MERGER ANTITRUST LAW

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

Classes 1-2

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Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination. The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will infer, subject to rebuttal evidence, that the merger may substantially lessen competition. In a market that is not highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market. The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete. When a merger creates a firm that can limit access to products or services that its rivals use to compete, the Agencies examine the extent to which the merger creates a risk that the merged firm will limit rivals' access, gain or increase access to competitively sensitive information, or deter rivals from investing in the market.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly. A trend toward consolidation can be an important factor in understanding the risks to competition presented by a merger. The Agencies consider this evidence carefully when applying the frameworks in Guidelines 1-6.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy when applying the frameworks in Guidelines 1-6.

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms when applying the frameworks in Guidelines 1-6.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers. The Agencies apply the frameworks in Guidelines 1-6 to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. The Agencies apply the frameworks in Guidelines 1-6 to assess if an acquisition of partial control or common ownership may substantially lessen competition.

* * *

This edition of the Merger Guidelines consolidates, revises, and replaces the various versions of Merger Guidelines previously issued by the Agencies. The revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy and have been refined through an extensive public consultation process.

As a statement of the Agencies' law enforcement procedures and practices, the Merger Guidelines create no independent rights or obligations, do not affect the rights or obligations of private parties, and do not limit the discretion of the Agencies, including their staff, in any way. Although the Merger Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Merger Guidelines will be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of industries, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.

These Merger Guidelines include references to applicable legal precedent. References to court decisions do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools as they evolve and advance, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Merger Guidelines therefore reference applicable propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities. References herein do not constrain the Agencies' interpretation of the law in particular cases, as the Agencies will apply their discretion with respect to the applicable law in each case in light of the full range of precedent pertinent to the issues raised by each enforcement action.

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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JUSTICE NEWS

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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
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): December 21, 2017

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

As previously announced on the TransDigm Group Incorporated (the "Company") (NYSE: TDG) November 9, 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.

A copy of the December 21, 2017 press release announcing the proposed divestiture of SCHROTH and the Department of Justice's acceptance of this proposal is attached to this Current Report as Exhibit 99.1.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

The following exhibit is being filed with this Current Report on Form 8-K:

99.1	Press Release dated December 21, 2017.

SIGNATURES

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/ Terrance Paradie

Terrance Paradie
Executive Vice President and Chief Financial Officer

Date: December 21, 2017

Exhibit Index

Exhibit No.	Description
99.1	Press Release dated December 21, 2017

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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)

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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*]

[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.

A NOTE ON THE COMMERCE NEXUS IN FEDERAL ANTITRUST CASES

The federal antitrust laws are exercises of Congress's power under the Commerce Clause.[1] That constitutional source matters because the federal antitrust laws do not purport to regulate every business transaction in the United States merely because the transaction has economic significance. Each statute requires a sufficient relationship between the regulated conduct and interstate or foreign commerce.

The Sherman Act reaches the full extent of Congress's Commerce Clause power.[2] The Sherman Act's commerce nexus may be satisfied in either of two ways. The challenged conduct may occur within the *flow of interstate commerce*, or conduct that is local in character may have a *substantial effect on interstate commerce* as a matter of practical economics.[3] It is not necessary that the challenged restraint itself occur in or directly affect interstate commerce. Nor must the plaintiff quantify the precise amount of interstate commerce affected. The plaintiff must, however, identify the relevant interstate commerce and explain the connection between that commerce and the affected local activity. In *McLain v. Real Estate Board of New Orleans, Inc.*,[4] the Court held that allegedly anticompetitive conduct involving local real estate brokerage services satisfied the requirement because those services were intertwined with interstate mortgage financing, title insurance, and secondary mortgage markets.[5] Similarly, in *Summit Health, Ltd. v. Pinhas*,[6] the Court held that an alleged boycott of a single physician sufficiently affected interstate commerce because the restrained hospital services generated out-of-state revenues and the proper inquiry concerned the effect of the restraint if successful.[7]

The commerce nexus must nevertheless be pleaded and proved. A plaintiff cannot merely identify local conduct and presume some unspecified relationship to interstate commerce. The complaint must identify the relevant aspect of interstate commerce and allege the critical relationship between that commerce and the challenged conduct.[8]

Section 7 of the Clayton Act also contains a commerce nexus, but it did not always reach as broadly as the Sherman Act. Before 1980, Section 7 applied only to

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1 *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

2 *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932) (observing that Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it enacted the Sherman Act); *accord* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 111 (1980); *see also* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743 n.2 (1976) (recognizing that the Sherman Act's reach has expanded with the expansion of Congress' commerce power).

3 McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-42 (1980).

4 *Id*.

5 *Id*. at 245-46.

6 500 U.S. 322 (1991).

