004).

302 Fanto, *supra* note 280, at 257; Mathew L. A. Hayward & Donald C. Hambrick, *Explaining the Premium Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103, 105-06 (1997); Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market's*

lack of information, and the continued misaligned interests of directors beholden to corporate insiders suggest that a board of directors will not typically be in a position to stop these suboptimal acquisition plans once embarked upon by a powerful CEO.[303] Behavioral economics also provides additional insight into why even well-meaning CEOs, as the key players in this process, may behave in such a fashion.

Behavioral economics documents, through empirical research, how actual human beings behave "quasi-rationally," rather than as the purely rational, profit-maximizing entities assumed in most traditional law-and-economics analyses.[304] Instead of the purely rational profit-maximizing individual or organization as posited by the rational-choice theorists, behavioral economics seeks to show that decisionmakers tend to act with bounded rationality, bounded willpower, and bounded self-interest.[305]

Reaction, 89 J. FIN. ECON. 20, 21 (2008); Scherer, *supra* note 295, at 337 ("[W]e in the US have created a sizeable professional establishment that sees as a significant justification for its existence the making of mergers."); Nihat Aktas et al., CEO Narcissism and the Takeover Process: From Private Initiation to Deal Completion 4-5 (Nov. 19, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1638972; Bayazitova et al., *supra* note 281, at 30. For a description and critique of the trends toward CEO primacy, autonomy, and hubris, see generally Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54 ST. LOUIS U. L.J. 1 (2009); Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 334 (2007); Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345 (2007).

303 Pandit, *supra* note 274, at 8-12.

304 *See, e.g.*, S. Mullainathan & R. H. Thaler, *Behavioral Economics*, *in* 20 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 1094, 1094 (Neil J. Smelser & Paul B. Baltes eds., 2001); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 18 (Daniel Kahneman et al. eds., 1982); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-78 (1998); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1343-44 (1990); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1469 (2003); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1055-56 (2000); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, SCI., Jan. 30, 1981, at 453, 453. For applications of behavioral economics to legal and regulatory policies aimed at a general audience, see generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books 2009) (2008); RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992). For examples of behavioral economics as applied to antitrust, see generally Leslie, *supra* note 175; Reeves & Stucke, *supra* note 282; Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002); Rosch, *supra* note 282. Not all commentators view behavioral economics as a viable addition to antitrust analysis. *See, e.g.*, Gregory J. Werden et al., *Behavioral Antitrust and Merger Control* (Vanderbilt Law & Econ. Research Paper Series, Paper No. 10-14, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612282.

305 Stucke, *supra* note 304, at 527.

This behavioral research documents how both consumers and business decisionmakers are prone to predictable biases and use known heuristics and other shortcuts that produce suboptimal decisions in the real world.[306] Some of the well-known biases and heuristics relevant to the decision to enter into mergers and acquisitions that frequently result in value-destroying transactions include: myopia, loss aversion, endowment effects, status quo bias, extremeness aversion, overoptimism, hindsight bias, anchoring heuristics, availability heuristics, framing effects, representative bias, and saliency effects.[307] One does not have to stretch to find numerous acquisitions driven by corporate decisionmakers suffering from overoptimism combined with numerous other all-too-human tendencies to produce poorly conceived or overpriced acquisitions dependent on future synergies and efficiencies that were unachievable in the real world. Professor Richard Thaler has described these types of outcomes more generally as the winner's curse.[308]

Professor Fanto surveyed the securities filings for the ten largest mergers and acquisitions for 1998, 1999, and 2000 and concluded that most of these biases are present in the statements that managers and board members relied upon, were legally bound by, and/or used to persuade shareholders to approve the very largest transactions of those years.[309] Most of these transactions were among the most significant value-destroying deals of their eras.[310]

The Moeller, Schlingemann and Stulz 2005 study notes that most of the largest value-destroying acquisitions constituted the last in a series of acquisitions by the acquiring firm.[311] This further suggests that the behavioral-economics factors identified by Fanto and others, such as overconfidence, hindsight bias, and framing effects, have played an important role in the destruction of shareholder wealth.

