MERGER ANTITRUST LAW

Unit 1: Introduction to Merger Antitrust Law: TransDigm/Takata

Class 1

Professor Dale Collins
Georgetown University Law Center
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TransDigm/Takata

TransDigm Announces the Acquisition of Takata Corporation's Aerospace Business

CLEVELAND, Feb. 22, 2017 /PRNewswire/ -- TransDigm Group Incorporated (NYSE: TDG) announced today that it has acquired the stock of SCHROTH Safety Products GmbH and certain aviation and defense assets and liabilities from subsidiaries ("Business") of Takata Corporation (TYO:7312) for approximately $90 million in cash.

The primary businesses purchased are that of SCHROTH Safety Products GmbH and Takata Protection Systems Inc., both of which will be known going forward as SCHROTH, which design and manufacture proprietary, highly engineered, advanced safety systems for aviation, racing and military ground vehicles throughout the world. Nearly all of the revenues are from proprietary products. Aftermarket content accounts for approximately 40% of the revenues, while aerospace and defense accounts for approximately 80% of the revenues.

SCHROTH, which accounts for approximately 90% of the revenues, specializes in specialty technical restraints, passenger belts covering Airbus and Boeing platforms, structural monument airbags for Airbus and Boeing platforms including the Boeing 787, and cockpit security components for the Airbus A350 and A380 platforms. SCHROTH also provides restraint systems into business jet, general aviation, helicopter, military and racing markets.

Located in Arnsberg, Germany and Pompano Beach and Orlando, Florida, the Business employs approximately 260 people and is estimated to have revenues of approximately $43 million for the fiscal year ending March 31, 2017.

W. Nicholas Howley, Chairman and CEO of TransDigm, stated, "SCHROTH has built a solid reputation based on technical expertise and product excellence. The company has significant and growing aftermarket on attractive high use platforms. SCHROTH fits well with our consistent product and acquisition strategy. As with all TransDigm acquisitions, we see opportunities for significant value creation."

About TransDigm

TransDigm Group, through its wholly-owned subsidiaries, is a leading global designer, producer and supplier of highly engineered aircraft components for use on nearly all commercial and military aircraft in service today. Major product offerings, substantially all of which are ultimately provided to end-users in the aerospace industry, include mechanical/electro-mechanical actuators and controls, ignition systems and engine technology, specialized pumps and valves, power conditioning devices, specialized AC/DC electric motors and generators, NiCad batteries and chargers, engineered latching and locking devices, rods and locking devices, engineered connectors and elastomers, databus and power controls, cockpit security components and systems, specialized cockpit displays, aircraft audio systems, specialized lavatory components, seatbelts and safety restraints, engineered interior surfaces and related components, lighting and control technology, military personnel parachutes, high performance hoists, winches and lifting devices, and cargo loading, handling and delivery systems.

Forward-Looking Statements

Statements in this press release that are not historical facts are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995.Words such as "believe," "may," "will," "should," "expect," "intend," "plan," "predict," "anticipate," "estimate," or "continue" and other words and terms of similar meaning may identify forward-looking statements.

All forward-looking statements involve risks and uncertainties which could affect TransDigm's actual results and could cause its actual results to differ materially from those expressed or implied in any forward-looking statements made by, or on behalf of, TransDigm. These risks and uncertainties include but are not limited to failure to complete or successfully integrate the acquisition; that the acquired business does not perform in accordance with our expectations; and other factors. Further information regarding important factors that could cause actual results to differ materially from projected results can be found in TransDigm's Annual Report on Form 10-K and other reports that TransDigm or its subsidiaries have filed with the Securities and Exchange Commission. Except as required by law, TransDigm undertakes no obligation to revise or update the forward-looking statements contained in this press release.

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To view the original version on PR Newswire, visit:http://www.prnewswire.com/news-releases/transdigm-announces-the-acquisition-of-takata-corporations-aerospace-business-300411547.html

SOURCE TransDigm Group Incorporated

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 8700
Washington, D.C. 20530,

Plaintiff,

v.

TRANSDIGM GROUP INCORPORATED
1301 East 9th Street, Suite 3000
Cleveland, Ohio 44114,

Defendant.

Civil Action No.:

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action for equitable relief against defendant TransDigm Group Incorporated ("TransDigm") to remedy the harm to competition caused by TransDigm's acquisition of SCHROTH Safety Products GmbH and substantially all the assets of Takata Protection Systems, Inc. from Takata Corporation ("Takata"). The United States alleges as follows:

I. NATURE OF THE ACTION

1. In February 2017, TransDigm acquired SCHROTH Safety Products GmbH and substantially all the assets of Takata Protection Systems, Inc. (collectively, "SCHROTH") from Takata. TransDigm's AmSafe, Inc. ("AmSafe") subsidiary is the world's dominant supplier of restraint systems used on commercial airplanes. Prior to the acquisition, SCHROTH was

AmSafe's closest competitor and, indeed, its only meaningful competitor for certain types of restraint systems.

2. Restraint systems are critical safety components on every commercial airplane seat that save lives and reduce injuries in the event of turbulence, collision, or impact. There are a wide range of restraint systems used on commercial airplanes, including traditional two-point lapbelts, three-point shoulder belts, technical restraints, and more advanced "inflatable" restraint systems such as airbags. The airplane type, seat type, and seating configuration dictate the proper restraint type for each airplane seat.

3. Prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe. Until 2012, AmSafe, the long-standing industry leader, was nearly unrivaled in the markets for restraint systems used on commercial airplanes. Certification requirements and other entry barriers reinforced AmSafe's position as the dominant supplier to the industry. However, beginning in 2012, after being acquired by Takata, SCHROTH embarked on an ambitious plan to capture market share from AmSafe by competing with AmSafe on price and heavily investing in research and development of new restraint technologies. Over the next five years, the increasing competition between AmSafe and SCHROTH resulted in lower prices for restraint system products for commercial airplanes and the development of innovative new restraint technologies such as inflatable restraints. TransDigm's acquisition of SCHROTH removed SCHROTH as an independent competitor and eliminated the myriad benefits that customers had begun to realize from competition in this industry.

4. Accordingly, TransDigm's acquisition of SCHROTH is likely to substantially lessen competition in the development, manufacture, and sale of restraint systems used on

commercial airplanes worldwide, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. DEFENDANT AND THE TRANSACTION

5. TransDigm is a Delaware corporation headquartered in Cleveland, Ohio. TransDigm operates as a holding company and owns over 100 subsidiaries. Through its subsidiaries, TransDigm is a leading global designer, manufacturer, and supplier of highly engineered airplane components. TransDigm's fiscal year 2016 revenues were approximately $3.1 billion. TransDigm is the ultimate parent company of AmSafe, a Delaware corporation headquartered in Phoenix, Arizona. AmSafe develops, manufactures, and sells a wide range of restraint systems used on commercial airplanes. AmSafe had global revenues of approximately $198 million in fiscal year 2016.

6. Takata is a global automotive and aerospace parts manufacturer based in Japan. Takata was the ultimate parent entity of SCHROTH Safety Products GmbH, a German limited liability corporation base in Arnsberg, Germany, and Takata Protection Systems, Inc., a Colorado corporation based in Pompano Beach, Florida. SCHROTH Safety Products and Takata Protection Systems collectively had approximately $37 million in revenue in fiscal year 2016.

7. On February 22, 2017, TransDigm completed its acquisition of SCHROTH Safety Products and substantially all the assets of Takata Protection Systems from Takata for approximately $90 million. Because of the way the transaction was structured, it was not required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §

18a. After the acquisition was completed, the Takata Protection Systems assets were incorporated as SCHROTH Safety Products LLC.

III. JURISDICTION AND VENUE

8. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain TransDigm from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

9. TransDigm sells restraint systems used on commercial airplanes throughout the United States. It is engaged in the regular, continuous, and substantial flow of interstate commerce, and its activities in the development, manufacture, and sale of restraint systems used on commercial airplanes have had a substantial effect upon interstate commerce. The Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

10. TransDigm has consented to venue and personal jurisdiction in this District. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

IV. TRADE AND COMMERCE

A. Industry Overview

11. Commercial airplanes are fixed-wing aircraft used for scheduled passenger transport. Restraint systems used on commercial airplanes are critical safety devices that secure the occupant of a seat to prevent injury in the event of turbulence, collision, and impact.

12. Restraint systems used in the economy and premium cabins in commercial airplanes vary based on the airplane type, seat type (*e.g.*, economy, premium, crew, "lie-flat," etc.), and seating configuration of the airplane.

13. Restraint systems used on commercial airplanes come in two primary forms: (i) conventional belt systems with two or more belts or “points” that are connected to a central buckle; or (ii) inflatable systems with one or more airbags that may be installed in combination with a conventional belt system. The airbags can be installed either within the belt itself (called an “inflatable lapbelt”) or in a structural monument within the airplane (called a “structural mounted airbag”).

14. Economy cabin seats typically require two-point lapbelts, though other restraint systems such as inflatable restraint systems may be necessary in limited circumstances to comply with Federal Aviation Administration (“FAA”) safety requirements.

15. Premium cabin seats come in many different seating configurations, and passenger restraint systems used in premium cabin seats vary as well. Premium cabin restraint systems include two-point lapbelts, three-point shoulder belts, and inflatable restraint systems. While two-point lapbelts and three-point shoulder belts are used widely throughout the premium cabins, the use of inflatable restraint systems is more common in first-class and other ultra-premium cabins.

16. Flight crew seats on commercial airplanes require special restraint systems called “technical” restraints. Technical restraints are multipoint restraints with four or more belts that provide additional protection to the flight crew.

17. Restraint systems typically are purchased by commercial airlines and airplane seat manufacturers. Because certification of a restraint system is expensive and time-consuming, once a restraint system is certified for a particular seat and airplane type it is rarely substituted in the aftermarket for a different restraint system or supplier. Accordingly, competition between suppliers of restraint systems generally only occurs when a customer is designing a new seat or

purchasing a new seat design, either when retrofitting existing airplanes or purchasing new airplanes.

B. Industry Regulation and Certification Requirements

18. All commercial airplanes must contain FAA-certified restraint systems on every seat installed on the airplane. The process for obtaining FAA certification is complex and involves several distinct stages.

19. Before selling a restraint system, a supplier of airplane restraint systems must first obtain a technical standard order authorization ("TSOA"). A TSOA certifies that the supplier's restraint system meets the minimum design requirements of the codified FAA Technical Standard Order ("TSO") for that object, and that the manufacturer has a quality system necessary to produce the object in conformance with the TSO. To obtain a TSOA for a restraint system, a supplier must test its restraint system for durability and other characteristics. Once a TSOA is issued for the restraint system, the supplier must then obtain a TSOA for the entire seat system—*i.e.*, the seat and belt combination. To obtain a TSOA for the seat system, the seat system must successfully complete dynamic crash testing to demonstrate that the seat system meets the FAA required g-force and head-injury-criteria safety requirements. Dynamic crash-testing is expensive and can be cost prohibitive to potential suppliers. Once a supplier obtains a TSOA for the seat system, it must then obtain a supplemental type certificate, which certifies that the seat system meets the applicable airworthiness requirements for the particular airplane type on which it is to be installed.

20. Certain restraint system types such as inflatable restraint systems do not have a codified TSO and must instead satisfy a "special condition" from the FAA prior to manufacture and installation of the restraint system. In those circumstances, the FAA must first determine

and then publish the terms of the special condition. Once the special condition is published, the supplier must then satisfy the terms of the special condition to install the object on an airplane.

V. RELEVANT MARKETS

21. AmSafe and SCHROTH compete across the full range of restraint systems used on commercial airplanes. However, restraint systems are designed for specific airplane configurations and seat types and are therefore not interchangeable or substitutable for different restraint systems. FAA regulations dictate which restraint system may be used for a particular airplane configuration and seat type. In the event of a small but significant price increase for a given type of restraint system, commercial customers would not substitute another restraint system in sufficient numbers so as to render the price increase unprofitable. Thus, each restraint system described below is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

22. The relevant geographic market for restraint systems used on commercial airplanes is worldwide. Restraint systems are marketed internationally and may be sourced economically from suppliers globally.

A. Relevant Market 1: Two-Point Lapbelts Used on Commercial Airplanes

23. A two-point lapbelt is a restraint harness that connects two fixed belts to a single buckle and restrains an occupant at his or her waist. Two-point lapbelts are used on nearly every seat in the economy cabins of commercial airplanes; they also are regularly used in the premium cabins. Commercial airline companies prefer lightweight two-point lapbelts in the economy cabins to save fuel costs, reduce CO_2 emissions, and provide convenience to their passengers. Two-point lapbelts are significantly less expensive than other restraint system types.

24. The market for the development, manufacture, and sale of two-point lapbelts used on commercial airplanes is already highly concentrated and has become significantly more concentrated as a result of TransDigm's acquisition of SCHROTH. Prior to the acquisition, there were only three significant suppliers of two-point lapbelts used on commercial airplanes: AmSafe, SCHROTH, and a third firm, a small, privately-held company that has been supplying two-point lapbelts for many years. Although a handful of other firms served the market, they only sell a negligible quantity of two-point lapbelts each year. AmSafe is by far the largest supplier of two-point lapbelts used on commercial airplanes, and serves the vast majority of major commercial airlines around the world. However, SCHROTH recently entered this market after developing a new, innovative lightweight two-point lapbelt and had emerged as AmSafe's most significant competitor as it aggressively sought to market its lapbelt to major international airline customers.

B. Relevant Market 2: Three-Point Shoulder Belts Used on Commercial Airplanes

25. A three-point shoulder belt is a restraint harness that restrains an occupant at his or her waist and shoulder. It consists of both a lapbelt component and shoulder belt (or sash) component. Three-point shoulder belts are widely used in the premium cabins of commercial airplanes where the seating configurations often necessitate the additional protection provided by three-point shoulder belts.

26. The market for the development, manufacture, and sale of three-point shoulder belts used on commercial airplanes was already highly concentrated prior to the acquisition. In fact, AmSafe and SCHROTH were the only two significant suppliers of three-point shoulder belts used on commercial airplanes although a handful of other firms made a negligible quantity of sales each year. As with two-point lapbelts, AmSafe was the dominant supplier of three-point

shoulder belts, and SCHROTH was aggressively seeking to grow its business at AmSafe's expense.

C. Relevant Market 3: Technical Restraints Used on Commercial Airplanes

27. Technical restraints are multipoint restraint harnesses (usually four or five points) that restrain an occupant at his or her waist and shoulders. Technical restraints consist of multiple belts that connect to a single fixed buckle—typically a rotary-style buckle. Technical restraints are used by the flight crew in commercial airplanes. The critical nature of the flight crew's responsibilities and the design of their seats necessitate the additional protections provided by technical restraints.

28. The market for the development, manufacture, and sale of technical restraint systems used on commercial airplanes was already highly concentrated and became significantly more concentrated as a result of the acquisition. Prior to the acquisition, there were only three significant suppliers of technical restraints used on commercial airplanes: AmSafe, SCHROTH, and a third firm, an international aerospace equipment manufacturer. Although a handful of other firms supplied technical restraints, they only sold a negligible quantity of technical restraints each year. As with passenger restraints, AmSafe was the leading supplier of technical restraints, and SCHROTH was aggressively seeking to grow its business at AmSafe's expense.

D. Relevant Market 4: Inflatable Restraint Systems Used on Commercial Airplanes

29. Inflatable restraint systems, which include both inflatable lapbelts and structural mounted airbags, are restraint systems that utilize one or more airbags to restrain an airplane seat occupant. Inflatable restraint systems are most commonly used in the premium cabin of commercial airplanes, particularly in first-class and other ultra-premium cabins that have "lie-flat" or oblique-facing seats. Inflatable restraint systems also are used in the economy cabin in

certain circumstances, for example, in bulkhead rows to prevent an occupant's head from impacting the bulkhead. When required by FAA regulations, inflatable restraint systems provide airplane passengers with additional safety.

30. The market for the development, manufacture, and sale of inflatable restraint systems used on commercial airplanes was already highly concentrated prior to the acquisition. The only two suppliers of inflatable restraint systems used on commercial airplanes were AmSafe and SCHROTH. AmSafe and SCHROTH both offered structural mounted airbags, while AmSafe was the exclusive supplier of inflatable lapbelts. In recent years, SCHROTH had emerged as a strong competitor to AmSafe in the development of inflatable restraint technologies.

VI. ANTICOMPETITIVE EFFECTS

31. Mergers and acquisitions that reduce the number of competitors in highly concentrated markets are likely to substantially lessen competition. Before TransDigm's acquisition of SCHROTH, the markets for all restraint system types set forth above were highly concentrated. In each of these markets, SCHROTH and at most one other smaller firm competed with AmSafe prior to the acquisition and AmSafe had at least a substantial—and often a dominant—share of the market. TransDigm's acquisition of SCHROTH therefore significantly increased concentration in already highly concentrated markets and is unlawful.

32. TransDigm's acquisition of SCHROTH also eliminated head-to-head competition between AmSafe and SCHROTH in the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide. Prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe and was challenging AmSafe on pricing and innovation.

33. In 2012, Takata acquired SCHROTH with the stated intention to "overtake AmSafe" in the markets for restraint systems used on commercial airplanes. AmSafe had traditionally dominated these markets with few, if any, significant competitors. Sensing a demand for new competitors and restraint technologies, SCHROTH began to compete with AmSafe on price and to invest heavily in research and development to create new restraint technologies.

34. Customers were already beginning to see the benefits of increased competition in these markets. Between 2012 and 2017, SCHROTH introduced several new innovative restraint products, challenging older products from AmSafe. These products included a new lightweight two-point lapbelt called the "Airlite," structural mounted airbag systems, and other advanced restraint systems. Prior to the acquisition, SCHROTH had already found customers—including major U.S. commercial airlines—for both its new Airlite belt and structural mounted airbag systems. With the introduction of these new products, potential customers also had begun qualifying SCHROTH as an alternative supplier to AmSafe and leveraging SCHROTH against AmSafe to obtain more favorable pricing. As new commercial airplanes were expected to be ordered, SCHROTH believed that its market share would continue to grow. Indeed, SCHROTH expected that it would capture nearly 20% of the sales of restraint systems used on commercial airplanes by 2020, with most of the gains coming at the expense of AmSafe.

35. Prior to the acquisition, SCHROTH and AmSafe competed head-to-head on price. The resulting loss of a competitor indicates that the acquisition likely will result in significant harm from expected price increases. Furthermore, prior to the acquisition, AmSafe and SCHROTH also competed to develop new restraint technologies. The transaction eliminated that competition depriving customers of more innovative and life-saving restraint systems.

36. The transaction, therefore, is likely to substantially lessen competition in the development, manufacture, and sale of restraint systems used on commercial airplanes worldwide in violation of Section 7 of the Clayton Act.

VII. ENTRY

37. New entry and expansion by existing competitors are unlikely to prevent or remedy the acquisition's likely anticompetitive effects. Entry into the development, manufacture, and sale of restraint systems used on commercial airplanes is costly, and unlikely to be timely or sufficient to prevent the harm to competition caused by the elimination of SCHROTH as an independent supplier.

38. Barriers to entry and expansion include certification requirements. Before a supplier may sell restraint systems, it must first obtain several authorizations, including a TSOA for the restraint system, a TSOA for the seat system, a supplemental type certificate, and, in certain cases, a special condition. These certification requirements discourage entry by imposing substantial sunk costs on potential suppliers with no guarantee that their restraint systems will be successful in the market. They also take substantial time—in some cases, years—to complete.

39. Barriers to entry and expansion also include the significant technical expertise required to design a restraint system that satisfies the certification requirements. The technical expertise required to design a restraint system is proportionate to the complexity of the restraint system design. However, while more advanced restraint systems such as inflatable restraint systems require more expertise than simpler belt-type restraint systems, even belt-type restraint systems require significant expertise to design the belt to be strong, lightweight, and functional.

40. Additional barriers to entry and expansion include economies of scale and reputation. Customers of restraint systems used on commercial airplanes require large volumes

of restraint systems at low prices. Companies that cannot manufacture restraint systems at these volumes efficiently cannot compete effectively. Furthermore, customers of restraint systems used on commercial airplanes prefer established suppliers with known reputations.

VIII. VIOLATIONS ALLEGED

41. The acquisition of SCHROTH by TransDigm is likely to substantially lessen competition in each of the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

42. The transaction will likely have the following anticompetitive effects, among others:

a. actual and potential competition between AmSafe and SCHROTH in the relevant markets will be eliminated;

b. competition generally in the relevant markets will be substantially lessened; and

c. prices in the relevant markets will likely increase and innovation will likely decline.

IX. REQUEST FOR RELIEF

43. The United States requests that this Court:

a. adjudge and decree TransDigm's acquisition of SCHROTH to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. order TransDigm to divest all assets acquired from Takata Corporation on February 22, 2017 relating to SCHROTH Safety Products GmbH and Takata Protection Systems and to take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition;

c. award the United States its costs of this action; and

d. grant the United States such other relief as the Court deems just and proper.

Dated: December 21, 2017

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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TransDigm Agrees to Divest SCHROTH to Management and Perusa

CLEVELAND, Dec. 21, 2017 /PRNewswire/ -- As previously announced on the TransDigm Group Incorporated (the "Company") (NYSE: TDG) November 09, 2017 earnings call, the U.S. Department of Justice has been investigating the Company's acquisition of SCHROTH Safety Products, which closed on February 22, 2017.

Although TransDigm respectfully disagrees with the Department of Justice's position, the Company decided that given the size of the deal, the expense and burden of continued investigation and the uniqueness of the situation, that it was prudent to settle the matter and agree to divest the SCHROTH business.

Therefore, after running a lengthy search and evaluation process to identify a buyer and working with the Department of Justice, the Company has agreed to sell SCHROTH Safety Products in a management buyout (MBO) to Perusa Partners Fund 2, L.P., a private equity fund advised by Perusa GmbH, as majority shareholder, as well as dedicated SCHROTH managers from both Germany and the U.S.

The Department of Justice has accepted this proposal, which is subject to court approval. The transaction is subject to customary closing conditions and regulatory approvals.

About SCHROTH

SCHROTH Safety Products, a global leader in the development and manufacturing of occupant protection systems for specialized applications in aerospace, motorsports, defense, and medical transport is made up of two businesses. SCHROTH Safety Products GmbH, based in Arnsberg, Germany and SCHROTH Safety Products LLC., based in Pompano Beach, Florida.

About Perusa

Perusa Partners Fund 2, L.P. is a private equity fund with 200 million Euro committed equity. The fund invests in medium-sized companies and in carve-outs of business segments within larger corporations in German-speaking Europe as well as in the Nordic region. The fund is advised by Perusa GmbH. Perusa is pursuing a strong operational approach to increase the efficiency and thus the long-term value as well as the potential of the portfolio companies.

About TransDigm Group

TransDigm Group, through its wholly-owned subsidiaries, is a leading global designer, producer and supplier of highly engineered aircraft components for use on nearly all commercial and military aircraft in service today. Major product offerings, substantially all of which are ultimately provided to end-users in the aerospace industry, include mechanical/electro-mechanical actuators and controls, ignition systems and engine technology, specialized pumps and valves, power conditioning devices, specialized AC/DC electric motors and generators, NiCad batteries and chargers, engineered latching and locking devices, rods and locking devices, engineered connectors and elastomers, databus and power controls, cockpit security components and systems, specialized cockpit displays, aircraft audio systems, specialized lavatory components, seatbelts and safety restraints, engineered interior surfaces and related components, lighting and control technology, military personnel parachutes, high performance hoists, winches and lifting devices, and cargo loading, handling and delivery systems.

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View original content:http://www.prnewswire.com/news-releases/transdigm-agrees-to-divest-schroth-to-management-and-perusa-300574569.html

SOURCE TransDigm Group Incorporated

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, December 21, 2017

Justice Department Requires TransDigm Group to Divest Airplane Restraint Businesses Acquired from Takata

Divestiture Will Restore Competition in the Development, Manufacture, and Sale of Restraint Systems Used on Commercial Airplanes

The Department of Justice announced today that TransDigm Group Incorporated will be required to divest two businesses it acquired from Takata Corporation. The divestitures will restore competition in markets for several types of restraint systems used on commercial airplanes. TransDigm acquired the businesses—SCHROTH Safety Products GmbH and SCHROTH Safety Products LLC (collectively, "SCHROTH")—from Takata in February 2017 in a $90 million transaction that, due to its structure, was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act.

The Justice Department's Antitrust Division filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia challenging the consummated acquisition. At the same time, it filed a proposed settlement that, if approved by the court, would resolve the Department's competitive concerns.

"Today's settlement, which requires TransDigm to divest the entire SCHROTH business, restores competition without relying on a regulatory behavioral decree," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "TransDigm's AmSafe subsidiary is the world's largest supplier of restraint systems used on commercial airplanes and SCHROTH was its only meaningful competitor."

According to the Department's complaint, AmSafe and SCHROTH develop, manufacture, and sell a wide range of restraint systems used on commercial airplanes, including traditional two-point lapbelts, three-point shoulder belts, technical restraints, and more advanced "inflatable" restraint systems such as airbags. The complaint alleges that prior to the acquisition, SCHROTH was a growing competitive threat to AmSafe that was challenging AmSafe on price and investing heavily in the research and development of new restraint technologies. According to the complaint, the acquisition eliminated TransDigm's most significant competitor, and the loss of competition between AmSafe and SCHROTH was likely to result in higher prices and reduced innovation.

Under the terms of the proposed settlement, TransDigm must divest the entirety of SCHROTH, including its facilities in Pompano Beach, Florida, and Arnsberg, Germany, to a consortium between Perusa Partners Fund 2, L.P. and SSP MEP Beteiligungs GmbH & Co. KG (MEP KG), or an alternate acquirer approved by the United States. Pursuant to an agreement with the Antitrust Division, TransDigm held SCHROTH separate from AmSafe during the pendency of the Division's investigation.

Perusa is a diversified German private equity fund that invests in mid-sized companies. MEP KG is a German limited partnership owned by several members of the existing management team of SCHROTH, including executives who have extensive experience in the airplane restraint systems business. The Department said that the divestiture will remedy the acquisition's anticompetitive effects by quickly reestablishing SCHROTH as an independent competitor.

TransDigm, a Delaware corporation headquartered in Cleveland, Ohio, is a leading global designer, manufacturer, and supplier of highly engineered airplane components. In 2016, TransDigm's global revenues were $3.1 billion. TransDigm's AmSafe subsidiary is a Delaware corporation headquartered in Phoenix, Arizona. AmSafe had global revenues of approximately $198 million in 2016.

SCHROTH Safety Products GmbH (SSPG) is a German limited liability corporation based in Arnsberg, Germany. SCHROTH Safety Products LLC (SSPL) is a Delaware corporation based in Pompano Beach, Florida. SSPG and SSPL collectively had approximately $37 million in revenue in fiscal year 2016.

As required by the Tunney Act, the proposed consent decree, along with the Department's competitive impact statement, will be published in the Federal Register. Any person may submit written comments concerning the proposed settlement within 60 days of its publication to Maribeth Petrizzi, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, N.W., Suite 8700, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the court may enter the final judgment upon a finding that it serves the public interest.

Attachment(s):
Download Competitive Impact Statement
Download Complaint
Download Explanation of Consent Decree Procedures
Download Hold Separate Stipulation and Order
Download Proposed Final Judgment

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
17-1463

Updated February 1, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRANSDIGM GROUP INCORPORATED,

Defendant.

Civil Action No.:

UNITED STATES' EXPLANATION OF CONSENT DECREE PROCEDURES

The United States submits this short memorandum summarizing the procedures regarding the Court's entry of the proposed Final Judgment. This Judgment would settle this case pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA"), which applies to civil antitrust cases brought and settled by the United States.

1. Today, the United States has filed a Complaint and, attached to this Explanation of Consent Decree Procedures, a proposed Final Judgment and a Hold Separate Stipulation and Order between the parties by which they have agreed that the Court may enter the proposed Final Judgment after the United States has complied with the APPA. The United States has also filed a Competitive Impact Statement relating to the proposed Final Judgment.

2. The Hold Separate Stipulation and Order is a document that has been agreed to by both the United States and the Defendant. The United States and the

Defendant ask that the Court sign this Order, which ensures that the Defendant preserves competition by complying with the provisions of the proposed Final Judgment and by maintaining the Divestiture Assets during the pendency of the proceedings required by the Tunney Act. *See* 15 U.S.C. § 16(b)-(h).

3. The APPA requires that the United States publish the proposed Final Judgment and the Competitive Impact Statement in the *Federal Register* and cause to be published a summary of the terms of the proposed Final Judgment and the Competitive Impact Statement in certain newspapers at least sixty (60) days prior to entry of the proposed Final Judgment. Defendant in this matter has agreed to arrange and bear the costs for the newspaper notices. The notice will inform members of the public that they may submit comments about the proposed Final Judgment to the United States Department of Justice, Antitrust Division, 15 U.S.C. § 16(b)-(c).

4. During the sixty-day period, the United States will consider, and at the close of that period respond to, any comments that it has received, and it will publish the comments and the United States' responses in the *Federal Register*.

5. After the expiration of the sixty-day period, the United States will file with the Court the comments and the United States' responses, and it may ask the Court to enter the proposed Final Judgment (unless the United States has decided to withdraw its consent to entry of the Final Judgment, as permitted by Paragraph IV(A) of the Hold Separate Stipulation and Order, *see* 15 U.S.C. § 16(d)).

6. If the United States requests that the Court enter the proposed Final Judgment after compliance with the APPA, 15 U.S.C. § 16(e)-(f), then the Court may

enter the Final Judgment without a hearing, provided that it concludes that the Final Judgment is in the public interest.

Dated: December 21, 2017

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRANSDIGM GROUP INCORPORATED,

Defendant.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on December 21, 2017, the United States and Defendant, TransDigm Group Incorporated, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, TransDigm agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by TransDigm to assure that competition is substantially restored;

AND WHEREAS, the United States requires TransDigm to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, TransDigm has represented to the United States that the divestiture required below can and will be made and that TransDigm will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against TransDigm under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means Perusa and MEP KG, or another entity to whom TransDigm divests the Divestiture Assets.

B. "TransDigm" means Defendant TransDigm Group Incorporated, a Delaware corporation with its headquarters in Cleveland, Ohio, its successors and assigns, and its subsidiaries (including, but not limited to, SCHROTH Safety Products LLC, SCHROTH Safety Products GmbH, and AmSafe, Inc.), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "SCHROTH" means, collectively, SCHROTH Germany and SCHROTH U.S.

D. "SCHROTH Germany" means SCHROTH Safety Products GmbH, a German limited liability company headquartered in Arnsberg, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. "SCHROTH U.S." means SCHROTH Safety Products LLC, a Delaware limited liability company, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Share and Asset Purchase Agreement" means the Share and Asset Purchase Agreement among Takata Europe GmbH, Takata Protection Systems, Inc., Interiors In Flight, Inc., Takata Corporation, TransDigm, and TDG Germany GmbH, dated February 22, 2017.

G. "Share Transfer Agreement" means the Share Transfer Agreement among Takata Europe GmbH and TDG Germany GmbH, dated February 21, 2017.

H. "Perusa" means Perusa Partners Fund 2, L.P., a Guernsey limited partnership with its headquarters in St. Peter Port, Guernsey, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

I. "MEP KG" means SSP MEP Beteiligungs GmbH & Co. KG, a German limited partnership with its headquarters in Munich, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

J. "Divestiture Assets" means all SCHROTH shares and assets acquired by TransDigm pursuant to the Share and Asset Purchase Agreement and Share Transfer Agreement including, but not limited to:

1. SCHROTH Germany's owned real property listed in Appendix A including, but not limited to, SCHROTH Germany's warehouses located at Im Ohl 14, 59757 Arnsberg, Germany;

2. SCHROTH Germany's leases for the real property listed in Appendix A including, but not limited to, SCHROTH Germany's headquarters located at Im Ohl 14, 59757 Arnsberg, Germany;

3. SCHROTH U.S.'s leases for the real property listed in Appendix A including, but not limited to, SCHROTH U.S.'s facility at 1371 SW 8th Street, Pompano Beach, Florida;

4. All tangible assets that comprise SCHROTH, including research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used by SCHROTH; all licenses, permits, certifications, and authorizations issued by any governmental organization (including, but not limited to, the Federal Aviation Administration and the European Aviation Safety Agency) or industry standard-setting body (including, but not limited to, the Society of Automotive Engineers and the International Organization for Standardization) relating to SCHROTH; all contracts, teaming arrangements, agreements, leases, commitments, and understandings, relating to SCHROTH, including supply agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to SCHROTH;

5. All intangible assets relating to the SCHROTH businesses, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related

documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information provided to SCHROTH employees, customers, suppliers, agents, or licensees. Intangible assets also include all research data concerning historic and current research and development efforts relating to the development, manufacture, and sale of airplane restraint systems, designs of experiments, and the results of successful and unsuccessful designs, experiments, and testing.

K. "Airplane restraint system" means a belt, harness, or airbag used to restrain airplane passengers and crew.

III. Applicability

A. This Final Judgment applies to TransDigm, as defined above, and all other persons in active concert or participation with TransDigm who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and Section V of this Final Judgment, TransDigm sells or otherwise disposes of all or substantially all of its assets or of lesser business units that include the Divestiture Assets, TransDigm shall require the purchaser to be bound by the provisions of this Final Judgment. TransDigm need not obtain such an agreement from the acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestiture

A. TransDigm is ordered and directed, within 30 calendar days after all necessary regulatory approvals have been obtained from the Committee on Foreign Investment in the United States ("CFIUS") and the German Federal Ministry of Economic Affairs and Energy (the

"*Bundesministerium für Wirtschaft und Energie*"), or 30 calendar days after the Court's signing of the Hold Separate Stipulation and Order in this matter, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to Perusa and MEP KG, or to an alternative Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. TransDigm agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In the event TransDigm is attempting to divest the Divestiture Assets to an Acquirer other than Perusa and MEP KG, TransDigm promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. TransDigm shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment.

C. In accomplishing the divestiture ordered by this Final Judgment, TransDigm shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. TransDigm shall make available such information to the United States at the same time that such information is made available to any other person.

D. TransDigm shall provide the Acquirer and the United States information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment. TransDigm will not interfere with any negotiations by the Acquirer to employ any TransDigm employee whose primary responsibility is the operation of the Divestiture Assets.

E. For any personnel involved in the operation of the Divestiture Assets that elect employment with the Acquirer, TransDigm shall waive all noncompete and nondisclosure agreements, vest all unvested pension and other equity rights, and provide all benefits to which the relevant employees would generally be provided if transferred to a buyer of an ongoing business. For a period of two (2) years from the filing of the Complaint in this matter, TransDigm may not solicit to hire, or hire, any such person who was hired by the Acquirer, unless (1) such individual is terminated or laid off by the Acquirer or (2) the Acquirer agrees in writing that TransDigm may solicit or hire that individual. Nothing in this paragraph shall prohibit TransDigm from maintaining any reasonable restrictions on the disclosure by any employee who accepts an offer of employment with the Acquirer of TransDigm's proprietary non-public information that is (1) not otherwise required to be disclosed by this Final Judgment, (2) related solely to TransDigm's businesses and clients, and (3) unrelated to the Divestiture Assets.

F. TransDigm shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of SCHROTH; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

G. TransDigm shall warrant to the Acquirer that each asset will be operational on the date of sale.

H. TransDigm shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

I. TransDigm shall warrant to the Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, TransDigm will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

J. At the Acquirer's option, and subject to approval by the United States, TransDigm shall enter a Transition Services Agreement for information technology services and other such transition services that are reasonably necessary for the Acquirer to operate the Divestiture Assets for a period of up to twelve months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six months. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. Any amendments or modifications of the Transition Services Agreement may only be entered into with the approval of the United States, in its sole discretion.

K. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business of developing, manufacturing, and selling airplane restraint systems. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of developing, manufacturing, and selling airplane restraint systems; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and TransDigm give TransDigm the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. **Appointment of Divestiture Trustee**

A. If TransDigm has not divested the Divestiture Assets within the time period specified in Paragraph IV(A), TransDigm shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Paragraph V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of TransDigm any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

C. TransDigm shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by TransDigm must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of TransDigm pursuant to a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to TransDigm and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and TransDigm are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to TransDigm and the United States.

E. TransDigm shall use its best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and TransDigm shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. TransDigm shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report contains information that the Divestiture Trustee deems confidential, such report shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. In the event TransDigm divests the Divestiture Assets to an Acquirer other than Perusa and MEP KG, within two (2) business days following execution of a definitive divestiture agreement, TransDigm or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or Section V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify TransDigm. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from TransDigm, the proposed Acquirer, any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. TransDigm and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from TransDigm, the proposed Acquirer, any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to TransDigm and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to TransDigm's limited right to object to the sale under Paragraph V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by TransDigm under Paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

TransDigm shall not finance all or any part of any purchase made pursuant to Section IV or Section V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, TransDigm shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. TransDigm shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Firewalls

A. TransDigm shall implement and maintain procedures to prevent the sharing by the TransDigm Executive Vice President currently assigned to SCHROTH, the TransDigm Controller currently assigned to SCHROTH, and the TransDigm Executive Vice President of Mergers & Acquisitions of competitively sensitive information from SCHROTH with personnel with responsibilities relating to AmSafe, Inc.

B. TransDigm shall, within thirty (30) calendar days of the Court's entry of the Hold Separate Stipulation and Order, submit to the United States a document setting forth in detail the procedures implemented to effect compliance with this Section. The United States shall notify TransDigm within ten (10) business days whether, in its sole discretion, it approves or rejects TransDigm's compliance plan.

C. In the event TransDigm's compliance plan is rejected, the reasons for the rejection shall be provided to TransDigm and TransDigm shall be given the opportunity to submit, within ten (10) business days of receiving the notice of rejection, a revised compliance plan. If the parties cannot agree on a compliance plan, the United States shall have the right to request that the Court rule on whether TransDigm's proposed compliance plan fulfills the requirements of Paragraph IX(A).

D. TransDigm may at any time submit to the United States evidence relating to the actual operation of any firewall in support of a request to modify any firewall set forth in this Section. In determining, in its sole discretion, whether it would be appropriate for the United States to consent to modify the firewall, the United States, shall consider the need to protect competitively sensitive information of SCHROTH and the impact the firewall has had on TransDigm's ability to efficiently manage AmSafe, Inc.

X. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or Section V, TransDigm shall deliver to the United States an affidavit, signed by TransDigm's Chief Financial Officer and General Counsel, which shall describe the fact and manner of TransDigm's compliance with Section IV or Section V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts TransDigm has taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by TransDigm, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, TransDigm shall deliver to the United States an affidavit that describes in reasonable detail all actions TransDigm has taken and all steps TransDigm has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. TransDigm shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in TransDigm's earlier affidavits filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. TransDigm shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally-recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to TransDigm, be permitted:

(1) access during TransDigm's office hours to inspect and copy, or at the option of the United States, to require TransDigm to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of TransDigm, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, TransDigm's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by TransDigm.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, TransDigm shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the

United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by TransDigm to the United States, TransDigm represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and TransDigm marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give TransDigm ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), TransDigm, without providing advance notification to the Antitrust Division, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity, or management interest, in any entity engaged in the development, manufacture, or sale of airplane restraint systems during the term of this Final Judgment.

B. Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about airplane restraint systems. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, TransDigm shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XIII. No Reacquisition

TransDigm may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including its right to seek an order of contempt from this Court. TransDigm agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and TransDigm waives any argument that a different standard of proof should apply.

B. In any enforcement proceeding in which the Court finds that TransDigm has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. TransDigm agrees to reimburse the United States for any attorneys' fees, experts' fees, and costs incurred in connection with any effort to enforce this Final Judgment.

XVI. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and TransDigm that the divestiture has been completed and that the continuation of the Final Judgment no longer is necessary or in the public interest.

XVII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ___________________

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

____

United States District Judge

APPENDIX A: Real Property
(Owned and Leased)

SCHROTH U.S. Leased Real Property

Facility Name	Address	Type of Facility
Pompano Beach	1371 SW 8th Street, Pompano Beach, FL	Manufacturing Plant, Office, and Warehouse

SCHROTH Germany Leased Real Property

Facility Name	Address	Type of Facility
Headquarters "Im Ohl"	Im Ohl 14, 59757 Arnsberg, Germany	Manufacturing Plant and Office (Headquarters)
Parking Area "Im Ohl"	Im Ohl 14, 59757 Arnsberg, Germany	Parking Area

SCHROTH Germany Owned Real Property

Facility Name	Address	Type of Facility
Warehouse "Im Ohl"	Im Ohl 14, 59757 Arnsberg, Germany; Land Register of Neheim-Husten of the local court of Arnsberg; Page 13024; Plot 5, Parcel 390	Warehouse
Warehouse "Im Ohl"	Im Ohl 14, 59757 Arnsberg, Germany; Land Register of Neheim-Husten of the local court of Arnsberg; Page 9777; Plot 5, Parcel 88	Warehouse

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. TRANSDIGM GROUP INCORPORATED, *Defendant*.

HOLD SEPARATE STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. DEFINITIONS

As used in this Hold Separate Stipulation and Order:

A. "Acquirer" means Perusa and MEP KG, or another entity to whom TransDigm divests the Divestiture Assets.

B. "TransDigm" means Defendant TransDigm Group Incorporated, a Delaware corporation with its headquarters in Cleveland, Ohio, its successors and assigns, and its subsidiaries (including, but not limited to, SCHROTH Safety Products LLC, SCHROTH Safety Products GmbH, and AmSafe, Inc.), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "SCHROTH" means, collectively, SCHROTH Germany and SCHROTH U.S.

D. "SCHROTH Germany" means SCHROTH Safety Products GmbH, a limited liability company headquartered in Arnsberg, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. SCHROTH U.S. means SCHROTH Safety Products LLC, a Delaware limited liability company, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. “Share and Asset Purchase Agreement” means the Share and Asset Purchase Agreement among Takata Europe GmbH, Takata Protection Systems, Inc., Interiors In Flight, Inc., Takata Corporation, TransDigm, and TDG Germany GmbH, dated February 22, 2017.

G. “Share Transfer Agreement” means the Share Transfer Agreement among Takata Europe GmbH and TDG Germany GmbH, dated February 21, 2017.

H. “Perusa” means Perusa Partners Fund 2, L.P., a Guernsey limited partnership with its headquarters in St. Peter Port, Guernsey, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

I. “MEP KG” means SSP MEP Beteiligungs GmbH & Co. KG, a German limited partnership with its headquarters in Munich, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

J. “Divestiture Assets” means all SCHROTH shares and assets acquired by TransDigm pursuant to the Share and Asset Purchase Agreement and Share Transfer Agreement, including, but not limited to:

1. SCHROTH Germany's owned real property listed in Appendix A of the proposed Final Judgment, including, but not limited to, SCHROTH Germany's warehouses located at Im Ohl 14, 59757 Arnsberg, Germany;

2. SCHROTH Germany's leases for the real property listed in Appendix A of the proposed Final Judgment, including, but not limited to, SCHROTH Germany's headquarters located at Im Ohl 14, 59757 Arnsberg, Germany;

3. SCHROTH U.S.'s leases for the real property listed in Appendix A of the proposed Final Judgment, including, but not limited to, SCHROTH U.S.'s facility at 1371 SW 8th Street, Pompano Beach, Florida;

4. All tangible assets that comprise SCHROTH, including research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property and all assets used by SCHROTH; all licenses, permits, certifications, and authorizations issued by any governmental organization (including, but not limited to, the Federal Aviation Administration and the European Aviation Safety Agency) or industry standard-setting body (including, but not limited to, the Society of Automotive Engineers and the International Organization for Standardization) relating to SCHROTH; all contracts, teaming arrangements, agreements, leases, commitments, and understandings, relating to SCHROTH, including supply agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to SCHROTH;

5. All intangible assets relating to the SCHROTH businesses, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks,

trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information provided to SCHROTH employees, customers, suppliers, agents, or licensees. Intangible assets also include all research data concerning historic and current research and development efforts relating to the development, manufacture, and sale of airplane restraint systems, designs of experiments, and the results of successful and unsuccessful designs, experiments, and testing.

K. "Airplane restraint system" means a belt, harness, or airbag used to restrain airplane passengers and crew.

II. OBJECTIVES

The Final Judgment filed in this case is meant to ensure TransDigm's prompt divestiture of the Divestiture Assets for the purpose of establishing one or more viable competitors in the airplane restraint systems business in order to remedy the effects that the United States alleges have resulted and will continue to result from TransDigm's acquisition of SCHROTH. This Hold Separate Stipulation and Order ensures, prior to such divestitures, that the Divestiture Assets remain independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by TransDigm, and that competition is maintained during the pendency of the ordered divestitures.

III. JURISDICTION AND VENUE

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia. TransDigm waives service of summons of the Complaint.

IV. COMPLIANCE WITH AND ENTRY OF FINAL JUDGMENT

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16, and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on TransDigm and by filing that notice with the Court. TransDigm agrees to arrange, at its expense, publication as quickly as possible of the newspaper notice required by the APPA, which shall be drafted by the United States in its sole discretion. The publication shall be arranged no later than three (3) business days after TransDigm's receipt from the United States of the text of the notice and the identity of the newspaper within which the publication shall be made. TransDigm shall promptly send to the United States (1) confirmation that publication of the newspaper notice has been arranged, and (2) the certification of the publication prepared by the newspaper within which the notice was published.