7 *Id*. at 329-33.

8 *McLain*, 444 U.S. at 241-42 ("[J]urisdiction may not be invoked . . . unless the relevant aspect of interstate commerce is identified.").

acquisitions by persons "engaged in commerce."[9] The Supreme Court construed that language to require that both the acquiring and acquired firms be within the flow of interstate commerce; it was not enough that their activities merely affected interstate commerce.[10]

Congress broadened Section 7 in 1980 by adding the words "or in any activity affecting commerce."[11] Section 7 now applies to acquisitions by persons "engaged in commerce or in any activity affecting commerce" where the acquisition may substantially lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country."[12] The phrase "affecting commerce" ordinarily extends a statute to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[13] Because the Sherman Act already reached the full extent of Congress' commerce power, the 1980 amendment made Section 7's commerce nexus coextensive with the Sherman Act's. The Sherman Act decisions discussed above therefore supply the operative content of the commerce-nexus requirement in Section 7 cases as well.

As a practical matter, therefore, the commerce nexus is rarely disputed in modern domestic merger litigation. Virtually any acquisition of an operating business will involve firms engaged in activities affecting interstate commerce. That is why the leading modern commerce nexus decisions arise under the Sherman Act: contested litigation over the domestic commerce nexus in Section 7 cases is essentially nonexistent. The requirement remains an element that must be alleged and, if contested, proved, but it ordinarily plays no material role in the analysis of whether a merger violates Section 7.

9 Clayton Act § 7, 15 U.S.C. § 18 (1976), *amended by* Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1154, 1157-58; *see also* Transamerica Corp. v. Board of Governors of the Federal Reserve System, 206 F.2d 163, 168 (3d Cir. 1953).

10 *See* United States v. American Building Maintenance Industries, 422 U.S. 271, 283 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).

11 Antitrust Procedural Improvements Act of 1980 § 6(a), 94 Stat. at 1157-58.

12 15 U.S.C. § 18.

13 Russell v. United States, 471 U.S. 858, 860 n.5 (1985) (internal quotation marks omitted).

The Common Law Nature of 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.

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[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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Texas Law Review

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

William F. Baxter

April 1982 Vol. 60 No. 4

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

William F. Baxter*

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 eugrossing, 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).

Goals of Merger Antitrust Law

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 inch1de 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.

. . .

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 Consumer Welfare Debate

DEPARTMENT OF JUSTICE

Ensuring The Legacy of the Consumer Welfare Standard

MAKAN DELRAHIM
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Opening Remarks as Prepared for
The Federalist Society National Lawyers Convention

"The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals"

Washington, DC

November 14, 2019

Thank you all for having me here, in particular to Dean Reuter and the other leaders of The Federalist Society for organizing another fantastic National Lawyers Convention.

The subject of this panel, "The Future of Antitrust," could not be more timely. Antitrust law, in many ways, again appears to be at a crossroads. It has worked its way into public consciousness and debate unlike any time since the *Microsoft* case in the late 1990s. The debate over antitrust law may be even louder today than it was then, as we now have presidential hopefuls campaigning on how they will change or enforce antitrust law.

At the Department of Justice Antitrust Division, we have not shied away from this debate. Indeed, it is imperative that the Executive Branch speak clearly on behalf of the United States regarding questions of antitrust policy, especially when the debate involves foreign antitrust enforcers analyzing the same conduct.

Over the past two years as Assistant Attorney General, I repeatedly hear the same question at conferences and events across the United States and overseas. It is the following: "Is the consumer welfare standard capable of handling new threats to competition, especially in the context of digital markets?"

I have given the same answer each time: Yes, I believe the consumer welfare standard is flexible and adaptable enough for the 21st Century and new business models such as digital platforms. It is incumbent on enforcers and courts to stay up to date with the latest economic thinking and understanding of new markets. That is critical to ensuring that the consumer welfare standard keeps pace with new technologies.

This understanding of the consumer welfare standard—flexible and adaptable—is exactly how Judge Robert Bork and other titans of the Chicago school antitrust revolution intended it. Judge Bork wrote the following in a new epilogue to *The Antitrust Paradox,* fifteen years after it was originally published, "Though the goal of the antitrust statutes as they now stand should be constant, the economic rules that implement that goal should not. It has been understood from the beginning that the rules will and should alter as economic understanding progresses."[1]

Consistent with this understanding, for over forty years, the consumer welfare standard has served as a neutral principle for the administration of the antitrust laws. It focuses enforcers and courts on harm to competition and requires them to evaluate competitive effects. The consumer welfare standard is agnostic to considerations other than the actual competitive process.

Drawing the line in this manner is crucial. Otherwise, enforcers or courts would be placed in the powerful and awkward position of deciding whether a pro-consumer practice nevertheless violates antitrust law because it offends a non-competition value, like free speech.