These common human tendencies, combined with broad CEO autonomy and hubris, produce incentives to pursue certain mergers and acquisitions that benefit no one other than senior management. At the same time, a passive board of directors, generally lacking in information and resources to challenge senior management, creates incentives to approve transactions that benefit few other than senior management.

Behavioral economics also provides additional insights into the critical issue of entry in the market where the merger has occurred. Once the gov-

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306 *See, e.g.*, Reeves & Stucke, *supra* note 282, at 1532-43.

307 *See* Fanto, *supra* note 286, at 1342-46; Stucke, *supra* note 304, at 527-28.

308 THALER, *supra* note 304; *see also* Roll, *supra* note 301, at 200 (stating that acquiring corporations often fail to account for the "winner's curse" when making takeover bids).

309 *See generally* Fanto, *supra* note 286.

310 *Id.* at 1374-80; *see also* Steven Lipin & Nikhil Deogun, *Deals & Dealmakers: Big Mergers of '90s Prove Disappointing to Shareholders*, WALL ST. J., Oct. 30, 2000, at C1.

311 Moeller et al., *supra* note 280, at 781.

ernment (or other plaintiff) has established that the merger is likely to produce anticompetitive effects,[312] they have established a prima facie case that the transaction has violated Section 7 of the Clayton Act. The defendants may then rebut the plaintiff's prima facie case by showing that the merger nonetheless is unlikely to substantially harm competition.[313]

The most typical type of evidence shows that entry barriers to the affected market are so low that any postmerger price increase would be ineffective as a result of inducing timely, effective entry that would be profitable at even premerger prices.[314] Professor Avishalom Tor has discussed how the insights of behavioral economics demonstrate that postmerger entry may be more prevalent than normally assumed, but it usually is less effective in disciplining the postmerger exercise of market power than normally believed.[315] Conversely, Professor Maurice Stucke provides numerous examples where even admittedly moderate entry barriers are insufficient to prevent the exercise of market power.[316]

A robust market for corporate control goes hand-in-hand with a vigorous continued antitrust presence in securities market. If anything, the role for antitrust in takeover markets has been minimized in recent years to the detriment of both corporate governance and competition policy. Accepting the need for a robust market for corporate control suggests that a continued antitrust presence, which has been minimized in recent times, is also needed. If shareholders are going to receive maximum value, rules that forbid collusive bidding for firms and limit the termination of auctions for firms once in play are required.[317] Accepting that a robust market for corporate control is needed also suggests limiting the growth of antitrust immunities in the securities law field. It also suggests limiting ill-advised and overly deferential reliance by the courts on securities regulators to maintain

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312 United States v. Phila. Nat'l Bank, 374 U.S. 321, 362-63 (1963); Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1071-72 (D.D.C. 1997).

313 United States v. Gen. Dynamics Corp., 415 U.S. 486, 506-07 (1974); 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, §§ 9-11, at 27-32.

314 *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 984 (D.C. Cir. 1990); United States v. Waste Mgmt., Inc., 743 F.2d 976, 978-79 (2d Cir. 1984); 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, § 9, at 27-29. Proof by the defendants of substantial merger-specific efficiencies that offset any anticompetitive harm will also rebut a prima facie violation of Section 7. Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001); 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, § 10, at 29-31.

315 Tor, *supra* note 304, at 488-92. Brand management and marketing literature further suggests that the repositioning of existing brands offered as an alternative to entry may be virtually impossible in the real world. *See generally* Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1480 (2011).

316 Stucke, *supra* note 304, at 563-72.

317 *See* Edward B. Rock, *Antitrust and the Market for Corporate Control*, 77 CALIF. L. REV. 1365, 1381 (1989) (explaining how bargaining between bidders is susceptible to collusion).

competition in order to maximize shareholder value in the takeover process.[318]

If management cannot document convincingly why a particular newly contemplated transaction of the type that typically has harmed shareholders in the past is different than similar previous transactions, then the board should have the duty to reject the deal as against the interests of shareholders. If it fails to do so, the board should be held liable, not because the transaction turned out badly, but because the board ignored the red flags of the past and failed in its duty to adequately probe the new transaction in advance.[319] Similarly, if the principal reason that a transaction may enhance shareholder value is the likely increased exercise of market power, rather than dubious efficiency scenarios that typically have not panned out in the past, then the board must similarly do more before the transaction meets with their approval.