B. TransDigm shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment's entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Hold Separate Stipulation and Order by the parties, comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment, including Section XI, as though the same were in full force and effect as the Final order of the Court.

C. This Hold Separate Stipulation and Order shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

D. In the event (1) the United States has withdrawn its consent, as provided in Paragraph IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Hold Separate Stipulation and Order, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Hold Separate Stipulation and Order, and the making of this Hold Separate Stipulation and Order shall be without prejudice to any party in this or any other proceeding.

E. TransDigm represents that the divestitures ordered in the proposed Final Judgment can and will be made, and that TransDigm will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. HOLD SEPARATE PROVISIONS

Until the divestitures required by the Final Judgment have been accomplished:

A. TransDigm shall preserve, maintain, and continue to operate the Divestiture

Assets as independent, ongoing, economically viable competitive businesses, with management, sales and operations of such assets held entirely separate, distinct and apart from those of TransDigm's other operations. TransDigm shall not coordinate its production, marketing, or terms of sale of any products with those produced by or sold under any of the Divestiture Assets. Within twenty (20) days after the entry of the Hold Separate Stipulation and Order, TransDigm will inform the United States of the steps it has taken to comply with this Hold Separate Stipulation and Order.

B. TransDigm shall take all steps necessary to ensure that (1) the Divestiture Assets will be maintained and operated as independent, ongoing, economically viable and active competitors in the airplane restraint systems business; (2) management of the Divestiture Assets will not be influenced by TransDigm; and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning production, distribution or sales of products by or under any of the Divestiture Assets will be kept separate and apart from TransDigm's other operations. Notwithstanding the foregoing, until the divestitures required by the Final Judgment are accomplished (1) TransDigm may continue to have the TransDigm Executive Vice President currently assigned to SCHROTH, the TransDigm Controller currently assigned to SCHROTH, and the TransDigm Executive Vice President of Mergers & Acquisitions assist with the management of SCHROTH; and (2) TransDigm may continue to receive from SCHROTH all financial information required for TransDigm to comply with its tax and financial reporting obligations.

C. TransDigm shall use all reasonable efforts to maintain and increase the sales and revenues of the products produced by or sold under Divestiture Assets, and shall maintain at

2017 or previously approved levels for 2018, whichever are higher, all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Divestiture Assets.

D. TransDigm shall provide sufficient working capital and lines and sources of credit to continue to maintain the Divestiture Assets as economically viable and competitive, ongoing businesses, consistent with the requirements of Paragraphs V(A) and (B).

E. TransDigm shall take all steps necessary to ensure that the Divestiture Assets are fully maintained in operable condition at no less than its current capacity and sales, and shall maintain and adhere to normal repair and maintenance schedules for the Divestiture Assets.

F. TransDigm shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any of the Divestiture Assets.

G. TransDigm shall maintain, in accordance with sound accounting principles, separate, accurate and complete financial ledgers, books and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of the Divestiture Assets.

H. TransDigm shall take no action that would jeopardize, delay, or impede the sale of the Divestiture Assets.

I. TransDigm's employees with primary responsibility for the development, manufacture, and sale of the Divestiture Assets shall not be transferred or reassigned to other areas within the company except for transfer bids initiated by employees pursuant to TransDigm's regular, established job posting policy. TransDigm shall provide the United States with ten (10) calendar days' notice of such transfer.

J. TransDigm shall, subject to the approval of the United States, appoint a person or persons to oversee the Divestiture Assets, and who will be responsible for TransDigm's compliance with this Section. This person shall have complete managerial responsibility for the Divestiture Assets, subject to the provisions of this Final Judgment. In the event such person is unable to perform his duties, TransDigm shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should TransDigm fail to appoint a replacement acceptable to the United States within this time period, the United States shall appoint a replacement.

K. TransDigm shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to an Acquirer acceptable to the United States.

VI. DURATION OF HOLD SEPARATE OBLIGATIONS

TransDigm's obligations under Section V of this Hold Separate Stipulation and Order shall remain in effect until (1) consummation of the divestitures required by the proposed Final Judgment or (2) until further order of the Court. If the United States voluntarily dismisses the Complaint in this matter, TransDigm is released from all further obligations under this Hold Separate Stipulation and Order.

Dated: December 21, 2017

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

JEREMY CLINE (D.C. Bar #1011073)
United States Department of Justice
Antitrust Division
Defense, Industrials, and Aerospace Section
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FOR DEFENDANT
TRANSDIGM GROUP INCORPORATED

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ORDER

IT IS SO ORDERED by the Court, this ____ day of __________________, 2017.

____
United States District Judge

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d)
of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): January 26, 2018

TransDigm Group Incorporated
(Exact name of registrant as specified in its charter)

Delaware	001-32833	41-2101738
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

1301 East 9th Street, Suite 3000, Cleveland, Ohio	44114
(Address of principal executive offices)	(Zip Code)

(216) 706-2960
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

¨ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

¨ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

¨ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

¨ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter). ¨

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ¨

Item 7.01 Regulation FD Disclosure

On January 26, 2018, TransDigm Group Incorporated (the "Company") completed the divestiture of SCHROTH Safety Products in a management buyout (MBO) to Perusa Partners Fund 2, L.P., a private equity fund advised by Perusa GmbH, as majority shareholder, as well as dedicated SCHROTH managers from both Germany and the U.S for approximately $61.4 million, subject to a working capital adjustment. The sale was previously announced by the Company on December 21, 2017.

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

TRANSDIGM GROUP INCORPORATED

By /s/ James Skulina

James Skulina
Executive Vice President and
Interim Chief Financial Officer

Date: January 26, 2018

Federal Merger Antitrust Statutes

THE FEDERAL MERGER ANTITRUST STATUTUES

Substantive Prohibitions

Clayton Act § 7. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [15 U.S.C. § 18]

[*Remainder of section omitted*]

Sherman Act § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Sherman Act § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

FTC Act § 5. Unfair methods of competition unlawful; prevention by Commission [1]

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [15 U.S.C. § 45(a)(1)]

[*Remainder of section omitted*]

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[1] Technically, Section 5 of the FTC Act is not an antitrust law. Section 1 of the Clayton Act defines "antitrust law" to include only the Sherman Act, the Clayton Act, and the import cartel provisions of the Wilson Tariff Act, Act of Aug. 27, 1894, ch. 349, §§ 73-76, 28 Stat. 509, 570, *as amended by* Act of Feb. 12, 1913, ch. 40, 37 Stat. 667 (current version found at 15 U.S.C. §§ 8-11). 15 U.S.C. § 12.

Goals of Merger Antitrust Law

A NOTE ON THE COMMON LAW NATURE OF ANTITRUST LAW

The federal antitrust statutes are written in broad, sweeping terms that, standing alone, give little guidance about the line between lawful and unlawful conduct. Unlike modern regulatory codes, the Sherman, Clayton, and Federal Trade Commission Acts were never intended to provide a comprehensive, once-and-for-all catalogue of forbidden practices. The framers of the antitrust statutes recognized the diversity and rapidly changing nature of business conduct, if not the inadequacy of contemporary economic theory to uncover the root causes of anticompetitive behavior. They also recognized that they could not predict how the trusts would react to attempts to regulate them and what new prohibitions might be required. These factors made an attempt at a definitive statutory cure unwise, if not impossible. Rather than attempt an exhaustive code of forbidden practices, Congress adopted a "common law" approach to antitrust law.

This note traces that legislative design choice. After a brief explanation of the common law process, the note illustrates how the 51st Congress, in enacting the Sherman Act in 1890, deliberately incorporated common law concepts, allowing courts to develop antitrust doctrine on a case-by-case basis. The note then demonstrates that the same strategy was reaffirmed in 1914, when the Clayton and FTC Acts adopted similarly open-ended standards rather than exhaustive statutory definitions.

The common law process. The "common-law process" is a distinctly incremental mode of lawmaking by the courts. Each lawsuit presents a concrete dispute; judges resolve it by applying broad statutory principles, announce a rule, and then adhere to that rule (stare decisis) unless later experience or new learning reveals that it frustrates the statute's aims. Because new controversies continually test existing precedents, doctrine can be refined—or even reformulated—as economic learning and business methods evolve. The resulting body of case law provides operational details that a fixed, highly specific code could never match, thereby preserving both flexibility and continuity in the governance of competition.

The Sherman Act. In the 1890 Sherman Act, the first of the federal antitrust laws, Congress adopted a fluid, evolutionary approach to federal competition law. Rather than specifying a rigid, detailed regulatory scheme, the draftsmen used sparse, broadly phrased language to describe the key substantive concepts in the new antitrust law—"contract, combination or conspiracy," "restraint of trade," "monopolize," and "attempt to monopolize"—language that is almost unique among congressional enactments in its constitution-like quality.

Congress employed this language—terms of art drawn from the common law—to empower federal courts to apply a large existing body of competition common law immediately to regulate business conduct. However, the Sherman Act was not written to codify the common law once and for all as it existed in 1890. Instead, the framers were explicit that the statute enabled courts to refine the law and its application to particular courses of conduct over time through the common law process. As Senator John Sherman (R-OH) candidly stated during the floor debate on the Sherman bill:

> I admit it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left to the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.[1]

Similarly, Senator George F. Hoar (R-MA), the floor manager for the Sherman bill after the Judiciary Committee reported it to the full Senate, observed:

> Now, the Judiciary Committee has carefully and as thoroughly as it could agreed upon what we believe will be a very efficient measure, under which one long forward step will be taken in suppressing this evil. We have affirmed [in the Judiciary Committee redraft] the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave [criminal] penalty.[2]

Senator George F. Edmunds (R-VT), chairman of the Judiciary Committee, expressed a second, even more pragmatic, reason to empower the courts to develop the precise boundaries between lawful and unlawful conduct rather than look in the future to refining legislation from Congress:

> The trouble about this business [of drafting an antitrust law] is, as I have seen a good many times before when we were trying to strike at great evils in a broad way and leave the details and difficulties that might arise afterwards to be repaired by legislation, as we do about all such things, that Congress has failed to make a law because the very person against whom it was intended to operate in their mischievous performances got up, as they say on the prairies, a counter-fire and added to the fuel and stimulated men to carry the law so far that it could not be executed at all.
>
> That was the aspect of this thing when this subject was sent to the Committee on the Judiciary. We all felt, and the committee, I think unanimously, including my friend from Mississippi [Senator James Z. George (D-MS)[3]], thought that if we were really earnest in wishing to

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[1] 21 CONG. REC. 2460 (Mar. 21, 1890). *See* 21 CONG. REC. 2456 (Mar. 21, 1890) (the Sherman bill "does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government") (remarks of Sen. Sherman); *id.* at 2461 ("This bill declares a rule of public policy in accordance with the rule of the common law.") (remarks of Sen. Sherman).

[2] 21 CONG. REC. 3146 (Apr. 8, 1890).

[3] George was one of the Senate's most vocal opponents to the original Sherman bill. George had a successful private legal practice and had served as a member of the Mississippi Secession Convention, a circuit court judge, and a member of the Mississippi Supreme Court before being elected to the U.S. Senate in 1881. He was known for his legal expertise and strong advocacy for

> strike at these evils broadly, in the first instance, as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, that we should make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far it or its definitions as applicable to each particular case as it might arise.[4]

On April 8, 1890, the Senate passed S. 1 by a vote of 52 to 1, with 29 senators recorded by the clerk as absent.[5]

House debate on the Senate's bill was brief but echoed the same theme. The House Judiciary Committee reported the bill without amendment and recommended its passage.[6] Representative David B. Culberson (D-TX), the ranking member and immediate past chairman of the Judiciary Committee and a highly respected legal authority in the House, brought the bill to the House floor and served as floor manager.[7] When asked whether certain conduct would violate the bill if enacted, Culberson explained that it would depend on how the courts construed the law, though he added that he believed the courts should find the conduct unlawful.[8] Culberson's response reflects Congress's deliberate adoption of a common law approach, leaving the courts to develop antitrust principles through case-by-case adjudication rather than attempting to define violations through detailed statutory language.

The Clayton and FTC Acts. Congress reaffirmed the common-law model in 1914 when it adopted the Clayton Act[9] and the Federal Trade Commission Act,[10] two statutes that applied broad incipiency and fairness standards rather than specifically delineating unlawful business conduct. Although the Clayton Act was designed to

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states' rights and limited federal power. He was a member of the Senate Judiciary Committee when it redrafted the Sherman bill, but he does not appear to have actively participated in the drafting.

4 *Id*. at 3148. *See* George Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 814 (Dec. 1911) ("After most careful and earnest consideration . . . [the Senate Judiciary Committee thought that] it was quite impracticable to include by specific description all the acts which should come within the meaning and purposes of the words 'trade' and 'commerce' or 'trust,' or the words 'restraint' or 'monopolize' . . . and that these were truly matters for judicial consideration.").

5 21 CONG. REC. 3153 (Apr. 8, 1890).

6 H.R. REP. NO. 51-1701 (Apr. 25, 1890) (to accompany S.1)

7 The Republican-controlled Judiciary Committee probably selected Culberson, a Democrat, to manage the bill because he was a highly respected legal authority within the House and a capable debater. Culberson had been an early advocate of antitrust legislation. While House Judiciary Committee chairman in 1888, Culberson had introduced an antitrust bill, although it was never reported out of committee. *See* H.R. 11401, 50th Cong. (Sept. 10, 1888). Although there appeared broad bipartisan support for antitrust legislation, Republicans no doubt also wanted a prominent Democratic congressman to be the face of the bill in the House.

8 21 CONG. REC. 4091 (1890).

9 Ch. 323, 38 Stat. 730 (1914) (supplementing the Sherman Act) (current version at 15 U.S.C. §§ 12 to 27).

10 Ch. 311, 38 Stat. 717 (1914) (prohibiting "unfair methods of competition" and creating the Federal Trade Commission to enforce the new offense) (current version at 15 U.S.C. §§ 41-58).

address specific practices—price discrimination, exclusive dealing agreements, and corporate stock acquisitions—none of these practices was unlawful unless the effect of the practice "may be to substantially lessen competition, or tend to create a monopoly." [11] However, Congress provided almost no guidance on what this anticompetitive effects test entails, leaving it to the courts to construe it using a common law process.

Likewise, the prohibitions provision of the FTC Act eschewed an exhaustive catalog of unlawful practices and broadly prohibited "unfair methods of competition." [12] Congress left it in the first instance to the new Commission to determine, in adjudicative proceedings, when business conduct constituted an "unfair method of competition," subject to review by the federal courts of appeal and ultimately the Supreme Court. The Conference Report was explicit about the need for a common law approach to determining what amounts to an "unfair method of competition":

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances. [13]

The Conference Report concluded:

> The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations. [14]

By again choosing broad language and expressly delegating the task of elaboration to the FTC and ultimately the courts, Congress confirmed that the evolution of federal antitrust doctrine was to remain, at its core, a common law exercise.

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[11] Clayton Act §§ 2 (price discrimination), 3 (exclusive dealing), 7 (stock acquisitions) (original 1914 act).

[12] FTC Act § 5 (original act).

[13] H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.).

[14] *Id.*

Senator Edmunds was undoubtedly correct that the task of defining antitrust violations could not realistically be left entirely to Congress. Rather than attempt the impossible—crafting exhaustive statutory definitions that would inevitably prove inadequate—Congress wisely chose a common law approach that empowered courts to develop doctrine incrementally through case-by-case adjudication. This strategy has proven remarkably durable, permitting antitrust doctrine to evolve organically as business practices have transformed from the railroad trusts of the 1890s to today's digital platforms, and as economic understanding has advanced from the rudimentary theories available to the Sherman Act's framers to modern sophisticated analysis of market power and consumer welfare. By resisting the temptation to micromanage competition policy through detailed statutory amendments, Congress has preserved the flexibility essential to effective antitrust enforcement while maintaining the continuity that comes from building on established precedent.[15] The result is a body of law that, while complex, remains both responsive to new challenges and grounded in enduring principles—precisely what the framers of the antitrust laws intended when they chose to "declare general principles" and leave their application to judicial wisdom.

[15] Congress, of course, always has the power to enact new antitrust legislation to change judicially created rules if it disagrees with some rule or with the general direction the courts are taking. Surprisingly, perhaps, Congress has intervened to change a judicially created substantive rule or to redirect the courts on only three occasions since the passage of the Clayton and FTC Acts in 1914:

a. In 1936 with the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (strengthening the price discrimination provision of the Clayton Act) (current version at 15 U.S.C. §§ 13-13a).
b. In 1937 with the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (exempting resale price maintenance from the prohibitions of federal antitrust law if permitted by state law), and in its subsequent repeal in 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).
c. In 1950 with the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)) (closing certain loopholes in Section 7 of the Clayton Act).

By contrast, Congress has passed a number of statutes dealing with antitrust process and penalties and aligning the antitrust laws with the full extent of subject matter jurisdiction permitted by the Commerce Clause.

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Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law

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A number of critics of the Reagan administration's antitrust policy appear to consider it the duty of the Antitrust Division to prosecute every type of conduct susceptible to challenge under existing judicial precedents construing the antitrust laws, and in doubtful cases uniformly to press for a resolution that would lead to a finding of illegality. While seldom articulated in this extreme form, assumptions along these lines seem to underlie much of the recent criticism that has been leveled against the way in which I have attempted to discharge my responsibilities as Assistant Attorney General in charge of the Antitrust Division.

In this Article I shall argue that such a conception of the functions of the Antitrust Division is wrong. Its adoption as the guiding standard for the Division's operations would require the Division to shoulder obligations that, given its limited resources, it could not possibly discharge in an effective manner, and which it need not shoulder in view of the availability of other enforcement vehicles, particularly private rights of action. More fundamentally, this standard would ignore the legislative purposes underlying the antitrust laws and lead in many situations to economically and socially indefensibile results. In contrast with this standard, I will argue that an exercise of discretion informed by the competitive effects of business conduct and the potential precedential implications of resultant judicial decisions is the approach mandated by the Constitution and antitrust jurisprudence.

The point of departure in any analysis of prosecutorial discretion is to locate its source and scope. Consequently, I will examine first the "common law" approach to antitrust law adopted by Congress and the roles of the judicial branch, the executive branch, and private litigants. Once I have identified the outside bounds of prosecutorial discretion, I will consider the implications of the separation of powers and the com-

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mon-law approach for the proper exercise of this discretion, including allocation of the Division's limited resources in antitrust law enforcement. Finally, I will review several applications in current Division policy.

I. The Common-Law Approach to Antitrust Law

At the turn of the century, Congress created the general statutory framework for government intervention in the marketplace,[1] a framework that remains largely unchanged today.[2] Its cornerstone is the Sherman Act, whose substantive prohibitions make unlawful every "contract, combination . . . or conspiracy, in restraint of trade"[3] and conduct to "monopolize, or attempt to monopolize . . . any part of . . . trade."[4] Closely aligned with these provisions is section 7 of the Clayton Act, which provides that "no person . . . shall acquire . . . any part of the stock . . . or assets of another person . . . where in any line of commerce . . . in any section of the country, the effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[5]

These provisions contain the kernel of antitrust law.[6] They are

1. Regulated markets, such as public utilities, are the one exception. Despite their popularity as a topic of discussion, however, they remain a relatively small part of the United States economy. For example, transportation, communications, public utilities, banking, and insurance—the industries subject to substantial economic regulation—accounted for less than 12% of the value added to national income in 1979. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 426 (1981). It is also true that the bulk of activity within these industries is subject to antitrust scrutiny of one form or another.

2. Of course, there have been a number of amendments to the basic acts as well as the passage of new statutes. Among the most notable of the substantive changes are the passage of the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)); the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), and its subsequent repeal, Pub. L. 94-145, 89 Stat. 801 (1975); and the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)). However, none of these changes altered the philosophy underlying the original antitrust enactments.

3. Sherman Act § 1, 15 U.S.C. § 1 (1976).

4. *Id.* § 2, 15 U.S.C. § 2 (1976).

5. 15 U.S.C. § 18 (1976 & Supp. V 1981).

6. Two other provisions often discussed in the context of substantive antitrust law are § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), and the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. § 13 (1976)). While the Supreme Court has held that the antitrust reach of § 5 is not bound by the Sherman and Clayton Acts, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), in practice both the Commission and reviewing courts use conventional antitrust analysis when applying the section. *See, e.g.,* E.I. du Pont de Nemours & Co., 96 F.T.C. 653 (1980); Brunswick Corp., 94 F.T.C. 1174 (1979), *aff'd sub nom.* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981); Borden, Inc., 92 F.T.C. 669 (1978), *aff'd*, 674 F.2d 498 (6th Cir. 1982); Beatrice Foods Co., 67 F.T.C. 473 (1965). Moreover, enforcement jurisdiction over § 5 is vested solely in the Federal Trade Commission. This section is, therefore, largely irrelevant to the duties of the head of the Antitrust Division. The Robinson-Patman Act, on the other hand, recognizes as unlawful conduct that injures competitors, regardless of its effects on competition, and as a result is not regarded as a true "antitrust" law. *Cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (antitrust laws enacted for "protection of *com-*

broadly phrased—almost constitutional in quality—embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments.[7] In failing to provide more guidance, the framers of our antitrust laws did not abdicate their responsibility any more than did the Framers of the Constitution. The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.[8]

A. *The Role of the Judiciary*

By adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch.[9] Three attributes of the basic statutes reflect the breadth of this delegation. First, the jurisdictional reach of the antitrust laws, at least that of the Sherman Act, is as far-reaching as constitutionally permitted.[10] This allows

petition, not *competitors*" (emphasis in original) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

7. The constitutional quality of the antitrust laws has been recognized by the Supreme Court. *See* Appalachian Coal, Inc. v. United States, 288 U.S. 344, 360 (1933) (antitrust laws described as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions").

8. As the Supreme Court observed in National Soc'y of Professional Eng'rs v. United States:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its applications in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

435 U.S. 679, 688 (1978) (footnote omitted).

9. I use the term "delegated" advisedly. Governance by legal norms begins with abstract principles of justice and proceeds along a continuum of increasingly factual specificity until a particular situation is completely identified. Under the doctrine of separation of powers, we recognize the creation of the abstract principles to be within the province of the legislative branch (subject, of course, to various constitutional constraints such as those contained in the Bill of Rights), while the application of these principles to particular facts and named persons belongs to the judicial branch. While the doctrine of separation of powers locates the responsibilities for the extremes of the continuum, it does not provide a clean division of the interior responsibilities between the two branches. Rather, the doctrine confers upon the legislative branch considerable discretion over the degree of the factual specification of its enactments, and leaves to the judiciary the residual. In this sense, Congress "delegates" its lawmaking power to the judicial branch to the extent its enactments require interpretation before they can be applied to particular facts. *See generally* Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1915), *reprinted in* SCIENCE OF LEGAL METHODS 202 (1969).

10. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-59 (1944). *See* McLain v. Real Estate Bd., Inc., 444 U.S. 232, 241-42 (1980). The courts initially interpreted the Clayton Act's "in commerce" language to provide narrower jurisdictional scope than the Sherman Act. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974). Section 7 was amended

the courts to scrutinize the full range of business conduct. Second, the substantive terms within the statutes are either of common-law origin or otherwise readily susceptible to judicial interpretation.[11] Taken on their face, the antitrust provisions could have reached almost all business decisions, whether entered unilaterally or multilaterally, directed toward internal operations or external dealings, or intended for present or future effect. Third, Congress provided little if any extrastatutory guidance to direct interpretation of the basic antitrust provisions.[12] The legislative histories of the antitrust statutes provide only the most basic description of the goals Congress sought to promote—competition and free enterprise—and little indication of how these goals can best be fostered by the judiciary.[13]

Confronted with an expansive, open-ended set of statutory prohibitions and little congressional guidance for their interpretation, the courts have had to distill a more operational conception of the public interest underlying the antitrust laws before applying statutory construction to secure the fundamental legislative goals. They have been forced to develop an understanding of the various types of business behavior as they measure them against this conception of the public interest. They also have had to discover the limits of the extent to which judicial regulation of business conduct can promote the public interest better than unregulated behavior.

Questions regarding the objectives of the law, the measure by which to test conduct against these objectives, and the ability of gov-

in 1980 to make its jurisdiction coextensive with that of the Sherman Act. Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980).

11. For a discussion, see, e.g., W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 96 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 181-84 (1954); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955)

12. It is true that at least some of the legislators thought they were merely enacting the existing common law of restraints of trade. *See, e.g.*, 21 CONG. REC. 2456, 2457, 2563 (remarks of Sen. Sherman); *id.* at 3146, 3152 (remarks of Sen. Hoar). But the common-law precedents at that time did not form a coherent body of doctrine to assist in construing the new antitrust laws; rather, they differed in significant and sometimes contradictory ways from jurisdiction to jurisdiction and often within the same jurisdiction. *See* Dewey, *supra* note 11; Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954). To make matters even less clear, the drafters appear to have misunderstood the focus of the common law to be restriction on competition, a somewhat different notion than restriction or exclusion of competitors. *See* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 36-38 (1966). Both of these factors cast doubt on the reliability of the body of law the framers stated they were seeking to codify as a source of aid in statutory construction.

13. Senator Sherman candidly stated during the course of debate over the Sherman Act:

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . .

21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman).

ernment intervention to further these objectives, are basic to all lawmaking processes. What distinguishes the common-law approach from the legislature's statutory approach is the manner in which these questions are answered and the stability of the answers once given. The press of business, coupled with the constitutional and institutional rules governing legislative action, often prevent Congress from actively supervising the implementation of statutes once they are passed. Instead, the typical statutory approach is to define comprehensive answers to the basic questions of lawmaking at the time of enactment and to modify these answers only if dissatisfaction becomes intense. Consequently, the evolution of statutory law is characterized by long periods of stability occasionally interrupted by relatively basic changes.[14]

By contrast, the common-law approach avoids immediate answers to basic lawmaking questions. Instead, questions are raised and answered narrowly as individual cases are brought to the courts. By the critical use of stare decisis, more comprehensive answers to the basic questions gradually evolve as more cases are decided. As Munroe Smith described the process:

> The rules and principles of case-law have never been treated as final truths but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated.

14. This simple model of legislative supervision is, of course, subject to numerous refinements and qualifications. In many circumstances, legislative control may be exercised through means other than the fine-tuning of its substantive enactments. When the implementation of a statute is exclusively in the hands of the executive branch or an independent regulatory agency, effective control may be exercised through the authorization and appropriations process, or even more informally through oversight hearings and legislative liaison. These alternatives concentrate considerable power in congressional committees, if not individual senators and representatives, and control by the Hill may often be exercised without the need for full congressional action. *See generally* R. Fenno, Congressmen in Committees (1973); R. Fenno, The Power of the Purse (1966); M. Fiorina, Congress: Keystone of the Washington Establishment (1977); A. Wildavsky, The Politics of the Budgetary Process (1964); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 Public Choice 33 (1982); Weingast & Moran, Bureaucratic Discretion or Control: Regulatory Policymaking by the Federal Trade Commission (1982) (Working Paper 72, Center for the Study of American Business, Washington University); Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 Law & Contemp. Probs. 147 (1981). However, where implementation of the law depends significantly on private actions and interpretations by an independent judiciary, effective legislative control turns on the ability to amend quickly the substantive law in response to deviations from the congressionally desired course. This requires actions by both Houses and approval by (or override of the veto of) the President, and consequently is typically too cumbersome to permit effective legislative control.

> The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[15]

By its very nature, the common-law approach assumes that judicial mistakes will be made, or at least that incomplete answers will be given to the more general questions raised by the case. While the common-law approach lacks the certainty of the statutory approach, it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law. The need for a process of incremental change was particularly acute in antitrust at the turn of the century, when there was great pressure to control perceived abuses by business but little understanding of what the government could and ought to do to promote competition and free enterprise.

The common-law process of answering basic lawmaking questions was in full bloom by 1897 with the debate between Justices Peckham and White in *United States v. Trans-Missouri Freight Association*[16] over the scope of conduct to be declared unlawful under the Sherman Act. The government had brought a bill to enjoin the Trans-Missouri Freight Association and its eighteen member railroads from jointly establishing rates and other terms of service upon competitive traffic. The lower courts had found no violation of the Sherman Act since there was no suggestion that the defendants had violated the Interstate Commerce Act's requirement that rail rates be "reasonable and just." Justice Peckham, leading a five-to-four majority, held that dismissal of the bill was error. In his view, the Sherman Act prohibited *every* restraint of trade,[17] and the Association's price-fixing arrangement was such a restraint notwithstanding the assumed reasonableness of the rates.[18] Justice White, relying on his reading of the common law, urged in a dissent joined by the three remaining Justices that only "unreasonable" restraints should be unlawful,[19] and, since the rates fixed by the defendants were assumed reasonable, dismissal of the bill was proper.[20] The following year in *United States v. Joint-Traffic Association*,[21] the Court examined another railroad price-fixing agreement indistinguish-

15. M. SMITH, JURISPRUDENCE 21 (1909), *quoted in* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921).
16. 166 U.S. 290 (1897).
17. *Id.* at 312, 328.
18. *Id.* at 328-32.
19. *Id.* at 351-52, 355 (White, J., dissenting).
20. *Id.* at 343-44.
21. 171 U.S. 505 (1898).

able in principle from that in *Trans-Missouri*.[22] Justice Peckham, again speaking for a five-to-four majority,[23] refined his earlier views, indicating that while "every" restraint of trade was unlawful, *restraint of trade* under the Sherman Act was not co-extensive with restraint of trade under common law.[24] Rather, the act reached only those "contracts whose direct and immediate effect is a restraint upon interstate commerce."[25]

Justice Harlan joined the debate with his opinion in *Northern Securities Co. v. United States*,[26] insisting that "*every* combination or conspiracy which would extinguish competition between otherwise [competitors] . . . engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act."[27] Since the challenged combination involved a merger between two prior competing railroads, both of which transported passengers and freight interstate,[28] Justice Harlan would have held the combination illegal.[29] Justice Holmes disagreed. In his dissent (notably joined by Justices White *and* Peckham, together with Chief Justice Fuller),[30] Justice Holmes argued that the Sherman Act did not reach complete fusions of interests, even between previously competing entities, in part because the mere formation of such combinations could not

22. *Id.* at 562-65.

23. Justice White and three other justices dissented, although they filed no dissenting opinion.

24. For example, Justice Peckham indicated that a noncompetition covenant binding the seller of a business in his individual capacity was "a contract not within the meaning of the act," 171 U.S. at 568, although it was clearly regarded as a restraint of trade at common law. *See* Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); Dyer's Case, Y.B. Pasch., 2 Hen. V f.5, pl. 26 (1415). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY 17-20 (1955). This redefinition of "restraint of trade" was anticipated in *Trans-Missouri*. *See* 166 U.S. at 329.

25. 171 U.S. at 568. Justice Peckham further explained:

> [t]o treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

Id.

26. 193 U.S. 197 (1904).

27. *Id.* at 331 (emphasis in original).

28. *Id.* at 320.

29. Justice Harlan wrote for four justices; Justice Brewer's concurrence in a separate opinion provided the majority for holding the merger unlawful.

30. Justice White also wrote a dissenting opinion, joined by the three other dissenters, arguing that the formation of a holding company and the acquisition of shares of other corporations—the form of the merger in this case—did not meet the interstate commerce requirement of the Sherman Act. 193 U.S. at 364 (White, J., dissenting).

exclude third parties from competing with the combination.[31] Otherwise, given Justice Peckham's interpretation in *Trans-Missouri* and *Joint Traffic* with which Holmes agreed,[32] the Sherman Act would make unlawful *every* integration of competing interests and require the atomization of economic endeavor.[33]

The judicial view shifted once again in 1911 with the decision in *Standard Oil Co. v. United States*,[34] in which Chief Justice White obtained a majority of the Court and attempted still another restatement of the fundamentals of antitrust law. While Chief Justice White found "every conceivable contract or combination" to be subject to Sherman Act scrutiny,[35] not all such contracts of combinations were unlawful, even if they resulted in a restraint of trade. Rather, the act prohibited only those contracts or combinations which effected "undue" restraints when measured against a "rule of reason,"[36] a test which looked to the nature of the "contracts or agreements, their necessary effect, and the character of the parties."[37] In *United States v. American Tobacco Company*,[38] a case decided two weeks after *Standard Oil*, Chief Justice White elaborated that under the rule of reason

> the words "restraint of trade" . . . only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade.[39]

Chief Justice White had come full circle from his dissent in *Trans-Missouri*. Restraints of trade were to be judged by the "reasonableness" of their character in relation to competition, not their degree as he had originally urged. In reaching this conclusion, Chief Justice White was able to formulate an interpretation of the Sherman Act which retained its essential flexibility to respond to new business practices and new insights regarding the competitive conseqences of business conduct—a quality absent in the articulations of Justices Peckham, Harlan, and Holmes.

This short digression illustrates the conceptual quagmire faced by

31. *Id.* at 408 (Holmes, J., dissenting).
32. *Id.* at 405.
33. *Id.* at 410-11.
34. 221 U.S. 1 (1911).
35. *Id.* at 59-60.
36. *Id.* at 62.
37. *Id.* at 65.
38. 221 U.S. 106 (1911).
39. *Id.* at 179.

those who sought to regulate competitive business behavior at the turn of the century and the need for a common-law approach to antitrust law.[40] This need remains apparent today as the law continues to evolve.

For example, in *Standard Oil* Chief Justice White, in finding that Standard Oil Company had violated the Sherman Act, stressed that the company had acquired its dominant share of the market through merger rather than internal growth, and that it had engaged in a variety of predatory practices against competitors.[41] By 1945, however, in *United States v. Aluminum Co. of America*,[42] Judge Hand was able to find that Alcoa had violated section 2 of the Sherman Act when its dominant market share had not been "thrust upon" it, even though it had achieved its size largely through internal growth and was not accused of predatory conduct.[43] Thirty years later, the tide once again had shifted, and the law required a showing of anticompetitive conduct as a prerequisite to monopolization.[44]

Merger antitrust law provides another example of the continuing evolution of antitrust law. In the 1960s the Supreme Court tightened considerably the market-share standards to which horizontal mergers would be held.[45] Later, however, the Court abandoned its almost religious devotion to market-share analysis and found lawful a horizontal merger that would have been presumptively illegal under prior cases because the defendant had demonstrated that the acquisition threatened no substantial lessening of competition.[46]

In addition, the Court has overruled its earlier decision that non-

40. The early history of the Sherman Act is analyzed with great care and insight in Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 785-79 (1965).

41. 221 U.S. at 75-76. A question has been raised whether Standard Oil did in fact engaged in predatory pricing. *See* McGee, *Predatory Price-Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137 (1958).

42. 148 F.2d 416 (2d Cir. 1945).

43. *Id.* at 430-31.

44. *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). On facts strikingly similar to those in *Alcoa*, the Federal Trade Commission declined to find unlawful the successful expansion strategy adopted by duPont in the titanium pigments business. *In re* E.I. duPont de Nemours & Company, 96 F.T.C. 653, 705 (1980).

45. In 1962 the Supreme Court indicated it would refuse to sanction a horizontal acquisition of as much as 5% in a market characterized by minimal or no entry barriers. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). Four years later the Court appeared to have lowered the threshold market share to no greater than 4.5%. United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966). That same year the Court struck down a horizontal merger between two grocery chains in which the surviving firm had only 1.4% of the grocery stores and 7.5% of the grocery sales in a relevant market characterized by a significant trend toward concentration and an increase of acquisitions of small companies by large chains. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

46. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

price vertical restraints (such as territorial sales restrictions) were per se unlawful, and ruled instead that such restraints must be analyzed under the rule of reason.[47] The Court has also found that the legality of the sale of blanket licenses for musical compositions by a clearinghouse of composers and publishing houses, an arrangement which under existing precedent seemed to be per se unlawful, is to be examined under the rule of reason.[48]

These examples illustrate both the evolving nature of antitrust law and the fact that the evolution does not always proceed in one direction. Neither this evolution nor its lack of direction should be surprising. It is exactly what the framers of the antitrust laws intended. An adaptive approach to antitrust law is necessary both because of the diversity and rapidly changing nature of the business conduct to be scrutinized, and because of the continuing progress of economic theory in explaining why firms pursue certain strategies and the competitive consequences of their behavior. As the courts gain experience through scrutiny of challenged conduct and as economic theory continues to provide a more complete understanding of business conduct, it is inevitable that mistakes will be exposed in some of the past applications of antitrust law.[49] Moreover, given this nation's complex economic history since the late 1800s and the political and intellectual forces that this history has encompassed, it is likely that the distribution of mis-

47. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). On remand the contractual restriction on the locations where the plaintiff could sell defendant's television sets was upheld under rule of reason analysis. Continental T.V., Inc. v. GTE Sylvania, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,962 (9th Cir. 1982).

48. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979). On remand, the clearinghouse arrangement was upheld with respect to blanket licensing of music performing rights for use in television network programming. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). However, in a related case against the clearinghouse brought by independent television stations, the district court found the arrangement unlawful under the rule of reason with respect to the blanket licensing of performing rights for use in non-network programming. Buffalo Broadcasting Co. v. ASCAP, 1982-2 Trade Cas. (CCH) ¶ 64,898 (S.D.N.Y. 1982).

49. Chief Justice White recognized the same evolutionary forces in the early English law of restraint of trade:

> From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade.

Standard Oil co. v. United States, 221 U.S. 1, 55 (1911).

takes is not continually skewed in the direction of either a too expansive or too limited law of competition. Errors could be, and were, made on both sides. Even so, in my opinion the antitrust law of today is a major improvement on prior law and far superior to anything that could have resulted from more prescriptive statutory approaches. The common-law approach to antitrust law, if it has not served us well, has served us better than would the available alternatives.

This is not to say that the evolution of antitrust law has reached its apogee. Some areas of antitrust law exhibit substantial doctrinal confusion, if not plain error. Confusion is inevitable as courts apply rules to fact situations different from those in which the rules were developed.[50] More fundamentally, the confusion reflects the still evolving character of the answers to the basic questions in antitrust law. After close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise.[51] As a result, uncertainty remains over the measure against which the social desirability (and hence legality) of various types of business conduct should be tested.[52] More-

50. Perhaps the best example of this confusion lies in the attempts by lower courts and the Federal Trade Commission to apply the rules regarding unilateral and multilateral conduct enunciated in United States v. Colgate & Co., 250 U.S. 300 (1919), and United States v. Parke, Davis & Co., 362 U.S. 29 (1960). *Compare, e.g.,* Battle v. Lubrizol Corp., 673 F.2d 984, 991-92 (8th Cir. 1982) (concluding that complaint-and-termination evidence alone is sufficient to infer agreement), *and* Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238-40 (7th Cir. 1982) (same), *with* Roesch Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982) (concluding that mere complaint-and-termination evidence is insufficient to support an inference of conspiracy), *and* Edward J. Sweeny & Sons Inc. v. Texaco, Inc., 637 F.2d 105, 110, 116 (3d Cir. 1981) (same).

51. *See, e.g.,* M. GREEN, B. MOORE, JR. & F. WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM (1971); Austin, *A Priori Mechanical Jurisprudence in Antitrust*, 53 MINN. L. REV. 739 (1969); Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972); Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965); Brodley, *Massive Industrial Size, Classical Economics and the Search for Humanistic Value*, 24 STAN. L. REV. 1155 (1972); Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413 (1964); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Hart, *The Quality of Life and the Antitrust Laws: A View from Capitol Hill*, 40 ANTITRUST L.J. 302 (1971); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968); Lande, *The Goals of the Antitrust Laws*, 33 HASTINGS L.J. — (1982) (forthcoming); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980); Note, *Antitrust Enforcement Against Organized Crime*, 70 COLUM. L. REV. 307 (1970). *See also, e.g., Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

52. This source of confusion, for example, probably lies behind the split among the circuits on whether an employee discharged or otherwise punished by his employer for refusing to assist in an antitrust violation has standing to challenge the violation. *Compare* Ostrofe v. Crocker Co.,

over, while economic theory has made enormous strides toward understanding business behavior, it still falls far short of enabling us to test many kinds of business conduct against the public interest (whatever its measure).[53] Finally, there is considerable disagreement over the extent to which government intervention in the marketplace can successfully regulate socially undesirable conduct to further the public interest.[54]

As the courts refine antitrust law by incorporating new insights and resolving old confusions, they act much like Congress (at least in principle) when it updates statutory law. But the courts cannot act alone in this process. Unlike Congress, the courts have only limited discretion in fashioning their lawmaking agenda. The Constitution limits the exercise of judicial power to "cases" and "controversies."[55] The courts are not free to render advisory opinions[56] or to reach out and select the issues they wish to hear.[57] The law's course of development is bounded by the nature of the cases brought before the courts.[58]

670 F.2d 1378 (9th Cir. 1982) (recognizing standing), *with In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982) (denying standing).

53. The law of predatory pricing amply illustrates the inadequacy of current economic theory. Despite the efforts of numerous analysts, there is little agreement about the existence, characteristics, or welfare economics of the putative phenomenon. The inability of current economic theory to resolve this lack of agreement is reflected in the difficulty the courts have in finding a unified framework in which to examine allegations of predatory pricing. *See, e.g.,* Utah Pie v. Continental Baking Co., 386 U.S. 685, 698 (1966); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978); Pacific Eng. & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977). *See generally* Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends,* 35 VAND. L. REV. 63 (1982); Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules,* 61 TEXAS L. REV. — (1982) (forthcoming).

54. Compare, for example, the various proposals for regulatory reform contained in S. BREYER, REGULATION AND ITS REFORM (1982); L. LAVE, THE STRATEGY OF SOCIAL REGULATION (1981); P. MACAVOY, THE REGULATED INDUSTRIES AND THE ECONOMY (1979); R. NOLL, REFORMING REGULATION (1971); R. POOLE, INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES (1981); L. WHITE, REFORMING REGULATION (1981).

55. U.S. CONST. art. III, § 2. The case or controversy requirement serves the dual purpose of limiting the business of federal courts to questions presented in adversary context and in a form historically viewed as capable of resolution to the judicial process and of assuring that federal courts will not intrude into areas committed to other branches of government. Flast v. Cohen, 392 U.S. 83, 95 (1968).

56. United States v. Freuhauf, 365 U.S. 146 (1961); Muskrat v. United States, 219 U.S. 346 (1911). See generally H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70 (2d ed. 1973), and materials cited therein.

57. This rule is subject to some qualification. Once a proceeding has been initiated, a court has some leeway to suggest that the litigants raise certain questions or, where appropriate, to raise the questions sua sponte. Even so, the court's ability to consider questions it would like to address is severely constrained since it cannot raise such questions except in rare instances in the proceedings before it.

58. Nor have the courts always decided the issues brought to them for adjudication. A

Moreover, for the most part judges do not play an inquisitorial role in adjudication. They depend instead on the litigants to present relevant evidence and the arguments necessary for an informed decision. Consequently, the agenda of antitrust issues presented to the courts and the evidence and arguments necessary to an informed decision depend upon the litigants, particularly the executive branch in its role as the nation's chief enforcer of the antitrust laws.

B. The Role of the Executive Branch

The Constitution provides that the President, and by implication subordinate officers of the President to whom authority has been properly delegated, "shall take Care that the Laws be faithfully executed."[59] This allocation of power and responsibility empowers the President, through the executive branch and particularly the Office of the Attorney General, to enforce acts of Congress and treaties of the United States and to prosecute offenses against the United States.[60] In enacting the antitrust laws, Congress made violations of antitrust law offenses against the United States[61] as well as quasi-tort offenses against

number of doctrines permit the courts to avoid answering questions presented to them. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (standing); Flast v. Cohen, 392 U.S. 83 (1968) (standing); Frothingham v. Mellon, 262 U.S. 447 (1923) (standing); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (ripeness); DeFunis v. Odegaard, 416 U.S. 312 (1974) (mootness); Golden v. Zwickler, 394 U.S. 103 (1969) (mootness); Baker v. Carr, 369 U.S. 186 (1962) (political question); Colegrove v. Green, 328 U.S. 549 (1946) (political question); Luther v. Borden, 48 U.S. (7 How.) 1 (1839) (political question); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930) (administrative question).

59. U.S. CONST. art. II, § 3.

60. *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); United States v. San Jacinto Tin Co., 125 U.S. 273, 278-79 (1888); The Confiscation Cases, 74 U.S. (7 Wall.) 454, 456-57 (1868). In addition, at least one commentator has found in the faithful execution clause the power to enforce judicial decrees obtained by the government. Comment, *Constitutional Law—Executive Powers—Use of Troops to Enforce Federal Laws*, 56 MICH. L. REV. 249 (1957). The clause has been interpreted more generally to embrace any obligation that can be inferred from the Constitution or is "derived from the general code of his [the President's] duties under the laws of the United States." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 88-89 (1916). *See* 2 W.C. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE STATES AND THE FEDERAL GOVERNMENT § 13:27 (1969).

The President's power under the faithful execution clause may be supplemented by the executive power clause, which provides that "[t]he executive Power shall be vested in a President of the United States." U.S. CONST. art. II, § 1, cl. 1. However, it is questionable whether this clause confers any substantive power beyond that conferred by the faithful execution clause. *See* Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of power to execute the laws.").