Justice Robert H. Jackson—another antitrust visionary—understood this concern well, and emphasized the need for neutral principles of antitrust enforcement forty years before Robert Bork helped supply them. In a 1937 speech entitled *Should the Antitrust Laws Be Revised?*, then-Assistant Attorney General Jackson argued: "What is needed is the establishment of a consistent national policy of monopoly control, intelligible to those expected to comply with it and those expected to enforce it."[2] Jackson warned that "the only probable alternative" to a consistent national policy favoring competition is "government control" of industry.[3]

What does the future hold for the consumer welfare standard? That is up to us.

No policy—no matter how sound—is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won't mention specific examples, but we

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[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 430 (1993 ed., orig. 1978).
[2] Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937), *available at* https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/.
[3] *Id.* at 577.

have seen this playbook when federal courts "interpret"—or more accurately, rewrite—the law in head-scratching ways, and when agencies issue new regulations that strain the statutory text.

Some reformers now seek to bring this playbook to the domain of antitrust law, which if read broadly could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains in efficiency, and other procompetitive outcomes for consumers. Antitrust law may be particularly vulnerable to hasty change given its "common law" status and evolution in light of advancements in economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made.

What can practitioners, academics, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as "Hipster Antitrust," because advocates for abandoning the consumer welfare standard invoke a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one's opponents only goes so far. Winning an economic debate goes further, but not far enough: the modern antitrust reform movement is less concerned about economic soundness than it is about results.

That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don't act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don't use our scalpel, we shouldn't be surprised to see the reformers sharpening their axes.

Second, and more importantly, I believe that the consumer welfare standard will survive the winds of change if we prove that *it works*. Antitrust law must live up to its promise of protecting competition and consumers. That requires enforcers to think creatively and act vigorously.

In particular, enforcers must answer critics of the consumer welfare standard who wrongly assert that it is concerned only with price effects. That has never been the case. For decades, courts interpreting the Sherman and Clayton Acts have recognized harms to competition in the form of lower output, decreased innovation, and reductions in quality and consumer choice.

Indeed, the harm asserted by the government in the *Microsoft* case took the form of reduced innovation and consumer choice. The D.C. Circuit recently affirmed this innovation-centric approach in its *AT&T/Time Warner* opinion. Despite the district court's factual findings in that case, the circuit court's opinion was favorable to future enforcement actions in several respects. Among others, the court recognized that harm to competition extends "beyond higher prices for consumers, including decreased product quality and reduced innovation."[4] The court's legal analysis will help us when we bring our next case alleging non-price effects as competitive harm.

To be sure, price effects are easiest to quantify and may be an effective way to appeal to a skeptical judge or jury. They are not, however, the exhaustive means of proving an antitrust violation. Instead, we should focus our energy on understanding the broader set of effects that may result from anticompetitive behavior or transactions.

Ultimately, I believe that antitrust law and the consumer welfare standard will survive the winds of proposed reform, in much the same way Judge Bork envisioned it. It is up to us, however,

[4] United States v. AT&T Inc., 916 F.3d 1029, 1045 (D.C. Cir. 2019).

to keep the foundation steady through vigorous action to protect competition and the American consumer.

Thank you again, and I look forward to our discussion.

UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

Remarks of Chair Lina M. Khan
As Prepared for Delivery
Fordham 50th Annual Conference on
International Antitrust Law & Policy

September 22, 2023

Good morning, everyone. Thanks so much for the introduction—it's great to be here.

Each year this conference does a terrific job of convening a vibrant group of enforcers, practitioners, and leading academic thinkers from across the international community. The opportunity for shared learning here is tremendous—especially as we in the United States are at the forefront of a broader reassessment of antitrust policy and enforcement.

One key area of reassessment has been our merger enforcement program.

Over the last decade, we've heard mounting concerns about inadequate competition across key markets in the U.S. economy. Evidence suggests that decades of mergers have been a key driver of weakened competition. As President Biden noted in his Executive Order on Promoting Competition, industry consolidation has "den[ied] Americans the benefits of an open economy," with "workers, farmers, small businesses, and consumers paying the price."[1] Evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.[2] A lack of competition also appears to have left segments of our economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks.[3]

These facts have prompted us to assess how our merger policy tools can better equip us to discharge our statutory obligations and halt this trend.

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[1] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021). *See also* Fact Sheet: Executive Order on Promoting Competition in the American Economy, The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (noting that "economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen").

[2] *See, e.g.*, José A. Azar, et al., *Concentration in US Labor Markets: Evidence From Online Vacancy Data* 66 LAB. ECON. (2020); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2422-45, 48 (2020); Jan De Loecker, et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPERS ON ECON. ACTIVITY 89, 95–97 (2017); *see generally* JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014).