Broader changes could do much to better align corporate boards' incentives to enter into mergers and acquisitions that both increase shareholder value and do not violate the antitrust laws. Such changes could also cause boards to refrain from proceeding with transactions that violate either or both legal regimes. Some commentators have proposed addressing this issue by amending the Clayton Act itself to shift the burden of proof and persuasion to the parties to a transaction, requiring them to demonstrate the procompetitive and efficiency-enhancing aspects of the deal in order to win approval.[320] While this would certainly do the trick, such a wide-ranging proposal raises serious issues beyond the unlikely chances of its adoption by Congress. The most noticeable is that it uses antitrust law as a club to indirectly achieve governance goals, but the real problem is that the deal is value destroying for shareholders, not that it harms competition for the public.

More nuanced proposals regarding corporate governance have included increased disclosure of efficiency claims to the SEC and shareholders when such claims are the basis for proceeding with the kind of stock-for-stock megadeals that have proved so destructive of shareholder value in the past.[321] To avoid pro forma disclosure that does nothing to avoid or to deter such transactions, post-transaction reporting should be required to

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318 Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 270-71, 285 (2007); Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC, 588 F.3d 128, 131 (2d Cir. 2009).

319 Liability for failing to inform others of red flags has been found in other contexts. *See, e.g.*, Grant Thornton, LLP v. Fed. Deposit Ins. Corp., 694 F. Supp. 2d 506, 521-22 (S.D. W. Va. 2010) (holding that counsel had a duty to inform its client bank's board of directors of red flags associated with a board decision).

320 *See* AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 155, 169 (Albert A. Foer ed., 2008).

321 *E.g.*, Stucke, *supra* note 304, at 582.

document where efficiencies and synergies have been realized and where such benefits have failed to materialize.[322]

The increased scrutiny for dubious, value-destroying deals should be applied to both antitrust and corporate governance. Antitrust agencies and courts should exercise increased skepticism of such transactions. This scrutiny should be in addition to increased duties for corporate boards and disclosure to the securities agencies. Antitrust and securities agencies should work hand-in-hand so that parties to mergers and acquisitions are providing consistent, truthful, and credible information to both sets of agencies just as the antitrust agencies currently do with their U.S. sectoral regulators and their foreign counterparts. If efficiency claims are weak, then parties have a more serious burden under corporate governance law to explain why the transaction enhances shareholder value. And if the efficiency claims are weak, but the parties are claiming that the transaction nonetheless enhances shareholder value, then they have some antitrust explaining to do. Parties cannot have it both ways, or do even worse by proceeding with transactions that fly in the face of the values promoted by both fields of law and potentially harm both shareholders and consumers in the process.

F. *Abuse of Dominance*

Liability for abuse of dominance and for monopolization is much more nuanced, almost never condemned without a highly intensive inquiry into facts and economic effects, and less subject to international consensus as to theories of liability and remedies.[323] Such cases tend to be few and far between, but they have much higher stakes, as illustrated by the Microsoft litigation in the United States,[324] in the European Union,[325] and elsewhere around the world.[326] In almost every jurisdiction, such investigations and cases begin with an examination of whether the firm in question has market power, which is frequently dependent on difficult questions of market defi-

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322 Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 222-27 (1992) (proposing conditional clearance of mergers subject to post-closing verification of efficiencies).

323 *See, e.g.*, Rudolph Peritz, *Re-Thinking* U.S. v. Microsoft *in Light of the E.C. Case* 4 (N.Y. Law Sch. Pub. Law & Legal Theory, Paper No. 04/05-4, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=571803 (stating that the monopolization claim in *Microsoft* required a "fact-intensive inquiry" over a finding of "*per se* illegality" notwithstanding "clear anti-competitive implications").

324 *See* United States v. Microsoft Corp., 253 F.3d 34, 48 (D.C. Cir. 2001).