61. The statutes authorize the federal government to prosecute antitrust violations by bringing criminal actions for violations of the Sherman Act, 15 U.S.C. §§ 1-3 (1976), or injunctive actions for violations of the Sherman Act, 15 U.S.C. § 4 (1976), and the Clayton Act, 15 U.S.C. § 25 (1976). In addition, whenever the United States itself is injured as a result of an antitrust violation, it may institute a civil proceeding to recover actual damages. Clayton Act § 4A, 15 U.S.C. § 15a (1976).

BROWN SHOE CO. V. UNITED STATES
370 U.S. 294 (1962)
(EXCERPT ON THE CELLER–KEFAUVER ACT OF 1950)*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

I.

This suit was initiated in November 1955 when the Government filed a civil action in the United States District Court for the Eastern District of Missouri alleging that a contemplated merger between the G. R. Kinney Company, Inc. (Kinney), and the Brown Shoe Company, Inc. (Brown), through an exchange of Kinney for Brown stock, would violate § 7 of the Clayton Act, 15 U. S. C. § 18. The Act, as amended, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the wb.ole or any part of the stock or other share capital . . . ·of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The complaint sought injunctive relief under § 15 of the Clayton Act, 15 U.S.C. § 25, to restrain consummation of the merger.

A motion by the Government for a preliminary injunction *pendente lite* was denied, and the companies were permitted to merge provided, however, that their businesses be operated separately and that their assets be kept separately identifiable. The merger was then effected on May 1, 1956.

In the District Court, the Government contended that the effect of the merger of Brown—the third largest seller of shoes by dollar volume in the United States, a leading manufacturer of men's, women's, and children's shoes, and a retailer with over 1,230 owned, operated or controlled retail outlets—and Kinney—the eighth largest company, by dollar volume, among those primarily engaged in selling shoes, itself a large manufacturer of shoes, and a retailer with over 350 retail outlets—"may be substantially to lessen competition or to tend to create a monopoly" by eliminating actual or potential competition in the production of shoes for the national wholesale shoe market and in the sale of shoes at retail in the Nation, by foreclosing competition from "a market represented by Kinney's retail outlets whose annual sales exceed $42,000,000," and by enhancing Brown's competitive advantage over other producers, distributors and sellers of shoes. The Government argued that the "line of commerce" affected by this merger is "footwear," or alternatively, that the "line[s]" are "men's," "women's," and "children's" shoes, separately considered, and that the "section of the country," within which the anticompetitive effect of the merger is to be judged, is the

* Most footnotes and internal citations have been omitted without indication.

Nation as a whole, or alternatively, each separate city or city and its immediate surrounding area in which the parties sell shoes at retail.

In the District Court, Brown contended that the merger would be shown not to endanger competition if the "line[s] of commerce" and the "section[s] of the country" were properly determined. Brown urged that not only were the age and sex of the intended customers to be considered in determining the relevant line of commerce, but that differences in grade of material, quality of workmanship, price, and customer use of shoes resulted in establishing different lines of commerce. While agreeing with the Government that, with regard to manufacturing, the relevant geographic market for assessing the effect of the merger upon competition is the country as a whole, Brown contended that with regard to retailing, the market must vary with economic reality from the central business district of a large city to a "standard metropolitan area" for a smaller community. Brown further contended that, both at the manufacturing level and at the retail level, the shoe industry enjoyed healthy competition and that the vigor of this competition would not, in any event, be diminished by the proposed merger because Kinney manufactured less than 0.5% and retailed less than 2% of the Nation's shoes.

[The district court rendered judgment for the government and ordered Brown to divest all of the stock, assets, and interests in held in Kinney. Brown Shoe took a direct appeal under the Expediting Act.]

. . .

III.

LEGISLATIVE HISTORY.

This case is one of the first to come before us in which the Government's complaint is based upon allegations that the appellant has violated § 7 of the Clayton Act, as that section was amended in 1950. The amendments adopted in 1950 culminated extensive efforts over a number of years, on the parts of both the Federal Trade Commission and some members of Congress, to secure revision of a section of the antitrust laws considered by many observers to be ineffective in its then existing form. Sixteen bills to amend § 7 during the period 1943 to 1949 alone were introduced for consideration by the Congress, and full public hearings on proposed amendments were held in three separate sessions. In the light of this extensive legislative attention to the measure, and the broad, general language finally selected by Congress for the expression of its will, we think it appropriate to review the history of the amended Act in determining whether the judgment of the court below was consistent with the intent of the legislature.

As enacted in 1914, § 7 of the original Clayton Act prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition between the acquiring and the acquired companies, or tend to create a monopoly in any line of commerce. The Act did not, by its explicit terms, or as construed by this Court, bar the acquisition by one corporation of the assets of another. Nor did it appear to preclude the acquisition of stock in any corporation other than a direct competitor. Although proponents of the 1950 amendments to the Act suggested that the terminology employed in these provisions was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views. The possibility of asset acquisition was discussed but was not considered important to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock.

It was, however, not long before the Federal Trade Commission recognized deficiencies in the Act as first enacted. Its Annual Reports frequently suggested amendments, principally along two lines: first, to "plug the loophole" exempting asset acquisitions from coverage under the Act, and second, to require companies proposing a merger to give the Commission prior notification of their plans. The Final Report of the Temporary National Economic Committee also recommended changes focusing on these two proposals. Hearings were held on some bills incorporating either or both of these changes but, prior to the amendments adopted in 1950, none reached the floor of Congress for plenary consideration. Although the bill that was eventually to become amended § 7 was confined to embracing within the Act's terms the acquisition of assets as well as stock, in the course of the hearings conducted in both the Eightieth and Eighty-first Congresses, a more far-reaching examination of the purposes and provisions of § 7 was undertaken. A review of the legislative history of these amendments provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers. However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger.

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

What were some of the factors, relevant to a judgment as to the validity of a given merger, specifically discussed by Congress in redrafting § 7?

First, there is no doubt that Congress did wish to "plug the loophole" and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock.

Second, by the deletion of the "acquiring-acquired" language in the original text, it hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.

Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

Fourth, and closely related to the third, Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.

Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example,. a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. The deletion of the word "community" in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant "section" of the country. Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged. Nor did it adopt a definition of the word "substantially," whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured.

Seventh, while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

Eighth, Congress used the words "may be substantially to lessen competition" (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

It is against this background that we return to the case before us.

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A Note on Antitrust Appellate Jurisdiction

Brown Shoe, having lost in the district court, brought a direct appeal to the Supreme Court under the Expediting Act.[1] Congress considered antitrust cases too important to be handled by the courts of appeals before reaching the Supreme Court. Therefore, in 1903, it enacted the Expediting Act, which enabled a direct appeal to the Supreme Court from the district court in cases brought by the United States. As a result, there are relatively few courts of appeals decisions in government antitrust cases between 1903 and 1974, when the Expediting Act was substantially amended. However, the Expediting Act did not apply to private cases, so the courts of appeals reviewed those cases from the district courts.[2]

This note examines the federal judicial system in 1890, the creation of an intermediate tier of appellate courts by the Judiciary Act of 1891, the reasons behind the changes made by the Expediting Act of 1903, and the significant modifications made to the Expediting Act, part of which remains in effect today.

The federal judicial system in 1890. When the Sherman Act was passed, the federal judicial system operated under a cumbersome three-tier structure established by the Judiciary Act of 1789.[3] The act created *district courts*, each consisting of a single

1. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (Feb. 11, 1903).

2 Prior to the 1960s, private antitrust cases were relatively few in number and mostly lacked the doctrinal significance of government cases. *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970) (finding only 389 reported private antitrust cases from 1890 to 1959).

3 An Act to Establish the Judicial Courts of the United States, ch. 20. 1 Stat. 73 (Sept. 24, 1789) ("Judiciary Act of 1789"). Constitutional authority for the act is found in Article III, which authorizes Congress to vest judicial power "in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. When the First Congress convened, one of its first enactments was the organization of the federal judiciary through the Judiciary Act of 1789. For more on the enactment and early history of the Judiciary Act, see, for example, JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 457-508 (1971); WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE ___ (1990); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990).

district judge.[4] District courts were exclusively trial courts with original jurisdiction to adjudicate cases involving minor federal crimes, civil admiralty and maritime offenses, and certain other limited types of cases.[5]

The Judiciary Act of 1789 also established *circuit courts*. These itinerant courts were the primary trial courts in the federal system. Notably, Congress did not establish separate, permanent judges for the circuit courts. Initially, each circuit court consisted of two Supreme Court justices assigned to that circuit ("riding circuit") and the district judge of the district where the court was meeting,[6] although in 1793, Congress reduced the number of Supreme Court justices who had to participate in each circuit panel from two to one, thereby also reducing the panel quorum to two.[7] Congress granted circuit courts original jurisdiction in diversity of citizenship cases where the amount in controversy exceeded $500, in federal criminal cases (concurrent with the district court for minor offenses), and in cases involving the United States as a party.[8] The circuit courts' original jurisdiction over federal criminal cases covered antitrust criminal actions, and the Sherman Act gave circuit courts original jurisdiction over government and private civil cases brought under the act.[9] Congress also gave circuit courts limited appellate jurisdiction over district court decisions in civil cases and in admiralty cases where the amount in controversy exceeded $50 and $300, respectively.[10]

After 1793, except for a year between 1801 and 1802,[11] the composition of the circuit courts remained largely unchanged for almost eighty years.[12] In 1869, Congress

[4] Judiciary Act of 1789, § 3. The Act gave district court jurisdiction exclusive of the states over some matters (including federal crimes and admiralty and maritime offenses), but provided for concurrent jurisdiction with the states for other matters (including suits at common law brought by the United States where the amount in controversy was $100 or less). *Id*.

[5] *Id*. § 9.

[6] *Id*. § 4. District court judges could not vote in appeals of district court cases over which the judge had presided, but the judge could assign the reasons for his decision. *Id*.

[7] Judiciary Act of 1793, ch. 22, §§ 1-2, 1 Stat. 333, 333-34 (Mar. 2, 1793).

[8] Judiciary Act of 1789, § 11.

[9] Ch. 647, §§ 4 (government), 7 (private), 26 Stat. 209, 210 (1890).

[10] *Id*. §§ 22 (civil cases), 21 (admiralty and maritime cases).

[11] In 1801, the lame-duck Federalist majority in Congress passed the Judiciary Act of 1801, also known as the "Midnight Judges Act," which expanded federal jurisdiction, eliminated Supreme Court justices' circuit court duties, and created 16 new federal circuit court judgeships. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (1801). Outgoing President John Adams quickly filled the new positions with Federalist lifetime appointees (the so-called "midnight judges"). When Democratic-Republicans gained control of Congress in 1802, they passed the Judiciary Act of 1802, which repealed the 1801 Act and eliminated the new judgeships, reinstated circuit riding for Supreme Court justices, and implemented the Republicans' own judicial reorganization that increased the number of circuits from three to six. Judiciary Act of 1802, ch. 31, 2 Stat. 156 (1802). The constitutional question of whether could remove the "midnight judges" by eliminating their judicial positions giventhe lifetime tenure provision of Article III was never litigated.

[12] After 1802, Congress briefly created a single circuit judgeship for California (1855-1863), Act of Feb. 27, 1855, ch. 127, 10 Stat. 604 (1855). In 1869, Congress established dedicated circuit judges for all nine circuits while reducing Supreme Court justices' circuit riding duty from annual to once every two years. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (1869).

established one circuit judge for each circuit, who could preside over the circuit court alone or in conjunction with a district judge or a Supreme Court justice.[13] After 1869, any one of these judges constituted a quorum of the circuit court, making it unnecessary for Supreme Court justices to ride circuit, and the practice quickly fell into disuse.[14]

For the next century, the Supreme Court remained the primary federal appellate tribunal. Most cases within the appellate jurisdiction of the Supreme Court were heard as a matter of right: if a case met the statutory requirements for review, the Court was required to hear and decide it. The absence of an intermediate appellate tier, combined with the expansion of federal jurisdiction and the increasing volume of litigation following the Civil War, resulted in severe delays and an unsustainable caseload. By the late nineteenth century, this mandatory appellate jurisdiction, combined with the justices' responsibilities to "ride circuit," was rapidly overwhelming the Court.

The Judiciary Act of 1891. To relieve the mounting appellate burden on the Supreme Court, Congress enacted the Judiciary Act of 1891,[15] which established the United States courts of appeals and transferred most of the Supreme Court's appellate jurisdiction to them.[16] The idea was that most appeals would terminate at the courts of appeals, making their decisions final in the vast majority of cases. Only in a narrowly limited set of five categories could parties appeal as of right to the Supreme Court.[17] In all other cases, the Court's review became discretionary: Congress authorized the Supreme Court to grant review by writ of certiorari. This mechanism enabled the Court to select which lower court decisions to review, allowing it to concentrate its docket on matters of national importance.[18]

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[13] Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44.

[14] Calls to remove the Supreme Court justices from the circuit courts and their circuit riding duties emerged almost immediately from the Attorney General and the Supreme Court. In 1793, Congress reduced the number of Supreme Court justices who had to participate in each circuit panel from two to one, thereby also reducing the panel quorum to two. Judiciary Act of 1793, ch. 22, §§ 1-2, 1 Stat. 333, 333-34 (Mar. 2, 1793).*See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 105-14 (1928) (describing the burdens of circuit riding, the creation of circuit judges in 1869 and the gradual decline of Supreme Court justices' participation in circuit courts); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003); Jake Kobrick, Federal Judicial History Office, Federal Judicial Center, A Brief History of Circuit Riding (Fed. Jud. Ctr. 2023).

[15] Ch. 517, 26 Stat. 826 (1891) (also called the "Evarts Act" or the "Circuit Court of Appeals Act"). The Judiciary Act of 1891 was the first structural modification in the federal judicial system since its creation a hundred years earlier. For more on the creation of the courts of appeal, see Jake Kobrick, Federal Judicial History Office, The Role of the U.S. Courts of Appeals in the Federal Judiciary 2-3 (Fed. Jud. Ctr. 2023).

[16] *Id*. § 6.

[17] *Id*. § 5.

[18] In addition to petitions for certiorari, the Judiciary Act of 1891 authorized the courts of appeals to certify "any questions or propositions of law" to the Supreme Court for instruction. See Judiciary Act of 1891, § 6. The Supreme Court was required to answer the certified question or, in its discretion, take up the entire case. *Id*. This procedure provided a mandatory avenue for review, unlike certiorari, but it

While the Judiciary Act of 1891 gave appellate jurisdiction over all other cases to the newly created courts of appeal,[19] it did not alter the original jurisdiction of either the circuit courts or the district courts.[20] As a result, government antitrust enforcement actions, whether civil suits for injunctive relief or criminal prosecutions, continued to be tried in the circuit courts, which retained original jurisdiction until 1912, when Congress abolished those courts and transferred their jurisdiction to the district courts.[21] Appeals from those cases were now taken first to the appropriate court of appeals. Except in the rare antitrust case that raised a constitutional issue—the only one of the five statutory categories for direct appeal plausibly applicable to an antitrust matter—Supreme Court review could be sought only by petition for certiorari, which was rarely granted. In practice, this meant that many antitrust decisions no longer received Supreme Court review, leading to doctrinal fragmentation across the circuits. The result was a slower and less coherent development of antitrust law at a time when courts were still engaged in the common law task of articulating the foundational principles of the Sherman Act. In this area, prompt, authoritative review by the Supreme Court was especially needed.

The Expediting Act of 1903. In 1903, at the urging of Philander C. Knox, President Theodore Roosevelt's attorney general, Congress responded to growing concerns about the slow and uneven development of federal antitrust law by enacting the

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was used sparingly. The certified question procedure remains in place today, but Congress gave the Supreme Court discretion in 1948 over whether to answer certified questions. *See* Judicial Code of 1948, ch. 646, § 1254(2), 62 Stat. 869, 928 (codified at 28 U.S.C. § 1254(2)). There do not appear to be any antitrust cases from 1891 to the present that reached the Supreme Court via certified question, and certification has played no significant role in the development of federal antitrust doctrine.

19 *Id*. § 6.

20 When reforming the federal judiciary in 1891, both the House and the Senate agreed on the need to create an intermediate tier of appellate courts to relieve the Supreme Court's growing appellate burden. The House also argued that the federal trial court system was overwhelmed and rendered inefficient by the duplication of two overlapping trial courts. Its bill proposed abolishing the circuit courts entirely, consolidating their original jurisdiction in the district courts, and expanding the number of district judges to absorb the increased trial workload. *See* H.R. Rep. No. 51-637, at 2-3 (1890); 22 Cong. Rec. 2614 (1891) (statement of Rep. Culberson). The Senate disagreed and introduced a bill that limited reform to the creation of appellate courts and preserved the circuit courts as trial courts. *See* S. 679, 51st Cong. (1890). Senator William M. Evarts (R-NY), former Attorney General, Secretary of State, and the lead sponsor of the Senate bill, argued that this more limited approach preserved familiar institutions, minimized the number of new judgeships, and ensured that circuit judges continued to "intermingle with the people" through trial work. *See* 22 Cong. Rec. 2435-36 (1891) (remarks of Sen. Evarts); S. Rep. No. 51-486, at iii–iv (1890). These considerations helped reassure skeptical senators who feared that abolishing the circuit courts and expanding the federal judiciary would upend long-standing practices and concentrate too much power in a newly created appellate bench. *See* 22 Cong. Rec. at 2436; S. Rep. No. 51-486, at iii–iv (1890). The House ultimately acceded, and Congress passed the Judiciary Act of 1891 along Senate lines.

21 Judicial Code of 1911, § 289, 36 Stat. 1087, 1167 (1911) (effective Jan. 1, 1912). The 1911 code also transferred all pending business from circuit courts to district courts, *id*. § 290, and provided that existing legal references to circuit courts would thereafter to deemed to refer to district courts, *id*. § 291. For more on the abolition of the circuit courts, see Fed. Jud. Ctr., Landmark Legislation: Abolition of U.S. Circuit Courts.

Expediting Act.[22] Designed to hasten the trial, appeal, and final resolution of major government antitrust suits,[23] the statute addressed two major procedural obstacles: (1) crowded circuit court trial dockets that delayed the trial and determination of government antitrust suits, and (2) a protracted appellate process through the courts of appeals followed by discretionary Supreme Court review, which could leave important antitrust cases without an authoritative Supreme Court ruling.

The provisions of the Expediting Act apply to the suits in equity brought by the United States under the Sherman Act, the Interstate Commerce Act,[24] or "any other Acts having a like purpose that hereafter may be enacted."[25] The Clayton Act is a statute that has a "like purpose," and the Expediting Act applies to suits in equity brought by the United States under the Clayton Act.[26] However, actions brought by the Federal Trade Commission, even if for permanent injunctive relief in federal district court, are not suits by the United States, and hence do not qualify for treatment under the Expediting Act.[27]

Section 1, often called the *three-judge court provision*, applied when the attorney general filed a certificate with the clerk of the circuit court (district court after 1912) stating that the case was of "general public importance." [28] The act required such cases to be tried before a three-judge panel, given precedence over other cases, and expedited "in every way."[29] After Section 1 was enacted, the Attorney General certified a number of major antitrust cases for three-judge court treatment from 1904 through the early 1970s. These included *Northern Securities, Swift, Standard Oil, American Tobacco, Terminal Railroad, Chicago Board of Trade, U.S. Steel Corp.*, *Interstate Circuit, Associated Press, International Salt, Lorain Journal, du Pont, General Motors, Von's Grocery, Schwinn, Topco, Falstaff, General Dynamics,* and *Marine Bancorporation.*[30]

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[22] *See* H. REPORT NO. 57-3020, at 1-2 (Jan. 9, 1903) (detailing the request of the attorney general). The Senate issued no report, held no floor debate, and passed the act by voice vote. 36 Cong. Rec. 1679 (Feb. 4, 1903).

[23] *See id*. (remarks of Sen. Charles W. Fairbanks (R-IN).

[24] Ch. 104, 24 Stat. 379 (Feb. 4, 1887).

[25] Expediting Act §§ 1-2.

[26] *See, e.g.*, United States v. Citizens & S. Nat. Bank, 422 U.S. 86, 90 (1975); United States v. Gen. Dynamics Corp., 415 U.S. 486, 488 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 527 n.2 (1973); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 323 (1963) Brown Shoe Co. v. United States, 370 U.S. 294, 304-07 (1962); United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 321, 81 S. Ct. 1243, 1247, 6 L. Ed. 2d 318 (1961).

[27] There is no case on point, but as far as I am aware the FTC, or the Department of Justice on its behalf, has never invoked the Expediting Act in an FTC case.

[28] Expediting Act § 1.

[29] *Id*.

[30] Northern Securities Co. v. United States, 193 U.S. 197 (1904); Swift & Co. v. United States, 196 U.S. 375 (1905); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Chicago Board of Trade v. United States, 246 U.S. 231 (1918); United States v. U.S. Steel Corp., 251 U.S. 417 (1920); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Associated Press v. United States, 326 U.S. 1 (1945); United States v. International Salt Co., 332 U.S. 392 (1947); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. E.I. du Pont de

By the 1970s, however, the three-judge court provision was widely regarded as a procedural burden that hindered rather than expedited litigation. As the House Judiciary Committee explained, the requirement was "obstructing rather than expediting the handling of antitrust cases" and created "potential and alleged clogs" in the trial process.[31] In 1974, Congress amended Section 1 to eliminate the requirement for a three-judge district court upon the attorney general's request, but retained the expediting requirement.[32] This provision was repealed without fanfare in 1984.[33]

Section 2, called the direct appeal provision, provided that in every suit in equity brought by the United States under a covered statute, whether or not the Attorney General certified the case to be of "general public importance," an appeal from the final decree of the trial court would lie only to the Supreme Court and bypass the court of appeals.[34] Between 1903 and 1974, almost every major civil antitrust case initiated by the United States was reviewed by the Supreme Court on direct appeal.

By its terms, the original Section 2 applied only to appeals of "final decree."[35] The Supreme Court interpreted this language strictly and rejected attempts to use Section 2 to bring interlocutory appeals from a district court order directly to the Supreme Court.[36] Moreover, the Court held Section 2 stripped all appellate jurisdiction from the courts of appeals in covered cases, including jurisdiction to hear otherwise proper interlocutory appeals,[37] although some courts of appeals disagreed.[38] The Supreme Court reaffirmed its earlier decisions in 1972 in *Tidewater Oil Co. v. United States*,[39] holding that there was no regular avenue of interlocutory review in covered cases to any court and that parties must await a final judgment to obtain review by the Supreme

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Nemours & Co., 353 U.S. 586 (1957); United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

31 *See* ANTITRUST PROCEDURES AND PENALTIES ACT, H. REP. NO. 93-1463, at 10 (Oct. 11, 1974). For a contrary view, see Emanuel Celler, *Case in Support of Application of the Expediting Act to Antitrust Suits,* 14 DEPAUL L. REV. 29 (1964).

32 Antitrust Procedures and Penalties Act § 4, Pub. L. No. 93-528, § 4, 88 Stat. 1708 (Dec. 21, 1974) ("APPA").

33 Pub. L. No. 98-620, § 402(11), 98 Stat. 3358 (1984).

34 Expediting Act § 2.

35 *Id*.

36 *See* United States v. California Co-operative Canneries, 279 U.S. 553, 558 (1929); *accord* De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945); Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 142 (1944).

37 *See, e.g.*, *California Co-operative Canneries*, 279 U.S. at 558; *accord* United States v. FMC Corp., 84 S. Ct. 4, 5-8 (1963); *De Beers*, 325 U.S. at 217; *Allen Calculators*, 322 U.S. at 142.

38 *See* Fisons Ltd. v. United States, 458 F.2d 1241, 1244-48 (7th Cir. 1972) (jurisdiction); United States v. Ingersoll-Rand Co., 320 F.2d 509, 517 (3d Cir. 1963).

39 409 U.S. 151 (1972).

Court unless the Court granted a rare extraordinary writ under the All Writs Act providing for interlocutory review.[40]

But the *Tidewater* majority, over the dissent of Justice Douglas, also noted that since the early 1960s both the Court and individual justices have commented, whatever the wisdom of the original act in 1903, the direct appeal provision has proved "unsatisfactory" since direct appeals "not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."[41] Congress responded to the Court's call for reform in the Antitrust Procedures and Penalties Act of 1974.[42] The APPA amended Section 2 to redirect appeals from final judgments in government civil cases from the Supreme Court to the courts of appeals in the usual course under Sections 1291 and 2107 of Title 28 of the United States Code, with the opportunity for Supreme Court review through a discretionary writ of certiorari.[43] The amendment also provided that appeals of interlocutory orders and decrees in covered cases could be conducted as other cases under Sections 1292(a)(1) and 2107, "but not otherwise."[44]

The amendment preserved a direct appeal to the Supreme Court in the exceptional case where, upon application by a party, the district judge enters an order stating "immediate consideration by the Supreme Court is of general importance in the administration of justice" and the Supreme Court decides in its discretion to hear the appeal.[45] The only case in which the Supreme Court has taken a direct appeal since the 1974 amendment was in the government's case to break up AT&T in the early 1980s.[46] The government also requested and obtained a certification order from the district court in the *Microsoft* case, allowing for a direct appeal to the Supreme Court. However, the Court declined to accept the appeal and remanded the case to the Court of Appeals for the District of Columbia.[47]

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[40] *Id*. at 154-74; All Writs Act, 28 U.S.C. § 1651; *see also* United States Alkali Export Ass'n v. United States, 325 U.S. 196, 201-202 (1945) (holding that a writ of certiorari for an interlocutory ruling is preempted by Section 2).

[41] 409 U.S. at 419 (quoting United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963), and collecting cases).

[42] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in scattered sections of 15 U.S.C.).

[43] *Id*. at § 5 (codified at 15 U.S.C. § 29(a)). *See* 28 U.S.C. §§ 1291 (appeal of final decisions of district courts); 2107 (time for appeal to court of appeals).

[44] Expediting Act § 5 (codified at 15 U.S.C. § 29(b)). *See* 28 U.S.C. §§ 1292(a)(1) (interlocutory appeals of the grant, denial, or modifications of injunctions).

[45] *Id*. at § 5.

[46] *See* United States v. Western Elec. Co., No. 82-0192, 1982 WL 1931 (D.D.C. Nov. 10, 1982) (entering certification order for direct appeal of the modified final judgment). The Supreme Court accepted the direct appeal and affirmed the district court's judgment. *Maryland v. United States*, 460 U.S. 1001 (1983).

[47] Microsoft Corp. v. United States, 530 U.S. 1301 (2000), *denying direct appeal from* 97 F. Supp. 2d 59 (D.D.C. 2000). Justice Breyer dissented and would have accepted the case. For the decision by the D.C. Circuit on appeal, see *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (holding that Microsoft had maintained its monopoly in the operating systems market through anticompetitive means in violation of Section 2, but reversing the breakup remedy and remanding for further proceedings before a new district judge).

1982 MERGER GUIDELINES

I. PURPOSE AND UNDERLYING POLICY ASSUMPTIONS

These Guidelines state in outline form the present enforcement policy of the U.S. Department of Justice ("Department") concerning acquisitions and mergers ("mergers") subject to section 7 of the Clayton Act[1] or to section 1 of the Sherman Act.[2] They describe the general principles and specific standards normally used by the Department an analyzing mergers.[3] By stating its policy as simply and clearly as possible, the Department hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Although the Guidelines should improve the predictability of the Departments merger enforcement policy, it is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. Difficult factual questions arise under the standards stated below, and the Department necessarily will base its decision on the data that are practicably available in each case. Moreover, the standards represent generalizations to which some exceptions are inevitable. In appropriate cases, the Department will challenge mergers that are competitively objectionable under the general principles of the Guidelines regardless of whether they are covered by the specific standards. Finally, the Guidelines are designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring. Although

[1]15 U.S.C.A. § 18 (1981). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly."

[2]15 U.S.C.A. § 1 (1981). Mergers subject to section 1 are prohibited if they constitute a "contract, combination... or conspiracy in restraint of trade."

[3]They replace a set of Guidelines issued by the Department in 1968, and are subject to further revision in light of subsequent judicial decisions or economic studies. Although changes in enforcement policy may precede the issuance of amended Guidelines, the Department will attempt to conform the Guidelines to such changes as soon as possible.

relevant in the latter context, the factors contemplated in the standards do not exhaust the range of evidence that the Department may introduce in court.[4]

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance "market power" or to facilitate its exercise. A sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Where only a few firms account for most of the sales of a product, those firms can in some circumstances coordinate, explicitly or implicitly, their actions in order to approximate the performance of a monopolist. This ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time is termed "market power." Sellers with market power also may eliminate rivalry on variables other than price. In either case, the result is a transfer of wealth from buyers to sellers and a misallocation of resources.[5]

Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral. In attempting to mediate between these dual concerns, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

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[4]Parties seeking more specific advance guidance concerning the Department's enforcement intentions with respect to any particular merger should consider using the Business Review Procedure. 28 C.F.R. § 50.6.

[5]"Market power" also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. Market power by buyers has wealth transfer and resource misallocation effects analogous to those associated with market power by sellers.

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

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[1] These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

[2] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

1. Overview

These Merger Guidelines identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission (the "Agencies") most often use to investigate whether mergers violate the antitrust laws. The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act,[1] 15 U.S.C. §§ 14, 18, 19.[2] Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system."[3] It rests on the premise that "[t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[4]

Section 7 of the Clayton Act ("Section 7") prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

Section 7 was designed to arrest anticompetitive tendencies in their incipiency.[5] The Clayton Act therefore requires the Agencies to assess whether mergers present risk to competition. The Supreme Court has explained that "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly.[6] Accordingly, the Agencies do not attempt to

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (1950), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.
[2] Although these Guidelines focus primarily on Section 7 of the Clayton Act, the Agencies consider whether any of these statutes may be violated by a merger. The various provisions of the Sherman, Clayton, and FTC Acts each have separate standards, and one may be violated when the others are not.
[3] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).
[4] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)); *see also NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (quoting *Board of Regents*, 468 U.S. at 104 n.27).
[5] *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (Section 7 "halt[s] incipient monopolies and trade restraints outside the scope of the Sherman Act." (quoting *Brown Shoe*, 370 U.S. at 318 n.32)); *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 783 (9th Cir. 2015) (Section 7 "intended to arrest anticompetitive tendencies in their incipiency." (quoting *Brown Shoe*, 370 U.S. at 322)); *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1213-14 (11th Cir. 2012) (same). Some other aspects of *Brown Shoe* have been subsequently revisited.
[6] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

predict the future or calculate precise effects of a merger with certainty. Rather, the Agencies examine the totality of the evidence available to assess the risk the merger presents.

Competition presents itself in myriad ways. To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?

The Merger Guidelines set forth several different analytical frameworks (referred to herein as "Guidelines") to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.

How to Use These Guidelines: When companies propose a merger that raises concerns under one or more Guidelines, the Agencies closely examine the evidence to determine if the facts are sufficient to infer that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly (sometimes referred to as a "prima facie case").[7] **Section 2** describes how the Agencies apply these Guidelines. Specifically, Guidelines 1-6 describe distinct frameworks the Agencies use to identify that a merger raises prima facie concerns, and Guidelines 7-11 explain how to apply those frameworks in several specific settings. In all of these situations, the Agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly. **Section 3** identifies rebuttal evidence that the Agencies consider, and that merging parties can present, to rebut an inference of potential harm under these frameworks.[8] **Section 4** sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the Agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or raise concerns in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms. The Agencies examine whether competition between the merging parties is substantial since their merger will necessarily eliminate any competition between them.

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[7] *See, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d at 1032 (explaining that a *prima facie* case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe*, 370 U.S. at 323 n.39)); *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).
[8] These Guidelines pertain only to the Agencies' consideration of whether a merger or acquisition may substantially lessen competition or tend to create a monopoly. The consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

The HSR Premerger Notification Act

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Premerger Notification and the Merger Review Process

Under the Hart-Scott-Rodino (HSR) Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. The FTC administers the premerger notification program, and its staff members answer questions and maintain a website with helpful information about how and when to file. The FTC also provides daily updates of deals that receive early termination.

Steps in the Merger Review Process

Step One: Filing Notice of a Proposed Deal

Not all mergers or acquisitions require a premerger filing. Generally, the deal must first have a minimum value and the parties must be a minimum size. These filing thresholds are updated annually. In addition, some stock or asset purchases are exempt, as are purchases of some types of real property. For further help with filing requirements, see the FTC's Guides to the Premerger Notification Program. There is a filing fee for premerger filings.

For most transactions requiring a filing, both buyer and seller must file forms and provide data about the industry and their own businesses. Once the filing is complete, the parties must wait 30 days (15 days in the case of a cash tender offer or a bankruptcy) or until the agencies grant early termination of the waiting period before they can consummate the deal.

Step Two: Clearance to One Antitrust Agency

Parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger. Staff from the FTC and DOJ consult and the matter is "cleared" to one agency or the other for review (this is known as the "clearance process"). Once clearance is granted, the investigating agency can obtain non-public information from various sources, including the parties to the deal or other industry participants.

Step Three: Waiting Period Expires or Agency Issues Second Request

After a preliminary review of the premerger filing, the agency can:

1. terminate the waiting period prior to the end of the waiting period (grant Early Termination or "ET");
2. allow the initial waiting period to expire; or
3. issue a Request for Additional Information ("Second Request") to each party, asking for more information.

If the waiting period expires or is terminated, the parties are free to close their deal. If the agency has determined that it needs more information to assess the proposed deal, it sends both parties a Second Request. This extends the waiting period and prevents the companies from completing their deal until they have "substantially complied" with the Second Request and observed a second waiting period. A Second Request typically asks for business documents and data that will inform the agency about the company's products or services, market conditions where the company does business, and the likely competitive effects of the merger. The agency may conduct interviews (either informally or by sworn testimony) of company personnel or others with knowledge about the industry.

Step Four: Parties Substantially Comply with the Second Requests

Typically, once both companies have substantially complied with the Second Request, the agency has an additional 30 days to review the materials and take action, if necessary. (In the case of a cash tender offer or bankruptcy, the agency has 10 days to complete its review and the time begins to run as soon as the buyer has substantially complied.) The length of time for this phase of review may be extended by agreement between the parties and the government in an effort to resolve any remaining issues without litigation.

Step Five: The Waiting Period Expires or the Agency Challenges the Deal

The potential outcomes at this stage are:

1. close the investigation and let the deal go forward unchallenged;

2. enter into a negotiated consent agreement with the companies that includes provisions that will restore competition; or

3. seek to stop the entire transaction by filing for a preliminary injunction in federal court pending an administrative trial on the merits.

Unless the agency takes some action that results in a court order stopping the merger, the parties can close their deal at the end of the waiting period. Sometimes, the parties will abandon their plans once they learn that the agency is likely to challenge the proposed merger.

Previous: Up
Mergers

A NOTE ON THE DOJ/FTC MERGER REVIEW PROCESS

This note examines the federal merger review process administered by the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[1] After introducing the HSR Act, the note focuses on the principal stages of the review process that apply once a transaction is signed: (1) the filing of the HSR report, (2) the interagency clearance process to assign agency responsibility for the merger review, (3) the preliminary investigation during the initial waiting period, (4) the issuance of a second request and the conduct of the second request investigation, (5) the final waiting period, and (6) the possible outcomes of the investigation. For each stage, the note describes the governing legal framework, typical agency practice, and key strategic considerations for merging parties.

The HSR Act

Pre-HSR Act experience showed that postclosing divestitures are likely unable to restore premerger competitive conditions because the acquiring firm may fire key employees, sell or shut down critical facilities, terminate research and development, and integrate operations in ways that permanently weaken the acquired business. Even if an agency later obtains a divestiture order, the divested business may lack the same competitive force as the original acquired firm, preventing the divestiture from fully restoring competitive conditions. The HSR Act addresses this problem by providing an early warning system that enables the federal antitrust agencies to investigate potentially anticompetitive mergers before closing and, when the investigation shows a sufficient likelihood that a consummated merger would substantially lessen competition, pursue litigation to obtain a blocking injunction that would prevent the problematic transaction from closing in the first instance.[2]

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1 Clayton Act § 7A, 15 U.S.C. § 18a. The HSR implementing regulations may be found at 16 C.F.R. pts 801-803. The C.F.R. is the Code of Federal Regulations. It is an annually updated codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government. The departments and agencies usually promulgate these rules and regulations pursuant a congressional delegation of power and have the force of law. The rulemaking process is governed by the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA).

2 The seminal study on the inability of postclosing divestitures to restore premerger levels of competition is Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969). Elzinga examined 39 cases filed between 1950 and 1960 and found that 90% of them resulted in relief that was either "unsuccessful" or "deficient." Congressional recognition of these problems is documented in H.R. Rep. No. 94-1373 (1976) and S. Rep. No. 94-803 pt I (1976), with House Judiciary Committee Chairman Peter W. Rodino Jr. noting that postclosing divestiture "is usually a costly exercise in futility-untangling the merged assets and management of the two firms is like trying to unscramble an omelet." 122 Cong. Rec. 25,051 (1976). Assistant Attorney General Thomas E. Kauper similarly testified that divestiture is "a wholly inadequate remedy in a merger case," explaining that experience shows divestiture often fails to restore premerger competition because of the scrambling of assets, loss of key employees, dissipation of goodwill, and deliberate delay by the merged firm. He described the 17-year El Paso Natural Gas case as a cautionary example and stated

The HSR Act requires that the parties to sufficiently large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must:

(1) file a *notification report form* with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission before closing their transaction, and

(2) observe a statutorily-prescribed postnotification *waiting period* before they can close their transaction (usually 30 calendar days for a preliminary review and multiple months for an in-depth review).

The HSR Act is purely procedural. It does not change the substantive standards under Section 7 of the Clayton Act or other provisions of the antitrust laws. Nor does compliance with the HSR Act confer any form of immunity from Section 7 enforcement. Moreover, the HSR Act is not jurisdictional, and the agencies can review and challenge transactions that fall below reporting thresholds or are exempt from HSR reporting requirements.

Today, almost all significant merger enforcement actions—whether resolved through litigation or settlement—arise out of investigations initiated under the HSR Act. As a result, the statutory procedures governing HSR filings and waiting periods define not only the mechanics of federal merger review but also the practical realities that merging parties must navigate when assessing antitrust risk and time to closing.

The HSR report

The HSR Notification and Report Form (the "HSR report") is the formal filing that initiates the federal premerger review process under the HSR Act. Once the parties determine that their transaction is subject to the HSR Act, each must file its own HSR report with both the DOJ and the FTC. The filing triggers the statutory waiting period and frames the agencies' initial review of the transaction. This section first explains how the parties assess whether a transaction is reportable and then describes the required content of the HSR report.

HSR reportability. The HSR Act covers the acquisition of voting securities, assets, and non-corporate interests, including mergers, consolidations, tender offers, joint ventures in corporate form, and other ownership transfers that result in control or a significant minority position. A transaction is *prima facie reportable* when it exceeds the statutory size-of-transaction threshold, which is adjusted annually for inflation. For 2025, that threshold is $126.4 million. The size of the transaction is measured by the total value of the assets or voting securities that the acquiring person will hold in the acquired person as a result of the transaction—including both newly acquired interests and any previously held interests—not the purchase price paid.

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bluntly that "the interminable problems and delay involved in obtaining divestiture are the rule, not the exception." *Merger Oversight and H.R 13131, Providing Premerger Notification and Stay Requirements Before Subcomm. on Monopolies and Commercial Law of the H. Comm. of the Judiciary*, 94th Cong, 94th Cong. 5, 8 (1976) (statement of Thomas E. Kauper, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

If a transaction meets the size-of-transaction threshold, the parties must assess whether an *exemption* applies under the HSR Act or its implementing regulations. The most significant exemptions include:

- Intraperson transactions, where the acquiring and acquired persons are the same legal entity
- Acquisitions of 10 percent or less of a company's voting securities solely for passive investment purposes
- Acquisitions of non-U.S. assets that generate annual sales in or into the United States of less than an inflation-adjusted threshold ($126.4 million in 2025).
- Acquisitions of non-U.S. voting securities where the acquired person's annual sales in or into the United States are less than the applicable threshold ($126.4 million in 2025).
- Acquisitions of convertible securities with no present voting rights
- Ordinary course of business acquisitions, such as purchases of inventory or goods held solely for resale

Exempt transactions are not subject to the reporting and waiting period requirements of the HSR Act.

Finally, a transaction that is prima facie reportable and not exempt is *reportable* if it crosses a notification threshold. A transaction crosses a notification threshold when, as a result of the acquisition, the acquiring person's holdings in the acquired person reach or exceed the applicable threshold. The HSR rules provide a set of jurisdictional notification thresholds, which are likewise adjusted annually for inflation. The table below gives the notification thresholds in effect for 2025:[3]

Notification thresholds (2025)
$126.4 million
$252.90 million
$1.264 billion
25% of the voting securities if their value exceeds $2.539 billion
50% of the voting securities if their value exceeds $126.4 million

Because the notification threshold applies to the value of the voting securities and assets the acquiring person will hold as a result of the acquisition, *not* the value of the voting securities and assets the acquiring person will acquire in the transaction, an acquisition in principle could be reportable even if it involved the purchase of one share of voting stock or $1.00 of assets.

Finally, the acquiring person must pay a filing fee when submitting its HSR report. The amount of the filing fee depends on the size of the transaction, with larger

[3] Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 Fed. Reg. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025).

transactions subject to progressively higher fees. The 2025 filing fee schedule follows:[4]

Filing fees (2025)

Value of Transaction	Filing Fee
Less than $179.4 million	$30,000
$179.4 million – $555.5 million	$105,000
$555.5 million – $1.111 billion	$265,000
$1.111 billion – $2.222 billion	$425,000
$2.222 billion – $5.555 billion	$850,000
$5.555 billion or more	$2,390,000

Although only the acquiring person is required to pay the filing fee, the parties may agree to allocate the fee differently.

The HSR form. Each party to a reportable transaction must file a separate HSR Act notification, using a form (creatively known as the "HSR form") prescribed by the HSR rules. The form requires the submission of three categories of content: (1) basic information about the parties, the transaction, and the parties' business activities; (2) documents that must be submitted with the form, including key transaction-related materials; and (3) additions adopted in 2025, which impose new narrative, organizational, and document production requirements.

First, each party must provide basic identifying information and a description of the transaction. This includes identifying its ultimate parent entity, listing subsidiaries and affiliates, and disclosing other entities within its corporate family that may be relevant to competitive analysis. The filing party must describe the structure of the transaction, the consideration to be paid, and the percentage of voting securities or assets to be acquired. In addition, each party must report its revenues for the most recent fiscal year, broken down by industry classification codes (NAICS codes), which the agencies use to assess potential business overlaps. Each party must also disclose significant minority holdings and any interlocking directorates with other firms that could present competition concerns. These disclosures give the agencies an initial understanding of the parties' business activities and the transaction's potential competitive significance.

Second, each filing party must submit certain documents prepared in the course of considering and negotiating the merger. These documents are likely to be the most informative materials in the HSR report for the agencies' initial assessment of the transaction's likely competitive effects. Unlike the basic information disclosures, which provide background on the parties and the transaction, these documents often

[4] Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 FED. REG. 7697 (Jan. 22, 2025) (effective Feb. 21, 2025). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, Div. GG, 136 Stat. 4459, ____ (Dec. 29, 2022).

reflect candid evaluations by company executives, boards, and advisors regarding market conditions, competitive dynamics, and the strategic purpose of the deal.

Item 4(c) requires the filing party to include the following materials with its initial premerger notification filing:

> [Any] studies, surveys, analyses and reports prepared by or for an officer or director for the purpose of analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

The documents submitted under this section can include offering memoranda or analyses prepared by investment bankers, capital authorization requests, board memoranda, slide presentations, and other internal analyses.

The agencies added Item 4(d) to the HSR form in 2011 in response to concerns that many filing companies were interpreting the requirements of Item 4(c) too narrowly. Item 4(d) identifies three categories of competitively informative documents that the agencies want to ensure are submitted with the HSR report:

- *Confidential information memoranda ("CIM")*: Item 4(d)(i) requires each filing party to submit any CIM prepared by or for its officers or directors of the acquired company. A CIM is typically prepared by investment bankers on behalf of a company seeking to sell itself and is designed to present the company to potential buyers as a strong competitive force with attractive financial prospects. These documents often highlight the company's market position, growth potential, and barriers to entry. CIMs also frequently describe the market environment in which the company operates, including identifying major competitors and competitive dynamics. If no formal CIM exists, the filing party must submit any documents provided to its officers or directors that serve a similar function. Only CIMs or equivalent documents prepared within one year of the HSR filing are required.
- *Third-party advisor documents*: Item 4(d)(ii) requires each filing party to submit all studies, surveys, analyses, and reports prepared by investment bankers, consultants, or other third-party advisors for any of its officers or directors for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets, provided the documents specifically relate to the sale of the target. Only materials developed by third-party advisors during an engagement—or in pursuit of an engagement, including unsolicited materials—must be submitted.
- *Synergy and efficiency documents*: Item 4(d)(iii) requires each filing party to submit all studies, surveys, analyses, and reports evaluating or analyzing synergies or efficiencies that were prepared by or for any of its officers or directors for the purpose of evaluating or analyzing the

acquisition. Financial models without stated assumptions do not need to be submitted in response to this item.

Importantly, the agencies consider the submission of all required Item 4(c) and 4(d) documents essential to an effective HSR filing. The agencies take the position that a filing omitting required documents is incomplete and does not start the running of the HSR Act waiting period, even if the filing party is unaware of the deficiency. Deficiencies in a filing party's HSR report often come to light during a second request investigation; when this happens, the agencies take the position that the filing party must submit a new, complete HSR report, which restarts the waiting period and the entire review process. If the parties close a reportable transaction without an effective filing and without observing the required waiting periods, the agencies may bring an enforcement action and seek civil penalties, regardless of whether the omission was intentional or not.

Third, in February 2025, the agencies implemented the most significant overhaul of the HSR form in nearly five decades. The revisions substantially expanded the information filing parties must provide, including detailed narrative descriptions of transaction rationales, competitive overlaps, and business relationships. The agencies also broadened document production requirements and imposed new compliance obligations, dramatically increasing the time and cost required to prepare HSR filings. These amendments reflect the agencies' stated goal of front-loading much of the information they believe necessary to assess the competitive significance of a transaction—information they had traditionally obtained later through a voluntary request or a second request.[5]

The revised form imposes six major new categories of disclosure and document production. Each is designed to provide the agencies with earlier and more detailed insight into the transaction, the parties' business relationships, and the potential competitive effects.

- *Broader document submission requirements*. Filing parties must submit not only final Items 4(c) and 4(d) documents but also draft versions, supervisory deal team materials, and ordinary-course business documents—such as strategic plans, market studies, and reports on competition—even if they were not created specifically for the transaction. These additions provide the agencies with a deeper understanding of competitive dynamics.
- *Mandatory narrative explanations*. The revised form requires narrative descriptions of the transaction's rationale, horizontal overlaps, vertical relationships, and supply chain connections—allowing the agencies to assess potential competitive concerns from the outset.

[5] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 89 FED. REG. 89,216 (Nov. 12, 2024) (effective Feb. 10, 2025). The 2025 form revisions were drafted and promulgated by the agencies during the Biden administration. The current antitrust leadership—including the FTC chair, who voted to approve the final rule while serving as a commissioner in the prior administration—appears inclined to retain them.

- *Expanded corporate structure and personnel disclosures*. Filing parties must provide detailed information on affiliates, subsidiaries, officers, directors, board observers, and significant minority investors—both current and from the prior two years—to help the agencies assess risks such as interlocks and cross-ownership.
- *Enhanced investment and minority holdings disclosures*. Filers must disclose detailed information on minority holdings, cross-ownership, and investment relationships that may create competitive risks, even when the interest is non-controlling.
- *Labor market information requirements*. The form now requires data on employees by occupation and commuting zone wherever the filing parties may compete for labor, reflecting the agencies' growing focus on labor market effects.
- *Document hold and compliance disclosures*. Filers must disclose document management systems and certify that they have suspended routine document destruction for transaction-related materials.

These expanded disclosure and document requirements make the preparation of a legally compliant HSR report a significantly more burdensome and resource-intensive process. They also increase the risk that a filing party will inadvertently omit required information or documents. The enforcement agencies are likely to take the position that any such omission renders the filing incomplete and ineffective, preventing the waiting period from starting. As a result, a deficient filing may subject the filing party to lengthy delays if discovered before closing, or to enforcement action and civil penalties if discovered after the transaction has been consummated.

The clearance process

When a merger is reported under the HSR Act or otherwise comes to the attention of one of the agencies, the FTC and DOJ determine which agency will review the transaction through what is known as the *clearance* process. To avoid duplicative investigations, the agencies operate under a longstanding liaison agreement, first established in 1935 and amended several times since, which allocates enforcement responsibility on a transaction-by-transaction basis. Clearance must be resolved before substantive review begins, and clearance disputes can delay the start of the agencies' investigation. The merging parties have no formal role in this process and cannot influence which agency receives clearance.

When a new matter arises, staff from both agencies consult to determine which agency should review the transaction. If only one agency requests "clearance," that agency is allocated responsibility. If both agencies request clearance, their representatives negotiate to resolve which agency will take the matter.

Typically, clearance decisions are straightforward. The agencies usually agree to assign the matter to the agency with the most experience in the relevant industry or with one of the merging parties. The FTC generally reviews mergers in consumer-facing industries, including retail, consumer goods, food and beverage, healthcare (such as hospitals and pharmaceuticals), computer software, and consumer electronics.

The DOJ, by contrast, typically handles mergers in regulated industries, including telecommunications, transportation, agriculture, defense, and insurance. The DOJ is also commonly assigned to mergers involving computer hardware, heavy industry, chemicals, and the automobile industry.

The clearance process, however, is not always straightforward. Disputes are most likely to arise in highly visible sectors where both agencies have active enforcement histories, such as technology, media, and entertainment, as well as certain healthcare segments. Some disputes escalate to senior agency officials and, in extreme cases, persist until the final day of the HSR initial waiting period. These contested matters are sometimes resolved through informal compromises, such as agreements whereby one agency agrees to concede one matter in exchange for clearance on another pending transaction or the right to handle the next comparable disputed case. Although some have proposed assigning specific industries exclusively to one agency, neither the DOJ, the FTC, nor their congressional oversight committees has shown any interest in limiting their ability to seek clearance in any particular sector.[6]

The initial waiting period

Once clearance is resolved, the assigned agency will open a preliminary investigation. This investigation takes place during the HSR Act's initial waiting period and is commonly referred to as the initial waiting period investigation. The initial waiting period is 30 calendar days for most transactions and 15 calendar days for all-cash tender offers. The purpose of the waiting period is to give the investigating agency time to begin its substantive review and assess whether the transaction warrants further scrutiny.

After the investigating staff reviews the HSR reports, the websites of the merging parties, trade and newspaper reports on the transaction, and other readily available materials that might inform the staff about the transaction's likely competitive effects, the staff will contact the merging parties. By this stage, the staff will have formed at least a preliminary view of which aspects of the transaction may warrant further investigation. Typically, the staff will introduce themselves, explain that they are conducting a preliminary investigation, and request that the parties voluntarily provide additional information and documents beyond what was included in the HSR filings.

These requests are usually formalized in a *voluntary access letter*, which often asks for business documents discussing the transaction or competition, data on sales and market shares, information about the parties' major customers and competitors, and organizational charts identifying key executives.[7] Although voluntary access letters

[6] There was an attempt to set more rigid allocations in 2002, when the DOJ and FTC signed a memorandum of agreement to divide merger enforcement responsibility by industry. Senator Ernest "Fritz" Hollings (D-SC), then chair of the Senate Commerce Committee (the FTC's oversight committee), objected to assigning exclusive authority over media mergers to the DOJ and excluding the FTC. Hollings threatened budgetary consequences if the agreement was implemented, and the agencies quickly terminated the memorandum. *See* Lauren K. Peay, Comment, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VANDERBILT L. REV. 1307 (2007).

[7] The staff will emphasize that compliance with the request is completely voluntary. This is to ensure that the letter will not be deemed to be a second request. Of course, if the parties do not comply

are often customized for each transaction, they commonly seek the following types of documents, information, and data:

- Most recent strategic, marketing, and business plans
- Internal and external market research reports for the last three years
- (Sometimes) product lists and product descriptions beyond those provided in the HSR report
- (Perhaps) competitor lists and estimates of market shares beyond those provided in the HSR report
- Customer lists of the firm's top 10-20 customers in each area of concern (including a contact name and telephone number)[8]

Counsel should anticipate the types of information and documents the staff is likely to request and should prepare the defense of the transaction with these materials in mind. Counsel also should expect that during the initial waiting period investigation the staff will contact each of the customers identified on the customer list. Counsel should work closely with co-counsel and the merging parties to assess how those customers are likely to respond to the staff's inquiries and to shape the defense of the transaction—and particularly the parties' initial presentation—with those anticipated responses in mind.

Early in the initial waiting period, typically seven to ten days after filing, the staff will invite the parties to make a presentation explaining why the transaction does not raise competitive concerns. As a practical matter, the parties should almost always accept this invitation, as declining can suggest they lack confidence in their position or have something to hide.

An effective presentation, usually lasting one to two hours for straightforward transactions but potentially four hours or longer for deals involving multiple areas of concern, addresses four key points: (1) a clear description of the parties and the transaction; (2) the business rationale for the deal; (3) the procompetitive benefits the transaction is expected to produce; and (4) evidence-based reasons why market conditions will prevent the merged firm from exercising market power. The business rationale is especially important, as it should provide a compelling explanation that the profit-maximizing strategy behind the transaction is to improve the customer value proposition and reduce costs—implicitly countering any hypothesis that the transaction's purpose is to enhance profits through anticompetitive means.

The agencies permit joint presentations by counsel for the merging parties and business executives from both sides. It is important that well-prepared business executives participate in the initial meeting. Ideally, they would make the presentation themselves with little or no involvement by outside counsel. Executive presentations are most effective because they demonstrate direct knowledge of business realities,

with the request, they should expect to receive a second request that will cover, among other things, the same materials.

[8] The agencies do not ask for customer lists in transactions involving consumer goods sold in retail stores, because the agencies do not believe that retail customers lack the knowledge and sophistication to make good predictions about the competitive effect of the merger.

convey authenticity that lawyers cannot match, and allow agency staff to hear directly from decision-makers about competitive dynamics and business strategy. Well-prepared executives can give the staff confidence that their investigation will confirm the executives' representations. Equally important, they can also alert staff to the quality of the merging companies' witnesses if the agency decides to challenge the transaction in litigation.

The agencies expect the claims made in these presentations to be supported by ordinary course business documents or confirmed by customers and other market participants contacted during the staff's investigation. The best presentations anticipate all the issues the staff is likely to raise, provide responses supported by company documents and consistent with customer perceptions, and ensure accuracy in all the facts. Ideally, the remainder of the investigation will serve only to confirm and reinforce the analysis presented in this initial meeting. These early interactions are often critical in persuading the agency to close its investigation at the end of the initial waiting period. However, presentations that raise additional concerns or fail to address staff questions may prompt a more intensive investigation.

Following the initial presentation, the staff will spend most of the remaining waiting period interviewing customers and competitors to test the parties' claims about market conditions and competitive dynamics. During this period, the staff may have follow-up questions for the merging parties, which should be answered quickly and completely to maintain momentum toward clearance. While the parties may request additional meetings to advance their defense, they should carefully consider that staff time spent in meetings means less time available for field interviews with market participants. Even for transactions that do not raise significant competitive concerns, the staff must complete their customer and competitor interviews to their satisfaction before they will be prepared to close the investigation at the end of the initial waiting period.

At the conclusion of the initial waiting period, the staff will recommend one of three courses of action to agency leadership:

- *Close the investigation*. The staff may recommend closing the investigation if they are satisfied that they have conducted a thorough review and uncovered no meaningful competitive concerns. Before doing so, the staff must convince senior management that their investigation was sufficiently complete to support this conclusion.
- *Issue a second request*. The staff may recommend issuing a second request to obtain additional information and extend the waiting period when the transaction raises significant competitive concerns or is too complex to evaluate fully within the initial waiting period. A second request may be issued only by senior agency officials acting under delegated authority.
- *Pull and refile the HSR reports*. The staff may encourage the parties to withdraw and refile their HSR reports, restarting the initial waiting period. This option is typically proposed when the staff's investigation to date suggests that the transaction is unlikely to present competitive concerns, but the review is incomplete, and the staff believes that another thirty days or

less should allow them to finish their work without resorting to a second request.

Agency leadership will then make the final decision based on the staff's recommendation, though they occasionally reach a different conclusion than the staff recommends.[9]

Second request investigations

If the investigating agency concludes that a transaction may raise significant competitive concerns or that it cannot complete its investigation within the initial waiting period, the agency will almost always issue a second request for additional information and documents.[10] A second request automatically extends the HSR Act waiting period until the merging parties submit a proper response, giving the agency time to conduct a comprehensive factual inquiry into the transaction's potential competitive effects.

This section examines four aspects of second request investigations: (1) the purpose and effect of a second request; (2) its scope and burden on the merging parties; (3) the legal standard governing substantial compliance; and (4) the agency's use of other evidence-gathering tools to obtain precomplaint discovery from customers, competitors, other market participants.

Purpose and effect of a second request. The HSR Act authorizes the investigating agency to issue one request for additional information and documentary material—commonly called a *second request*—to each filing party. The agency may issue only one second request per party per transaction, and it must do so before the waiting period expires.

In negotiated transactions, the issuance of a second request extends the waiting period until (1) all filing parties have substantially complied with their respective second requests and (2) a final waiting period of 30 calendar days (10 days in the case of an all-cash tender offer) has elapsed following compliance. In open market transactions, the final waiting period begins once the acquiring person has substantially complied, so that noncompliance by the acquired person will not allow the target to defeat a hostile acquisition.

The issuance of a second request typically indicates that the agency considers the transaction to raise significant antitrust concerns or present complex issues that necessitate an in-depth investigation. It marks the beginning of a formal, resource-

[9] HSR Rule 803.20(b)(1) that a second request may be issued by the Assistant Attorney General in charge of the Antitrust Division or a designee and by the Federal Trade Commission or its designee. 16 C.R.R. § 803.20(b)(1). The AAG has delegated this authority to the Deputy Assistant Attorney General for Litigation, the Deputy Assistant Attorney General for Regulatory Affairs, the Deputy Assistant Attorney General for Policy and Legislation, the Director of Operations, and Deputy Director of Operations. Delegation of Authority under Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Jan. 25, 1993). I am still trying to find out what the FTC has done.

[10] In a few rare cases in recent years, there have been indications that resource constraints have prevented the investigating agency from issuing a second request in a matter that would otherwise warrant one.

intensive phase of the merger review process, imposing substantial costs and delays on the merging parties.

The second request investigation is the most demanding phase of a merger review. Its most significant consequence is the length of time required to comply, which adds months of delay to the deal's closing. In a typical case, it takes the merging parties six to nine months or more to collect documents—which must be reviewed for responsiveness and privilege—respond to comprehensive data requests, and research and prepare the detailed interrogatory responses required to achieve compliance. During this period, the target company is almost always losing value: key employees may depart, customers may defect, and the company typically loses strategic focus and momentum. This extended timeline increases the risk of adverse changes in market conditions, customer relationships, or competitive dynamics that may materially reduce the net value of the transaction before it can be completed.

While second request compliance costs are typically a small percentage of the total transaction value, they represent significant expenses. Most merging parties incur $10 million to $20 million in compliance costs, covering outside counsel, economic and industry experts, document collection and review technology, contract attorneys, and data management platforms. Additional costs include the time and resources of internal legal and business teams diverted from day-to-day operations to support the compliance effort.

Scope. The extraordinary breadth of a second request is the principal reason for the delay, cost, and disruption it imposes on the merging parties. Under the HSR Act, the investigating agency can issue only one second request to a filing party. Moreover, the agency must issue the second request by the end of the initial waiting period, often before the staff's investigation has allowed it to narrow its areas of interest. Finally, the length of time the agency will have to conduct its remaining investigation depends on how long it takes the merging parties to respond to their second requests. These factors combine to incentivize the agencies to issue sweeping second requests, demanding that the parties submit all information that could possibly be relevant to the agency's investigation.

Unlike discovery in civil litigation, second request discovery is not subject to a formal proportionality standard or judicial oversight. While the merging parties may request that the staff voluntarily limit the scope of production by narrowing custodian lists, date ranges, search terms, or facilities to be searched, there is no mechanism to challenge the scope of a second request outside of the agency before submitting the response. The only way to contest the scope outside the agency is to certify compliance without producing all responsive materials, wait for the agency to assert that the submission is deficient, and then litigate the issue in federal district court. This litigation can take the form of either a government action to compel compliance or a declaratory judgment action against the agency.

Second requests impose sweeping *document demands* on the merging parties. Both agencies use "model" second requests that they customize for each transaction, typically applying to all facilities and employees of the filing person worldwide.[11] The requests often cover dozens or even hundreds of custodians and require production of all responsive documents created since January 1 of the third preceding year. For example, a second request issued on November 1, 2024, would require documents dating back to January 1, 2021.

The agencies typically define their document requests by reference to "relevant products" and "relevant geographic areas," terms that are either specified in the second request itself or subject to later negotiation with the staff. Although nominally limited to these defined areas, the requests are typically phrased as demands for "all documents relating to" specified topics—language that substantially broadens the scope beyond what might seem directly relevant to the investigation. Among other things, the agencies routinely request business, strategic, and marketing plans; pricing documents; product and research and development plans; analyses of competition or competitors; customer files and customer call reports; and board minutes and board materials relating to the transaction or relevant markets. The demands cover all forms of communication, including emails, text messages, and hard copy files, and the agencies generally insist on applying broad sets of search terms across all custodians to capture both transaction-related and ordinary-course materials. Responsive documents not currently on the company's servers must be retrieved and restored from archived files.

In recent years, both agencies have expanded their demands to include communications from collaborative work environments (such as Microsoft Teams, Slack, and SharePoint), messaging applications (including chats and ephemeral messaging services), and personal devices used for business purposes. The agencies also require production of company policies on document retention and destruction and closely monitor the document collection and review process, and insist as a condition of not objecting later on prior approval of search terms, deduplication methods, predictive coding protocols, and other search methodologies. These expansive requirements significantly increase both the time and complexity of responding to a second request.

Although the agencies generally allow the merging parties to negotiate limitations on the scope of second request compliance, they are under no obligation to do so. As noted above, there is no formal mechanism for contesting the scope of a second request apart from requesting discretionary modifications from the staff before submitting the parties' responses. Second requests are typically drafted with intentionally broad language, ostensibly on the investigating agency's expectation that the merging parties will negotiate limitations to make compliance more manageable. In practice, however, the agencies are well aware that most second requests will not be significantly narrowed. These negotiations can be time-consuming, often lasting a month or more, and frequently result in only modest concessions. Even when the staff is willing to negotiate, the scope of second request production typically remains broad and resource

[11] The FTC has posted its model second request on its website. *See* Fed. Trade Comm'n, Request for Additional Information and Documentary Material Issued to [Company] (rev. Jan. 2024). The Antitrust Division has removed its model second request from its website, probably because the Division is revising it.

intensive. While some counsel engage in lengthy negotiations over limitations, others seek only basic modifications on facilities, personnel, and date ranges to move quickly to assemble the response to the request. Regardless of the approach taken in negotiations, the breadth and complexity of the second request significantly add to both the cost of compliance and the timeline for completing the agency's investigation.

Compliance and enforcement. Once a second request is issued, the merging parties may not close their transaction until they have certified compliance and the final waiting period has elapsed. The HSR Act sets both the procedural requirements for certification and the legal standard for enforcement, leaving it to the courts—not the agencies—to determine whether a party's compliance is sufficient. In practice, merging parties must navigate not only the mechanics of certification but also the risk of agency challenge and potential enforcement. Over time, three distinct approaches to compliance have emerged, reflecting different interpretations of the statutory standard and varying levels of enforcement risk.

Before the final waiting period can begin to run, each filing person must certify that it has complied with its second request. The certification must be executed, under penalty of perjury, by an officer or director of the filing person. It must state that the submission—including all attachments and appendices—was prepared under the certifying individual's supervision and is, to the best of that individual's knowledge, "true, correct, and complete in accordance with the statute and rules." Although the investigating agencies often act as if they are the final arbiters of compliance, neither the HSR Act nor its implementing rules gives them that authority. If a dispute arises and remains unresolved, the ultimate decision on whether a party has complied rests with a federal court.

If a filing person is unable to provide a complete response to any item in the second request, HSR Rule 803.3 requires the party to submit a detailed statement explaining the reasons for noncompliance.[12] The statement must identify why the party cannot fully comply, describe the missing information or documents, explain who may have them, and outline the efforts made to obtain them. If the noncompliance is based on a claim of privilege, the party must also provide a detailed privilege log.

Section 7A(g) of the HSR Act establishes two enforcement mechanisms for failures to comply with a second request.

- Section 7A(g)(1) authorizes the United States to file suit in federal district court to seek civil penalties—up to an inflation-adjusted maximum of $53,088 per day in 2025—against any person that "fails to comply with any provision of this section." [13]

[12] HSR Rule 803.3, 16 C.F.R. § 803.3; *see* Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 43 FED. REG. 33450, 33508-09 (July 31, 1978) (promulgating and explaining the original HSR rules) (known as the "Statement of Basis and Purpose" or SBP).

[13] Clayton Act § 7A(g)(1), 15 U.S.C. § 18a(g)(1); *see* Fed. Trade Comm'n, Adjustments to Civil Penalty Amounts, 90 FED. REG. 5580 (Jan. 17, 2025) (increasing civil penalty from $51,744 to $53,088 per day effective January 17, 2025, pursuant to the Federal Civil Penalties Inflation

- Section 7A(g)(2) authorizes the investigating agency to bring an action in federal district court against any person that "fails substantially to comply" with the requirements of an HSR report or a second request for injunctive relief compelling compliance, extending the waiting period "until there has been substantial compliance," or granting such other equitable relief as the court deems necessary or appropriate.[14]

The regulatory scheme for compliance and enforcement is somewhat ambiguous. The Statement of Basis and Purpose (SBP) accompanying the original HSR rules in 1978 envisioned a process in which the final waiting period would begin once the filing parties submitted either a complete response to the second request or, in the case of an incomplete response, a response accompanied by a Rule 803.3 statement of reasons for noncompliance.[15] The SBP did not contemplate the investigating agency making the final determination of the adequacy of the submission. Instead, the SBP indicated that if the agency believed the response was insufficient, the agency could seek an order from a federal district court under Section 7A(g)(2) extending the waiting period and compelling further compliance. Under this framework, the ultimate decision on the sufficiency of a second request response rested with the court, not the investigating agency.

In practice, however, the process has developed differently. When the investigating agency believes that a party's second request response is deficient, it notifies the merging parties of the alleged deficiency. Even when a comprehensive Rule 803.3 statement accompanies an incomplete response, the agencies take the position—contrary to the SBP—that the final waiting period does not begin to run until the agency is satisfied with the response. Although merging parties have the legal option of proceeding to close over the agency's objection, none have done so. Instead, the merging parties typically negotiate a compromise with the agency over the scope of additional submissions required to resolve the agency's concerns. Historically, the agencies have been willing to accept compromises requiring far less than complete compliance, presumably because it does not want a court decision on what the proper procedure would be.

As a result, there are three competing standards for when a filing party has submitted a response sufficient to start the running of the final waiting period:

- *Full compliance.* Unless the investigating agency expressly agrees to limit the scope of the request, the filing party must comply fully with every demand in the second request, and any failure—whether intentional, inadvertent, or based on a misunderstanding—negates compliance. Under

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Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute's enactment)).

14 Clayton Act § 7A(g)(2), 15 U.S.C. § 18a(g)(2).

15 SBP, 43 FED. REG. at 33508 ("Under section 7A(b)(l)(A), the [initial] waiting period begins when the reporting persons submit completed notification and report forms, or. if any responses are not complete, the forms to the extent completed together with statements of the reasons for such noncompliance. Section 7A(e)(2) contains a similar provision [for the running of the final waiting period] with respect to requests for additional information.").

this view, the submission of a Rule 803.3 statement explaining the reasons for less than full compliance does not start the running of the final waiting period. This is the position of the DOJ and FTC.[16]

- *Substantial compliance.* A filing party must make good faith efforts to respond fully to all aspects of the second request, but is not required to produce documents that are unreasonably cumulative or duplicative in light of the production burden. Minor inadvertent omissions or technical failures do not negate compliance if the overall response demonstrates a reasonable effort to provide the investigating agency with substantially all the information it needs to conduct its investigation. This approach borrows the "substantial compliance" language of Section 7A(g)(2) and incorporates civil discovery limitations. Merging parties almost always invoke this standard and typically argue that substantial compliance does not require submission of an exhaustive Rule 803.3 statement of reasons for noncompliance.
- *Submissions with Rule 803.3 statements*. Under this approach, a filing party may satisfy its compliance obligations—and trigger the start of the final waiting period—by submitting a second request response accompanied by a comprehensive Rule 803.3 statement explaining the reasons for any incomplete responses. This standard draws from the 1978 Statement of Basis and Purpose to the original HSR rules and places the authority to decide whether further compliance is required—and whether the running of the final waiting period should be delayed—with the federal courts. While rarely invoked on its own today, some merging parties combine this approach with the substantial compliance standard, using both to support the adequacy of their submission and to trigger the start of the final waiting period.

In practice, disputes over the adequacy of a second request response are almost always resolved through negotiation rather than litigation. When the agencies believe a merging party has substantially complied with its second request, or nearly done so, they have not insisted on full compliance. Instead, they are generally willing to accept relatively minor additions to the production and confirm that they will not contest compliance further, in exchange for the merging party agreeing to give the agency additional time to complete its investigation. Neither the agencies nor the merging party has pursued judicial rulings to resolve these disputes in the course of a merger antitrust investigation. This outcome likely reflects the agencies' reluctance to have a court set the terms of required additional compliance or settle the debate over the governing compliance standard, and the merging party's desire to resolve the issue

[16] This is the position the Department of Justice has taken in the *KKR* litigation. *See* Complaint, United States v. KKR & Co. Inc., No. 1:25-cv-00396 (S.D.N.Y. Jan. 14, 2025); Memorandum of Law in Opposition to Motion to Dismiss, KKR, No. 1:25-cv-00396 (S.D.N.Y. May 15, 2025).

quickly with minimal additional burden while securing certainty that the final waiting period will begin after only a short delay.[17]

Third-party discovery. During a second request investigation, the investigating agency routinely seeks information from third parties—most often customers, competitors, suppliers, and other market participants—to assess market conditions, evaluate potential theories of harm, and test the claims of the merging parties. These inquiries are typically informal and conducted through voluntary interviews or telephone calls with industry participants. The agencies often treat customer feedback as particularly probative and rely heavily on it in shaping their competitive analysis. When a third party provides information the agency considers particularly important—especially evidence bearing on the likely anticompetitive effects of the transaction—the agency typically requests that the third party formalize its statement in an affidavit or declaration under penalty of perjury. This provides the agency with sworn evidence it can rely on both during the investigation and, if necessary, in a preliminary injunction proceeding.[18]

In addition to informal interviews, both the DOJ and the FTC possess statutory authority to compel information from third parties during merger investigations by issuing civil investigative demands (CIDs), a form of precomplaint administrative subpoenas. Although the agencies' CID powers arise from different statutes, they function similarly in practice, permitting each agency to require the production of documents, written interrogatory responses, and oral testimony.[19] The agencies typically issue CIDs to third parties when voluntary cooperation is insufficient, when they require more detailed information than informal interviews can provide, or when they seek deposition-like, sworn testimony. Both agencies have broad discretion in issuing CIDs, and they may issue a CID to any person that the investigating agency has reason to believe may be in possession, custody, or control of material relevant to a merger investigation.[20]

Although both agencies can issue CIDs unilaterally, they must seek court enforcement if recipients refuse to comply with them. If a CID recipient refuses to comply, the agency may petition a federal district court for an order enforcing the

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[17] The courts may soon resolve this issue. The Department of Justice has filed a complaint against KKR & Co. alleging that KKR violated the HSR Act by failing to fully comply with a second request before certifying compliance. The proper compliance standard is at the core of that dispute. *See* Complaint, United States v. KKR & Co. Inc., No. 1:25-cv-00396 (S.D.N.Y. filed Jan. 14, 2025).

[18] Sworn affidavits or declarations carry significant weight when the investigating agency is considering an enforcement action because they effectively lock in the declarant's testimony. They also may be used to support or oppose a motion for a preliminary injunction in federal district court. *See* Fed. R. Civ. P. 43(c) ("When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions."). However, affidavits and declarations may not substitute for live testimony at trial unless the opposing party stipulates to their use, the witness is unavailable as defined by the Federal Rules of Evidence, or another exception to the hearsay rule applies. *See, e.g.*, Fed. R. Evid. 801(d) (statements that are not hearsay), 804 (hearsay exceptions for unavailable declarants).

[19] *See* Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (DOJ authority); FTC Act, 15 U.S.C. § 57b-1 (FTC authority).

[20] 15 U.S.C. §§ 112(a)-(b) (DOJ); 15 U.S.C. § 57b-1(c)(1) (FTC).

CID.[21] Only after the court grants such an order does noncompliance become subject to sanction. A failure to comply with a court order compelling compliance with a CID is sanctionable by civil and criminal contempt.[22] Conversely, the CID recipient may initiate an action in federal district court to set aside or modify the CID on grounds such as undue burden, overbreadth, or privilege.[23] As a practical matter, both agencies and recipients generally prefer to resolve compliance disputes through negotiation rather than litigation, making third-party CID enforcement proceedings rare in merger investigations.

The final waiting period

After the merging parties have responded to their second requests, the HSR Act imposes a final waiting period before the transaction may close. This statutory period is intended to give the investigating agency a final opportunity to complete its review and decide whether to take enforcement action. During this time, the investigating staff must review the documents, data, and narrative responses submitted in response to the second request; meet with the merging parties to hear their final arguments; complete its analysis of the transaction's likely competitive effects; and prepare a recommendation for senior agency officials. After receiving the staff's recommendation, the agency's front office typically meets with the merging parties to hear their final presentation and consider any remaining concerns. The front office must then decide whether to allow the transaction to proceed or to challenge it by filing a complaint in federal district court. Because thirty days is rarely enough time for the agency to complete this process—or for the merging parties to present their defense—the agency and the parties almost always enter into a timing agreement under which the parties commit not to close the transaction for an agreed-upon period after the expiration of the HSR Act's final waiting period.

The final waiting period runs automatically once the required parties have submitted responses in full or negotiated compliance with their second requests. In negotiated transactions, the period begins only after both filing parties have complied with their respective second requests. In open-market transactions, by contrast, the period begins once the acquiring person has complied, even if the acquired person refuses to do so. This exception prevents a hostile target from blocking a transaction by withholding compliance. The length of the final waiting period is fixed by statute: 30 calendar days for most transactions, and 10 calendar days in the case of all-cash tender offers and certain bankruptcy acquisitions. Once the period expires, the merging parties are no longer barred by the HSR Act from closing their transaction.

Once the merging parties have submitted their final second request responses, the agency's work shifts into its final investigative phase. The staff must review the documents, data, and narrative responses, including what is often a large volume of material produced along with the compliance certification. At the same time, the staff typically conducts follow-up interviews with customers, competitors, or other market

[21] 15 U.S.C. § 1314(a) (DOJ); 15 U.S.C. § 57b-1(e) (FTC).

[22] 15 U.S.C. § 1314(e) (DOJ); 15 U.S.C. § 57b-1(h) (FTC).

[23] 15 U.S.C. § 1314(b) (DOJ); 15 U.S.C. § 57b-1(f) (FTC).

participants to clarify outstanding issues or confirm key facts. After completing this review and fact-gathering, the staff prepares a formal recommendation analyzing the transaction's likely competitive effects and advising whether the agency should challenge, settle, or clear the deal. This recommendation, often supported by briefing materials and economic analysis, is then presented to senior agency leadership for review and decision. If the staff recommends an enforcement action, they also must finalize drafting a complaint, a motion for a temporary restraining order (TRO), and a motion for a preliminary injunction, together with supporting papers, since the complaint must be filed and interim blocking injunctive relief obtained before the merging parties are free to close their transaction.

During this final phase, the merging parties typically request meetings with senior agency officials, commonly referred to as the *front office*, to present their arguments against enforcement. These meetings provide the parties with a final opportunity to address the agency's concerns, respond to staff analysis, and advocate for clearance of the transaction. The front office often hears directly from both the parties' counsel and business executives, and may ask follow-up questions or seek clarification on specific points. Although the staff's recommendation carries significant weight, the ultimate decision whether to challenge the transaction rests with the agency's leadership, who typically make their decision only after hearing from both the staff and the merging parties.

In a timing agreement, the merging parties agree not to close their transaction for a specified period—often 30 to 60 days—after the expiration of the final waiting period, giving the agency additional time to decide whether to challenge or clear the deal. The investigating staff often requests that parties provide advance notice—typically five to ten business days—before closing, even after the timing agreement period has expired. The FTC takes the position that the HSR Act's waiting periods are fixed by statute and cannot be extended or shortened by agreement. Accordingly, a timing agreement does not extend the HSR Act waiting period but rather functions as a contractual commitment by the merging parties to the investigating agency. Although it is common to say that a timing agreement "extends" the waiting period, the statutory waiting period formally expires in the normal course, and the agreement merely obligates the parties not to close for a defined period afterward. Although there is no reported instance where the merging parties have breached their timing agreement, a properly drawn timing agreement should be enforceable as a matter of contract law, and, in any event, a district court in a Section 7 challenge likely would be sympathetic to entering interim relief unwinding the transaction to restore the status quo under the timing agreement.

Investigation outcomes

At the conclusion of its investigation, the agency must decide whether to take enforcement action against the merger. Once that decision is made, the merging parties must determine how they will respond.

No enforcement action. If the agency decides not to take enforcement action, it will close its investigation and allow the transaction to proceed without further interference. Although this outcome is often referred to as "HSR clearance," it does not confer immunity from future antitrust challenges. Satisfying the HSR Act's reporting and waiting period requirements merely removes the HSR Act's bar to closing the transaction. The agencies retain full authority to reopen the investigation and challenge the transaction post-closing under the same Section 7 standards that apply before closing. In addition, private plaintiffs, including the states, may bring postclosing challenges after the transaction has "cleared" the HSR merger review process. While such challenges are relatively rare, they demonstrate that completing the HSR process without agency opposition does not insulate a transaction from future antitrust scrutiny. [24]

The government's continuing enforcement authority is illustrated by *DuPont/GM*,[25] the seminal case on post-closing enforcement under Section 7 of the Clayton Act. Between 1917 and 1919, with the encouragement of the U.S. government to support GM's wartime needs, DuPont acquired approximately 23% of General Motors' stock and maintained a substantial ownership stake and board influence for decades. In 1949, more than thirty years later, the Department of Justice brought suit, alleging that DuPont's stock acquisitions and continued ownership gave it influence over GM's purchasing decisions and allowed DuPont to foreclose rival suppliers in violation of Section 7.

The district court dismissed the claim after trial. On a direct appeal under the Expediting Act, the Supreme Court reversed, holding that Section 7 prohibits acquisitions that continue to present a reasonable probability of anticompetitive effects at the time of suit, regardless of when the acquisition occurred. The Court rejected the argument that the government's delay in bringing the action barred relief, emphasizing that laches and similar defenses do not constrain the government's authority to seek antitrust enforcement when competitive harm from an acquisition persists. Concluding

[24] *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. filed Dec.9, 2020) (challenging Facebook's acquisition of Instagram (2012) and WhatsApp (2014) eight and six years, respectively, after they cleared their HSR merger reviews); Memorandum Opinion, FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 30-32 (D.D.C. 2021) (rejecting Facebook's effort to dismiss the complaint as untimely); Complaint, United States v. Parker-Hannifin Corp., 1:17-cv-01354-UNA (D. Del. filed Sept. 26, 2017) (challenging Parker-Hannifin's $4.3 billion acquisition of Clarcor eight months after it cleared its HSR merger review for allegedly substantially lessening competition in the market for aviation fuel filtration systems), *settled by consent decree*, Modified Final Judgment, *id*. (D. De. Apr. 30, 2018) (requiring divestiture of Clarcor's aviation fuel filtration business); Leaon B. Greenfield & Hartmut Schneider, *Wait, I Thought We Were Done? DOJ Challenges $4B Merger Months After HSR Filing and Expiration of the HSR Waiting Period* (Oct. 2. 2017); Administrative Complaint, Chicago Bridge & Iron Company N.V., No. 9300 (F.T.C. issued Oct. 25, 2001) (challenging Chicago Bridge's acquisition of Pitt-Des Moines eight months after it cleared HSR review for allegedly substantially lessening competition in the markets for large industrial storage tanks), Opinion of the Commission, In re Chicago Bridge & Iron Co., 138 F.T.C. 1024 (2004) (finding a Section 7 violtion and ordering divestiture), *enforced*, Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410 (5th Cir. 2008).

[25] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (DuPont/GM).

that DuPont's stock interest enabled it to entrench itself as GM's dominant supplier and foreclose competitors, the Court ordered GM to divest its DuPont shares.[26]

While DuPont/GM represents an extreme case of delay, agencies typically bring post-closing challenges within a year of consummation, as the DOJ did in TransDigm/Takata. However, the FTC's challenge to Meta's acquisitions of Instagram (2012) and WhatsApp (2014) shows that much longer delays remain possible. In 2020, years after the FTC had reviewed both transactions under the HSR Act without taking enforcement action, the Commission sued under Section 2 of the Sherman Act, alleging that Meta's acquisitions were part of an unlawful course of monopolization rather than challenging the acquisitions as standalone Section 7 violations. In denying Meta's motion to dismiss, the district court rejected Meta's laches defense, holding that delay does not bar government antitrust enforcement when competitive harm persists.[27]

Enforcement action. If the agency concludes that a merger violates Section 7, it will take enforcement action to prevent the competitive harm it believes the merger is likely to create. In the first instance, the agency must be prepared to litigate its claim either to block the merger before it closes or, if the merger has already closed, to obtain post-closing divestiture or other injunctive relief.

The two agencies follow different enforcement procedures. The DOJ files a complaint in federal district court, where it litigates all aspects of the case, including preliminary and permanent injunctive relief. The FTC, by contrast, generally litigates the merits of its merger challenges in its own administrative adjudicative proceedings. However, because the FTC lacks authority to impose interim relief in administrative proceedings, if the merger has not yet closed, the FTC will first file a complaint in federal district court under Section 13(b) of the FTC Act seeking a temporary restraining order (TRO) and a preliminary injunction to block the transaction pending

[26] DuPont chose to comply with the divestiture order by distributing its GM shares directly to its own shareholders rather than selling them to third parties. This, however, created a significant tax problem. Members of the DuPont family, who were major shareholders, stood to receive large amounts of GM stock. Under existing tax law, their distributions would have been treated as a taxable dividend. Since the GM stock has a zero cost basis as distributed, the full market value of the stock they received would be taxed as ordinary income at marginal rates reaching as high as 91%, the top rate at the time.

To prevent this outcome, the DuPont family retained Clark Clifford, a prominent Washington attorney with a successful congressional lobbying practice and reputation as a skilled "fixer." Clifford played an influential role in persuading Congress to pass special legislation allowing stock distributions pursuant to an antitrust divestiture order to be treated as a return of capital rather than a dividend. The ostensible reason was to prevent punitive tax consequences from discouraging or complicating compliance with antitrust divestiture decrees. As a result, DuPont shareholders recognized no gain at the time of distribution. Instead, they would have to pay a capital gains tax if and when they sold the GM shares, with the capital gains based on a statutory allocation of their original DuPont stock basis to the GM stock. *See* Act of Feb. 22, 1962, Pub. L. No. 87-403, § 1, 76 Stat. 4, 979 (codified at 26 U.S.C. § 1111), *repealed by* Pub. L. No. 94-455, title XIX, § 1901(a)(134), Oct. 4, 1976, 90 Stat. 1520, 1786. *See generally* Theodore P. Kovaleff, *Divorce American-Style: The Du Pont-General Motors Case*, 18 DELAWARE HIST. 28 (1978).

[27] *See* FTC v. Facebook, Inc., 581 F. Supp. 3d 34, 56-57 (D.D.C. 2022).

completion of the administrative litigation. If the merger has already closed, the FTC will usually proceed solely with administrative litigation.

Merging parties that do not wish to litigate have two primary options. First, if the merger is HSR-reportable and has not yet closed, the parties may voluntarily terminate their merger agreement and withdraw their HSR filings. In that case, the agency will close its investigation without taking enforcement action. The parties are free to resurrect their transaction later, but doing so would require new HSR filings and restart the statutory waiting period, giving the agency a fresh opportunity to investigate and, if warranted, challenge the deal.

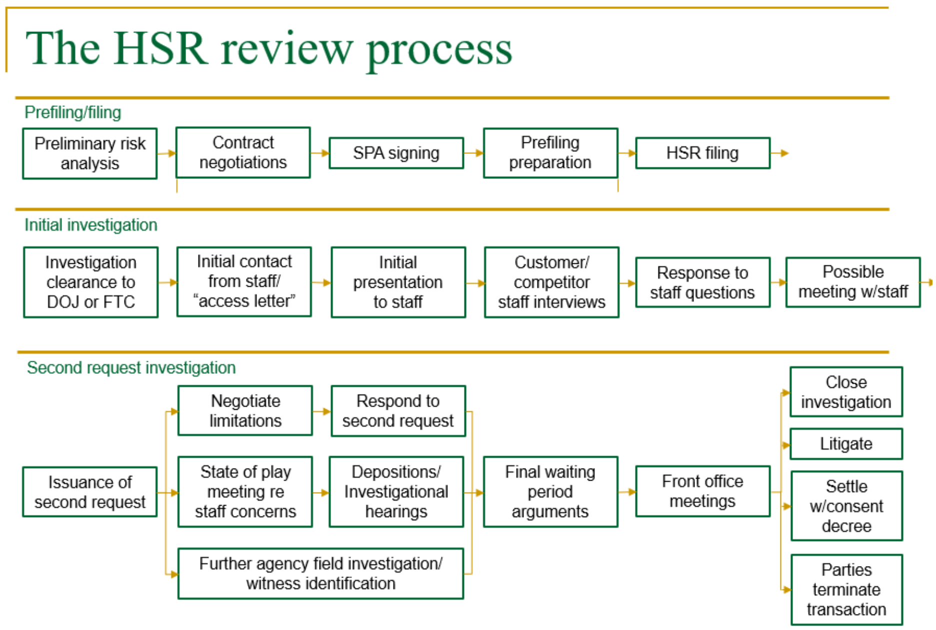
Alternatively, the parties may attempt to negotiate a consent settlement to address the agency's competitive concerns. The agencies expect the merging parties to initiate settlement discussions; they generally will not propose a remedy unilaterally, although the contours of an acceptable settlement often become clear as the investigation proceeds.

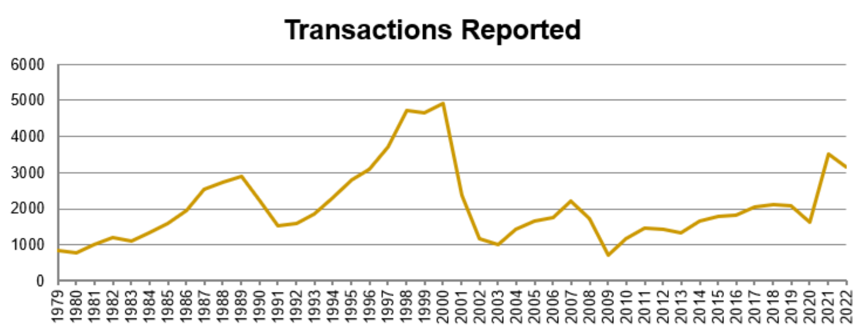
The structure of any settlement depends largely on timing. If the transaction has not yet closed, a consent settlement typically requires restructuring the deal to eliminate the identified competitive problem. In horizontal mergers, this usually means divesting one party's overlapping business units to a third-party buyer acceptable to the investigating agency. If the transaction has already closed, the settlement will require postclosing divestitures or other remedial commitments. Regardless of timing, the agency will carefully scrutinize any proposed remedy to ensure it preserves competition, can be implemented effectively, and does not create new competitive concerns.

Consent settlements are formalized as final judgments in federal court in DOJ investigations and as consent orders in FTC administrative proceedings. In both situations, the agency commences the action by filing a complaint, but the merging parties are not required to defend on the merits or admit liability. When the settlement is reached during the investigation, the agency files the proposed consent decree or consent order simultaneously with the complaint. The parties' consent to entry of the final judgment or order is sufficient to resolve the matter without further litigation.

If settlement negotiations are likely to extend beyond the expiration of the HSR waiting period or an existing timing agreement, the agency will insist on an extension of the timing agreement as a condition of proceeding with settlement discussions. If the parties and the agency cannot reach a settlement, litigation on the merits will proceed.

The following chart presents a flowchart of the HSR merger review process.





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settled by consent decree, Modified Final Judgment, *id*. (D. De. Apr. 30, 2018) (requiring divestiture of Clarcor's aviation fuel filtration business); Leaon B. Greenfield & Hartmut Schneider, *Wait, I Thought We Were Done? DOJ Challenges $4B Merger Months After HSR Filing and Expiration of the HSR Waiting Period* (Oct. 2. 2017); Administrative Complaint, Chicago Bridge & Iron Company N.V., No. 9300 (F.T.C. issued Oct. 25, 2001) (challenging Chicago Bridge's acquisition of Pitt-Des Moines eight months after it cleared HSR review for allegedly substantially lessening competition in the markets for large industrial storage tanks), Opinion of the Commission, In re Chicago Bridge & Iron Co., 138 F.T.C. 1024 (2004) (finding a Section 7 violtion and ordering divestiture), *enforced*, Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410 (5th Cir. 2008).

AN UPDATE: STATE PREMERGER NOTIFICATION

In addition to the federal premerger notification requirements under the Hart-Scott-Rodino Act, some states are adopting their own premerger notification laws to facilitate state-level merger enforcement. States have expressed growing concern that relying solely on federal merger review may leave competitively significant local or regional transactions inadequately scrutinized. This risk is particularly acute when federal agencies decline to act or focus primarily on national markets. Moreover, under the federal process, states typically gain access to HSR filings only if the parties grant a waiver authorizing the federal agencies to share those materials. Some states view this reliance on voluntary waivers as an insufficient basis for robust enforcement because it depends too heavily on the merging parties' voluntary cooperation. Earlier state premerger notification laws often targeted specific industries, particularly healthcare, but states adopting the UAPNA are seeking a more comprehensive, industry-agnostic approach that applies to all covered transactions regardless of sector.