325 Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, ¶ 46 (imposing a fine of over €497 million).

326 *Cf.* Abbott B. Lipsky, Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 ANTITRUST L.J. 965, 983 & n.51 (2009) (describing proceedings against Microsoft throughout the world).

nition.[327] If regulators find significant market power, then the case typically turns on an analysis of very specific corporate behavior involving pricing, contracting practices, innovation programs, product design, and other questions of corporate strategy.[328] Standards for unlawful monopolization or abuse of a dominant position differ greatly between jurisdictions.[329]

In the United States, liability increasingly turns on whether the anticompetitive harm outweighs the procompetitive benefits and efficiencies generated by the very same conduct at issue. In modern times, penalties generally are behavioral, rather than structural.[330] Criminal enforcement is theoretically possible, but has not been used since the late 1960s and appears to have been abandoned as a realistic option.[331]

There are very few cases that define what should constitute the appropriate red flags in connection with potential liability for monopolization or abuse of dominance. One of the few recent examples arose not surprisingly for Intel Corporation, which recently faced a series of competition law investigations and cases throughout the world.[332]

A shareholder derivative action in the United States alleged that the board's failure to prevent Intel from unlawfully monopolizing the market for computer microprocessors resulted in a breach of the board's fiduciary duty.[333] The board of directors ultimately succeeded because the plaintiffs failed to plead particular facts demonstrating that the board had actual or constructive knowledge of the wrongdoing such that a failure to respond to the alleged red flags resulted in a breach of their fiduciary duties to properly monitor corporate compliance.[334]

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327 ICN Unilateral Conduct Working Group, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws: Recommended Practices* 1-4 (2011), *available at* http://internationalcompetitionnetwork.org/uploads/library/doc317.pdf (listing and describing criteria for determining whether a firm has market power).

328 *See, e.g.*, LePage's Inc. v. 3M, 324 F.3d 141, 154-59 (3d Cir. 2003) (examining corporate practices, including above-cost pricing, rebates, and exclusive dealing contracts after determining that the accused firm had significant market power).

329 Michal S. Gal et al., *Introduction: Expansion and Contraction in Monopolization Law*, 76 ANTITRUST L.J. 653, 656 (2010).

330 Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 18 (2009).

331 The last known criminal case under Section 2 appears to be from 1967. *See* Raymond P. Niro & J. William Wigert, Jr., *Patents, Fraud and the Antitrust Laws*, 37 GEO. WASH. L. REV. 168, 176-79 (1968) (describing the DOJ's criminal proceedings against the Union Camp Corporation, its president and patent counsel, and the Bemis Bag Company under Sections 1 and 2 of the Sherman Act).

332 *See* Complaint at 17, *In re* Intel Corp., No. 9341 (F.T.C. Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf; Case COMP/C-3/37.990, *In re* Intel, ¶ 43-44 (May 13, 2009) (imposing a fine of over one billion Euros for Intel's abuse of its dominant position in the European Union).

333 *In re* Intel Corp. Derivative Litig., 621 F. Supp. 2d 165, 169 (D. Del. 2009).

334 *Id.* at 174.

The court in *In re Intel Corp. Derivative Litigation*[335] noted that the plaintiffs did "little more than . . . catalog the ongoing investigations into Intel's alleged wrongdoing" as an attempt to show that, by virtue of the existence of numerous red flags, the directors faced "substantial likelihood" of personal liability.[336] In other instances, the court found that some of the more specific allegations of red flags at the time of the decision were premature, and thus not grounds for liability.[337] This included an investigation by the European Commission that the court characterized as preliminary.[338]

In contrast, the court noted that the Japan Fair Trade Commission's ("JFTC") investigation and report on the anticompetitive activities of an Intel subsidiary in Japan could constitute a red flag.[339] However, the fact that the board complied with the JFTC report showed that it had, in fact, responded to the red flag.[340] In addition, the plaintiff pointed to investigations by the Korean Fair Trade Commission and the New York Attorney General as constituting sufficient red flags.[341] However, the court held that the plaintiffs had failed to adequately demonstrate that the individual directors either knew or should have known about the illegal anticompetitive activities.[342]

Intel thus suggests that there is no reason to think that a board can micromanage each decision of firms with market power, although the need for monitoring systems seems appropriate once market power is achieved or becomes a serious risk. However, there are also areas of legitimate concern for dominant firms (like any other corporate entity) where board involvement is more traditional. These can include acquisition of fringe and potential rivals, patterns of deception, and broadly exclusionary conduct at the strategic (rather than operational) level. In short, these are some areas where the business judgment rule does, and ought to, have some bite in

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335 621 F. Supp. 2d 165 (D. Del. 2009).