To address these concerns, the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), developed and approved the Uniform Antitrust Pre-Merger Notification Act (UAPNA) in 2024 as model legislation for states to adopt.[1] The UAPNA is designed to align closely with the federal HSR process while ensuring that state attorneys general receive timely notice of mergers that may affect competition within their jurisdictions. It requires parties to any transaction that is reportable under the HSR Act to submit a copy of the same HSR form and all attachments to the attorney general of any state where a party has a significant nexus. A significant nexus is defined as having a principal place of business in the state or annual sales in the state of at least 20 percent of the HSR size-of-transaction threshold (approximately $25 million as of 2025) involving the goods or services at issue. The statute does not require the parties to submit any information beyond what they are already required to provide in their federal HSR filing. Like the HSR notification itself, the UAPNA imposes no continuing obligation to update the information after the initial submission. The UAPNA imposes no separate state-level waiting period and does not require state approval before closing. Its sole function is to give state attorneys general timely access to the parties' HSR filings. If a state wishes to obtain additional information beyond what is included in the HSR filing, it must rely on the same precomplaint investigative tools available under its general antitrust authority, such as civil investigative demands or subpoenas.

1 *See* Nat'l Conf. of Comm'rs on Unif. State Laws, Uniform Antitrust Pre-Merger Notification Act (approved Sept. 16, 2024).

Washington was the first state to adopt the UAPNA, enacting its version in April 2025 with an effective date of July 27, 2025.[2] While the statute largely follows the UAPNA framework, Washington made several notable modifications. Most significantly, it adds a special filing requirement for healthcare providers and provider organizations doing business in the state, regardless of whether they meet the general nexus criteria based on principal place of business or in-state sales. In addition, the statute differentiates between parties with a principal place of business in Washington and those who meet the law's in-state sales threshold. Parties with a principal place of business in Washington must submit the full HSR filing, including all attachments. Parties that meet the sales threshold—or that are healthcare providers subject to the added requirement—need only submit the HSR form itself initially but must provide the accompanying attachments upon request from the attorney general within seven days. Washington's law does not impose a state-level waiting period or filing fee and incorporates confidentiality protections consistent with the UAPNA.

Colorado adopted its version of the UAPNA in June 2025, with an effective date of August 6, 2025.[3] Colorado generally follows the UAPNA framework but made some modifications tailored to its existing legal landscape. Unlike Washington, Colorado did not include a separate filing requirement for healthcare providers, relying instead on a preexisting healthcare-specific premerger notification law. Colorado also does not distinguish between parties with a principal place of business in the state and those meeting the in-state sales threshold. Under the Colorado statute, any party that satisfies either nexus criterion—either having a principal place of business in Colorado or annual in-state sales equal to at least 20 percent of the HSR size-of-transaction threshold—must submit the full HSR filing, including all attachments. There is no option to initially submit only the HSR form with attachments provided upon request. As with Washington's law, Colorado's statute imposes no state-level waiting period, does not require a filing fee, and includes confidentiality protections consistent with the UAPNA.

In addition to Washington and Colorado, several other jurisdictions are actively considering legislation modeled on the UAPNA. As of mid-2025, bills based on the UAPNA have been introduced in Hawaii, Nevada, Utah, West Virginia, and the District of Columbia. Meanwhile, other states are pursuing related legislation that would impose premerger notification requirements but are not modeled on the UAPNA framework. Notably, the California and New York senates have passed bills that would require parties to submit premerger notifications to the state attorney general, but these proposals are part of broader antitrust reform efforts and differ materially from the UAPNA in structure and scope. Merger antitrust practitioners need to stay informed about this rapidly evolving landscape of state premerger notification requirements to ensure that their clients remain in compliance as transactions move forward.

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2 Wash. Rev. Code § 19.390.060 (2025). Washington enacted its version of the UAPNA shortly after it was recommended by the Uniform Law Commission's drafting committee but before it was formally adopted by the full National Conference of Commissioners on Uniform State Laws at its annual meeting in July 2025.

3 Colo. Rev. Stat. §§ 6-4.5-101 to 6-4.5-108 (2025).

Outcomes in DOJ/FTC Merger Investigations

A NOTE ON DOJ/FTC INVESTIGATION OUTCOMES

Understanding the full range of investigation outcomes is essential for analyzing the strategic choices facing both agencies and merging parties. When agencies identify competitive concerns, the resolution path significantly affects the transaction's ultimate fate and the precedent set for future cases. The five outcomes below represent the universe of possibilities that shape settlement negotiations—from the agency's perspective of securing adequate relief to the parties' goal of preserving deal value. As you work through the TransDigm documents and other case materials, consider how the availability of these different outcomes influences the bargaining leverage each side brings to settlement discussions.

Close the investigation: The investigating agency closes the transaction without taking enforcement action, allowing the deal to close unimpeded. Agencies close investigations when they conclude the transaction does not violate Section 7 either because the investigating agency determines that no competitive harm is likely to result from the transaction or because they cannot prove their case with sufficient confidence. Unlike settlements or litigation, there are no ongoing obligations on the parties, no admissions of wrongdoing, and no precedential effect. Importantly, closing an investigation does not provide immunity from future enforcement action. The agencies retain the authority to open new investigations of the same transaction if circumstances change or new evidence emerges.[1]

Settle the investigation: During the investigation, the investigating agency and the merging parties agree to a consent settlement obligating the merging parties to take specific actions—including, in horizontal mergers, the divestiture of identified businesses or assets—to resolve the agency's competition concerns. As a practical matter, a consent settlement avoids a trial on the merits and allows the main transaction to close quickly, subject to fulfilling the settlement commitments postclosing. The settlement is embodied in a consent decree entered simultaneously with the filing of a complaint, but no evidence is taken, no findings of fact are made, and the decree explicitly states that the parties admit no violation of law. Before the Biden administration, consent settlements were by far the most common outcome when agencies identified competitive problems. The Trump administration is likely to return to this historical practice, and consent decrees will again become the most common outcome of merger investigations when the agency decides to challenge a transaction.

Notably, most divestiture sales occur at heavily discounted "fire sale" prices because there are typically only a few interested firms that are acceptable to the investigating agency as a divestiture buyer. These buyers understand that they serve as the merging parties' gateway to closing the main deal, providing them with enormous

[1] A later investigation could also arise if a new administration concludes that the proper application of antitrust law shows the transaction did violate Section 7, even absent changed circumstances or new evidence. *See* Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Dec. 9, 2020) (challenging Facebook's 2012 acquisition of Instagram and 2014 acquisition of WhatsApp, both of which had closed without FTC enforcement action after second request investigations that closed without enforcement action).

bargaining leverage. Moreover, divestiture negotiations usually occur late in the investigation process, when the transaction has been pending for months and pressure on the merging parties to close and move forward is intense. These same factors—limited buyer options and mounting time pressure—also provide the investigating agency with significant leverage in negotiating the settlement terms. The agency's objective is to obtain sufficient restructuring relief to eliminate likely anticompetitive effects, and it can always proceed to litigation if the parties refuse to accept its terms. The challenge for the merging parties—or, more commonly, just the buyer—is to negotiate a settlement that preserves enough value in the restructured deal to make a consent decree a superior option to litigation or abandoning the transaction.

Litigation: If the investigating agency and the merging parties do not settle and the parties do not abandon the deal, the matter will proceed to litigation at the end of the investigation. The two agencies follow different procedural paths. The DOJ, as a prosecutorial agency, cannot order relief on its own and must obtain both preliminary and permanent injunctive relief through federal district court litigation. The FTC, by contrast, has quasi-adjudicative authority to order permanent relief through administrative "cease and desist orders" after an administrative trial. However, the FTC lacks the authority to issue preliminary injunctions, so if it wants to prevent a deal from closing while its administrative case proceeds, it must simultaneously seek a preliminary injunction in federal district court. These procedural differences can affect litigation strategy and settlement leverage.

In recent years, some merging parties have pursued a strategy known as "litigating the fix." To litigate the fix, the merging parties typically implement a divestiture package that the agency rejected during the investigation by identifying a divestiture buyer and executing a definitive divestiture agreement—contingent only on the closing of the main transaction—that includes all elements of the proposed remedy. If the court is satisfied that the fix has been or will be sufficiently implemented in time for the agency to complete reasonable discovery on the remedy before trial, the court will evaluate whether the restructured transaction—not the original deal—violates Section 7. Although the procedural posture differs from a consent settlement, the substantive question remains the same: whether the proposed divestiture is adequate to preserve or restore premerger competition.

This strategy became more common during the Biden administration, when the agencies (especially the DOJ) refused to settle investigations on terms the merging parties believed were sufficient to resolve the competitive concerns. The parties' goal is to convince the court that the restructured transaction does not violate Section 7 and to obtain a judgment on the merits dismissing the complaint. The government, in turn, typically challenges the fix on one or more of three grounds: (1) the remedy does not cover all relevant markets, so even the restructured transaction would substantially lessen competition in at least some of them; (2) the divestiture assets are too limited to preserve competition, regardless of the buyer's capabilities; or (3) although the asset package may be sufficient, the proposed buyer lacks the incentive or ability to compete effectively using those assets. These objections mirror the agencies' internal standards for evaluating divestitures and underscore the legal and evidentiary risks parties assume when litigating a fix.[2]

Abandonment of the transaction: During or at the end of the investigation, the investigating agency and the merging parties are unable to reach a mutually acceptable settlement, and the merging parties voluntarily withdraw from their transaction. This outcome typically occurs when parties conclude that either the likelihood of success at trial is too low or the costs and uncertainty of litigation are too high to justify proceeding. Abandonment may also result from changes in business conditions, regulatory delays, or a strategic reassessment of the deal's value. Unlike settlements, abandonment extinguishes the need for litigation without any ongoing obligations or admissions, though it also forfeits any potential deal benefits.

"Fix it first": Sometime before the end of the investigation, the merging parties elect to "fix it first," that is, eliminate the agency's antitrust concerns by restructuring the transaction to remove problematic overlaps before consummating the deal.[3] This approach became a practical necessity for transactions investigated by the DOJ during the Biden administration, when the Antitrust Division under AAG Jonathan Kanter refused to accept consent decrees to settle investigations.[4] A "fix it first" solution requires the merging parties to find a qualified divestiture buyer to purchase the overlapping business and close that divestiture before closing the primary transaction. Alternatively, in some cases, the parties could restructure to leave the problematic assets with the seller. In all cases, the merging parties had to obtain the agency's agreement that the restructured transaction eliminated competitive concerns; otherwise, the agency could still challenge the restructured deal for failing to negate all of the transaction's anticompetitive effects.[5] With the Trump administration's

[2] We will examine "litigating the fix" in detail in the Kroger/Albertsons case study in Unit 7.

[3] The merging parties then file their HSR forms for the restructured transaction (pulling their original filings if necessary), which now does not contain the problematic horizontal overlap. The merging parties must complete the divestiture sale before closing the main transaction because the HSR forms do not cover a transaction with the horizontal overlap.

[4] There is one exception to the DOJ's practice, but it is very much an outlier. The DOJ refused to accept a divestiture consent decree to settle its investigation into Assa Abloy's pending acquisition of Spectrum Brands' Hardware and Home Improvement Division. The DOJ commenced litigation and the merging parties "litigated the fix" they had proposed. After six days of trial, the court abruptly paused the proceedings. Four days later, with the trial still paused, the DOJ accepted the "fix" in a consent settlement. Although there has been no formal acknowledgment of what happened, it appears clear that the court informed the DOJ that it was going to lose the case and reminded the merging parties of their continuing offer to accept a consent decree. The parties then settled. *See* Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023).

[5] Consider a situation where the parties restructure a horizontal grocery store transaction to eliminate the problematic overlaps by leaving the seller's overlapping stores with the seller, the seller intends to convert the retained grocery stores to parking lots, and in the absence of the transaction the seller would have continued to operate all stores as grocery stores. While the restructured transaction would have no overlaps, a direct consequence of the transaction is to substantially lessen competition in the grocery store markets in which the retained stores operated. There is no doubt that, in this situation, the investigating agency would challenge the restructured transaction as a violation of Section 7. I know of only one case that illustrates the principle. *See* Complaint, *Vons Cos*., 115 F.T.C. 710 (Aug. 7, 1992) (alleging that Von's acquisition of grocery stores from the William Bros.

return to traditional consent decree practice, this outcome will likely become rare again, used primarily in cases where the antitrust problem is obvious and indefensible, and parties prefer to avoid the timing pressures of consent decrees that typically result in fire-sale divestiture prices.

These five outcomes form the basic menu of possibilities that structure the behavior of agencies and parties during merger investigations. They shape negotiation dynamics, litigation risk assessments, and strategic deal design. Throughout the course, we will observe how these outcomes recur across transactions—sometimes in expected ways, and sometimes with surprising variations. Understanding the incentives, constraints, and leverage points associated with each is essential for effectively practicing merger antitrust law.

Markets, Inc. violated Section 7 in the San Luis Obispo supermarket market where Von's sought to eliminate the problematic overlap by selling the overlapping Williams grocery store to a drugstore operator that would not operate the store as a grocery store); 1992 FED. TRADE COMM'N ANN. REP. 34 (discussing case).

Consent Settlements in Horizontal Merger Cases

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chairman

Statement of Chairman Andrew N. Ferguson
Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador
In the Matter of Synopsys, Inc. / Ansys, Inc.
Matter Number 2410059

May 28, 2025

Today, the Commission unanimously authorizes the filing of an administrative complaint and proposed decision and order requiring Synopsys, Inc. and Ansys, Inc. to divest several lines of business, and publishes that order for public comment.[1] It does so because it has concluded that the merger without the divestitures would have violated the Clayton Act's prohibition on mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly."[2] Because this order is the first settlement of a merger-enforcement action by the Commission under President Donald J. Trump, I write to explain briefly my understanding of the role that remedies should play in the Commission's mission to protect competition in the American economy. But this will not be the Commission's last word on the subject. In due course, the Commission will publish a policy statement on its understanding of the role of remedies.

I

Competition makes the American economy great. It promotes economic freedom by preventing barriers to new businesses and new ideas. It breeds entrepreneurialism and innovation. The American entrepreneurial spirit is what sets our economy apart from the rest of the world. America is an engine of innovation in no small part because our economy is built on competition—on the drive to create and build better than your opponent in order to convince consumers to buy your product or service, rather than those of your competitor.

The Federal Trade Commission's mandate is to promote economic freedom, innovation, and dynamism by protecting competition. One of the Commission's most vital tasks in protecting competition is to guard against anticompetitive mergers. The danger that mergers and acquisitions could pose to a healthy business environment is obvious. For example, if two rival companies were to merge, the intensity of competition in that market may diminish. With fewer competitors and less competitive pressure, consumers may suffer. Prices may increase. Product quality may decline as firms feel less pressure to maintain the same standard of their products or services in order to win over consumers. The rate of innovation may diminish as companies feel less pressure to develop new products or industrial techniques to improve their product offerings. Consumers may have fewer choices in a market with fewer companies fighting to win their business. And by reducing the number of buyers of labor in a given market, mergers can undermine labor competition and injure American workers too. Safeguarding the markets from mergers that "may

[1] 16 C.F.R. § 2.34(c).
[2] 15 U.S.C § 18.

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[1] 16 C.F.R. § 2.34(c).
[2] 15 U.S.C § 18.

… substantially … lessen competition, or … tend to create a monopoly,"[3] then, is critical to protecting the vibrancy of the American economy.

But for all these possibilities, the Commission must not reflexively oppose mergers and acquisitions. Innovation does not occur randomly. New ideas do not appear in the market on their own. Taking an idea from its inception to a product offering requires capital, and lots of it. Innovation and competition therefore require healthy capital markets. Upstarts cannot take on dominant incumbents without tremendous resources. And investors will not contribute these resources if they cannot realize a return on that investment.

Mergers and acquisitions are a critical way in which capital fuels innovation because they are part of how investors realize returns on their investments. After all, the majority of startup firms in the U.S.—which bring many innovative ideas to market—expect to be acquired rather than go public.[4] If acquisition by a larger company is not a realistic potential exit strategy, investors will have less incentive to invest. Less investment means less fuel for the fires of innovation, which in turn could stunt the development of new technology and economic growth.[5] The benefits of mergers are not limited to startups. If a business is underperforming, an acquisition of that business and replacement of its management can unleash new vitality, innovation, and growth.

But the Commission does not implement industrial policy. It is not a central planner. It is a cop on the beat. When it sees a violation of the competition laws, it blows the whistle and takes the offending businesses to court. When a merger would not violate the antitrust laws, the Commission must get out of the way quickly to avoid bogging down innovation and interfering with the forces of a free and competitive market.

II

A

The Commission has a single tool to prevent anticompetitive mergers: litigation to block the merger's consummation.[6] If the Commission pursues litigation to block an anticompetitive deal and successfully litigates it to judgment, the court enjoins the proposed merger.[7] But the

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[3] 15 U.S.C § 18.

[4] See Silicon Valley Bank, 2020 Global Startup Outlook, at 7 (last accessed May 28, 2025), https://www.svb.com/startup-outlook-report-2020/ (58% of U.S. startups surveyed reported acquisition as the most realistic long-term goal); Silicon Valley Bank, 2019 Startup Outlook, US Report (last accessed May 28, 2025) ("2019 Startup Outlook"), https://www.svb.com/startup-outlook-report-2019/us/ (in 2019, 50% of U.S. startups surveyed report acquisition as the most realistic long-term goal, down from 57% in 2018); National Venture Capital Association, 2019 Yearbook (March 2019), https://nvca.org/wp-content/uploads/2019/08/NVCA-2019-Yearbook.pdf (in 2018, 85 venture-backed companies went public, whereas 799 were acquired—nearly ten times as many).

[5] Cf. 2019 Startup Outlook, *supra* note 4 (venture capital is the go-to source of funding with over half of U.S. startups expecting their next source of funding to be from venture capital from 2017 through 2019; fewer than 10% expected their funding to come from organic growth during that same timeframe).

[6] 15 U.S.C. § 53(b); 15 U.S.C. § 21(b); Merger Review, FTC (last accessed May 28, 2025), https://www.ftc.gov/enforcement/merger-review ("When necessary, the FTC may take formal legal action to stop the merger, either in federal court or before an FTC administrative law judge.").

[7] See, e.g., *FTC v. Kroger*., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *39 (D. Or. Dec. 10, 2024) (enjoining preliminarily the proposed merger between Kroger and Albertsons in its entirety). Generally, of course, the

Commission, like any litigant, also has the option of settling litigation. A settlement may be the best way to protect competition in some cases for two reasons. First, settlement can temper the potentially over-inclusive effects of an injunction blocking an entire merger. If, for example, a merger has anticompetitive and procompetitive features, a lawsuit blocking the entire merger would protect the public from the merger's anticompetitive effects but would also deny the public the benefit of the procompetitive effects. A settlement that successfully prevents the merger's anticompetitive features can strike a balance that permits the procompetitive aspects to proceed. Assuming the settlement would in fact prevent the merger's anticompetitive effects, the settlement would fully protect the competitive process while also promoting the innovation and growth that the remainder of the merger might foment.

Second, settlement maximizes the Commission's finite enforcement resources. Antitrust litigation is expensive.[8] It is also uncertain. Even when the Commission is confident that a merger will lessen competition, it may have difficulty convincing a district judge of that fact. If the Commission's only option when confronting an anticompetitive merger is litigating a case all the way to judgment, the Commission may have no choice but to decline bringing winnable suits in order to conserve its resources, or to avoid the risk of a loss in a close case. Settlement, by contrast, is much cheaper. If the Commission can successfully settle merger cases that are likely to result in anticompetitive harm, it can block more anticompetitive effects in the aggregate than it would if its only choice were litigating every one of those cases to judgment.

Commission files an administrative action to block the deal, and simultaneously seeks a preliminary injunction of the merger pending the resolution of the administrative action. See 15 U.S.C. Sec. 53(b); FTC, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority (last accessed May 28, 2025), https://www.ftc.gov/about-ftc/mission/enforcement-authority ("In the competition context, the Commission has used Section 13(b) primarily to obtain preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding."). For nearly all of the Commission's merger-enforcement actions, however, the preliminary-injunction litigation and subsequent appeal are dispositive. See, e.g., *In re Hackensack Meridian Health, Inc.*, Dkt. 9399, 2021 WL 2379546, at *2 (FTC May 25, 2021) (recognizing that the resolution of a district court action "could obviate the need for an administrative hearing."). If the Commission prevails in federal court, the parties generally abandon the merger and the administrative action is moot. See, e.g., *FTC v. Tapestry*, 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (granting FTC's motion for preliminary injunction); Capri and Tapestry abandon plans to merge, citing regulatory hurdles (Nov. 14, 2024), https://www.cnbc.com/2024/11/14/capri-and-tapestry-abandon-plans-to-merge.html. If the Commission loses, the merger closes and the Commission appropriately dismisses the pending administrative action. See, e.g., *FTC v. Tempur Sealy Int'l*, No. 4:24-CV-02508, 2025 WL 617735 (S.D. Tex. Feb. 26, 2025) (denying FTC's motion for preliminary injunction); Order Returning Matter to Adjudication and Dismissing Complaint, *In the Matter of Tempur Sealy Intn'l, Inc. and Mattress Firm Group Inc.*, Matter No. 2310016 (April 11, 2025).

[8] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020) ("Perhaps most remarkable about antitrust litigation is the blurry product that not infrequently emerges from the parties' huge expenditures and correspondingly exhaustive efforts."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) ("[P]roceeding to antitrust discovery can be expensive."); *FTC v. Dean Foods Co.*, 384 U.S. 597, 633 (1966) (Fortas, J., dissenting) ("[T]here is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation."); Kimberly L. King, An Antitrust Primer for Trade Association Counsel, 75 Fla. B.J. 26 (May 2001) ("No litigation is more complex, drawn out, or expensive than antitrust litigation."); Donald I. Baker & Mark R. Stabile, Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel, 48 Bus. Law 395, 396 (1993) ("Antitrust litigation is notoriously fact-intensive, time-consuming and expensive."); Assistant Attorney General Jonathan Kanter Delivers Farewell Address (Dec. 17, 2024), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address (DOJ can "accrue expert fees of up to 30 million dollars—just for a single case.").

In antitrust parlance, a settlement in a merger case is called a "remedy" because it is supposed to remedy a merger's anticompetitive effects.[9] Because most of the Commission's merger-enforcement actions involve horizontal mergers—mergers between direct competitors at the same place in the supply chain—the classic example of a remedy is a divestiture of each competing line of business of the merging parties, such that the consummated merger will not involve the combination of directly competing products or services.[10] We generally call this sort of remedy a "structural remedy," because it affects the structure of the market in which the merged firm operates.[11] A "behavioral remedy" or "conduct remedy," by contrast, is an enforceable commitment by the merged firm to engage in some behavior, or not to engage in some behavior.[12]

B

The Biden FTC expressed hostility to settlements in merger cases. The former Chairwoman said that the FTC should focus on litigating to block anticompetitive mergers rather than negotiating fixes.[13] And a former Director of the Bureau of Competition lamented that previous FTC structural remedies had not worked as well as had been hoped and announced that the FTC would not spend inordinate time helping merging companies work out a resolution of anticompetitive aspects of their deal.[14] "Executives should not presume," she warned, "that the FTC will agree to piecemeal divestitures that would allow the remainder of the merger to proceed. The FTC has neither the resources nor the mandate to function as an industrial planner."[15]

I am sympathetic to this view. In the past, the Commission became too comfortable with behavioral remedies that were difficult or impossible to enforce.[16] And although research demonstrates that a majority of divestiture settlements succeeded,[17] some did not. One very prominent divestiture package—*Albertsons/Safeway*—failed spectacularly, with the company that

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[9] See, e.g., FTC, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 17 (Jan. 2012), https://www.ftc.gov/advice-guidance/competition-guidance/negotiating-merger-remedies ("BC Remedies Statement").
[10] *Ibid*.
[11] See United States Note on Remedies in Merger Cases, OECD Working Party No. 3 on Co-operation and Enforcement, at 3 (June 24, 2011), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf.
[12] *Ibid*.
[13] FTC's new stance: Litigate, don't negotiate, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.
[14] Remarks by Holly Vedova, Director, Bureau of Competition, FTC, at 12th Annual GCR Live: Law Leaders Global Conference, at 10–12 (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.
[15] *Id*. at 12.
[16] See, e.g., The Courage to Learn, A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach, American Economic Liberties Project, at 49 (2021) ("Evaluating this experiment [with more behavioral remedies] after the end of the Obama administration, the American Antitrust Institute concluded that it was largely a failure—providing little in the way of deterrence and actually encouraging corporations to circumvent the remedy and creating a situation that precluded realistic oversight and enforcement of the remedy.").
[17] See The FTC's Merger Remedies 2006-2012, FTC (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

divested the stores buying many of them back at bargain-basement prices after the divestiture buyer went bankrupt.[18]

Nevertheless, remedies must be an option for the FTC as it fulfills its mission of protecting competition. First, for all of the Biden FTC's hostile rhetoric against merger settlements, it accepted them in lieu of suing—and it did so even after 2022, when it publicly expressed hostility toward such remedies.[19] Indeed, in the final months of the Biden Administration, the Commission accepted novel remedies in two oil mergers.[20] The Commission also accepted settlements in the middle of litigation.[21]

Second, a categorical refusal to consider settlement complicates subsequent litigation. If the Commission simply disregards proposed settlements that would have addressed a merger's competition problems, nothing stops the parties from presenting that settlement as a remedy to the court during litigation.[22] And nothing stops parties from proposing or executing remedies after the agencies have already initiated litigation. In these circumstances, courts often choose to adjudicate whether the transaction, as modified by the proposed structural or behavioral remedies, would violate Section 7 of the Clayton Act. Litigation over a proposed remedy is widely known as "litigating the fix,"[23] and it does not always play out well for the agencies.[24] Of course, that is not

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[18] Decision and Order, *In the Matter of Cerberus Institutional Partners V, LP., AB Acquisition LLC, and Safeway Inc.*, Matter No. 1410108 (July 2, 2015); West Coast Grocer Haggen Files for Chapter 11 Bankruptcy, Wall. St. J. (Sept. 9, 2015), https://www.wsj.com/articles/west-coast-grocer-haggen-files-for-chapter-11-bankruptcy-1441798163; Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway, Wall. St. J. (Nov. 24, 2015), https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193; FTC attorney shines light on failed Albertsons/ Safeway remedy, Glob. Competition Rev. (June 17, 2016), https://globalcompetitionreview.com/gcr-usa/article/ftc-attorney-shines-light-failed-albertsons-safeway-remedy.

[19] Three years running: Merger enforcement activity continues at historically low levels according to the agencies' most recent HSR report, Westlaw Today (Oct. 23, 2024), https://www.cov.com/-/media/files/corporate/publications/2024/10/three-years-running-merger-enforcement-activity-continues-at-historically-low-levels-according-to-the-agencies-most-recent-hsr-report.pdf ("From 2001 to 2020, the agencies averaged almost 20 consent decrees per year; in 2023 they entered two, and in 2024 they entered zero."); FTC, Merger Enforcement Actions (last accessed May 28, 2025), https://www.ftc.gov/competition-enforcement-database (showing that as part of its merger enforcement activity, the FTC accepted five Part 2 consents in 2021, 12 in 2022, and two in 2023).

[20] Decision & Order, *In the Matter of Chevron Corporation*, Matter No. 2410008 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410008c4814chevronhessorder.pdf (settlement propounding Section 7 theory entirely unsupported by judicial precedent); Decision & Order, *In the Matter of ExxonMobil Corporation*, Matter No. 2410004 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004-c4815-exxonpioneerfinalorderpublic.pdf (same).

[21] Decision & Order, *In the Matter of Amgen, Inc. and Horizon Therapeutics plc*, Matter No. 2310037 (Dec. 14, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09414amgenhorizonfinalorderpublic.pdf (no divestiture during litigation); Decision & Order, *In the Matter of Intercontinental Exchange, Inc./Black Knight, Inc.*, Matter No. 2210142 (Nov. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/D09413ICEBKFinalOrderPublic.pdf (divestiture during litigation—five months after complaint).

[22] Parties are More Willing Than Ever to 'Litigate the Fix' in the United States, Glob. Competition Rev. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states ("[T]he FTC or DOJ may determine that the fix is insufficient to address its concerns and decide to sue to block consummation of the proposed transaction. When the latter occurs, the parties are said to be litigating the fix.").

[23] *Id*.

[24] See, e.g., *FTC v. Microsoft*, 681 F. Supp. 3d 1069, 1095 (N.D. Cal. 2023), aff'd, No. 23-15992, 2025 WL 1319069 (9th Cir. May 7, 2025) (denying the FTC's motion for preliminary injunction, highlighting Microsoft's decision, after

to say that any and all remedy proposals may lead to the agencies losing their case—inadequate or uncertain remedies will not fare well before a court either.[25] Additionally, antagonism toward remedies may spur firms to employ a "fix it first" strategy, meaning that parties purport to address potential competitive concerns before submitting their merger notifications to the Commission for formal review.[26] This may sound like a good approach, but it involves serious risks. For example, the parties may craft and execute their own remedies beyond the oversight and involvement of the Commission. Those remedies may not be adequate to address fully the competitive problems posed by the merger—for example, involving divestiture sales to subpar buyers—but may be sufficient to make litigation challenging the "fixed" merger difficult or impossible. A settlement with the Commission, by contrast, ensures that the Commission can bring its expertise and experience to bare, while also promoting transparency and accountability on merger remedies. Thus, if the Commission takes remedies off the table, it will find itself fighting a more complex battle in court, and effectively little by little relegates its judgment about what constitutes an acceptable remedy to the parties themselves and the judiciary.

Finally, categorically refusing to settle merger cases diminishes the effect of the FTC's finite enforcement resources. As already noted, litigating antitrust cases is expensive—in terms of the costs the Commission must bear for experts and other costs related to discovery and trial, but also in terms of staff's time. Such litigation can tie up staff for six to eight months or even longer.[27] Every litigation entails costly tradeoffs. Every case the Commission brings forecloses other

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the FTC filed its complaint, to enter into contracts that mitigate concerns about an intent to foreclose access to the product at issue); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 135 (D.D.C. 2022), dismissed, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (denying DOJ's bid to block merger, holding proposed divestiture will preserve competition in relevant market); *United States v. AT&T*, 310 F. Supp. 3d 161, 251 & n.51, 254 (D.D.C. 2018), aff'd sub nom. *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) (denying DOJ's bid to block merger, where parties' arbitration agreement undercut governments' theory of competitive harm).

[25] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015) (enjoining the proposed transaction, noting that the proposed remedy was not sufficient to eliminate the anticompetitive effects of the transaction); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002) (enjoining the proposed transaction, finding that even as modified the proposed deal was likely to substantially lessen competition); Transcript of Pre-Hearing Conference at 18, 21–29, *FTC v. Ardagh Grp.*, No. 13-1021 (D.D.C. Sept. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf (bench ruling to not consider proposed divestiture where initial contours of parties' structural remedy proposal came after the close of discovery on the eve of the CEO's deposition and without an identified buyer so that it was not definitive enough for the FTC to evaluate).

[26] Fix-it-first: navigating a seismic shift in US antitrust agency approaches to merger remedies, Financier Worldwide (Aug. 2023), https://www.financierworldwide.com/fix-it-first-navigating-a-seismic-shift-in-us-antitrust-agency-approaches-to-merger-remedies.

[27] See, e.g., *FTC v. Tempur Sealy Int'l*, No. 4:24-CV-02508, 2025 WL 617735, at *9 (S.D. Tex. Feb. 26, 2025) (roughly seven months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC v. Tapestry*, 755 F. Supp. 3d 386, 406 (S.D.N.Y. 2024) (roughly six months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC v. Kroger Company*, No. 3:24-cv-00347-AN, 2024 WL 5053016, at *5 (D. Or. Dec. 10, 2024) (roughly ten months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC v. Cmty. Health Sys.*, 736 F. Supp. 3d 335, 350 (W.D.N.C. 2024), opinion vacated, appeal dismissed sub nom. *FTC v. Novant Health*, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024) (roughly four and a half months from filing of complaint and motion for preliminary injunction to district court ruling, and another month for appellate resolution after which parties abandoned transaction); *FTC v. IQVIA Holdings*, 710 F. Supp. 3d 329, 346 (S.D.N.Y. 2024) (just under six months from filing of complaint and motion for preliminary injunction to district court ruling). See also Farrell J. Malone & Ian C. Thresher, Leaving Time to Litigate: Lessons from Recent Merger Challenge, Antitrust Source (Oct. 2018) ("among the 13 cases that were litigated to a decision in 2011–2017, the average time from the filing of a complaint until a district court's decision on the merits has increased from 99 days in 2011 to as high as 221 days in 2017.").

potential merger cases or actions challenging anticompetitive conduct. Thus settlements, where they resolve the competitive concerns that a proposed transaction creates, save the Commission time and money that it can then deploy toward other matters. Settlements therefore must be on the table if the FTC is to protect competition efficiently and as fully as its resources allow.

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Although I believe the Trump FTC must be open to settling merger cases, I am clear-eyed about the dangers of inadequate or unworkable settlements. The object of settlement is to protect competition as fully as would successful litigation without the expense and risk of litigation. It is not to paper over an anticompetitive transaction. Accordingly, I believe that the Commission should accept settlements in merger cases only when it is confident that the settlement will protect competition in the relevant market to the same extent that successful litigation would. Specifically, experience teaches that behavioral remedies should be treated with substantial caution. They are often difficult or impossible for the Commission to enforce effectively and can lock the Commission into the status of a monitor for individual firms rather than a guardian of competition across the entire economy. They are therefore disfavored.

Nor should the Commission ordinarily accept a structural remedy unless it involves the sale of a standalone or discrete business, or something very close to it, along with all tangible and intangible assets necessary (1) to make that line of business viable, (2) to give the divestiture buyer the incentive and ability to compete vigorously against the merged firm, and (3) to eliminate to the to the extent possible any ongoing entanglements between the divested business and the merged firm. The Commission must also be confident that the divestiture buyer has the resources and experience necessary to make that standalone business competitive in the market. Unless these conditions obtain, the Commission should proceed to litigation. When confronted with an anticompetitive merger, I will favor litigation to guarantee that competition will be protected rather than accepting an uncertain settlement.

III

Today's settlement satisfies these requirements. Staff conducted a thorough investigation and identified substantial anticompetitive effects likely to flow from the proposed transaction across three relevant markets.[28] Had the Commission proceeded to litigation, I am confident the Commission would have prevailed in demonstrating that the merger as originally filed would have violated Section 7 of the Clayton Act. But the parties proposed divestitures in the three relevant markets,[29] and the divestitures satisfy the conditions of a successful structural remedy.[30] They involve the sale of standalone or discrete business units, or as close to it as possible, with all tangible and intangible assets necessary for a buyer to succeed in the market after the divestiture.[31]

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[28] Complaint, *In the Matter of Synopsys, Inc. and ANSYS, Inc.*, Matter No. 2410059, ¶¶ 5–18 (May 27, 2025).
[29] See Decision and Order, *In the Matter of Synopsys, Inc. and ANSYS, Inc.*, Matter No. 2410059 (May 27, 2025) ("Decision and Order"); Analysis of Agreement Containing Consent Orders, *In the Matter of Synopsys, Inc. and ANSYS, Inc.*, Matter No. 2410059, at 3–4 (May 27, 2025) ("AAOC").
[30] See, e.g., BC Remedies Statement, *supra* note 9.
[31] See Decision and Order.

And the divestiture buyer has a long track record of acquiring assets in related markets and making them successful, as well as the financial resources to compete effectively after the divestiture.[32]

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The upshot of today's Commission action for the American people and business community is that the Commission is willing to consider settlements in merger cases. But it must do so consistently with its mission to protect competition to the fullest extent possible, maximizing its resources, and in light of the lessons learned from remedies of the past. If the Commission is confident that a settlement will prevent a substantial lessening of competition as fully as would litigation, while sparing the Commission and the American people the expense and uncertainty of litigation, then it should accept that settlement.

But the Commission's standards for evaluating remedies should be exacting, and its strong preference should be for structural remedies over conduct remedies. The Commission must learn the lessons of unsuccessful past remedies and avoid returning to an era when it sometimes accepted weak remedies in lieu of the hard work of litigating to protect competition. Learning from the past, the Trump FTC should err in favor of litigating to protect competition where it believes it can prevail, rather than accepting a questionable settlement. But I am confident that accepting sound remedies in the right cases will allow the Commission to support a strong American economy that promotes human flourishing through competition and economic freedom.

[32] AAOC at 3–4.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

STRUCTURAL MERGER REMEDIES

MELISSA HOLYOAK*
COMMISSIONER, U.S. FEDERAL TRADE COMMISSION

JUNE 5, 2025

KEYNOTE ADDRESS AT THE USC GOULD/ANALYSIS GROUP GLOBAL COMPETITION LAW THOUGHT LEADERSHIP CONFERENCE
LOS ANGELES, C.A.

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction

Mergers and acquisitions play a critical role in economic growth and the promotion of innovation.[1] And, of course, the Biden antitrust enforcers' merger hostility based upon a view that organic or greenfield growth is always the preferred method of progress, is deeply flawed and counterproductive to growth and innovation. Equally problematic is the Biden-era enforcers' blanket hostility toward divestitures as a method to solve the anticompetitive components of proposed mergers.[2]

Last week, however, the Trump FTC announced a consent requiring divestitures to resolve allegations of anticompetitive effects in the proposed acquisition of Ansys by Synopsys. This is the FTC's first consent divestiture of tangible assets, outside of litigation, to be announced since October 2022.[3] So for the first time in three and a half years, merging parties have been able to solve competitive effects via divestiture of a product in an overlap market.

In Chairman Ferguson's statement last week, in which I joined along with Commissioner Meador, he explained several reasons why a universal rejection of divestitures has some serious pitfalls.[4] First, a divestiture or other settlement can "temper the potentially over-inclusive effects of an injunction blocking an entire merger."[5] Second, settlement maximizes the Commission's finite resources.[6] Third, refusing divestitures complicates subsequent litigation as parties engage in a "fix-it-first" divestiture or later present a divestiture as part of the litigation and the Commission is forced to "litigate the fix."[7] Though to be abundantly clear, the Commission will not hesitate to litigate against the fix when the proposal is inadequate.

All of these concerns flow from a blanket hostility toward divestitures, and this is why the Trump FTC is reversing course and will engage with merging parties when they present serious

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[1] *See, e.g.*, Statement of Chairman Andrew N. Ferguson, joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador, In re Synopsys, Inc. / Ansys, Inc., No. 2410059 (May 28, 2025) [hereinafter Synopsys/Ansys Statement].

[2] *See* Jonathan Kanter, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022) (explaining that divestitures should be "the exception, not the rule"); Margaret Harding McGill, *FTC's new stance: Litigate, don't negotiate*, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-newstance-litigate-dont-negotiate-lina-khan.

[3] *See* Fed. Trade Comm'n, Press Release, *FTC Approves Consent Order Addressing Concerns Over Tractor Supply's Acquisition of Orscheln Farm and Home* (Oct. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-consent-order-addressing-concerns-over-tractor-supplys-acquisition-orscheln-farm-home.

[4] Synopsys/Ansys Statement, *supra* note 1, at 3, 5-7.

[5] Synopsys/Ansys Statement, *supra* note 1, at 3.

[6] Synopsys/Ansys Statement, *supra* note 1, at 6-7.

[7] Synopsys/Ansys Statement, *supra* note 1, at 5-6. I want to elaborate on concerns with the posture where the merging parties are proposing a fix-it-first remedy without the Commission's involvement. The Commission's goal, which is explained below based upon legal precedent, is to prevent a lessening of competition from the merger. The merging parties, however, have a different goal and different incentives. They, rightfully so, want to divest as little as possible and to as weak a buyer as possible, while increasing the litigation risk for the Commission enough that the Commission will not sue to block the merger. These dramatically different incentives result in a fix-it-first remedy that may fail to protect competition but still tie the Commission's hands when it comes to enforcement decisions. The Commission will, however, aggressively litigate against the fix when the proposed remedy fails to protect competition. Kroger/Albertsons provides one such example.

divestitures that will preserve competition, and if the divestitures are inadequate, we will go to court to protect competition.

As the Commission announced last week in the Synopsys/Ansys statement, we will publish a policy statement on remedies in due course.[8] For the rest of my remarks, I'm going to share my views on this topic, and I look forward to working with the Chairman and Commissioner Meador as we create this important guidance document.

II. Legal Standards

Investigations under the HSR Act operate in the shadow of merger litigation. Divestiture analysis and negotiations are not an exception and also must be thought of in the broader context of litigation.

As the Supreme Court has explained, a divestiture can be "a start toward restoring the pre-acquisition situation."[9] And litigating a merger where a divestiture or other remedies have been proposed—has become increasingly common in recent years. Such litigation has commonly been called "litigating the fix."[10] The Supreme Court has explained that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'"[11] But beyond that, the Supreme Court has not provided guidance on litigating the fix, nor much other guidance on merger challenges in the last 40 years.

District courts—especially the DDC—have, however, grappled with these issues several times in the last 10 years. In the *Aetna* opinion, the court set forth the typical standard assessing divestitures: "A divestiture must effectively preserve competition in the relevant market. In other words, the divestiture must replace the *competitive intensity* lost as a result of the merger."[12]

But that standard has been questioned in a few recent decisions. In the DOJ's challenge to UnitedHealth's Acquisition of Change Health, the DDC observed that this typical standard that it had relied upon in past merger decisions may not be correct based upon the text of Section 7 of the Clayton Act. The court explained:

> [T]he text of Section 7 is concerned only with mergers that "*substantially* lessen competition," and by requiring on rebuttal a showing that the merger will preserve exactly the same level of competition that existed before the merger, the

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[8] Synopsys/Ansys Statement, *supra* note 1, at 1.
[9] *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).
[10] *See, e.g.*, Synopsys/Ansys Statement, *supra* note 1, at 5; David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10 (2016).
[11] *Ford Motor Co.*, 405 U.S. at 573.
[12] *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (brackets, citations, and internal quotation marks omitted); *see also Fed. Trade Comm'n v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity. To evaluate whether a divestiture will do so, courts consider the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the independence of the divestiture buyer from the merging seller, and the purchase price." (citations and internal quotation marks omitted)).

Government's proposed standard would effectively erase the word "substantially" from Section 7.[13]

Building upon the *UnitedHealth* opinion, the Fifth Circuit in *Illumina Grail*, analyzed an "Open Offer" to provide irrevocable contractual terms as a remedy to alleged vertical harm. The court concluded that the Commission committed legal error by effectively requiring that the merging parties present evidence that, with the remedy, the merger "would not lessen competition *at all*."[14] The court explained that "to rebut [the] prima facie case, [defendant] was only required to show that the Open Offer sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition."[15] Though *Illumina Grail* was not a divestiture remedy, in at least the Fifth Circuit, it is possible that other courts may apply this standard in the future.[16]

In addition to the appropriate standard for analyzing divestitures, courts have also grappled with who bears the *burden* of proving the effect of divestitures when analyzing a merger under Section 7 of the Clayton Act.

Under the *Baker Hughes* burden-shifting framework, defendants litigating against both the FTC and the DOJ have argued that as part of its prima facie burden, the government must account for the effects of any proposed divestiture.[17] The government has argued, on the other hand, that the effects of a divestiture should not be part of the liability phase of the trial, but rather should only be considered during the remedy phase.[18] Courts, however, have typically taken another approach, requiring the defendants to prove the effect of the divesture in rebuttal.

Again in *Illumina Grail*, this was an issue on appeal from the Commission Decision. The court adopted the FTC's concurring view proposed by my friend, then Commissioner Christine Wilson, that the burden of proving the effect of the remedy should be placed upon the merging parties in rebuttal.[19] The court distinguished between cases like *Ford Motor Co*. and *du Pont* which involved court-ordered divestitures *after* a finding of Section 7 liability and cases like *Aetna* and *Sysco* where the proposed divestitures were conditioned upon a court's liability determination,

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[13] *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 134 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (ellipses and citations omitted); But note that the court ultimately said that the outcome was the same regardless of the standard applied.
[14] *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1058 (5th Cir. 2023) (emphasis in original).
[15] *Id.* at 1059.
[16] *See Fed. Trade Comm'n v. Tempur Sealy Int'l, Inc.*, No. 4:24-CV-02508, 2025 WL 617735, at *50 (S.D. Tex. Feb. 26, 2025) ("These are properly considered as rebuttal to the FTC's *prima facie* case, had it been established. And in that context, the burden would shift to Defendants to demonstrate that their remedial commitments would sufficiently mitigate the merger's effect such that it is no longer likely that the merger would substantially lessen competition. To be effective, such commitments needn't restore the premerger *status quo* or eliminate *any and all* anticompetitive harm; they need only prevent *substantial* harm to competition." (citations, brackets, and internal quotation marks omitted)); *But see Fed. Trade Comm'n v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *24 (D. Or. Dec. 10, 2024) ("Defendants bear the burden of showing that any proposed remedy, including a divestiture, would negate any anticompetitive effects of the merger. A divestiture is successful rebuttal evidence if it sufficiently mitigates the merger's effect such that it is no longer likely to substantially lessen competition. Phrased differently, the divestiture must replace the competitive intensity lost as a result of the merger." (citations, brackets, and internal quotation marks omitted)).
[17] *See, e.g.*, *Illumina, Inc.* 88 F.4th at 1055; *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 132-33.
[18] *See Illumina, Inc.*, 88 F.4th at 1055.
[19] *Id.* at 1057.

with cases like *AT&T* and *Microsoft*, which involved *binding* offers by the companies that were not contingent on a finding of liability.[20]

III. Effective Divestitures

Within the confines of the legal standard and burden shifting framework that I've just discussed, both the courts and the agencies focus on a variety of factors when analyzing a proposed divestiture "including the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture; the independence of the divestiture buyer from the merging seller; and the purchase price."[21] I'll now provide my perspectives on what the FTC should consider when analyzing a proposed divesture, and, what merging parties should consider when proposing divestitures to the Commission.

I prefer a proposed divestiture that includes a standalone business or a complete business unit.[22] What I mean by this is that divestiture assets that include a preexisting complete business line that includes not only assets, but also the personnel, customer and supplier contracts, intellectual property, distribution centers, back-office support, management teams, and other assets that would allow the business unit to operate independently.

This also means that the divestiture assets are free of entanglements with the seller of the assets. If the divested assets were previously acquired by the seller and it has been continuing to operate the assets as a standalone business, then that serves as a good indicator that the assets, if divested, would be able to successfully operate without the prior firm's support, and therefore would be able to effectively restore lost competition.

At times, however, a proposed divestiture will include something less than a complete business unit. While it is not my preference, the divestiture of assets that amount to less than a full business unit may still be acceptable in limited circumstances. At a minimum, such a divestiture should anticipate additional scrutiny. But the standard remains the same—the question is whether the divestiture will replace lost competition. And given the additional risks that the divestiture will be successful, the likelihood that it will preserve competition also goes down.[23]

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[20] *Id.* at 1056-57.
[21] *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 135 (brackets and internal quotation marks omitted).
[22] *Aetna Inc.*, 240 F. Supp. 3d at 60 ("Divestiture of an existing business entity might be more likely to effectively preserve the competition that would have been lost through the merger, because it would have the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary to competition, but divestiture of some lesser set of assets might be appropriate when the purchaser already has, or could easily attain, the other capabilities needed to compete effectively." (brackets and internal quotation marks omitted)).
[23] The success of such a divestiture will depend heavily upon the capabilities of the divestiture buyer, including its past experiences and whether it has the assets necessary to make the divestiture successful without a full business unit. For example, if a divestiture excludes sales personnel or distribution centers, the buyer may not have sufficient personnel and a distribution center to ensure that the assets will be operated successfully. Related to the issue of divesting a partial business unit, if merging parties proposing mixing and matching assets from across the two merging parties, I'll be even more skeptical given that the assets were not operated in that fashion before the divestiture.

I also find it critical that the divestiture assets have limited ongoing entanglements with the seller of the divestiture assets.[24] At a basic level, if the seller continues to supply inputs for the divested business, then the seller could find ways to undermine the divested business's access to inputs and hamper its ability to compete. Other entanglements, like leases or licenses, could still be problematic, and as a result, they are disfavored. At the same time, especially when a divestiture is not a complete business unit, certain short-term entanglements and transition services may be critical in order to allow the divested business to quickly begin competing after the close of the transaction. In that circumstance, it is important to me that the transition services be minimized both in scope and duration so that any ability of the divestiture seller to hinder the buyer's business is limited. Any such proposal will likely result in additional scrutiny and will likely be overseen by the agency via compliance reports or by a monitor appointed by the agency.[25]

The divestiture buyer is also critical to the success of the divestiture. First and foremost, the divestiture buyer cannot—by acquiring the divestiture assets—create new anticompetitive concerns. And if the buyer is in over its head, financially unstable, or otherwise lacks the capabilities to effectively operate the divested assets, then the divestiture will not be successful.

Some of the documents cited by the court in *Aetna* give an entertaining example of what qualifies as evidence that a divestiture buyer may not be able to meaningfully operate the divestiture assets. There, executives of the divestiture buyer—Molina—expressed concerns in internal communications that Molina "lack[s] management with the requisite Medicare skills and the handful of people we have won't cut it."[26] And that "the sales and marketing of MA is a really different process for us."[27] And as a final striking example, one executive said: "The image that comes to my mind here is the dog chasing the car and we are the dog. What happens if we catch it?" To which the CEO responded, "I guess it depends on if it is a [sic] mini Cooper or a suburban."[28]

I also note that absent extraordinary circumstances, I would not likely consider divestiture without an upfront buyer. Such arrangements have many more risks, not least of which is the situation where no suitable buyer can be identified after the consent has been finalized and the transaction has been closed. This is not the kind of risk that I favor.

On the contrary, I much prefer the scenario where our talented and dedicated staff in the merger shops and within the Compliance division have the opportunity to thoroughly vet any proposed divestiture proposal, including the divestiture buyer. As staff investigate, they will request documents and data, interview customers and suppliers, and review contracts to better understand the potential risks of any divestiture proposal. And then, as they work with the merging

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[24] Courts are skeptical of a divestiture that relies on a "continuing relationship between the seller and buyer of divested assets because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor." *Aetna Inc.*, 240 F. Supp. 3d at 60 (brackets and internal quotation marks omitted).
[25] I do note that if entanglements are required in the long term, I consider that a strong indicator that the divestiture is inadequate to resolve competitive concerns.
[26] *Aetna Inc.*, 240 F. Supp. 3d at 69-70.
[27] *Id.* at 70.
[28] *Id.*

parties, the result is a consent—including compliance reporting and, at times, the appointment of monitors—that maximizes the likelihood that the divestiture will be successful.[29]

IV. Synopsys/Ansys

Last week's consent and divestiture in Synopsys/Ansys provides a good example of how these principles should be applied in real life.

In January of 2024, Synopsys entered an agreement to acquire Ansys for $35 billion. Synopsys develops and supplies software used to design semiconductors. The software it provides is called Electronic Design Automation software. Ansys provides Simulation & Analysis software that is used by engineers for testing products, especially semiconductors.

As alleged in the Complaint, the acquisition would result in anticompetitive effects and violate Section 7 of the Clayton Act in the markets for optical software tools, photonic software tools, and RTL power consumption analysis tools.[30]

The parties and the Commission agreed to the proposed consent that requires Synopsys and Ansys to divest optical software tools, photonic software tools, and the power consumption tools to Keysight Technologies. The proposed consent represents the principles that I described above:

- The assets divested to solve the concerns in the markets for optical software tools and photonic software tools represent a divestiture of a complete business unit.[31]
- The selected assets divested to solve the concerns in the power consumption tools market had not previously been operated as a separate business unit. Because of the inherent risk involved in divesting less than an ongoing business, the Commission took the time it needed to scrutinize aspects of the proposed remedy and ultimately insisted on additional order requirements as safeguards to ensure the effectiveness of the remedy.[32]
- Keysight represents a suitable, upfront divestiture buyer with experience acquiring and improving technological assets. It is financially sound and already has relationships with many of the customers of the divestiture products.[33] Plus, Keysight had a proven track record of successful acquisitions.

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[29] *See* Fed. Trade Comm'n, *A Guide for Respondents: What to Expect During the Divestiture Process*, Bureau of Competition (June 2019), https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_respondents.pdf; Fed. Trade Comm'n, *A Guide for Potential Buyers: What to Expect During the Divestiture Process*, Bureau of Competition (June 2019), https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_potential_buyers.pdf.
[30] Compl., *In re Synopsys, Inc.*, Matter No. 2410059, ¶¶ 10-17 (F.T.C. May 28, 2025).
[31] Proposed Decision & Order, *In re Synopsys, Inc.*, Matter No. 2410059, ¶ I.Y. (F.T.C. May 28, 2025)
[32] *Id.* at ¶¶ II.E-I and K.
[33] Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Synopsys, Inc.*, Matter No. 2410059, 3 (F.T.C. May 28, 2025).

- The consent also was designed to ensure that Keysight could compete immediately to the same extent as Synopsys and Ansys and to limit entanglements while providing the necessary transition services.[34]
- And, the consent also requires compliance reports and appointed a monitor to oversee compliance.[35]

In short, the divestiture and consent represent excellent work by the Commission's dedicated staff who conducted a thorough investigation of the underlying transaction and the proposed divestiture, resulting in a meticulous order that protects competition while allowing the broader merger to proceed.

As the Commission forges ahead with additional merger investigations and divestitures, we will continue to protect competition, but at the same time, where there are not problems, we will get out of the way. Where parties want to address problems with robust divestiture proposals, we look forward to engaging and identifying solutions when possible, and of course, litigating where divestiture proposals are inadequate.

[34] *Id.* at 3.
[35] *Id.* at 4.

SPEECH

DAAG Bill Rinner Delivers Remarks to the George Washington University Competition and Innovation Lab Conference Regarding Merger Review and Enforcement

Wednesday, June 4, 2025

Location
Washington, DC
United States

Thank you for inviting me to join you today. I'm grateful for the opportunity, and honored to be among you all. For those of you who don't know me, this is my second time serving at the Antitrust Division. I want to thank Assistant Attorney General Gail Slater for the opportunity to serve again alongside the tremendously talented attorneys, economists, and staff in the leadership and career ranks of the Division. My prior experience and former colleagues — some of whom I have the pleasure of serving alongside again — helped shape me into the attorney I am today.

On a personal note, I also want to acknowledge and thank my family for their support. Though I currently live in Brooklyn, behind my office desk stands the flag of the State of Colorado, where I grew up, and where much of my family still lives. The flag is my daily reminder of where I came from and the many sacrifices my parents made to support their kids.

The topic of my speech is merger enforcement — in particular, how we intend to operate the Division's processes under AAG Slater to ensure fair and vigorous enforcement, and what we expect of parties appearing before us.

In her opening speech at Notre Dame, my alma mater, AAG Slater articulated the conservative case for vigorous antitrust enforcement. She noted that accomplishing this objective requires "healthy respect for textualism, originalism, and precedent grounded in a commitment to robust and fair law enforcement."[1] I want to unpack these concepts further and provide some insight into how we will handle merger review to ensure procedural fairness and robust enforcement.

As a matter of first principles, our civil merger enforcement program operates out of respect for the statutory role of the Antitrust Division as a law enforcer protecting free markets, not as a regulator. We recognize that competition and economic growth necessarily rely on a healthy dealmaking environment. And competition thrives only if merger enforcement is robust and effective against unlawful transactions.

Over the past several years, there has been a growing concern across partisan lines that merger enforcement has fallen short, enabling and reinforcing monopoly power that threatens consumers, workers, and the pace of innovation. I'll leave it to the economists to unpack the merits of this suspicion, but suffice to say, the civil conduct litigation dockets at the Antitrust Division and Federal Trade Commission suggest that this view is warranted in some industries.

To be clear, I am in no position to re-litigate the hard decisions made by our predecessors. But with the benefit of hindsight, one can reasonably debate whether enforcers were overconfident in the ability of certain markets to self-correct, notwithstanding the presence of significant network effects with the potential to cement monopoly power. In the worst-case scenario, failure to adequately enforce the antitrust laws could lead to permanent regulation, crippling economic dynamism and growth.

Our commitment to robust enforcement is shared by the White House, which, I'm pleased to report, has approved the use of merger filing fees to support the Division's budget for fiscal year 2026. We are very grateful for this support. When companies pay a merger filing fee, they deserve to have those funds used by the Antitrust Division to timely and effectively review their merger. Should the White House's restoration of the Division's access to these fees become law, we look forward to leveraging those funds to further accelerate merger reviews and increase the rate and speed of early terminations — at no burden to taxpayers.

With our commitment to robust enforcement in mind, I nevertheless would underscore that we do not view dealmaking with inherent suspicion. There is no *per se* rule against mergers or transactions. Our primary mission is civil merger enforcement against the handful of mergers that are problematic, not civil merger deterrence generally. [2]

That may sound rudimentary to this audience, but it is a crucial observation for merger enforcement policy. Over more than 100 years of enforcement, neither Congress nor the courts have established a presumption of harm in mergers that warrants a categorical, or a "total deterrence" objective in enforcement. Even the *Philadelphia National Bank* presumption is rebuttable.[3] Moreover, in contrast to conduct that externalizes social costs in excess of private benefits — take pollution, for example — there is no equivalent punitive civil penalty to deter mergers to a *de minimis* level.[4]

Instead, Congress' pre-merger review scheme provides a structured process that supports predictability — firms know certain transactions will be subject to HSR review prior to consummation and are incentivized to plan accordingly. The statute avoids the economic waste of unscrambling unlawful transactions, and provides a timeline for review commensurate with the magnitude of potential antitrust issues.

The merger review process itself, as implemented by enforcers, needs to be fair and predictable for firms to plan. Failure to enforce the antitrust laws consistent with these principles risks overdeterrence of lawful transactions. That's what I'd like to discuss today.

As AAG Slater has said, antitrust is a scalpel that stands in contrast to the regulatory sledgehammer. On the merger side, our focus is on keeping the scalpel sharp. This allows us to surgically remove unlawful transactions (or their unlawful aspects) without nicking neutral deals or wounding procompetitive ones. Deterrence may be a second-order impact of deal-specific enforcement actions, but it is not the goal. Rather, our civil enforcement actions focus on the legality of specific transactions, each of which involves unique industry dynamics.

It is therefore imperative that antitrust enforcers recognize that the structural presumption is not a bright line rule that mandates enforcement to deter all mergers in concentrated industries. Evaluating the likely effects of a merger is a case-by-case exercise, and if other compelling evidence shows that a merger does not substantially lessen competition, an initial prediction of harm can be rebutted. The statutory enforcement regime, including available remedies, implicitly recognizes that the vast majority of mergers do not give rise to competitive concerns. For those that do, remedies may be available that adequately mitigate potential harm.

As the Division has sharpened its scalpel to aggressively pursue anticompetitive transactions, the need to wield this tool carefully has grown as well. A robust enforcement mission demands an even greater commitment to transparency and procedural fairness, not less. Our commitment to fair process enables us to enforce the law more vigorously against problematic deals without chilling the many beneficial ones.

When we stop transactions that cause harm, we will articulate our concerns in a transparent fashion, and fight to remedy harm without blocking the merger altogether, where possible. In this way, strong targeted enforcement can have an information multiplier effect on the broader dealmaking marketplace.

This brings me to the primary themes of my discussion today: procedural predictability and fairness in merger review and enforcement.

Ensuring procedural fairness is an initiative that the Division pursued during my prior period of service, in a multinational initiative led by former Assistant Attorney General Makan Delrahim and now-Principal Deputy AAG Roger Alford. Those efforts continue today.

In the merger context, we strive for a predictable process that provides parties a fair opportunity to engage and be heard. I know this doesn't sound earth shattering. Everyone favors predictability, particularly lawyers whose clients are dealmakers. Too often, however, "predictability" is shorthand for weak enforcement — you don't find many advocates on the defense side or the business community arguing for "predictably" high levels of enforcement. So let me be clear about what I mean by the term.

From both an economic and legal perspective, procedural predictability is critical to good government and economic dynamism. It promotes fairness and facilitates dealmaking that can benefit American companies and consumers. Procedural predictability also complements — in fact, promotes — vigorous enforcement.

When the Division's attorneys and economists focus on identifying competitive concerns, addressing them with parties, and reaching a swift determination on whether enforcement is needed, we can narrow our attention to genuinely anticompetitive transactions that violate the Clayton Act. On the other hand, deals that are pro-competitive or competitively neutral should be able to proceed without a lingering regulatory review tax.

Promoting a healthy marketplace for transactions through procedural fairness also benefits the Division's enforcement mandate by providing credibility when the Division appears in court. Under the system Congress enacted, you don't need to ask for permission to do a deal. The marketplace determines the deals that are made, and the law enforcer must go into court and prove a case, or the appropriateness of a remedy, to a judge.

This is a feature, not a bug. Judicial review disciplines federal enforcement and focuses the Division on the strength of evidence as viewed by a neutral arbiter. A healthy respect for the adversarial tradition of common law adjudication thus goes hand in hand with procedural predictability and fairness in merger review.

To be clear, procedural due process is a two-way street. At the Division, we respect the statutory framework for merger enforcement in the United States, but if parties undermine procedural fairness — disregarding legal or ethical obligations — we will not hesitate to bring a disciplinary or enforcement action to protect our investigatory process and prerogative.

Our investigative process is grounded in duly enacted statutes and regulations, and is critical to protecting competition on behalf of consumers and workers.

I'd like to provide a few concrete proposals for how we will attempt to apply these principles in practice going forward.

But first, a quick prelude to ground first principles of fairness and predictability. Modern conceptions of sovereignty often claim as a maxim that government maintains a "monopoly on the legitimate use of physical force."[5] At the heart of legitimacy in our Constitutional system and common law tradition is the principle of procedural due process. [6] Like a private monopoly extracting rents, government can cause harm by abusing procedural process — even where lawfully granted. In the extreme, governmental abuse of process not only undermines private persons' rights to due process, but subverts substantive policies enacted in the antitrust laws.

If this sounds too lofty, let me be more blunt: the procedural tools available to antitrust enforcers provide us enormous power, and without guardrails on their use, we become tyrants.

In this vein, let me start with what we will not do.

"Scarlet" Warning Letters[7]: We will not send "scarlet" letters warning parties that they "close at their own risk." Without dwelling too long on this point, such letters reflect a sorry state of counseling if clients mistakenly believe that expiration of the statutory waiting period constitutes "clearance" or "approval" of a transaction. Some commentators may miss this distinction, but we don't, and neither do well-counseled clients. If the Division declines to bring an enforcement action, there is no need to signal to parties: "Nice merger you have; would be a shame if something bad happened to it some day."

Policy "Leveraging"*:* We will not leverage the threat of law enforcement to accomplish policy objectives that are clearly beyond the law. If we conclude that a transaction is illegal and that the harm cannot be remediated through settlement, we will seek to enjoin the transaction.

We will not negotiate "relief" off-the-books that cannot be justified in federal court. Specifically, Section 7 of the Clayton Act does not contain a "public interest" mandate for the Division to seek relief beyond the specific harm to competition that a merger creates. By rough comparison, we would not allow a private monopolist to leverage its market power in one market to harm competition in another, and the same basic principle applies as a matter of merger enforcement policy: we do not use valid, but limited, grants of statutory authority to achieve policy objectives beyond the goals of the antitrust laws.

Nor do robust statutory grants of merger investigation authority provide blanket authorizations to the Division to use all means necessary to pursue absolute deterrence in mergers or in civil conduct. Congress stuck a policy balance in the different antitrust laws, and we should not mistake merger review authority for general civil investigative authority.

Abuse of HSR Process: To that end, we will not issue spurious second requests simply to build a civil or criminal conduct investigation. This follows logically from respect for procedural due process. The Division has broad and important statutory authority to investigate potential civil violations of law.[8] Of course, sometimes documents produced in merger reviews generate a civil or criminal investigation. But that result is incidental to the purpose of the second request. In the context of a merger investigation under the HSR Act, the statutory burden for obtaining documents is lower than in a conduct case, but that provides no justification to leverage HSR process as an end-run around the Antitrust Civil Process Act.

Again, our respect for the statutory text requires respect for procedural statutes as well. Vigorous enforcement demands, of course, that where the Division has merger-related concerns, we will not hesitate to investigate and to prosecute attempts to subvert the Division's investigatory authority.

This leads me to what else we will do.

We will vigorously enforce the law if there is a violation. We will think creatively about how to deploy our exceptional trial attorneys and economists, with confidence that our commitment to procedural fairness will bolster the Division's credibility in court. Vigor does not mean more cases, necessarily. Vigor means that we are using a scalpel wherever surgery is needed, not thrashing at every transaction we can bring under the knife.

We will be transparent with parties about where we have concerns so that they can focus their advocacy on addressing those concerns. This comes back to respect for the adversarial system. If the antitrust defense bar does its job, the cases that come to the Division will be hard cases. We value the advocacy of the merging parties (and interested third parties), which allows the Division to work through hard issues in good faith.

On this point, let me underscore: we care about the quality and professional integrity of the lawyers and economists that appear before us, not their stature in the antitrust bar or their political affiliation or background. We do not plan to hash out merger settlements over martinis. We are a team, and we intend to leverage the great expertise among our career and front office attorneys and economists to determine if settlements will appropriately protect competition.

We will enforce and prosecute procedural deficiencies that are important to our investigatory authority. An essential part of the adversarial system is a commitment to zealous advocacy on behalf of clients. But too often in recent years, parties have attempted to conceal materials in investigations and have abused legal professional privilege to benefit clients. As has been well-documented, we will seek judicial sanctions where parties systematically abuse legal professional privilege or recklessly disregard professional duties by withholding or altering documents required by the HSR Act.[9]

For dealmakers and their counsel, this means respecting that the Division is entitled to certain information to conduct its investigation. Strategic behavior, including attempts to withhold relevant information or abuse legal professional privilege to thwart the Division's ability to enforce the law, will be subject to heightened scrutiny.

The dual goals of procedural fairness and vigorous enforcement likewise animate the Division's approach to merger settlements.

On this topic, let me start with an observation on positive continuity. When I served as Counsel and then Chief of Staff to AAG Delrahim, we went to great lengths to articulate and bring in to practice the Division's longstanding preference for structural remedies. The strong institutional preference for structural remedies is a throughline to the present leadership under AAG Slater. It is also consistent with the Division's law enforcement mandate.[10]

Structural remedies are preferred as an "efficient default" principle,[11] primarily informed by their record of effectiveness compared to behavioral remedies. Ideally, structural relief offers a scalpel to remove harmful issues that may infect an otherwise lawful transaction. But the effectiveness of structural relief has as much to do with doctor as with patient. Antitrust enforcement is not an ex-ante or regulatory oversight regime.[12] If antitrust is law enforcement, settlement must be recognized as an efficient and legitimate resolution of claims under our adversarial system. Division resources are dedicated to enforcement at a particular point in time based on the facts and circumstances as they exist at the time.

On top of that, merger review is typically a prospective enterprise, limiting the potential confidence level of relief targeting future harm. If that wasn't enough, under the Tunney Act, the risk of failure weighs on the merging parties, not the public.[13]

The upshot of these factors is that structural relief is preferred based on practical considerations and learned experience rather than staid ideological commitments.

Of course, not all maladies are amendable to full-blown surgery. There may be times in which limited behavioral remedies buttress genuine structural relief. Remedies are inherently fact-specific, and behavioral conditions can provide necessary and adequate support. As I've said, the Division's mandate is to prosecute transactions that threaten to harm competition. If structural relief with or without ancillary commitments is capable of substantially mitigating potential harm, the Division will engage with parties to understand how proposed relief adequately addresses the risks of competitive harm.

At the risk of sowing confusion, this is not an invitation to morph behavioral commitments into structural relief through costly legal alchemy. Market fundamentals, not labels, will inform the Division's analysis. We will not pretend that night is day, that up is down, or that black is white.[14] As we work through these issues in negotiating a settlement that remedies competitive concerns, transparency between and among counsel and the Division is critical.

Transparency is also a statutory obligation under the Tunney Act.[15] We take that obligation seriously as lawyers that respect the Constitutional separation of powers.[16]

Accordingly, if we seek settlement to mitigate harm, the terms of settlement should be public. Parties can always address competitive concerns up front, through arms' length deals with third parties before we, as enforcers, muddy the waters. Such fix-it-first proposals are welcome.

In recent years, however, parties have inked a deal, filed an HSR, engaged with the Division, and based on concerns expressed by the agencies, been instructed to divest and file new HSRs for the original transaction, plus the divestiture deal.

That is a "fix it second" remedy, not a "fix it first." AAG Slater refers to this phenomenon as the "shadow decree" docket. It deprives the public of fair notice and opportunity for comment, and undermines the principle that antitrust is law enforcement rather than regulatory clearance.

In contrast, the public process afforded by the Tunney Act provides important guideposts for other parties. The contents of a complaint and competitive impact statement are an important tool for providing transparency to the public on how enforcement policy is applied in practice in particular cases.

I am pleased that, just this week, we announced a settlement of the merger of Keysight and Spirent that exemplifies the Division's continued preference for structural relief and the nuanced protections we will impose to ensure their success.

We want to be transparent about our goals for merger settlements: they must be strong, robust, and provide great confidence in their ability to protect competition. This can be a "clean" divestiture to a ready buyer with strong incentives and the ability to compete, such as in the Keysight/Spirent settlement.[17] The parties resolved our concerns by agreeing to a divestiture to Viavi, an up-front buyer capable of absorbing multiple lines of business from the merging parties to replace potential lost competition.[18]

On occasion, structural remedies will be more complicated and involve ongoing commercial entanglements that are inherent to the products and industry. In these instances, strong monitoring and enforcement mechanisms are of utmost importance. As a baseline, we will examine whether market dynamics and the settlement align the parties' incentives with the success of the remedy, or with its failure.

That is especially true of divestiture buyers. When we review proposed settlements involving identified divestiture buyers, we will be rigorous in assessing those buyers' incentive and ability to replace lost competition in every dimension, including product or service quality.

Through every settlement and competitive impact statement filed in court, we can articulate the facts and circumstances that necessitate the specific relief, for the benefit of the public, as well as for parties and their counsel.

To summarize, we will be thoughtful about whether a particular merger settlement sufficiently mitigates the risk of harm. The strong preference for structural remedies is an efficient default principle, informed by decades of experience and economic analysis. But a default — like a legal presumption — is not a bright line rule. Merger enforcement is fundamentally a fact-specific, case-by-case exercise. In every case, we will thus be careful not to wield the antitrust scalpel as a bludgeon.

Vigorous enforcement that avoids overdeterrence requires our commitment to transparency and procedural fairness. If we succeed in restoring procedural fairness and vigor to merger review and enforcement, I hope we will also succeed in enjoining or mitigating harm where it occurs, without hampering the many transactions that benefit Americans.

Thank you all for attending this event. I appreciate your time and interest in antitrust enforcement.

[1] Gail Slater, Assistant Attorney General, DOJ Antitrust Division, *Address at University of Notre Dame Law School* (Apr. 28, 2025), https://www.justice.gov/opa/speech/assistant-attorney-general-gail-slater-delivers-first-antitrust-address-university-notre; *see also* President Donald J. Trump, https://truthsocial.com/@realDonaldTrump/posts/113595703893773894 (Dec. 4, 2024) (announcing nomination of AAG Slater, to "help ensure that our competition laws are enforced, both vigorously and FAIRLY, with clear rules that facilitate, rather than stifle, the ingenuity of our greatest companies").

[2] *See* John Coffee Jr, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It,* 101 Yale L. J. 1875, 1976 n.6 (1992) (differentiating "optimal" from "total" deterrence as a normative basis for enforcement based on whether social utility exceeds specific harms); *cf. Ackerman v. Schwartz*, 947 F. 2d 841, 847 (7th Cir.) (Easterbrook, J.) (observing that certain conduct, like fraud, warrants total deterrence in civil enforcement).

[3] *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 366 (1963).

[4] *See, e.g., BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (recognizing that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition").

[5] *See, e.g.,* Max Weber, Politics as Vocation (1918).

[6] U.S. Const. amends. V, XIV.

[7] *Cf.* Nathaniel Hawthorne, The Scarlet Letter (1850).

[8] *See* Antitrust Civil Process Act, 15 U.S.C. Ch. 34.

[9] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a.

[10] The approach of the United States in favor of structural relief is shared by the Federal Trade Commission. *See* Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador In the Matter of Synopsys, Inc. / Ansys, Inc., FTC Matter Number 2410059 (May 28, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/synopsys-ansys-ferguson-statement-joined-by-holyoak-meador.pdf.

[11] *See generally* Richard A. Posner, Economic Analysis of Law (9th ed. 2014).

[12] *See* Makan Delrahim, Assistant Attorney General, DOJ Antitrust Division, *Keynote Address at American Bar Association's Antitrust Fall Forum* (Nov. 16, 2017), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[13] *See* Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(e)(1).

[14] *See generally* George Orwell, Nineteen Eighty-Four (1949).

[15] *See U.S. v. CVS Health Corp.*, 407 F. Supp. 3d 45, 52 (D.D.C. 2019) (noting "the decree should not be entered until the problems are fixed").

[16] *See also id.* at 53 (noting "the Government, alone, chooses which causes of action to allege in its complaint" and recognizing the "constitutional difficulties" in judicial review of potential claims beyond a complaint) (quoting *United States v. Microsoft Corp.,* 56 F.3d 1448, 1459-60 (D.C. Cir. 1995)).

[17] *See* DOJ Press Release, *Justice Department Requires Keysight to Divest Assets to Proceed with Spirent Acquisition* (June 2, 2025) (noting a "structural solution preserves competition for key testing equipment used to ensure that data moves quickly and securely across the world. The proposed divestiture to Viavi, an established and innovative test and measurement company, ensures that American consumers and businesses will continue to benefit from

competition that promotes innovation, and which allows American companies to maintain global leadership"), https://www.justice.gov/opa/pr/justice-department-requires-keysight-divest-assets-proceed-spirent-acquisition.

[18] Competitive Impact Statement, at 12, *U.S. v. Keysight Tech. Inc.*, No. 1:25-cv-01734 (D.D.C. June 2, 2025).

Speaker

William (Bill) Rinner, Deputy Assistant Attorney General

Topic

ANTITRUST

Component

Antitrust Division

Updated July 9, 2025

Remedies: Fashioning Divestiture Solutions

THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, September 3, 2020

Justice Department Issues Modernized Merger Remedies Manual

Merger Remedies Manual Reaffirms Antitrust Division's Commitment to Effective Structural Relief and Reflects Renewed Focus on Enforcing Consent Decree Obligations

The Department of Justice issued today the Merger Remedies Manual, which provides a framework for the Antitrust Division to structure and implement appropriate relief that preserves competition in merger cases. The Merger Remedies Manual updates the Antitrust Division's 2004 Policy Guide to Merger Remedies.

"The modernized Merger Remedies Manual reflects our renewed focus on enforcing obligations in consent decrees and reaffirms the Division's commitment to effective structural relief," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "It will provide greater transparency and predictability regarding the Division's approach to remedying a proposed merger's competitive harm."

The Merger Remedies Manual is the first revision of the Antitrust Division's remedies manual in nearly a decade and reflects important changes in the merger landscape over that time. The modernized document includes new sections explaining the approach that the division takes with consummated transactions and upfront buyers. In addition, the Merger Remedies Manual outlines certain "red flags" that in the division's experience increase the risk that a remedy will not preserve competition effectively. Finally, the manual reflects important principles implemented in recent Antitrust Division consent decrees, such as when it may be appropriate to name the divestiture buyer as a party to the consent decree or when it may be appropriate that the divestiture include assets beyond the overlapping relevant markets.

The manual reflects the key elements of the Division's approach to merger remedies.

Commitment to Effective Structural Relief. The Merger Remedies Manual emphasizes that structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market. The manual also describes the limited circumstances in which conduct remedies may be appropriate: (1) to facilitate structural relief, or (2) if there are significant efficiencies that would be lost through a structural divestiture, if the conduct remedy would completely cure the competitive harm, and if it can be enforced effectively.

Renewed Focus on Enforcing Consent Decree Obligations. The principles outlined in the Merger Remedies Manual describe how the Antitrust Division will ensure that consent decrees are fully implemented. The manual describes several standard consent decree provisions designed to improve the effectiveness of consent decrees and the Antitrust Division's ability to enforce them. In addition, the Manual highlights the role of the newly created Office of Decree Enforcement and Compliance, which oversees the Antitrust Division's decree compliance efforts.

The Merger Remedies Manual also outlines the following key principles that apply to structuring and implementing remedies in all the Antitrust Division's merger cases, both horizontal and vertical:

- Remedies must preserve competition.
- Remedies should not create ongoing government regulation of the market.
- Temporary relief should not be used to remedy persistent competitive harm.
- The remedy should preserve competition, not protect competitors.
- The risk of a failed remedy should fall on the merging parties, not on consumers.
- The remedy must be enforceable.

The Merger Remedies Manual is the culmination of a process first announced by Assistant Attorney General Delrahim in September 2018, when the division withdrew the 2011 Policy Guide to Merger Remedies and announced that the 2004 Policy Guide to Merger Remedies would be in effect pending the release of an updated policy.

Component(s):
Antitrust Division

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MERGER REMEDIES MANUAL

ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

SEPTEMBER 2020

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I. Overview

The Antitrust Division ("Division") is charged with enforcing the antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.[1] It is the Division's mission to protect American consumers from mergers and acquisitions ("mergers") that may substantially lessen competition.

Most mergers are not anticompetitive and may benefit consumers. Before seeking a remedy, there should be a sound basis for believing that the merger would violate Section 7 of the Clayton Act and that the resulting harm is sufficient to justify remedial action.[2] The Division should not seek remedies that are unnecessary to prevent anticompetitive effects because that could exceed its law enforcement function, unjustifiably restrict companies' ability to compete, and raise costs to consumers. Consequently, even though a party may be willing to settle early in an investigation, the Division must have sufficient information to be satisfied that there is a sound basis for believing that a violation would otherwise occur before agreeing to any settlement.

If the Division has concluded that a merger may substantially lessen competition, it can address the problem in several ways. The Division may seek an injunction that would prevent the parties from consummating the transaction. Parties frequently seek to avoid litigation by offering to cure the Division's concerns, and in those cases the Division may choose, instead, to agree to a settlement (a consent decree[3]) that allows the merger to proceed with modifications that preserve or restore competition.[4]

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[1] The Division is authorized to challenge mergers under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4.

[2] This manual has no force or effect of law. It does not constitute final agency action, has no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Division's complete discretion. The scope of this Manual is limited to remedies addressing anticompetitive mergers. Conduct that violates the antitrust laws may raise separate and unique considerations with respect to remedies.

[3] A consent decree is an agreement between the Division and defendants that is filed publicly in federal district court and, upon entry, becomes a binding court order. With a fix-it-first remedy, in contrast, the parties cure the Division's concerns upon or before consummation of the transaction. There is no complaint or other court filing. *See infra* Section III.C. Likewise, certain bank mergers can be resolved without a consent decree. *See, e.g.*, U.S. Dep't. of Justice, Antitrust Div., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger.

[4] The Division employs the criteria set forth in this manual when it evaluates the adequacy of a remedy and exercises its prosecutorial discretion in deciding whether to accept a settlement. As required by the Tunney Act, any proposed consent judgment the Division accepts must be filed in federal district court. *See* 15 U.S.C. § 16. After a period of public comment, the court may approve the proposed settlement upon finding that it is in the public interest. As part of this public-interest inquiry, the scope of the Court's review is limited to ensuring that the proposed consent judgment is a "reasonably adequate remed[y] for the alleged harm" in the complaint. *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016) (quoting United States v. Newpage Holdings, Inc., 2015 WL 9982691, at *7). In contrast to the limited public-interest inquiry under the Tunney Act, the Division's prosecutorial discretion encompasses a broader set of considerations, including the facts developed in the investigation, the judgment of the prosecuting attorneys, and the allocation of the Division's limited resources.

The purpose of this manual is to provide Division attorneys and economists with a framework for structuring and implementing appropriate relief short of a full-stop injunction in merger cases. This manual updates the Division's 2004 Policy Guide to Merger Remedies.[5] It focuses on the remedies the Division may consider, and is intended to ensure that those remedies are based on sound legal and economic principles and are closely related to the identified competitive harm. The manual also sets forth issues that may arise in connection with different types of relief, and offers Division attorneys and economists guidance on how to resolve them.

Any remedy must be based on sound legal and economic principles and be related to the identified competitive harm. Tailoring the remedy to address the violation is the best way to ensure that the relief obtained cures the competitive harm.[6] Before proposing a remedy to an anticompetitive merger, the Division should satisfy itself that there is a logical nexus between the remedy and the alleged violation—that the remedy both cures the competitive harm and flows from the theory of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, while preserving competitive markets.

The Division will review proposed remedies before accepting them. If parties propose a remedy, the Division will need adequate time and information to evaluate it. If the parties propose a remedy after a complaint challenging the transaction is filed, the Division may seek to bifurcate the proceeding into a liability phase and a remedy phase. The Division will investigate post-litigation remedies.

While it is useful to use past decrees as a starting point, it is inappropriate to include a provision in a decree merely because a similar provision was included in previous decrees, particularly where there has been no clear articulation of the purpose behind the inclusion of that provision in the decree at issue. There must be a nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions.

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[5] The Division withdrew the 2011 Policy Guide to Merger Remedies on September 25, 2018, and announced that the 2004 Guide would be in effect pending the release of an updated policy. *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., It Takes Two: Modernizing the Merger Review Process, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium 12 (Sept. 25, 2018), https://www.justice.gov/opa/speech/file/1096326/download.

[6] Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947))); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950) ("In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) ("The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions."); *cf.* Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981) (Relief barring certain vertical restrictions "goes beyond any reasonable relationship to the violations found."). *See also* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1228 (D.C. Cir. 2004) (In a Section 2 case, "the court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ." (quoting Microsoft Corp., 253 F.3d 34, 106)); United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (Relief "should be tailored to fit the wrong creating the occasion for the remedy."); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 154, 202 (D.D.C. 2002), *aff'd sub nom*, 373 F.3d 1199 (D.C. Cir. 2004).

Once the Division has accepted a remedy and entered into a consent decree, the Division will commit the time and effort necessary to ensure full compliance with the decree. It is contrary to the Division's law enforcement responsibilities to obtain a remedy and then not enforce it. The Division's work is not over until the remedies mandated in its consent decrees have been fully implemented. This requires, in the first instance, that decrees be drafted with sufficient reporting and access requirements to keep the Division apprised of how the decree is being implemented, and then a continuing commitment of Division resources to decree compliance and enforcement. Responsibility for enforcing all of the Division's outstanding judgments lies with the Office of the Chief Legal Advisor (specifically, with the Office of Decree Enforcement and Compliance), as well as the Division's civil litigating sections—to which the judgments are assigned according to the current allocation of industries or commodities among those sections—with assistance from a criminal section in criminal contempt cases.[7]

II. Principles

The following principles apply to structuring and implementing remedies in all Division merger cases, both horizontal and vertical:

- **Remedies Must Preserve Competition.**[8] Once the Division has determined that the merger is anticompetitive, the Division will insist on a remedy that resolves the competitive problem, irrespective of whether the transaction is horizontal or vertical. This assessment necessarily will be fact-intensive. It normally will require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will effectively remedy the competitive harm. Only after these determinations are made can the Division decide whether the proposed remedy will effectively redress the violation and, just as importantly, be no more intrusive than necessary to cure the competitive harm. Accepting remedies without analyzing whether they are sufficient and necessary to redress the violation would be abdicating the Division's responsibility to protect competition and American consumers.

  Although the remedy always should be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to preserve it. Preserving competition is the "key to the whole question of an antitrust remedy,"[9] and preserving competition is the only appropriate goal with respect to crafting merger remedies. Preserving competition requires replacing the competitive intensity that would be lost as a result of the merger rather than focusing narrowly on returning to

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[7] *See infra* Section VII.C for a discussion of civil and criminal contempt proceedings.

[8] For simplicity of exposition, this manual uses the phrase "preserving competition" throughout, which should be understood to include the concept of restoring competition, depending on the specific facts of the transaction and its proposed remedy. For example, in the case of consummated mergers, the Division will seek a remedy that will effectively restore competition to the relevant market, including, when appropriate, unwinding a transaction.

[9] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

premerger HHI levels.[10] For example, assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets and calculating HHIs.

- **Remedies Should Not Create Ongoing Government Regulation of the Market.** Merger remedies take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm.[11] Structural remedies generally will involve the sale of businesses or assets by the merging firms. A conduct remedy usually entails injunctive provisions that would, in effect, regulate the merged firm's post-merger business conduct or pricing authority. Conduct remedies substitute central decision making for the free market. They may restrain potentially procompetitive behavior, prevent a firm from responding efficiently to changing market conditions, and require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure.[12] Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions. Conduct remedies typically are difficult to craft and enforce. For these reasons, conduct remedies are inappropriate except in very narrow circumstances. *See infra* Section III.B.

- **Temporary Relief Should Not Be Used to Remedy Persistent Competitive Harm.** A merger indefinitely changes the incentives of the merged firm and the structure of the market. Structural remedies designed to preserve a competitive market similarly are in effect indefinitely. A consent decree temporarily regulating conduct, on the other hand, does not effectively redress persistent competitive harm resulting from an indefinite change in market structure. Regulating conduct is inadequate to remedy persistent harm from a loss in competition.

- **The Remedy Should Preserve Competition, Not Protect Competitors.** Because the goal is to preserve competition—rather than to pick winners and losers—consent

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[10] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) ("'Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.'" (quoting the Division's 2004 Policy Guide to Merger Remedies)); *see also* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[11] In appropriate circumstances, the Division may consider seeking disgorgement in consummated merger challenges instead of or in addition to unwinding the transaction. In particular, where available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits, the Division may seek disgorgement of those profits. *See* Competitive Impact Statement at 10-12, United States v. Twin America, No. 1:12-cv-08989 (S.D.N.Y. 2015) ([T]his case involves a consummated joint venture that resulted in actual and substantial consumer harm. . . . By awarding disgorgement of Defendants' ill-gotten gain, the proposed Final Judgment will prevent Defendants from being unjustly enriched by their conduct and deter Defendants and others from engaging in similar conduct in the future."). Previously, the Division has sought and obtained disgorgement in an action brought under Section 1 of the Sherman Act. United States v. Keyspan Corp., 2011 WL 338037 (S.D.N.Y. 2011).

[12] Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at the American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

decree provisions should be designed to preserve competition rather than protect or favor particular competitors.[13]

- **The Risk of a Failed Remedy Should Fall on the Parties, Not on Consumers**. Remedies should be designed to limit the risk of failure as much as possible. To the extent any risk of failure remains, that risk should be borne by the parties, who seek to consummate a merger that would otherwise violate Section 7. Consumers should not bear the risk of a failed remedy.

- **The Remedy Must Be Enforceable.** A remedy is inadequate if it cannot be effectively enforced.[14] Remedial provisions that are too vague to be enforced or that could be construed in such a manner as to fall short of their intended purpose can result in inadequate relief, which would render ineffective the enforcement effort that went into investigating the transaction and obtaining the decree.

  A defendant will scrupulously obey a decree only when the decree's meaning is clear, and when the defendant and its agents know that they face consequences if they do not comply with the decree. Decree provisions should be as clear and straightforward as possible, always focusing on how a judge not privy to the settlement negotiations is likely to construe those provisions at a later time.[15] Likewise, care must be taken to avoid vague language or potential loopholes that might lead to attempted circumvention of the decree. Decrees should include provisions designed to facilitate the Division's future enforcement of the decree.

  Similarly, a decree that fails to bind a person or entity necessary to implementing the remedy may be ineffective.[16] As a result, attention must be given to identifying those persons who must be bound by the decree to make all of the proposed relief effective

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[13] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("[I]t is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990); Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 116-17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Massachusetts v. Microsoft Corp., 373 F.3d at 1211, 1230; United States v. Microsoft Corp., 253 F.3d at 58.

[14] *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76, 137 (D.D.C. 2002), *aff'd sub nom*. Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) ("Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant on this definition to be largely unenforceable.").

[15] *See* New York v. Microsoft Corp., 224 F. Supp. 2d at 100 ("Moreover, the case law counsels that the remedial decree should be 'as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know [ ] their duties and unintended contempts may not occur.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1947))).

[16] *Cf.* Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that the government, Bayer, Monsanto, and BASF stipulated to the joinder of BASF, the divestiture buyer, as a party to the action for purposes of the divestiture); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

and to ensuring that the judgment contains whatever provisions are necessary to ensure fulfillment of their responsibilities.

III. Structuring the Remedy

The goal of a divestiture is to ensure that the purchaser[17] possesses both the means and the incentive to maintain the level of premerger competition in the market[18] of concern.[19]

A. A Divestiture Must Include All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor

Any divestiture must include the assets necessary to ensure the efficient current and future production and distribution of the relevant product or service and thereby preserve the competition that would have been lost as a result of the merger. A structural remedy requires a clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long term. The necessary assets may be tangible (factories capable of producing automobiles or raw materials used in the production of some other final good) or intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots). Any divestiture should address whatever obstacles that, absent the divestiture, lead to the conclusion that a competitor would not be able to discipline a merger-generated increase in market power.[20] For example, if the divestiture buyer lacks a distribution system or necessary know-how, effective relief may require that the divestiture include such assets. Effective relief may also require the divestiture of "pipeline" products or R&D necessary to ensure the future competitive significance of the divested assets.[21] That is, the divestiture assets must enable the purchaser to compete effectively[22] and maintain the premerger level of competition, and should

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[17] The use of "purchaser" in this manual refers to the third-party purchaser of the divested assets from the merging firms.

[18] In this manual the singular term "market" should be construed to include both the singular and plural.

[19] *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'. . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.") (citation omitted).

[20] S*ee, e.g.*, White Consol. Indust., Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986) (court analyzes sufficiency of a proposed divestiture package to restore effective competition); Fed. Trade Comm'n v. Sysco Corporation, 113 F. Supp. 3d 1, 72-8 (D.D.C. 2015) (analyzing the proposed divestiture's ability to preserve competition in the relevant market).