336 *Id.* at 175 (second internal quotation marks omitted).

337 *Id.* at 175-76.

338 *Id.* at 175.

339 *Id.* at 176.

340 *Id.*

341 *In re Intel Corp.*, 621 F. Supp. 2d at 175-76.

342 *Id.* at 174. Since the court's decision, the EU has fined Intel in excess of one billion Euros, Press Release, European Comm'n, Antitrust: Commission Imposes Fine of €1.06 bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices (May 13, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745, and the FTC has brought and settled a case against Intel for violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006), which prohibits "unfair methods of competition." Press Release, Fed. Trade Comm'n, FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets (Dec. 16, 2009), *available at* http://www.ftc.gov/opa/2009/12/intel.shtm; Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), *available at* http://www.ftc.gov/opa/2010/08/intel.shtm.

terms of director involvement and ultimate liability.[343] For example, the United Kingdom's statute and guidelines on director disqualification for competition violations state that the competition authority will take into account any genuine uncertainty over the legality of the conduct.[344] Commentators expressed the particular hope that this would be the case for abuse-of-dominance cases, where "the boundaries between competing 'on the merits' and illegal conduct can be particularly opaque."[345]

CONCLUSION

Better understanding the ties between corporate governance and competition law should lead to important legal and policy changes. Looking at the fields for their intersections, rather than their differences, opens up potential avenues for change on both sides of the existing fence.

For directors, clear rules are better than complicated, highly fact-specific inquiries where after-the-fact second guessing may expose the directors to potential liability. This is the basis for the business judgment rule in the first place. While a director obviously prefers no liability to the possibility of some liability, at the same time a clear "no" is often better than a "maybe" when viewed ex ante rather than ex post. While the existing statutory rules barring interlocking directorates between competing corporations are by no means perfect, they are workable and clear rules that most businesses have little difficulty complying with, even though the statutory provision undoubtedly produces both false positives and false negatives from time to time.

Sometimes highly fact-specific inquiries may be unavoidable. Some clear-cut rules about when a board of directors must take action to prevent or to report cartel activity do exist.[346] However, they are few and far between and are mostly limited to situations where it is already too late from the point of view of either good governance or good competition policy. Better incentives can be created for both good governance and effective compliance policies through individual director liability when reasonable steps are not taken to implement and monitor compliance programs that have a reasonable likelihood of deterring, detecting, and reporting hard-core activity. As the business judgment rule teaches, courts should defer to rea-

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343 In the modern era, it is hard to envision the active participation of the board of directors in the monopolization of an industry as appeared to be the case throughout the gilded era of the late 19th century. *See generally* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998) (detailing Rockefeller's monopolization of the oil refining and transportation industries).

344 OFT GUIDELINES, *supra* note 225, § 4.26, at 13.

345 John Ratliff et al., *Let the Punishment Fit the Crime? UK's OFT Publishes Revised Guidance on Disqualifying Directors for Competition Law Infringements*, WILMERHALE (July 15, 2010), http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9563.

346 *See supra* Part IV.C.

sonable judgments, but a board's failure to exercise judgment is not worthy of deference, and director liability may be appropriate when the failure to act has harmed the corporation and its shareholders. Suboptimal governance and decisionmaking can be further discouraged through statutory, judicial, or regulatory director disqualification where board members have been actively complicit or have manifestly fallen down on the job. Even in the fuzzier area of rule of reason liability, good governance structures can be designed to minimize both conflicting incentives and anticompetitive consequences.