[21] *See, e.g.*, Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("[B]ecause Bayer and Monsanto compete to develop new products and services for farmers, the proposed Final Judgment requires the divestiture of associated intellectual property and research capabilities, including 'pipeline' projects, to enable BASF to replace Bayer as a leading innovator in the relevant markets.").

[22] *See infra* Section IV.B for a discussion of purchaser approval.

be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.[23]

If, for example, a potential entrant or small incumbent would be constrained by the time or the incentive necessary to construct production facilities, then sufficient production facilities should be part of the divestiture package. If the assets being combined through the merger are valuable brand names or other intangible rights, then the divestiture package should include a brand or a license that enables its purchaser to compete quickly and effectively, both in the short term and as the companies continue to innovate.[24] In markets where an installed base of customers is required in order to operate at an effective scale, the divested assets should either convey an installed base of customers to the purchaser or quickly enable the purchaser to obtain an installed customer base.

A critical asset may be intangible, such as when firms with alternative patent rights for producing the same final product are merging.[25] In those cases structural relief must provide one or more purchasers with rights to that asset, either by sale to a different owner or through a fully paid-up license.[26]

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[23] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) (quoting the Division's 2004 and 2011 Policy Guides to Merger Remedies); Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶ 61717 at 72930, 1977 WL 1491 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture preserves competition at the premerger level. However, if the divestiture of one firm's assets would not preserve competition, then the other firm's assets must be divested. For example, if firm A's productive assets can operate efficiently only in combination with other assets of the firm, while firm B's productive assets are free standing, the Division likely would require the divestiture of firm B's assets.

[24] *See* Competitive Impact Statement at 14, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (noting that the purchasers will receive a transitional license for the TruMoo chocolate milk brand and a perpetual license to the intellectual property, product formulas, technology, and know-how for TruMoo because "consumers value the taste of the TruMoo milk and the divestiture buyers will benefit from the ability to perpetually offer chocolate milk with the same taste").

[25] A critical asset is one that is necessary for the purchaser to be an effective long-term competitor in the market. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

[26] United States v. Nat'l Lead Co., 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division will generally insist on fully paid-up licenses rather than running royalties for two reasons. First, running royalties require a continued relationship between the merged firm and the purchaser, which could soften competition between them. The result will be less competition than the two merging firms previously had been providing. Second, running royalty payments, even if they are less expensive to the licensee over the lifetime of the license, add a cost to the licensee's production and sale of incremental units, tending to increase the licensee's profit-maximizing price. The Division may consider the use of running royalties, however, if (a) no deal otherwise would be struck between the merged firm and the licensee (perhaps because the firms differ greatly in their estimates of future revenue streams under the license), (b) blocking the deal entirely likely would sacrifice significant merger-specific efficiencies worth preserving, and (c) the Division is persuaded that the running royalties will completely cure the

In addition, certain intangible assets likely should be conveyed whenever tangible assets are divested. These may include intangible assets that provide valuable information to the purchaser—for example, documents and computer records providing the purchaser with customer information or supply or production information, research results, computer software, and market evaluations. Other intangible assets that likely should be conveyed include those pertaining to patents, copyrights, trademarks, other IP rights, licenses, or access to key intangible inputs (for example, access to a particular range of broadcast spectrum) that are necessary to allow for the most productive use of any tangible assets being divested.[27]

The package of assets to be divested must not only allow a purchaser to preserve the competition that would have been lost due to the merger, but also provide it with the *incentive* to do so.[28] Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market. In addition, there should be no *disincentives* associated with shifting the divested assets or employees to the purchaser. For example, employees should not suffer a financial disadvantage when they leave the seller to become employed by the purchaser.

In some circumstances there may be a trade-off between requiring a somewhat smaller, less valuable package of divestiture assets and accepting greater risk that the remedy will prove inadequate, or demanding a more substantial divestiture in order to be confident that post-merger competition will be preserved. Because consumers should not bear the risk of a failed remedy and the Division must be confident that the merger will not harm competition, the Division's preference is to demand a remedy that is sufficiently robust to provide this confidence. Accordingly, it also may be necessary for the parties to warrant that the divestiture assets are sufficient for the divestiture buyer to maintain the viability and competitiveness of the divested businesses.[29]

1. Divestiture of an Existing Standalone Business Is Preferred

To best achieve the goal of preserving the competition that would have been lost as a result of the merger, the Division has a preference for requiring the divestiture of an existing standalone business, because it has demonstrated success competing in the relevant market.[30] In

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competitive harm. Also, the Division generally will not require royalty free licenses since parties ordinarily should be compensated for the use or sale of their property, intangible as well as tangible. *See id.* at 349 ("[T]o reduce all royalties automatically to a total of zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion."); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1231 (D.C. Cir. 2004).

[27] If tangible assets are not being divested because they already are in the hands of the purchaser, intangible assets that are necessary to allow for the most productive use of those tangible assets may need to be conveyed.

[28] *See infra* Section IV.B. for a further discussion of the characteristics of an acceptable purchaser.

[29] *See, e.g.*, Final Judgment at 21, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[30] The Federal Trade Commission's study of merger remedies found that divestitures of ongoing businesses succeeded at higher rates than divestitures of selected assets. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-

addition, an existing standalone business typically possesses all of the physical assets, personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product.[31] Parties proposing to divest a standalone business should be prepared to show that the business to be divested includes all of the components necessary to operate such business, that it operates or has in the recent past operated as a standalone business, and that it can be sold to a divestiture buyer who will be able to preserve competition. Where an existing business lacks these characteristics, additional assets from the merging firms will need to be included in the divestiture package.[32]

2. Divestiture of More than an Existing Standalone Business May Be Required When It Is Necessary to Preserve Competition

Divesting an existing business, even if the divestiture includes all of the production and marketing assets responsible for producing and selling the relevant product, will not always give the purchaser both the ability and incentive to preserve the competition threatened by the merger. Where divestiture of an existing standalone business is insufficient to resolve the competitive issues raised by the proposed merger and preserve competition, additional assets from the merging firms will need to be included in the divestiture package. For example, in some industries, it is difficult to compete without offering a "full line" of products.[33] In such cases, the Division may seek to include a full line of products in the divestiture package, even when the antitrust concern relates to only a subset of those products.[34] Similarly, to address competitive problems in a United States market, divestiture of a world-wide business or assets outside of the United States nevertheless may be required, including when necessary to give the purchaser the scale and scope needed to preserve competition.[35] More generally, integrated firms can provide

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economics/p143100_ftc_merger_remedies_2006-2012.pdf [hereinafter FTC Merger Remedies Report]. In some cases, an existing business may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

[31] *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[32] *See infra* Section III.A.2.

[33] *See, e.g.*, Competitive Impact Statement at 20, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (explaining that divestiture of Bayer's R&D programs associated with wheat was required: "Because seed and trait innovations can often be applied across multiple crops, a broader seed and trait portfolio will provide the promise of higher returns on investment and increase the incentive to innovate. [The divestiture of Bayer's wheat programs will] preserve the scope efficiencies that Bayer enjoys today by keeping these businesses together.").

[34] *See, e.g.*, Competitive Impact Statement at 11, United States v. Transdigm Group, Inc., No. 1:17-cv-02735 (D.D.C. 2017) (proposed remedy required divestiture of business unit developing and manufacturing commercial aircraft passenger restraints, including plants in Florida and Germany, to remedy competitive problems in specific types of restraints).

[35] *See* Dep't of Justice & Fed. Trade Comm'n, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 5.1.5 (2017) ("An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis.") (citations omitted), https://www.justice.gov/atr/internationalguidelines/download [hereinafter International Guidelines]; Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1218-19 (11th Cir. 2012).

scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant product.[36] When the evidence suggests that this is likely to be the case (such as where only large integrated firms manage to remain viable in the marketplace), suing to block the entire transaction rather than accepting a divestiture may be the only effective solution.

3. An Asset Carve-Out Consisting of Less than an Existing Standalone Business May Be Considered in Limited Circumstances

The Division should scrutinize critically a merging firm's proposal to sell less than the entirety of an existing standalone business. The merging firm may have an incentive to divest fewer assets than are required for the purchaser to compete effectively going forward. Further, at the right price, a purchaser may be willing to purchase and monetize these assets even if they are insufficient to produce competition at the premerger level. A purchaser's interests are not necessarily identical to those of the consumer, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or enabling it to produce weak or short-term competition in the relevant market), it may be willing to buy them at a discounted price regardless of whether they remedy the competitive concerns.

An asset carve-out consisting of less than an existing standalone business may be considered if: (1) there is no existing standalone business smaller than either of the merging firms and a set of acceptable assets can be assembled from one of the merging firms, or (2) certain of the entity's assets are already in the possession of, or readily obtainable in a competitive market by, the divestiture purchaser. As discussed above, the Division will scrutinize these divestitures carefully, and any risk of failure should be borne by the merging parties.[37] If the Division is not satisfied that the parties have addressed the risk of a failed remedy, a more appropriate course may be to sue to block the transaction.

The Division also may approve the divestiture of less than an existing standalone business if the evidence clearly demonstrates that the purchaser does not want or need some of the entity's assets, for example because the purchaser already is in the possession of, or can readily obtain in a competitive market, similar assets, such as non-specialized services like general accounting or computer programming. For example, if the likely purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create unnecessary and costly redundancy. If the potential purchaser

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[36] *See, e.g.*, Modified Final Judgment, United States v. Parker-Hannifin Corp., No. 1:17- cv- 01384 (D. Del. 2017) (divestiture of international assets necessary to remedy harm in U.S. market); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("the proposed Final Judgment requires the divestiture of additional assets that will give BASF the scale and scope to compete effectively today and in the future").

[37] The Division will pay close attention to asset carve-outs where certain customer contracts are divested to the purchaser and others are retained by the seller. In such cases, the Division may require the waiver of any contractual prohibitions on the purchaser soliciting customers during the term of those contracts, or may require the seller to permit customers to switch to the purchaser without penalty. *See, e.g.*, Final Judgment at 11, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (requiring Defendants to release customers from contractual obligations and otherwise applicable termination fees).

is given the option of purchasing such assets and declines to do so, divesting only the assets required to design and build the relevant product efficiently may be appropriate. Of course, in those circumstances, the Division would need to know the purchaser's identity in advance and likely would require an upfront buyer.[38]

There may be situations where there is no obvious existing standalone business or collection of assets from a single firm to divest. Although disfavored, in limited circumstances, it may be possible to assemble the full set of assets necessary to preserve competition from both of the merging firms. The Division regards such "mix and match" asset packages with skepticism. The Division will not accept mix-and-match divestitures when there is reason to believe that they will not effectively preserve competition, such as when interoperability or brand are important. Because the assets in a "mix and match" divestiture package are not being operated by the same owner as an existing business, they likely will require some reconfiguration by the buyer, and it is more difficult to determine whether the selected assets are appropriate and can be operated efficiently together. The parties must demonstrate to the Division's satisfaction that the divestiture of these assets will create a viable entity that will preserve competition. In such cases, the Division likely will require an upfront buyer to ensure that the package gives the buyer everything it needs to preserve existing competition.

4. All Assets to Be Divested Must Be Specified in the Consent Decree

Division policy requires that any proposed consent decree include a precise description of the package of assets that, when divested, will resolve the Division's competitive concerns by maintaining competition at premerger levels.[39] The package of assets typically should comprise all assets owned by or used to operate the divested business. If the parties propose to exclude any such assets from the divestiture package, they must demonstrate that the absence of such assets will not affect the purchaser's ability and incentive to maintain the level of premerger competition in the market of concern. The consent decree ordinarily will identify a single set of divestiture assets. In rare circumstances, the decree may include a description of more than one set of assets the divestiture of which would be acceptable to the Division, with the defendant permitted to sell any of the described asset packages during the initial divestiture period.[40] If, at any time after the decree is filed, the Division and the defendant agree that the sale of an asset package not described in the consent decree will resolve the competitive concerns raised by the proposed transaction, the consent decree must be modified to describe this new divestiture

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[38] In circumstances in which there are many potential purchasers that possess or could acquire in a competitive market the assets necessary to effectively preserve competition despite purchasing less than an existing standalone business, the Division may not need to know the identity of the purchaser in advance. The Division also might approve divestiture of less than an existing standalone business in matters involving industries where there has been a substantial history of success with divestitures of this kind. *See, e.g.*, Competitive Impact Statement at 8, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (explaining that the assets to be divested "are attractive assets that should draw suitable acquirers with sufficient expertise to accomplish the divestitures expeditiously").

[39] Nothing, however, prohibits the merged firm from selling *additional* assets not specified in the decree.

[40] The decree may specify that a selling trustee have similar flexibility to sell the alternative sets of assets or may require the trustee to sell only one of the described sets of assets.

package and the reasons this new divestiture is appropriate must be set forth in the moving papers.[41]

In rare cases, it may be appropriate to permit flexibility in the specification of the divestiture assets. Although the appropriate identification of the divestiture assets is sometimes obvious, either due to the nature of the business or the homogeneity of potential purchasers, this is not always the case. When an upfront buyer is not required, the circumstances of potential bidders may vary in ways that affect the scope of the assets each would need to be an effective competitor. For example, one potential purchaser might require certain distribution assets and another may not. In other cases, the Division may be indifferent between alternative sets of divestiture assets—for example, a manufacturing facility owned by merging firm A versus a similar facility owned by merging firm B, or even differently configured sets of assets, either of which would enable a purchaser to maintain the premerger level of competition in the affected market. The Division recognizes the need for flexibility in defining the divestiture assets in such cases.

5. Permitting the Merged Firm to Retain Access to Divested Intangible Assets May Present a Competitive Risk

When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm can retain rights to these assets, such as the right to operate under the divested patent. Because intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, there may be no cost to allowing the seller to retain the same rights as the purchaser. In such cases, the Division may require the merging parties to divest the intangible asset, and then require the purchaser to license it back to the merged firm.[42] Doing so will ensure the purchaser's independence from the merged firm, and will ensure that the purchaser has the same incentive to deploy or invest in the asset that the seller did.

Permitting the merged firm to retain access to critical intangible assets, however, may also present a competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may be more difficult for it to differentiate its product from its rivals' and therefore it may be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. For example, the purchaser may face greater risks of misappropriation by its rival of future "add on" investments or marketing activities. Where the purchaser is unable effectively to differentiate its offering from that of the merged firm, this may

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[41] A minor deletion of assets from the divestiture package, however, may not require a decree modification.

[42] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (dividing certain "shared" intangible assets, some of which were to be sold with the divested assets and licensed back to Thales, while others were required to be licensed for use with the divested assets); Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring Bayer to divest intangible assets related to its digital agriculture business, and requiring BASF, the divestiture buyer, to license certain intangible assets back to the merged firm "for the limited purpose of allowing Bayer to sell outside North America" certain digital agriculture products).

weaken its ability and incentive to compete as aggressively as the two formerly independent firms had been competing premerger. Moreover, where multiple firms have rights to the same trademark or copyright, *none* may have the proper incentive to promote and maintain the quality and reputation of the brand. Finally, this type of ongoing entanglement may create close and persistent ties between the merged firm and the purchaser that may serve to enhance the flow of information or align incentives, which may facilitate collusion. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to critical intangible assets will hinder the purchaser from preserving competition and, accordingly, the Division will require that the merged firm relinquish all rights to the critical intangible assets.[43]

There may be other circumstances, however, when the merged firm needs to retain rights to the intangible assets to achieve demonstrable efficiencies—which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture—and a non-exclusive license is sufficient to preserve competition and assure the purchaser's future viability and competitiveness.[44] Under these circumstances, the merged firm may be permitted to retain certain rights to the critical intangible assets and may only be required to provide the purchaser with a non-exclusive license.[45]

B. Structural Relief Is the Appropriate Remedy for Both Horizontal and Vertical Mergers

Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market. A carefully crafted divestiture decree is "simple, relatively easy to administer, and sure" to preserve competition.[46] Almost all merger remedies are structural. There are limited circumstances, however, when conduct remedies may be appropriate.

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[43] For example, the Division required the divestiture of rights to trade dress and other intellectual property relating to certain brands of hair care products in *United States v. Unilever N.V.* Competitive Impact Statement at 11, United States v. Unilever N.V., 1:11-cv-00858 (D.D.C. 2011).

[44] These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks. This is because the purchaser is almost certain to rely on the latter to distinguish its products from incumbent products. In contrast, patented production technology that is shared, in addition to having the beneficial effect of lowering both producers' marginal costs, is less likely significantly to affect competition since the production process generally does not affect the purchaser's ability to differentiate its product.

[45] *See, e.g.*, United States v. 3D Sys. Corp., 2002-2 Trade Cas. ¶ 73738, 2001 WL 964343 (D.D.C. 2001).

[46] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961); *see generally* California v. Am. Stores Co., 495 U.S. 271, 280-81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

1. Conduct Relief to Facilitate Structural Relief

Tailored conduct relief may be useful in certain circumstances to facilitate effective structural relief.[47] Temporary[48] supply agreements, for example, may be useful when accompanying a structural remedy.[49] If the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured, product mixes are altered, licenses are applied for or transferred, or new supply contracts are negotiated), a temporary supply agreement can help prevent the temporary loss of a competitor from the market.[50] The Division will scrutinize supply agreements to confirm that they prevent the flow of competitively sensitive information between the parties.

Similarly, divestitures normally involve the transfer of personnel, and *temporary* limits on the merged firm's ability to re-hire these employees may be necessary. Incumbent employees often are essential to the productive operation of the divested assets, particularly in the period immediately following the divestiture. For example, they may have unique technical knowledge of particular manufacturing equipment or may be the authors of essential software. While knowledge is often transferrable or reproducible over time, the immediate loss of certain

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[47] *See, e.g.*, Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[48] The Division pays close attention to the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. The Division does not have a one-size-fits-all limit on how long a temporary supply agreement can be, but rather assesses the duration of a proposed supply agreement in the context of the product at issue. Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise competitive issues. First, given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for products or key inputs are likely to be disadvantaged in the long term. Contractual terms are difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to preserve competition. Second, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Third, long-term supply agreements may put the buyer at a competitive disadvantage, for example by being locked in to a non-competitive price.

[49] The Division also considers carefully the pricing terms of these supply agreements. Pricing terms that require the purchaser to pay a markup above the cost incurred by the divestiture business prior to the merger may compromise the purchaser's ability to preserve competition by putting the purchaser at a competitive disadvantage relative to the pre-merger status quo. On the other hand, pricing at the divestiture business's pre-merger cost may reduce the purchaser's incentive to secure an alternative source of supply—and compete as an independent entity—as quickly as possible. The Division evaluates these considerations in the context of the product at issue. For example, if the purchaser's post-divestiture cost is higher than the divestiture business's pre-merger cost, whether and to what extent that higher input price limits the purchaser's ability to compete will depend on the relative significance of the cost of the input to the price of the downstream product or service.

[50] *See, e.g.*, Final Judgment, United States v. United Technologies Corp., No. 1:18-cv-02279 (D.D.C. 2018) (requiring Defendants to supply manufacturing services at the purchaser's option); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that interim supply and transition services agreements are "aimed at ensuring that the [divestiture] assets are handed off in a seamless and efficient manner. . . [and that divestiture buyer] BASF can continue to serve customers immediately upon completion of the divestitures.").

employees may substantially reduce the prospect that the divestiture will preserve competition, at least at the outset. To protect against this possibility, the Division may prohibit the merged firm from re-hiring these employees for some limited period.[51]

Restricting the merged firm's right to compete in final output markets or against the purchaser of the divested assets, even as a transitional remedy, is disfavored. Such restrictions directly limit competition in the short term, and any long-term benefits are inherently speculative. For this reason, the Division is unlikely to impose them as part of a merger remedy. When the purchaser appears incapable of surviving or competing effectively against the merged firm without such restrictions, the Division is likely to seek a full-stop injunction against the transaction.[52]

Firewall provisions[53] are designed to prevent the dissemination of information within a firm that could facilitate anticompetitive behavior, such as coordination between competitors.[54] Firewalls are infrequently used because, no matter how well crafted, the risk of collaboration in spite of the firewall is great. They occasionally have been used, however, in limited circumstances to facilitate structural relief or where significant efficiencies could not be achieved without the merger or through a structural remedy.[55]

In considering whether a firewall is appropriate, the Division is careful to ensure that the provision fully prevents the targeted information from being disseminated. Time and effort are devoted to identifying potentially problematic types of information and to considering how to effectively cordon off that information. Effective monitoring also is required to ensure that the firewall provision is adhered to and effective. A necessary aspect of any firewall provision is a carefully designed enforcement mechanism with meaningful consequences for violations.

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[51] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (prohibiting Defendants from hiring certain employees hired by the acquirer of the divested assets for a period of one year); Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2019). Of course, in a situation in which there are a limited number of key employees who are essential to any purchaser competing effectively in the market, the Division will scrutinize carefully whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, a more appropriate action may be to sue to block the transaction.

[52] When divestitures are required in a consummated transaction, however, the Division may consider such a provision as a transitional remedy if it is necessary to give the purchaser time to become established as a competitor.

[53] For purposes of this section, the term "firewall provisions" refers to long-term obligations imposed by a Final Judgment as a part of a remedy. This term does not include short-term obligations included in Asset Preservation or Hold Separate Stipulations and Orders, which operate under different incentives and time frames.

[54] While coordination is perhaps the chief concern in such instances, such information sharing could also lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation. Further, information sharing could lead to unilateral anticompetitive effects.

[55] *See, e.g.*, Competitive Impact Statement at 18-19, United States v. Northrop Grumman Corp., 1:02-cv-02432 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses); Competitive Impact Statement, United States v. Lehman Bros. Holdings, Inc., 1:98-cv-00796 (D.D.C. 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defense technologies).

2. Stand-Alone Conduct Relief

Stand-alone conduct relief is appropriate only when the parties prove[56] that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.[57]

Mergers present the potential to create efficiencies or benefit consumers.[58] Where cognizable efficiencies[59] are significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies. In such situations, a stand-alone conduct remedy may be appropriate to consider. For the prospect of potentially attainable efficiencies to justify accepting a conduct remedy, however, the efficiencies in question need to be cognizable[60] (rather than merely asserted), they must mitigate the merger's potential to harm consumers in the relevant market, and they must be unattainable in the context of a structural divestiture.

Mergers may also present the situation where any possible structural remedy that would undo the competitive harm would result in the loss of pre-existing internal efficiencies, i.e., efficiencies already achieved by a merging firm, prior to the merger, that are not due to the merger. For example, in order to minimize costs a firm may use the same distribution system for both the widgets and the gadgets that it produces. A divestiture that requires breaking up the distribution system into a widget distribution system, entirely separate from the gadget distribution system, may eliminate efficiencies that had been created by their original consolidation. The Division will consider a conduct remedy that retains these efficiencies if it

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[56] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., 'Harder Better Faster Stronger': Evaluating EDM as a Defense in Vertical Mergers, Remarks as Prepared for Delivery at George Mason Law Review 22nd Annual Antitrust Symposium 9-10 (Feb. 15, 2019), https://www.justice.gov/opa/speech/file/1132831/download.

[57] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

[58] Horizontal and vertical mergers often produce different types of efficiencies. Examples of possible horizontal-merger-related efficiencies include achieving economies of scale or scope, and rationalization of sales forces, design teams, and distribution networks. For a discussion of the efficiencies that can arise from a horizontal merger, *see* Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES § 10 (2010), https://www.justice.gov/atr/file/810276/download [hereinafter Horizontal Merger Guidelines]. Vertical mergers may benefit consumers through the elimination of double marginalization (i.e., the vertically integrated firm may have an incentive to set lower downstream prices if it can self-supply an input rather than paying an independent upstream firm for the input at a price that includes a markup over the upstream firm's marginal cost), or through the creation of other efficiencies that may benefit competition and consumers. *See* Dep't of Justice & Fed. Trade Comm'n, VERTICAL MERGER GUIDELINES § 6 (2020), https://www.justice.gov/atr/page/file/1290686/download.

[59] If, absent the transaction, assets of the acquired firm otherwise would exit the market, maintaining these assets in the marketplace may be considered a type of economy of scale or scope.

[60] Cognizable efficiencies are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Horizontal Merger Guidelines, *supra* note 58, § 10.

completely cures the anticompetitive harm arising from the proposed merger, and can be effectively enforced.[61]

In deciding whether a conduct remedy is appropriate, the Division will also consider the costs of monitoring and enforcing the remedy. Monitoring and enforcing a conduct remedy may be easier in markets in which regulatory oversight is already employed and data on the merged firm's conduct would be collected regularly and audited in any event. Although those regulators will not generally have the same incentives and goals as the Division, the greater transparency of market conduct that they permit can lower the cost to the Division and the courts of monitoring and enforcement.[62]

C. A Fix-It-First Remedy Must Fully Eliminate the Competitive Harm

A fix-it-first remedy is a structural solution[63] implemented by the parties that the Division accepts before a merger is consummated.[64] An acceptable fix-it-first remedy eliminates the Division's anticipated (and yet to be determined) competitive concerns and therefore the need to file a case.[65]

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[61] In rare circumstances, the Division has accepted a waiver of legal rights as a remedy to cure anticompetitive harm. For example, when an agricultural cooperative with certain antitrust exemptions under the Capper-Volstead Act acquired assets not exempt under the Act, the Division obtained an injunction prohibiting the merged firm from asserting the exemption with respect to the acquired assets. *See, e.g.*, Final Judgment at 8-9, United States v. Dairy Farmers of America, No. 00-1663 (E.D. Pa. 2000); Competitive Impact Statement at 2, *Dairy Farmers of America*, No. 00-1663 ("Moreover, because both DFA and Land O'Lakes are agricultural cooperatives they are entitled to federate their branded butter businesses under the Capper-Volstead Act, 7 U.S. C. §291, which exempts from antitrust scrutiny collective marketing by or on behalf of agricultural production cooperatives. SODIAAL, however, does not have the benefit of the Capper-Volstead exemption. Thus, DFA's acquisition of the SODIAAL assets would bring the important SODIAAL brands under the control of an exempt cooperative."); *see also* Competitive Impact Statement at 30-31, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020). Such a waiver is more akin to a structural remedy because it preserves independent competition among existing competitors that otherwise would have been lost as a result of the merger.

[62] This will not, however, eliminate all mechanisms through which conduct-regulated firms can evade the conduct remedy. For instance, suppose the Division is considering a conduct remedy partly because a government agency accurately monitors the prices in the industry (but only the prices). One way to comply with the pricing provision (such as a non-discrimination provision) might be to keep prices the same, but decrease quality. However, if quality is not easily altered, or if there are other restraints on the merged firm's incentive to decrease quality, then the conduct remedy may be acceptable.

[63] A fix-it-first remedy usually involves the sale to a third party of a subsidiary or division or of specific assets from one or both of the merging parties.

[64] If the parties *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm, it is not considered a fix-it-first remedy for the purposes of this manual since the Division did not "accept" the fix. Similarly, a one-time action by the parties that eliminates any potential competitive harm and neither regulates ongoing conduct nor requires ongoing monitoring, such as a one-time waiver of a non-compete provision to reduce entry barriers or facilitate entry by a new competitor, would not be considered a fix-it-first remedy.

[65] A fix-it-first remedy does not trigger the Tunney Act process because the statute applies only to "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws." 15 U.S.C. § 16(b); *see also In re* IBM, 687 F.2d 591, 600-03 (2d Cir. 1982) (holding that the Tunney Act does not apply to a stipulated dismissal under Fed. R. Civ. P. 41(a) and noting

A fix-it-first remedy may be inappropriate if it is presented to the Division after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction. Once the Division has made that determination, the Division is unlikely to accept a fix-it-first remedy in lieu of filing a consent judgment in federal district court.[66]

If an acceptable fix-it-first remedy can be implemented, the Division may exercise its prosecutorial discretion to forgo filing a case and conclude its investigation without imposing additional obligations on the parties.

Parties who propose a fix-it-first remedy will be required to give the Division a reasonable period of time and information needed to evaluate it. As part of this process, Division attorneys and economists reviewing fix-it-first remedies will carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy preserves competition indefinitely and contains no less substantive relief than would be sought if a case were filed.[67] The Division, therefore, conducts an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.[68] Indeed, parties should be prepared for the Division to issue compulsory process to identify and evaluate any potential fixes that the merging parties may be considering.

If the parties propose a remedy after a complaint challenging the transaction is filed, the Division reserves its right to seek to bifurcate the proceeding into a liability phase and a remedy phase.

If the competitive harm requires remedial provisions that entail continuing, post-consummation obligations on the part of the merged firm, a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy may be unacceptable if, as part of the solution, the merged firm would be required to provide the purchaser with a necessary or important input pursuant to a supply agreement. In addition, the prospect that the merged firm may reacquire the divested

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constitutional concerns that would arise if the district court were to be involved in the executive branch's decision to abandon litigation). The legislative history of the Tunney Act confirms that the statute applies only to consent decrees filed in civil court cases brought by the United States; indeed, Congress considered and rejected an alternative version of the bill that would have expanded its scope to "any proposed consent judgment or decree *or other settlement*." S*ee In re* IBM, 687 F.2d at 601 (citing S. 1088, 93d Cong. § 2(a) (1973) (emphasis added)).

[66] *See supra* note 4.

[67] The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail timely to comply with the written agreement.

[68] Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. *See* discussion *infra* Section IV.B.

business or assets may make a fix-it-first remedy inappropriate. The Division would insist upon having recourse to a court's contempt power in such circumstances to ensure the merged firm's compliance with the agreement.

D. Remedies for Transactions Challenged Post-Consummation

The Division typically reviews mergers prior to consummation, but it also reviews and challenges consummated transactions.[69] The legal analysis of the competitive effects of a proposed transaction does not differ significantly from that of a consummated deal. Remedying a consummated deal, however, may pose unique issues. The Division's objective in all cases is to eliminate, to the extent possible, the anticompetitive effects that will result or have resulted from the merger. In a consummated transaction, the parties already have acquired, and often integrated, the assets. If the acquired assets are integrated, crafting an effective divestiture to eliminate the anticompetitive effects may be difficult,[70] but nonetheless necessary to undo the illegal effects of the merger.[71] In some cases, unwinding the transaction may be necessary to effectively restore competition in the relevant market.[72] In other cases, divestiture of more than the acquired assets may be required to restore the divested business to the same competitive position it had held prior to the transaction, and transitional assistance for an interim period may be required. In still other cases, divestiture of less than the acquired assets—in particular, of assets necessary and sufficient for smaller competitors or market entrants to restore competition—may be sufficient.[73]

E. Collaboration when Structuring a Remedy

1. Collaboration with International and State Antitrust Enforcers

The Division often interacts with international and state antitrust authorities in merger matters. In many cases, the Division may be able to work collaboratively with other antitrust enforcers to structure remedies that are effective across jurisdictions and that, to the extent

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[69] *See* United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. 2014); United States v. Parker-Hannifin Corp., No. 1:17-cv-01354 (D. Del. 2017); Complaint, United States v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2012).

[70] The difficulty of "unscrambling of the eggs" led Congress to enact the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a.

[71] For instance, in one consummated case in which the respondent had fully integrated the acquired assets, the Federal Trade Commission required the respondent to reorganize the company into two separate, stand-alone divisions, and divest one of them. In the matter of Chicago Bridge & Iron Co. N.V., No. 9300, 138 F.T.C. 1024, *aff'd* Chicago Bridge & Iron Co. v. Fed. Trade Comm'n, 534 F.3d 410 (5th Cir. 2008), http://www.ftc.gov/os/adjpro/d9300/index.shtm.

[72] *See, e.g.*, Final Judgment, United States v. Microsemi Corporation, No. 8:09-cv-00275 (C.D. Cal. 2010).

[73] *See* Competitive Impact Statement at 9, United States and State of New York v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2015) (requiring the divestiture of New York City Department of Transportation bus stop authorizations because "the most intractable barrier to entry is the inability of new firms to obtain bus stop authorizations from NYCDOT at or in sufficient proximity to New York City's top attractions and neighborhoods.").

possible, do not conflict unnecessarily with the remedies of other jurisdictions.[74] Where possible, while the Division continues its investigation of the transaction, it welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies. The Division will not advocate for remedies with international or state enforcement agencies that would not be available to the Division under United States law.

2. Collaboration with Regulatory Agencies

When mergers involve firms in regulated industries, the Division considers the impact of the applicable regulations on the competitive dynamics and any proposed remedy. The existence of regulation typically does not eliminate the need for an antitrust remedy to preserve competition effectively. Just as in unregulated markets, when the Division determines that an antitrust remedy is necessary to eliminate a merger's potential competitive harm in a regulated market, it seeks that remedy.

Whenever the Division is considering a remedy for a merger in a regulated industry, collaboration with the regulatory agency is a best practice. By working together, the Division and the regulatory agency can avoid remedies with inconsistent requirements and can ensure that their remedies work together efficiently and effectively to preserve competition and protect consumers.

F. Characteristics that Increase the Risk a Remedy Will Not Preserve Competition

Based on the Division's experience evaluating remedies, certain characteristics of proposed remedies increase the risk that a remedy will not effectively preserve competition. Proposed remedies that feature one or more of these characteristics are at greater risk of being found by the Division to be unacceptable.

- *Divestiture of less than a standalone business.* The Division prefers the divestiture of an existing standalone business. An existing business typically possesses not only all of the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market. In contrast, divestiture of less than an existing standalone business may not result in a viable entity that will effectively preserve competition.[75]

- *Mixing and matching assets of both firms*. A divestiture that combines assets or personnel that have never operated together increases the risk that the divestiture will not effectively preserve competition.[76]

[74] Additional guidance concerning cooperation with international enforcers regarding merger remedies is available in the International Guidelines, *supra* note 35, § 5.1.5.

[75] *See supra* Sections III.A.1, III.A.3.

[76] *See supra* Section III.A.3.

- *Allowing the merged firm to retain rights to critical intangible assets*. Divestitures must include all assets, tangible and intangible, necessary for the purchaser to be an effective, long-term competitor. Intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, so there may be no cost to allowing the merged firm to retain the same rights as the purchaser. Permitting the merged firm to retain access to divested intangible assets, however, may make it more difficult for the purchaser to differentiate its product from its rivals, or may reduce the purchaser's incentive to invest in the business.[77]

- *Ongoing entanglements*. Ongoing entanglements between the merged firm and the purchaser may put the purchaser in the position of having to rely on its rival in order to compete, and therefore call into question the purchaser's position as a truly independent competitor.[78] In addition, close and persistent ties between the merged firm and the purchaser may serve to enhance the flow of information or align incentives, which may facilitate collusion.

- *Substantial regulatory or logistical hurdles*. Divestitures may require the purchaser to establish legal entities or obtain regulatory approvals. Substantial regulatory or logistical hurdles may put competition at risk to the extent the purchaser is unable to fully and independently deploy the divested assets during the interim period.[79]

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[77] *See supra* Section III.A.5.

[78] Fed. Trade Comm'n v. CCC Holdings Inc., 605 F. Supp. 2d 26, 59 (D.D.C. 2009) ("In order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact ... a willing, independent competitor capable of effective production in the . . . market.'" (quoting White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir.1986))); Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 77 (D.D.C. 2015) ("As the court observed in *CCC Holdings*, it can be a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.'"); United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("Courts are skeptical of a divestiture that relies on a "'continuing relationship[ ] between the seller and buyer of divested assets" because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor.'") (quoting Sysco, 113 F.Supp.3d at 77)).

[79] United States v. Aetna Inc., 240 F. Supp. 3d 1, 63 (D.D.C. 2017) (analyzing regulatory hurdles to the parties' proposed divestiture); Complaint at 34, United States v. Halliburton Co. and Baker Hughes Inc., No. 1:16-cv-00233 (D.D.C. 2016) ("[M]any permits and licenses from around the world that are required to engage in the businesses at issue cannot be assigned at all; the divestiture buyer would have to go through a new permitting and licensing process."); *cf*. Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment, United States v. General Electric Co., No. 1:17-cv-01146, (D.D.C. 2017) (outlining the challenges (due to legal hurdles in foreign jurisdictions) to completing the divestiture by the agreed-upon deadline, and proposing modifications that would incentivize GE to complete the divestiture as quickly as possible).

IV. Divestiture Buyers

A. Identifying a Buyer

In most merger cases, the Division will require the divestiture of a specific package of assets to an acceptable buyer that has been identified before the Division enters into the consent decree.[80] In such cases, the parties must identify an acceptable "upfront" buyer and then negotiate, finalize, and execute the purchase agreement and all ancillary agreements with that buyer before the Division enters into the consent decree. Identification of an upfront buyer is particularly important in cases where the Division determines that there are likely to be few acceptable and interested buyers who will effectively preserve competition in the relevant market post-divestiture. For example, upfront buyers are particularly important in cases in which: (1) parties seek to divest assets comprising less than a stand-alone, ongoing business; (2) the assets are susceptible to deterioration pending divestiture (and a hold separate order will not minimize the interim harm); (3) the parties propose to divest primarily intellectual property or other limited assets; or (4) the business is so specialized there are likely to be few acceptable buyers.

This type of arrangement can be beneficial for both the merging parties and the Division. For the parties, resolving a merger's competitive issues with an upfront buyer can provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoids the possibility of a sale dictated by the Division. The Division benefits from avoiding the costs that might be incurred in a longer post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition. An upfront buyer consent decree also must give the Division the right to seek appointment of a trustee to sell the assets, in the event that the pre-approved buyer decides to back out of the arrangement.

In limited circumstances, the Division may decide that an upfront buyer is not necessary. In such cases, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition, and that there will be a sufficient number of acceptable potential purchasers for the specified asset package. Generally, the Division will allow the parties an opportunity to find a purchaser on their own within 60 to 90 days[81] of the entry of the Asset Preservation and/or Hold Separate Stipulation and Order.[82] The

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[80] *See, e.g.*, Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2018) (requiring defendants to first attempt to sell the divestiture assets to a specified buyer).

[81] *Cf.* Proposed Final Judgment at 12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestiture within 30 days); Final Judgment at 6, United States v. Nexstar Media Group, Inc., No. 1:19-cv-02295, (D.D.C. 2020) (same); Proposed Final Judgment at 7, United States v. Symrise AG, No. 1:19-cv-03263 (D.D.C. 2019) (requiring divestiture within 45 days).

[82] *Cf.* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring divestiture by the later of 90 calendar days after the filing of the Complaint or 90 calendar days after receiving all necessary international antitrust approvals); Final Judgment, United States v. Harris Corp., No. 1:19-cv-01809 (D.D.C. 2019) (requiring divestiture by the later of 45 days after the entry of the Hold Separate Stipulation and Order by the Court or 15 calendar days after necessary regulatory approvals have been received); Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (requiring divestiture within 90 days after notice of the entry of the Final Judgment by the Court).

Division reserves the right to approve any purchaser chosen by the parties and/or to appoint a selling trustee to complete the sale if the parties are unable to do so.[83]

B. The Division Must Approve the Proposed Purchaser

The Division's approval of a proposed purchaser will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might be. On the other hand, if the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.[84]

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. Even if the choice of a proposed purchaser does not raise competitive problems, the need for the Division's review arises because the seller has an obvious incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets today in return for selling to a rival that will not be especially competitive in the future. In contrast, if the firm selling the assets is itself exiting the market, its incentive is simply to identify and accept the highest offer.

Because the purpose of a divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets are likely to be redeployed elsewhere.[85] Thus, there should be evidence of the purchaser's intention to compete in the relevant market.[86] Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.[87] In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed

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[83] For a more detailed discussion of selling trustees, see *infra* Section VI.C.

[84] *See, e.g.*, Final Judgment, United States v. US Airways Group, Inc., No. 1:13-cv-01236 (D.D.C. 2014) (remedying the competitive harm associated with the merger of two of the four "legacy" air carriers with divestitures to low-cost carriers). Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.

[85] *See supra* Section III.A.

[86] Restrictions that would prohibit the purchaser from using divested assets outside the relevant market, however, may be disfavored. For example, it may be possible to use assets in different product segments, allowing a company to share costs across segments. If the purchaser is prohibited from doing so while its competitors can, the purchaser may be put at a competitive disadvantage.

[87] Complementary businesses often have a strong independent interest in maintaining competition in the relevant market, because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not also vertically integrated, creation of a vertically integrated rival may serve to disrupt post-merger coordinated conduct. *See* Horizontal Merger Guidelines, *supra* note 58, § 2.11.

purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. In no case, however, will they be given veto power over a proposed purchaser.

Third, the Division will evaluate the "fitness" of the proposed purchaser to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term.[88] As part of this process, the Division will examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity over the long term. It must be demonstrated to the Division's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.[89]

In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition according to the requirements in the consent decree, not that it will necessarily be the best possible competitor.

If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.[90] Ideally, assets should be held by those who value them the most, and in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively. On the other hand, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to compete effectively, then a more rigorous review may be warranted and the Division may reject that purchaser.

The Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms. Indeed, in some cases a private equity purchaser may be preferred. The Federal Trade Commission's study of merger remedies found that in some cases funding from private equity and other investment firms was important to the success of the remedy because the purchaser had flexibility in investment

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[88] The Division will consider any evidence that casts doubt on the fitness of a proposed purchaser, including the purchaser's views about its own ability to preserve competition. *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 71 (D.D.C. 2017) ("In short, before even looking at [divestiture buyer] Molina's internal emails, there are reasons to doubt that it has the internal capabilities needed to manage the divestiture plans. Molina executives and board members have the same concerns, at least when expressing their views candidly at the time. It seems more likely that Molina and its board moved forward with the divestiture because, for the price, it was low-risk and high-reward for the company, despite their belief that Molina was not well positioned to be an effective competitor.").

[89] *See, e.g.*, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019).

[90] The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation. In addition, the Division may, under limited circumstances, require that a selling trustee, such as an investment banker or other intermediary, conduct the shop from the outset when the Division is concerned that the defendant will not complete the divestiture within a reasonable time. See *infra* Section VI.C. for a discussion of the role of a selling trustee.

strategy, was committed to the divestiture, and was willing to invest more when necessary.[91] The study also identified cases in which a purchaser's lack of flexibility in financing contributed significantly to the failure of the divestiture.

Private equity purchasers often partner with individuals or entities with relevant experience, which may inform the Division's evaluation of whether the purchaser has sufficient experience to compete effectively in the market over the long term. The Division also will evaluate any links between purchasers with relevant experience and other competitors to assess whether the purchaser has any disincentive to use the divestiture assets to compete in the relevant market.

V. Terms of the Divestiture Sale

A. A Successful Divestiture Does Not Depend on the Price Paid for the Divestiture Assets

The Division's interest in a divestiture lies in the effective preservation of competition, not with whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is "too low" or "too high." The divesting firm is being forced to dispose of assets within a limited period. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize the full value of the business or assets being sold. On the other hand, if there are many interested purchasers, the divesting firm may get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless, as discussed below, it raises concerns about the effectiveness or viability of the purchaser.

The caveat to this general rule is that the purchase will not be approved if the purchase price and other evidence indicate that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is "too low" may suggest that the purchaser does not intend to keep the assets in the market.[92] A "fire sale" price may indicate that the purchaser has doubts about its ability to operate the divestiture assets, but is willing to try in light of the bargain price. In determining whether a price is "too low," the Division will look at the assets' liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value can be reliably determined and (b) the constraint is needed as assurance that the proposed purchaser intends to use the divestiture assets to compete in the relevant market. Also, a sale at a price below liquidation value does not *necessarily* imply that the assets will be redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other reasons to conclude

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[91] FTC Merger Remedies Report, *supra* note 30, § IV.D.2.

[92] United States v. Aetna Inc., 240 F. Supp. 3d. 1, 72 (D.D.C. 2017) ("An extremely low purchase price reveals the divergent interest between the divestiture purchaser and the consumer: an inexpensive acquisition could still 'produce something of value to the purchaser' even if it does not become a significant competitor and therefore would not 'cure the competitive concerns.'").

that the proposed purchaser intends to compete in the relevant market, the Division will not reject the divestiture solely because the price does not exceed liquidation value. If the Division has other reasons to be concerned about the purchaser's ability to compete in the relevant market, a low purchase price, even if it is above liquidation value, may corroborate those concerns.[93]

A price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. This concern, however, is adequately and more directly addressed by applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, the Division may consider a price that is unusually high when evaluating the financial ability of the purchaser to compete.

B. Seller Financing of the Divestiture Is Strongly Disfavored

The Division generally is opposed to permitting the seller to finance the divestiture. First, seller financing may enable the seller to retain some partial control over the assets, which could weaken the purchaser's competitiveness. Second, seller financing may impede the seller's incentive to compete with the purchaser because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, seller financing may make the purchaser disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, seller financing may give the seller some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information. Finally, seller financing may indicate that the purchaser is unable to obtain financing from banks or other lending institutions, which raises questions about the purchaser's viability. The Division will consider seller financing only when it is persuaded that these potential concerns do not exist or could be eliminated.[94]

In the rare case where the information financial institutions need to evaluate adequately the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, limited seller financing may be considered.

[93] *Id*. at 72 (D.D.C. 2017) ("The low purchase price thus further supports the conclusion that [divestiture buyer] Molina has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in Molina's ability to effectively replace the competition lost by the merger.").

[94] The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing. However, the Division is unlikely to approve any arrangement in which the purchaser's payments to the seller are conditioned on the purchaser hitting benchmarks that can adversely impact the competitive incentives of either the seller or the purchaser.