In the merger area, the corporate finance literature is convincing that megamergers on a stock-for-stock basis between roughly equal competitors are highly likely to destroy shareholder value.[347] There are a number of resulting helpful steps in both corporate governance law as well as antitrust that can be taken. On the corporate governance side, the tendency of stock-for-stock megamergers among equals to be value destroying argues in favor of enhanced board duties in reviewing and approving such deals.[348] This trend further suggests the need for enhanced securities disclosure to shareholders and regulators for these categories of value-destroying deals and for situations where parties to the transaction seek to rely on efficiency claims.[349] Both securities and competition regulators must be more vigilant in scrutinizing such facile claims, which rarely materialize in the real world. Finally, the courts should apply an intermediate standard of review in place of the current formulation of the business judgment rule, which amounts to near-blind deference to board approval.[350]

On the antitrust side, increased attention is needed as to what types of deals prove to be value destroying and why they do not succeed. Additionally, there needs to be a better understanding of why predicted synergies and efficiencies often are not achieved. More importantly, the field needs a better understanding of why certain deals may be value enhancing. If there are not substantial synergies and efficiency gains, when is increased market power a more likely explanation?

To be clear, mergers are not unlawful under the antitrust laws because they are stupid or they mean well but turn out badly. Mergers only violate Section 7 of the Clayton Act when they have the tendency to substantially harm competition.[351] The present situation, however, is the worst of all possible worlds, because certain types of mergers do nothing for shareholders or for competition. Even worse, both bodies of law, which purport to regulate such transactions, have inadequate tools to help shareholders or competition in the market as a whole.

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347 *See supra* Part IV.E.

348 Fanto, *supra* note 280, at 251-58.

349 Reeves & Stucke, *supra* note 282, at 1575; Stucke, *supra* note 304, at 582.

350 *See* Fanto, *supra* note 280, at 263.

351 15 U.S.C. § 18 (2006).

Although it is not phrased this way, there is at least a soft presumption in both corporate governance and antitrust that most mergers and acquisitions are efficient and should be regulated primarily by market forces. The Horizontal Merger Guidelines come closest to this in stating that the "primary benefit of mergers to the economy is their potential to generate significant efficiencies."[352] The growing empirical and theoretical evidence from the economic, finance, and accounting worlds as well as behavioral economics suggest this is not inevitably so.[353]

The key question, ex ante, is: which types of mergers are likely to generate which types of efficiencies with what degree of probability and what degree of magnitude? To the extent that the economic, financial, and corporate governance literature is persuasive that there are categories of mergers that are sufficiently value destroying and that the ex ante efficiency claims are strongly suspect, then the agencies and the courts should be particularly suspicious of such claims. As a result, any legal presumptions should run against such claims.

These collective blind spots cannot be remedied without both communities investing in increased attention to each other's literature, language, and expertise. For the antitrust community, this means greater investment in business theory as a supplement to the already substantial economic expertise brought to bear on merger analysis. For the corporate governance community, this means increased attention to the role of competitive and anticompetitive outcomes in formulating duties and responsibilities for corporate actors. Combining the two fields suggests new possibilities of collaborative research and teaching across formerly separate law school subjects and between law school and business school faculty.

Antitrust lawyers and policymakers can also play a meaningful role in corporate governance as competition advocates. It is common practice for competition agencies, bar associations, antitrust committees, specialty antitrust associations, practitioners, and academics to play an active role in competition advocacy more generally.[354] Potential improvements include formulation of antitrust guidelines by federal, state, and foreign agencies, and/or formulation of policies and rules by sectoral regulators at the federal, state, and local levels. Such competition advocacy must be extended to related issues in corporate governance when government and private groups are formulating policies that seek to ameliorate (or worsen) the conflicting incentives and agency costs that lie at the heart of corporate governance.

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352 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 49, § 10, at 29-31.

353 F. M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE W. RES. L. REV. 5, 16-18 (2001).

354 *See generally* James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005); D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 135-64 (2009); Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951 (2008).

Only in such a world of deep interaction and continued interdisciplinary learning will both shareholders and consumers benefit from efficient and shareholder-oriented public corporations operating in a more consumer-friendly and competitive economy.