VI. Decree Terms

Merger remedies are effective only when properly implemented. Several provisions in Division decrees are designed to ensure proper implementation, including provisions governing the time by which the remedy must be fulfilled, those preventing the dissipation of assets before the sale, and those necessary to ensure that the remedy effectively preserves competition in the relevant market after the sale is complete.

The terms of the consent decree govern the parties' obligations to the Division. The seller and purchaser are responsible for ensuring that their purchase agreement is consistent with the consent decree. In the event of a conflict, the parties must comply with the consent decree and assume any risk associated with a breach of the purchase agreement.

A. To the Extent Possible, Divestitures Should Not Be Delayed

The Division will require the parties to accomplish any divestiture as quickly as possible consistent with the objectives of the divestiture. A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process. Hold separate provisions and asset preservation clauses ensure the independence and viability of the divestiture assets, and that competition is preserved while the divestiture is pending.[95]

Depending on the size and complexity of the divestiture, the divesting firm normally will be given 60 to 90 days[96] to complete the divestiture.[97] The Division may consider a longer period to complete the divestiture if it is clear that there will be no interim competitive harm, and no harm to the competitive significance of the divestiture assets. The consent decree may also permit the Division to exercise discretion in granting short extensions when it appears that the divesting firm is making good faith efforts and an extension seems likely to result in a successful divestiture. On the other hand, the Division may insist upon a more rapid divestiture in cases where critical assets appear likely to deteriorate quickly or there will be substantial competitive harm before the purchaser can operate the assets. In situations where an investment banker or other intermediary conducts the shop, the Division may require that the intermediary's compensation be based in part on speed of the sale.[98]

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[95] *See infra* Section VI.B for a discussion of hold separate provisions and asset preservation clauses.

[96] *But see supra* note 81 for several examples of cases in which shorter periods were required.

[97] The Tunney Act provides for a 60-day waiting period before the court can enter a proposed consent decree. 15 U.S.C. § 16(b). The Division will not oppose the sale of the divestiture assets to a purchaser acceptable to the Division before the judgment is entered if (a) the court is notified of the plan to complete the sale before the court enters the judgment and (b) there is no objection from the court. However, under no circumstance will such a sale preclude the Division from proceeding to trial, dismissing the case, or requesting additional or different relief if the court ultimately rejects the proposed decree. *See generally* United States v. BNS, Inc., 858 F.2d 456, 466 (9th Cir. 1988).

[98] *See infra* Section VI.C. for a discussion of the role of a trustee.

In the event that an upfront buyer is not required, the Division recognizes that a comprehensive "shop" of the assets, the need for due diligence by potential purchasers, and Division review of the divestiture and purchaser take time. The Division will balance these considerations in developing an appropriate timetable for the divestiture process.

The Division will require regular reports on the divestiture process in order to ensure good faith efforts and to facilitate a quick review of the proposed settlement. Once a purchaser is proposed, the Division may require additional information to evaluate the purchaser and the process by which the purchaser was chosen. The divesting firm and the proposed purchaser ordinarily will be required promptly to respond to such requests.

In addition, when the proposed remedy is contingent on the approval of a third party, such as a government permitting agency, and that approval will not be obtained prior to the entry of the decree, the decree should include a contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.[99] To the extent the divestiture purchaser's cooperation is required to obtain such third-party approvals, the Division may require that the purchaser be named a party and bound by the decree.[100]

B. Hold Separate and Asset Preservation Provisions Are Necessary for Most Consent Decrees

Consent decrees requiring divestiture after the transaction closes should require defendants to take all steps necessary to ensure that the assets to be divested are separately maintained and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets and to effectively preserve competition in the market during the pendency of the divestiture. The Division also often requires the consent decree to include an asset preservation clause, in which the defendant agrees to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process.

It is unrealistic, however, to expect that hold separate and asset preservation provisions will entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision are unlikely to engage in vigorous competition. Likewise, customers during

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[99] In one case in which divestitures were not completed on the prescribed schedule because the parties had not obtained the necessary licenses from certain international jurisdictions, the Division sought a modified final judgment that contains additional provisions designed to give the parties a financial incentive to complete the divestitures promptly. *See* United States v. General Electric Co. and Baker Hughes Incorporated, 1:17-cv-01146, Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment (D.D.C. 2017).

[100] *See* Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] is appropriate because, after extensive analysis, the United States has determined that BASF is a necessary party to effectuate complete relief; the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on BASF to ensure that the divestitures take place expeditiously and that BASF and Bayer reduce entanglements as quickly as possible after BASF acquires the Divestiture Assets."); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

the period before divestiture may be influenced in their purchasing decisions by the merger, even if the soon-to-be-divested assets are being operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate or asset preservation provision—valuable employees may leave and certain investments may not be made. For these reasons, hold separate and asset preservation provisions do not eliminate the need for a speedy divestiture.

C. Selling Trustee Provisions Must Be Included in Consent Decrees

For a divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.[101] A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and at what price, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly and appropriately. Thus, decrees in Division merger cases should include provisions for the appointment of a selling trustee.[102] Although the trustee's obligation is to the Division, the parties will be responsible for compensating the trustee.

In most cases, the defendant will have a reasonable opportunity to divest the decree assets to an acceptable purchaser before the Division asks the court to appoint a trustee to complete the sale. The expectation is that the defendant, at least initially, is best positioned to have complete information about the operation and value of the assets to be divested and to communicate that information quickly to prospective buyers, thereby facilitating a speedy divestiture to an acceptable purchaser. However, as discussed in Section IV.B. *supra*, because a divestiture may strengthen an existing competitor or introduce a viable new competitor into the market, the defendant also has incentives to delay or otherwise frustrate the ordered divestiture. Therefore, the Division will permit the defendant only a limited time to complete the ordered divestiture before seeking appointment of a trustee.

A defendant may fail to complete a divestiture to an acceptable purchaser for any number of reasons. The defendant's selling efforts may have been dilatory. It may have sought a more favorable price or other terms to which potential purchasers were unwilling to agree. A decree-ordered divestiture may also languish for reasons unrelated to the defendant's diligence in seeking to divest the assets, for example, an inability to obtain necessary approvals from a third

[101] Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee may be necessary in the event that the ordered sale is not completed for some unforeseen reason. *See* United States v. Mittal Steel Co. N.V., 2007-1 Trade Cas. ¶ 75719, 2007 WL 9431726 (D.D.C. 2007); United States v. Cargill Inc., 1997-2 Trade Cas. ¶ 71893, 1997 WL 599424 (W.D.N.Y. 1997).

[102] In cases where the Division already has determined that the upfront buyer is the only acceptable purchaser, the Division has declined to include provisions for a selling trustee in the consent decree. *See* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018). In such cases, the more appropriate action may be to seek to block the transaction.

party such as a government permitting agency, or a purchaser that backed out of the deal at the last minute.

Effective divestiture decrees typically provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible.

The immediate appointment of a selling trustee may, however, be required in the rare instance when the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time. For example, immediate appointment may be appropriate if the assets will deteriorate quickly, such that the seller has an especially strong incentive to delay divestiture, or when a defendant has taken an inordinately long time to complete an ordered divestiture in a previous case.[103]

D. Monitoring Trustees May Be Required

A monitoring trustee may be required when technical expertise unavailable within the Division is critical to an effective divestiture. Alternatively, one may be required when there is an unusually high burden associated with monitoring compliance with a decree, for example in the case of a complex global asset carve-out that requires an extended transition period, and that burden is more appropriately borne by the parties than the taxpayers.[104] A monitoring trustee is responsible for reviewing a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. In a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts.

In all cases the trustee's absolute obligation will be to the Division, while the parties will be responsible for compensating the trustee.

E. Restraints on the Resale of Divestiture Assets Ordinarily Will Not Be Required

Although the Division will insist that the purchaser have both the intention and ability to compete in the market for the foreseeable future, the Division generally will not include in the decree a provision that requires that the assets, once successfully divested, continue to be employed in the relevant market indefinitely. Conditions change over time, and the divested assets may in the future be employed more productively elsewhere. The decree should, however,

[103] *Cf*. Competitive Impact Statement at 4 and 11-12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestitures within 30 days in part because the bankrupt seller faced imminent liquidation).

[104] United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019); Competitive Impact Statement at 27-28, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

prohibit defendants from reacquiring or otherwise exerting control over the assets ordered to be divested.[105]

The market for corporate control is imperfect. In unusual cases, an unfit, poorly informed potential purchaser may overbid and win the divestiture assets. The Division is not able consistently to foresee and correct faulty market outcomes. Also, even when in retrospect the market for corporate control has made a mistake, the market itself tends to correct the mistake as long as the purchaser is free to resell the divestiture assets to the firm capable of operating them most efficiently in the relevant market. Therefore, the Division will not attempt to limit the purchaser's ability to resell the divestiture assets, although the purchaser's business plan should indicate its commitment to competing in the relevant market. If, however, the purchaser plans to sell the divestiture assets promptly after acquiring them, any such plan must be disclosed to the Division.[106]

Although restraints on the resale of divestiture assets ordinarily will not be required, they may be warranted in unusual circumstances. For example, if the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would lessen competition, it may seek to limit the purchaser's ability to sell those assets to such an entity. Alternatively, a requirement that the purchaser notify the Division if it sells the divestiture assets may be warranted in cases where the industry is highly concentrated, there are few acceptable divestiture buyers, and the Division has an interest in preventing the purchaser from quickly reselling the assets, and thereby undermining the effectiveness of the remedy. Such a provision may require joining the purchaser as a party to the decree.

There may be circumstances in which the merging firm will be permitted to limit a licensee's further licensing of divested intangible assets. For example, if the remedy includes the right to use a particular brand name in the relevant market but not elsewhere, and the value of the brand name elsewhere is both significant and reasonably dependent on how it is used in the relevant market, the merging firm may have a legitimate interest in limiting the licensee's ability to re-license the brand name rights.

F. Prior Notice Provisions May Be Appropriate

Prior notice provisions require the merged firm to report otherwise non-reportable deals to the Division. Prior notice provisions may be required when there are competitors to the parties whose acquisition would not be reportable under the Hart-Scott-Rodino Act, and when market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction.

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[105] This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture. The typical term of Division merger decrees is 10 years. The decree may, however, permit the merging firm in limited circumstances to retain rights to intangible assets. *See* discussion *supra* Section III.A.5.

[106] To be sure, the Division always should ask whether the divestiture purchaser has any agreements, plans, or intention of selling any part of the divestiture assets.

G. The Decree Must Bind the Entities Against Which Enforcement May Be Sought

For a decree to be effective, it must bind the parties needed to fulfill the objectives of the consent decree. Both parties to the transaction are generally named defendants even if only one will be making the required divestitures.[107] Furthermore, the decree should include language to bind the defendants' successors and assigns, so that a defendant cannot sell its interest in the assets to be divested before divestiture, thereby frustrating the sale of the divestiture package to the approved purchaser. If it is anticipated that a non-party to a decree could be instrumental to its enforcement, consideration should be given to joining that entity as a party,[108] or otherwise obtaining its agreement to be bound by the decree. For example, in some circumstances the purchaser may be subject to certain commitments in the decree, and therefore should be named as a party so that it will be bound by the decree.[109] If other non-parties are needed for effective enforcement, the decree should require that the non-party be given actual notice of the decree.[110]

H. The Consent Decree Must Provide a Means to Investigate Compliance

Consent decrees must include provisions allowing the Division to monitor compliance. For example, they may require defendants to submit written reports and permit the Division to inspect and copy all books and records, and to interview defendants' officers, directors, employees, and agents as necessary to investigate any possible violation of the decree. Division decrees also may require firms to regularly provide to the Division certain data useful for the Division's decree oversight or to self-report decree violations or allegations of violations. Although civil investigative demands may be issued to investigate potential violations,[111] access

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[107] Naming both parties to the transaction as defendants increases the likelihood that (a) the assets to be divested are maintained as separate, distinct, and saleable until they are transferred to the purchaser, (b) the assets to be divested are actually divested, and (c) the Division can obtain appropriate relief in the event the court does not accept the decree or later orders revisions.

[108] 15 U.S.C. § 25; Fed. R. Civ. P. 19.

[109] Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] is appropriate because, after extensive analysis, the United States has determined that BASF is a necessary party to effectuate complete relief; the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on BASF to ensure that the divestitures take place expeditiously and that BASF and Bayer reduce entanglements as quickly as possible after BASF acquires the Divestiture Assets."); Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

[110] The parties' agents and employees, and others who are in active concert or participation with the parties, their agents, or their employees, will be bound by the decree so long as they receive actual notice of the order. *See* Fed. R. Civ. P. 65(d).

[111] 15 U.S.C. §§ 1311(c), 1312(a).

terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

I. Consent Decrees Must Include Standard Provisions Allowing Effective Enforcement

Consent decrees must include several standard provisions designed to improve the effectiveness of the decree and the Division's ability to enforce it. First, in a decree enforcement proceeding, the Division may establish the violation and the appropriateness of any remedy by a preponderance of the evidence. Second, if a court finds that a party has violated the consent decree, the Division may apply to the court for a one-time extension of its term. Third, the Division may terminate the decree upon notice to the court and the parties that the remedy is complete and continuation of the decree is no longer necessary or in the public interest. The fourth provision governs the interpretation of the decree, and provides that courts can enforce any provisions that are stated specifically and in reasonable detail, whether or not they are clear and unambiguous on their face. The final provision requires the parties to reimburse the Division for the costs it incurred in connection with a successful enforcement effort.

VII. Consent Decree Compliance and Enforcement

It is incumbent upon the Division, pursuant to its responsibility to the public interest, as well as to the court in the case of a consent decree, to ensure strict implementation of and compliance with the agreed-upon remedy. The Division will commit substantial resources to monitor parties' implementation of and compliance with the remedy and will not hesitate to bring actions to enforce consent decrees, typically through the use of civil or criminal contempt proceedings.[112]

A. The Office of the Chief Legal Advisor Oversees Compliance and Enforcement

It is essential to the Division's mission that all merger remedies are strictly enforced. Even the most appropriately tailored remedy is of little value if it is not enforced. The organization of the Division's enforcement efforts seeks to combine case- and industry-specific expertise with specialized remedy expertise. To ensure that the enforcement of merger remedies is rigorous and benefits from learning across the Division, the evaluation of and oversight over all Division remedies resides in the Office of Decree Enforcement and Compliance, which reports to the Office of the Chief Legal Advisor. The Office of Decree Enforcement and Compliance directly oversees the litigating sections' ongoing review of decree compliance and evaluation of potential decree violations and makes recommendations to the Assistant Attorney General. By concentrating remedy expertise in the Office of the Chief Legal Advisor, the Division can efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness. The Office of Decree Enforcement and Compliance, as

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[112] Non-parties are not permitted to enforce Division decrees. The court in New York v. Microsoft Corp., 224 F. Supp. 2d 76, 181 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft, 373 F.3d 1199 (D.C. Cir. 2004), likewise noted that "non-parties should not be allowed direct access to the enforcement mechanisms." *See also* Massachusetts v. Microsoft, 373 F.3d at 1243-44.

supported with appropriate assistance by lawyers and economists with industry expertise assigned to a particular matter, oversees the Division's decree compliance efforts.

B. The Division Will Ensure that Remedies Are Fully Implemented

The Division will devote appropriate resources, both before and after a decree is entered, to ensure that the decree is fully implemented. The specific steps necessary to ensure compliance with a decree will vary depending on its nature. For a divestiture decree, staff will closely monitor the sale, including reviewing (a) the sales process, (b) the financial and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationship will inhibit the purchaser's ability or incentive to compete vigorously.

Where a decree requires affirmative acts, such as the submission of periodic reports, Division staff will determine whether the required acts have occurred and evaluate the sufficiency of compliance. With respect to decrees that prohibit certain actions, staff may also conduct periodic inquiries to determine whether defendants are observing the prohibitions.[113]

C. Contempt Proceedings to Enforce Consent Decrees

If the Division concludes that a consent decree has been violated, it will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose—compelling compliance with the court's order or compensating the complainant for losses sustained.[114] Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.[115] Criminal contempt is not remedial—its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.[116] Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a

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[113] Use of special masters for Division decree enforcement is disfavored, Fed. R. Civ. P. 53(b); New York v. Microsoft Corp., 224 F. Supp. 2d at 179-82.

[114] *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-30 (1994); IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973).

[115] *See, e.g.,* United States v. United Mine Workers of Am., 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies may also be available (for example, compensation for harm or disgorgement of profits as a proxy for harm). *In re* General Motors Corp., 110 F.3d 1003, 1019 n.16 (4th Cir. 1997); *see also* Settlement Agreement and Order, United States v. Cal Dive International, No. 1:05-cv-02041 (D.D.C. 2007) (requiring disgorgement of profits after the merging parties delayed divesting assets as required in the consent decree; the delay enabled the merging parties to continue to profit from the divestiture assets, which were in high demand because they were being used in clean-up efforts following Hurricanes Katrina and Rita).

[116] A criminal contempt proceeding may be instituted by indictment, *see* United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, *see* United States v. Gen. Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961).

reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed.[117] The penalty may be a fine, imprisonment, or both.

The Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.[118] In some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment.[119]

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[117] *See, e.g.*, United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993) ("There are three essential elements of criminal contempt under 18 U.S.C. § 401(3): (1) there must be a violation, (2) of a clear and reasonably specific order of the court, and (3) the violation must have been willful. United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987). The Government carries the burden of proof on each of these elements, and the evidence must be sufficient to establish guilt beyond a reasonable doubt."); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000).

[118] *See, e.g.*, *Work Wear Corp.*, 602 F.2d at 115-16; United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974); United States v. Morton Plant Health Sys., Inc., 2000 WL 33223244 (M.D. Fla. July 14, 2000); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000); United States v. FTD Corp., 1996-1 Trade Cas. ¶ 71395, 1995 WL 864082 (E.D. Mich. 1995); United States v. N. Suburban Multi-List, Inc., 516 F.Supp. 640 (W.D. Pa. 1981). *See also* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52 (D.C. Cir. 1993).

[119] *See, e.g.*, United States v. CBS Inc., 1981-2 Trade Cas. ¶ 64227, 1981 WL 2123 (C.D. Cal. 1981).

The FTC's Merger Remedies 2006-2012

A Report of the Bureaus of Competition and Economics

January 2017

FEDERAL TRADE COMMISSION

Contents

I. Introduction

In the late 1990s, FTC staff embarked on what, at the time, was the first effort by an antitrust enforcement agency to evaluate systematically its merger remedy program. Staff evaluated 35 horizontal merger orders that the Commission issued from 1990 through 1994, relying on a case study method. In 1999, the Bureau of Competition issued its report concluding that "most divestitures appear to have created viable competitors in the market of concern to the Commission."[5] Although there was some criticism at the time that the 1999 Divestiture Study had not gone far enough in assessing the competitive effectiveness of the remedies, the idea of evaluating past orders was generally well received. Since then, antitrust enforcement agencies in other jurisdictions have conducted similar studies with largely similar results.[6]

The Commission made several changes in its merger remedy policies and practices in large part due to the findings of the 1999 Divestiture Study. For example, the Commission began requiring upfront buyers[7] for divestitures of less than an ongoing business[8] or assets that raised particular risks of deterioration pending divestiture. The Commission also shortened the default divestiture period for post-

[5] 1999 Divestiture Study at 8. "The Study was not designed to conduct a complete competitive analysis of the relevant markets or draw definitive conclusions about how any of the markets are performing. Instead, it attempted to draw conclusions about whether the buyer of the divested assets was able to enter the market and maintain operations." *Id.* at 9.

[6] DG Competition of the European Commission, MERGER REMEDIES STUDY (2005), http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf; UK Competition & Markets Authority, UNDERSTANDING PAST MERGER REMEDIES: REPORT ON CASE STUDY RESEARCH (updated July 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448223/Understanding_past_merger_remedies.pdf; and Competition Bureau of Canada, COMPETITION BUREAU MERGER REMEDIES STUDY (2011), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-merger-remedy-study-summary-e.pdf/$FILE/cb-merger-remedy-study-summary-e.pdf.

[7] The "buyer" is the entity that the Commission approves under its order to acquire divested assets. An "upfront buyer" is a buyer named in the proposed order after that buyer has negotiated a transaction agreement with the respondent and the Commission has approved that buyer and the terms of the transaction.

[8] The 1999 Divestiture Study described assets comprising an "ongoing business" as follows:

> [T]he assets include most typically an established customer base, a fully staffed facility of some sort (a manufacturing facility or a retail operation) or an otherwise self-contained business unit that may have product contract packed, a manufacturing and/or sales force, perhaps a research and development team, and other assets that are included in the business, including ancillary agreements and third-party contracts. This type of divestiture should result in the almost immediate transfer of market share from respondent to buyer. Most of the packages of assets labeled as "on-going businesses" had not, however, actually been operated as autonomous businesses before the divestiture; nevertheless, they were characterized this way because the market share attributed to the assets could be transferred immediately and potentially for the long-term. A buyer could buy and be operational the next day, selling to all of the same customers.

1999 Divestiture Study at 11. The present study uses the same criteria to define an ongoing business.

order buyers,[9] from a year or more to six months or less, and started appointing independent third parties more often to monitor complex remedies or those in highly technical industries. In addition, the Commission staff began interviewing buyers of divested assets six months to a year after the divestitures to discuss their progress and any issues that might have arisen.

Early in 2015, the Commission decided to evaluate the impact of the changes implemented since the 1999 Divestiture Study and to conduct another merger remedy study. The Commission designed the study to be more comprehensive in scope and broader in analysis than the 1999 Divestiture Study. As required by the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*., the Commission sought public comment and approval from the Office of Management and Budget ("OMB"). OMB approved the project in August 2015.[10]

The study relied in large part on the willingness of market participants—respondents,[11] buyers of divested assets, other competitors, and customers—to share their experiences with the Commission's remedies and their impact on competition in the relevant market. During the study, over 200 market participants shared with staff their thoughts and observations.[12] To protect the confidentiality of the information discussed during those interviews and submitted to the Commission, this report does not contain any confidential information or identify the parties from whom information was received.

This study encompassed all 89 orders issued by the Commission from 2006 through 2012 in order to remedy the anticompetitive effects of a proposed or consummated merger.[13] For purposes of analysis, staff divided these 89 orders into three groups based, in large part, on the degree of experience the Commission has with the affected industry.

- Commission staff evaluated 50 of the orders—involving the broadest range of industries—using a case study method that relied on interviews of market participants and sales data. Staff

[9] A "post-order buyer" is a buyer of divested assets approved by the Commission following the issuance of a divestiture order. As with upfront buyers, the Commission will set a deadline by which the divested assets must be transferred.

[10] Office of Management and Budget Control No. 3084-0166.

[11] This report uses the term "respondent" to refer to the parties to a merger order. Although the FTC also has the authority to obtain merger remedies in federal court, where a party to the order would be referred to as the "defendant," *see, e.g.*, *St. Alphonsus Med. Ctr.-Nampa, Inc.*, *et al. v. St. Luke's Health Sys.*, *et al.*, 778 F.3d 775 (9th Cir. 2015), all of the merger orders included in the study were issued by the Commission.

[12] Participation in the interviews was voluntary, and the rate of participation was high. Staff interviewed 193 market participants, including 42 respondents, 46 buyers, 49 additional competitors, and 56 customers. Staff also interviewed 14 monitors. Overall, about two-thirds of the proposed interviewees agreed to an interview: 80% of the merged firms, nearly 90% of the buyers, 80% of other competitors, and 45% of customers. In addition, well over half of the buyers that received questionnaires responded to them. The study relied, in large part, on the information obtained in these interviews and from the responses to the questionnaires. The staff appreciates the willingness of all parties who agreed to participate in the interviews and who responded to the questionnaires.

[13] Ninety-two merger orders were first identified, and that number was used in the Federal Register Notice, dated January 16, 2015, requesting comments on the proposed study. Upon further examination, however, staff determined that three of those 92 orders related to mergers that were abandoned for business or other reasons and were thus dropped from the study.

interviewed not only buyers and respondents, as had been done in the 1999 Divestiture Study, but also selected competitors and customers. For these orders, the Commission also went beyond the 1999 Divestiture Study by requesting seven years of sales data from significant market competitors and by compiling market shares based on that data.

- Staff evaluated another 15 orders involving industries with which the Commission is well familiar—supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities—using responses to voluntary questionnaires sent to the buyers. The questionnaires focused on several issues that had arisen in prior divestitures in these industries, such as the scope of the asset package and the due diligence process.

- The final 24 orders reviewed involved the pharmaceutical industry, another industry about which the Commission is knowledgeable. These orders were evaluated based on internal expertise, information, and data, as well as information obtained from publicly available sources.

This report focuses primarily on the learning from the case studies, which delved more deeply into the implementation and outcome of the remedies reviewed than the other two parts of the study.[14] The study concluded that most of the remedies in the case studies successfully maintained or restored competition in the identified relevant markets. Section IV.C. explains the criteria for evaluating success and discusses the results of that analysis. The study also identified the concerns interviewees raised about certain aspects of the remedy process, which the Commission has already begun to address. This report summarizes those concerns below and discusses them in more detail in Section IV.D.

The study found that all remedies involving divestitures of assets comprising ongoing businesses succeeded, confirming that such divestitures are most likely to maintain or restore competition. The study also revealed that buyers of less than an ongoing business—buyers of "selected assets"—did not always succeed at maintaining competition, suggesting that the more limited scope of the asset package increases the risk that a remedy will not succeed. The study showed that, even with an upfront buyer, the Commission has not always eliminated the risk associated with divestiture of more limited asset packages.[15] Therefore, proposals to divest selected assets generally warrant more detailed Commission examination.

The 1999 Divestiture Study revealed that respondents sometimes may have proposed buyers that, though marginally acceptable, were less likely to provide robust competition. The new study showed that respondents in most cases proposed buyers likely to fully satisfy the Commission's criteria for strong, viable competitors. But because the success or failure of a divestiture depended, in part, on whether the buyer had adequate funding commitments to ensure success, the Commission will examine more closely, among other things, the source of the buyer's financing, its plans if the transaction does not

[14] The case study findings are consistent with the findings of the other two parts of the study. The results compiled from responses to the questionnaires and review of pharmaceutical orders are summarized in Sections V and VI, respectively.

[15] The reason, of course, that the Commission is concerned about the success of a remedy in restoring or maintaining competition is to protect customers and ultimately end consumers. If a divestiture remedy fails, customers and consumers would likely be harmed.

meet its financial goals, what it has done in other instances when acquisitions have not met financial goals, and related issues.

For their part, most buyers appeared to understand the Commission's remedy process and expressed satisfaction with how it transpired. Some buyers, however, raised concerns about the limited time available for due diligence and the lack of access to respondents' facilities and employees. Although upfront buyers raised this concern more frequently than post-order buyers, several post-order buyers raised it as well. In some cases, the lack of access to facilities and employees during the due diligence process may have delayed the buyers' ability to compete in the relevant markets or increased the buyers' costs.

Some buyers identified unforeseen complexities in transferring "back-office" functions related to the divested assets,[16] regardless of whether the divested assets included those functions or the buyers developed them internally or obtained them from third parties. When respondents did provide those functions on a transitional basis until buyers could perform them on their own, some buyers believed the length of the transition services agreements was too short. In several cases, buyers took longer to transition away from respondents' information technology systems than anticipated, requiring a longer period of transition services than specified in, or available via, the orders.

In addition, some buyers raised questions about the length of supply agreements. Although extensions of supply agreements may not always be warranted, providing mechanisms for extending them may be helpful to accommodate unanticipated complexity in the limited cases where buyers need a temporary extension. Both respondents and buyers raised concerns about the operation of assets that respondents are sometimes required to hold separate from the remainder of their operations pending their divestiture and the role of the hold separate managers typically appointed in orders to hold separate.

Finally, despite the Commission's efforts since the 1999 Divestiture Study to encourage buyers to reach out to staff if they encounter difficulties, it appeared that buyers continue to be reluctant to bring issues to the attention of staff or the monitors when they arise.

The concerns identified by buyers did not necessarily affect the ability of any particular buyer in the study to maintain or restore competition, but they represent potential gaps and risks that may adversely affect merger remedies. Addressing these concerns does not require a change in the Commission's overall approach to remedies. It does, however, necessitate enhanced staff scrutiny, including asking additional questions of respondents and proposed buyers, and, in some instances, increased monitoring of the overall divestiture process. In certain cases, addressing these concerns may also require different order language. The Best Practices section at the end of this report describes the additional steps staff is now taking as part of the Commission's remedy process and provides information to respondents and buyers regarding additional issues they should consider during the course of the remedy process.

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[16] "Back-office" functions refer to a variety of support functions such as legal, finance, accounting and tax, risk, insurance, environmental services, and human resources (and includes related personnel and books and records). They also encompass information technology systems and databases, used in connection with warehousing, sales, production, and inventory databases, as well as controls, processing, and operations software.

Sections II-VI omitted

VII. Best Practices

Incorporating learning from the study, these best practices describe what respondents and proposed buyers can expect during the remedy process. While not exhaustive, they specifically respond to concerns raised during the study and incorporate suggestions made by buyers, respondents, and monitors. They do not reflect significant changes to the Commission's current practice, but rather further refine the Commission's approach to remedies and the remedy process. In particular, the aim is to make clear to respondents and buyers what they will be required to do and show as the Commission evaluates proposed remedy proposals. Respondents proposing a remedy must demonstrate that the proposal will solve the likely competitive problem identified by the Commission. The Commission will not accept a remedy unless it determines that the remedy will address the competitive harm caused by the merger and serve the public interest.

A. Defining the Asset Package

1. Scope of Asset Package

Divestitures of selected assets in the study, even with upfront buyers, succeeded less often and raised more concerns than divestitures of ongoing businesses. This confirms the Commission's preference for divestitures of ongoing businesses. When parties propose divestiture of an ongoing business, the Commission must confirm that all aspects of an ongoing business are being divested. The respondent should:

- explain how the proposed business contains all aspects needed for it to operate on its own;
- explain how a buyer can acquire the ongoing business and begin competing right away;
- identify at least three potential buyers that it believes are interested and approvable if it proposes to divest an ongoing business in a post-order divestiture; and
- be aware that staff will talk with potential buyers and other market participants.

While parties may propose a divestiture of selected assets rather than a divestiture of an ongoing business, the Commission will accept such a proposal only if the respondent and the buyer demonstrate that divesting the more limited asset package is likely to maintain or restore competition. In a merger where the respondent proposes a selected asset divestiture as a remedy, the respondent should:

- explain why an alternative ongoing business divestiture is inappropriate or infeasible;
- demonstrate how the selected assets can operate as a viable and competitive business in the relevant market;
- explain what aspects of an ongoing business are excluded from the package and, for each aspect that is excluded, how a proposed buyer would be able to address that gap, at what cost, and how quickly; and
- provide the buyer with adequate time and access to employees, facilities, and information to conduct due diligence.

Where the respondent proposes a selected asset divestiture, a proposed buyer will need to demonstrate that it will be able to compete effectively in all affected relevant markets without all of the assets relating to an ongoing business. The buyer should:

- explain how it plans to maintain or restore competition with a selected asset package;
- assess what additional assets and services it will need to operate the selected assets as a viable and competitive business in the relevant market;
- explain how it will obtain these additional assets and services, at what cost, and how quickly; and
- document its cost and time estimates to obtain these additional assets and services.

The Commission will accept only a divestiture package that it deems sufficient to enable a buyer to maintain or restore competition. Accordingly, a proposal to divest selected assets as a remedy may need to include, for example, assets relating to complementary products outside of the relevant market; manufacturing facilities, even if the facilities also manufacture products outside of the relevant market; or use of applicable brands or trade names. The Commission may also require the respondent to engage in certain other conduct, including, for example, facilitating the transfer of customers. If the Commission determines that a proposed asset package is inadequate to restore or maintain competition, it may consider alternative settlement proposals or seek to block or undo the merger.

2. Transfer of Back-Office Functions

The provision of back-office functions that relate to the product market and the assets being divested is often more important and more complicated than parties anticipate. Those functions must be assessed to determine whether a proposed buyer can perform them on its own or if they are otherwise easily obtainable. If a proposed buyer does not already have the capability to perform the functions itself or will not be able to access them through, for example, third parties, then the respondent will be required to provide them on a transitional basis. If the buyer does not have access to them because they are specialized and not readily available from third parties, then the respondent will have to divest the assets relating to the provision of these functions. Even if the respondent must divest assets that provide these functions, there may be a transitional period while the respondent is completing the transfer of the assets to the buyer, during which the respondent may be required to provide those services to the buyer while the buyer integrates the assets.

The successful transfer of these back-office functions is often essential for a divestiture buyer to compete in the affected market. To help assess the scope of back-office functions that the buyer will need and to ensure that the buyer has these functions, the respondent should:

- explain to staff and the buyer all back-office functions related to all relevant products, as well as all necessary personnel and documentation;
- ensure that the proposed buyer can conduct adequate due diligence to understand what back-office functions will be needed and the complexities involved in the transfer of such functions;
- make its information technology employees available to discuss and plan the transfer of the back-office functions with the buyer; and
- provide back-office functions to the buyer as needed on a transitional basis for a period sufficient to allow the buyer to transition all services, at no more than respondent's cost.

The buyer should:

- explain to staff the scope of back-office functions it will need to support the asset package and how it will provide or obtain these functions and at what cost; and
- explain the length of time it will need transition services and its options if the transition takes longer than expected.

B. Reviewing the Proposed Buyer

In general, the study revealed that respondents appeared to understand the remedy process and usually proposed approvable buyers. When proposing a buyer to staff, the respondent should:

- explain to staff how it selected the proposed buyer;
- share with staff any offering memoranda or other documents it intends to provide to potential buyers, prior to distribution; and

- be aware that staff will talk to potential buyers as well as other market participants.

In its communications with staff, the proposed buyer should:

- identify all sources of financing for the acquisition of the divested assets, including private equity or other investors, and explain the criteria it used for evaluating such sources;
- explain how it, and all entities providing financing for the transaction, reviewed and evaluated the transaction and formed the basis for authorizing it;
- provide detailed financial and business plans, with supporting documentation, to demonstrate its competitive and financial viability;
- explain the underlying assumptions of its financial and business plans, including contingency plans if sales and other financials do not meet projections;
- make management, sales and marketing representatives, and accounting and other representatives available to staff;
- explain the structure of the funding for the investment, including any limitations of the funds; and
- make representatives from the entities providing financing available for discussions with staff.

C. Implementing the Remedy

Some buyers raised concerns about implementation of the remedy. Some of these concerns could have been allayed with more time to conduct thorough due diligence. Other concerns included difficulty attracting and retaining customers, the length of transition services and supply agreements, and the operation of hold separate orders.

1. Due Diligence

The respondent should provide adequate opportunity for the buyer to conduct due diligence. Specifically, the respondent should:

- provide access to information, facilities, and employees at least to the extent it would in a typical arm's length transaction;
- provide staff information regarding the extent to which the buyer has taken advantage of due diligence opportunities;
- provide direct access to key employees who are identified in the order;
- if the acquired firm's assets are being divested to an upfront buyer, provide the upfront buyer direct access to the acquired firm's information, facilities, and employees; in this circumstance, the upfront buyer should not be required to work through the respondent's representatives; and
- in the case of a post-order buyer, provide the post-order buyer direct access to the hold separate business, including the hold separate monitor and the hold separate manager.

The buyer should ensure that it takes advantage of the due diligence process and conducts adequate due diligence. In particular, the buyer should:

- provide staff information regarding the specific due diligence efforts it undertakes and any concerns about any aspect of the diligence process;
- in the case of an upfront divestiture, access the acquired firm's information, facilities, and employees, directly, without going through the respondent's representatives; and
- in the case of a post-order divestiture, access the hold separate business, including the hold separate monitor and the hold separate manager directly, pending divestiture to a post-order buyer.

2. Customer and Other Third-Party Relationships

Some buyers in the study had difficulty attracting and retaining customers, while others stepped into complicated third-party relationships. Respondents and buyers should be prepared to take certain steps to facilitate the transition in these relationships. The respondent should:

- provide the buyer access to customers, and relevant third parties, early in the process;
- inform customers of the divestiture, of the buyer's identity, and, if applicable, of their right to terminate their contracts with the divesting firms, incorporating input from the buyer into such communication;
- when customer contracts are assignable, assign customer contracts to the buyer;
- when customer consent is required to assign contracts, take steps to assist the buyer in obtaining those consents, including encouraging customers to consent;
- when required, waive contract restrictions that prevent customers from switching to the buyer and allow customers to terminate their contracts early and without penalty; and
- assist the buyer in obtaining any necessary governmental and other regulatory approvals.

The buyer should:

- take advantage of its access to all third parties involved, including customers, suppliers, landlords, and others;
- review and understand customer and other third-party relationships, including customers' buying patterns, customer brand and product loyalty, and customer switching costs; and
- when the order allows customers to terminate their contracts with the respondent, provide input into the respondent's communication with the customers that informs customers of such right.

3. Transition Services Agreements

As discussed above, the respondent should be prepared to provide back-office and other functions for a limited period until the buyer can provide them itself. The respondent will be required to provide those services pursuant to an agreement between the respondent and the buyer that the Commission has approved and that the Commission will monitor. The respondent will be required to:

- provide transition services for a sufficient period until the buyer can perform these services on its own, at no more than respondent's costs, which respondent will be required to document;
- enable the buyer to extend the agreement for a reasonable period, when appropriate;
- enable the buyer to terminate such agreement early, without financial penalty; and

- provide for monitor oversight, when necessary.

The study found that buyers seek to end their reliance on respondents' transition services quickly. Despite this, a few buyers needed the full term of the agreements and one needed the transition services agreement extended beyond what was provided by the order. The buyer should thus keep staff apprised of its progress in transitioning services from the respondent.

4. Supply Agreements

As with transition services agreements, the Commission seeks to minimize the length of time that buyers rely on respondents. The study confirmed that buyers are also wary of relying on respondents for supply of product or inputs. At the same time, supply agreements can be critical, enabling buyers to enter the affected markets quickly. To provide a buyer with supply of product or input for a sufficient period, but not so long as to diminish the buyer's competitive incentives, a respondent will be required to:

- provide supply for a term that extends at least for the length of the product qualification process or the time needed to enable the buyer to manufacture the product on its own or obtain the inputs; and
- allow for an extension when it is clear that the buyer needs additional supply on a transitional basis.

The buyer should keep staff apprised of its progress in transitioning off the supply agreement.

5. Hold Separates

Where there is a need for a hold separate, the assets to be divested are vulnerable to growing stale and the possibility that competitors may make potential inroads during the hold separate period. The hold separate manager, typically experienced in operating the assets, is critical to the success of the ongoing business during the hold separate period. To help the hold separate assets stay competitive during this period, the respondent should:

- allow the hold separate manager open and direct access to staff, independent of the respondent and respondent's counsel; and
- authorize hold separate managers to respond to competitive pricing in the market, maintain levels of production that best position the business to compete in the long term, implement all planned capital investments, and otherwise compete in the market.

The respondent and hold separate monitor should work with staff, beginning as early as possible, to ensure that hold separate operations can be structured efficiently and effectively.

D. Orders in the Pharmaceutical Industry

To ensure the success of divestitures in the pharmaceutical industry, the respondent should:

- divest the easier-to-divest product wherever possible, such as products already made at a third-party manufacturing site;

- provide complete information upfront to the proposed buyer so that the buyer can be prepared to step into the respondent's place with key customers, including regarding any production problems or supply chain issues and more in-depth sales and costs figures;
- work with the proposed buyer to develop a comprehensive technology transfer plan and identify specific employees to oversee respondent's transfer to the new manufacturing facility; and
- retain a Commission-approved monitor prior to entry of the order to facilitate development of the technology transfer plan.

The proposed buyer should identify any necessary third-party contract manufacturers for divested products that the buyer will not manufacture in its own facilities, and provide detailed business plans for investment in products in development, including internal hurdle rates.

E. Communication

Communication with staff is critical at every stage of the remedy process. A buyer, or any other affected party, should bring issues or concerns to the attention of the staff or the monitor as soon as they arise. A buyer should:

- stay in contact with staff and the monitor, if appointed; and
- raise issues as they arise with staff or the monitor.

Respondents should be aware that staff will remain in contact with buyers at least until the respondents have fully divested all required assets and have provided all required supply and transitional services.

Settlements without Consent Decrees ("Fix it First")

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 1, 2021

Major International Automotive-Parts Suppliers Restructure Deal to Resolve Antitrust Concerns

Auto parts supplier Tupy agreed to restructure its acquisition of Teksid after the Department of Justice raised concerns that the merger would result in higher prices and reduced quality and timeliness of production for crucial components used in heavy-duty engines. As initially proposed, the deal would have combined the two most significant suppliers of engine blocks and cylinder heads for heavy-duty engines to customers in North America. These components are key inputs for engines used in large trucks, construction and agricultural equipment, as well as numerous other vehicles.

Under the original agreement, Tupy would have acquired Teksid's entire iron automotive components business from Teksid's parent company Stellantis N.V. The original acquisition included Teksid's plant and other assets in Mexico used to manufacture iron blocks and heads for U.S. automotive customers. Following the restructuring, Tupy will acquire only Teksid's iron operations in Brazil and Portugal. Teksid will retain its iron operations in Mexico and continue to compete with Teksid to supply U.S. customers.

"Tupy's decision to restructure their merger is a victory for American engine manufacturers and consumers," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "I commend our team for their diligence in conducting a thorough investigation, a testament to the division's resolve to enforce the antitrust laws. As originally proposed, the transaction would have eliminated competition that keeps prices low and quality high for vital industries such as transportation and agriculture."

Tupy S.A., a Brazilian company headquartered in Brazil, is the largest supplier of iron blocks and heads for heavy-duty engines to customers in North America. Tupy owns four iron foundries, two in Brazil and two in Mexico.

Teksid S.p.A., an Italian corporation headquartered in Italy, is a wholly-owned subsidiary of Stellantis, a multinational automobile manufacturer headquartered in Amsterdam, the Netherlands. Teksid is the second largest supplier of blocks and heads for heavy-duty engines in North America. Teksid owns iron foundries in Mexico, Brazil, Poland, and Portugal. Teksid is also part of a joint venture that owns an iron foundry in China.

Topic(s):
Antitrust

Press Release Number:
21-618

Component(s):
Antitrust Division

Updated July 1, 2021

MATERIAL FACT

AGREEMENT TO ACQUIRE THE BRAZILIAN AND PORTUGUESE CAST IRON OPERATIONS OF TEKSID

Joinville, July 1st, 2021 – Tupy S.A. ("Company", B3: TUPY3), pursuant to article 157, paragraph 4, of Federal Law 6,404, of December 15, 1976 ("Brazilian Corporate Law") and Instruction 358 of the Brazilian Securities and Exchange Commission, of January 3, 2002, informs its shareholders and the market in general that it entered into an Amendment and Restatement to the Share Purchase and Sale Agreement, dated December 19, 2019, with Stellantis N.V. ("Stellantis" or "Seller"), the successor of Fiat Chrysler Automobiles N.V., and Teksid SpA ("Teksid"), a wholly owned subsidiary of Stellantis, to acquire the Brazilian and Portuguese cast iron components operations of Teksid by way of the acquisition of Teksid's interests in Teksid Iron do Brasil Ltda. and Funfrap-Fundição Portuguesa S.A. ("Transaction").

The Company had announced on 12.19.2019 its agreement to acquire the global cast iron components operations of Teksid. Based on review and input from U.S. competition authorities, the Company and Stellantis agreed to revise the transaction. In addition, the Company has decided that a revised perimeter for the transaction will focus on assets with higher strategic fit. Therefore, the Company will not proceed with the acquisition of Teksid's Mexican, Chinese and Polish operations and Teksid's offices in Italy and in the United States.

The Company will maintain the strategic alliance for global supply with Stellantis, considering the commitments already assumed with the Brazilian antitrust authority.

In 2019, Teksid's cast iron components operations in Brazil and Portugal recorded net revenue of €242 million and EBITDA of €14.4 million. The Enterprise Value for the new perimeter is €67.5 million.

The Transaction has been approved by Company's Board of Directors on July 1st and is expected to be completed in the fourth quarter of 2021.

According to the appraisal elaborated pursuant to article 256, of Brazilian Corporate Law, which will be timely released to shareholders and the market, the Transaction: (a) represents a relevant investment for the Company and, therefore, is subjected to ratification by the General Meeting and (b) grants right of withdrawal to its dissenting shareholders, who abstain or who do not attend the General Meeting. The reimbursement amount will be calculated based on the shareholder´s equity of the Company, calculated on 12.31.2020.

In addition, the Company states that received a communication from BNDES Participações S.A. – BNDESPAR and Caixa de Previdência dos Funcionários do Banco do Brasil – PREVI, which own shares representing 28.2% and 24.8%, respectively of the Company's share capital. BNDESPAR and PREVI have irrevocably committed to approving the Transaction at the Extraordinary Shareholders' Meeting.

Finally, a conference call will be held on July 1, according to the information below to present the Transaction's and its next stages.

Date of the conference call: July 1 , 2021

08h30 – EST

09h30 – BRT

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EUA toll-free: +1 844 204 8942

Brazil dial-in: (11) 3181 8565 / (11) 4210 1803

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