[3] *See, e.g.*, David Dayen, *The Great Supply Shock We Brought Upon Ourselves*, AM. PROSPECT (Sept. 22, 2021), https://prospect.org/economy/great-supply-shock-we-brought-upon-ourselves.

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as industrial trusts captured the sugar, steel, oil, and railroad sectors, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.[4] Once it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[5] When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law captured vertical and conglomerate deals as well as acquisitions of assets.[6] Discussions leading up to the 1950 amendments made clear that lawmakers viewed protecting America from monopolies as critical to maintaining our system of free enterprise.

With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

The durability and public legitimacy of our antitrust regime depends on the ability of enforcers and courts to adapt, remaining faithful to these legislative mandates even as markets and business practices shift and evolve.

Our proposed revisions of the Merger Guidelines are a core part of this effort. The draft guidelines we released in July were animated by two overarching goals. First, we wanted to ensure the guidelines faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent. And second, we sought to ensure the guidelines reflect the reality of how firms do business in the modern economy.

One of the first steps our team took was to chart key developments in the merger guidelines since 1968. Revisiting this history highlighted the extent to which the 1982 guidelines departed from controlling law and precedent—*and* how deep and lasting the impact of the 1982 guidelines has been.

As is happening now, the publication of the 1982 guidelines was followed by extensive commentary from antitrust practitioners and academics. A striking theme across comments was a recognition of how sharply the guidelines had broken from the statutes Congress had passed and prevailing legal precedent.

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[4] Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. (1890); *see also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the 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 conductive to the preservation of our democratic political and social institutions.").

[5] Clayton Act, 15 U.S.C. § 12 *et seq*. (1914). Congress in 1914 also passed the Federal Trade Commission Act, supplementing the Sherman and Clayton Acts by creating the Federal Trade Commission and assigning it with checking "unfair methods of competition." Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*. (1914).

[6] *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).

For example, Professor Eleanor Fox noted that the 1982 guidelines embedded "an ideology at war with the legislation… [disavowing] the will of Congress to be skeptical of mergers and to stop increasing concentrations in their incipiency."[7] Similarly, former Assistant Attorney General Thomas Kauper described the 1982 guidelines as choosing to "err on the side of nonintervention rather than on the side of precedent," ultimately asking "what is the duty of the government to enforce the law?" University of Pennsylvania's Professor Louis Schwartz put it more bluntly, noting, "The Guidelines virtually ignore Section 7 of the Clayton Act."[8]

Even those who were overall supportive of the new guidelines noted the departure from controlling law. Prominent practitioners Don Baker and Bill Blumenthal wrote,[9] "Virtually every provision deviates from precedent [in some particular], however, and thus is exposed to the risk of judicial rejection." Indeed, courts did not immediately accept DOJ's break from precedent. By spring of 1983, DOJ had litigated two merger cases under the theories laid out in the 1982 Guidelines. As one observer summarized, "In both [cases], DOJ was summarily trounced."[10]

The 1982 merger guidelines set forth assumptions and frameworks that have stayed intact and shaped merger policy for 40 years—even as the agencies issued updates in 1984, 1992, 1997, and 2010.

Against this backdrop, the 2023 proposed merger guidelines seek to close the gap between prevailing law and agency practice. As federal enforcers, our job is to enforce the laws as Congress has written and as the courts have interpreted. We cannot substitute that mandate from Congress with our own policy preferences or a set of tidier or more quantifiable goals that we wish Congress had set out instead.

Accordingly, the proposed guidelines root each core proposition in prevailing law. It has been striking to see how much discussion and debate this aspect of the proposed guidelines has prompted—underscoring, perhaps, how fully the 1982 guidelines and their progeny departed from this basic exercise.

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[7] Eleanor Fox, *Tackling the Critics of the Draft Merger Guidelines*, PROMARKET (Sept. 5, 2023), https://www.promarket.org/2023/09/05/eleanor-fox-tackling-the-critics-of-the-draft-merger-guidelines; *see also*, Eleanor M. Fox, *The 1982 Merger Guidelines: When Economists Are Kings?*, 71 CAL. L. REV. 281 (1983).

[8] Louis Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?* 71 CAL. L. REV. 600 (1983). ("That section is treated as indistinguishable from the Sherman Act, despite Congress' expressed intention in 1914, and again in 1950, to cast the antimerger net more widely. Notably, where the Sherman Act forbade mergers only if an unreasonable restraint of trade would result, the criterion under the Clayton Act became whether 'the effect *may be* substantially to lessen competition.' The inquiry was thus shifted from demonstrable restraint to plausible risk… Effect was to be judged not merely by the impact on competition of the particular merger before the court, but also by the likelihood that the approval of the merger would trigger similar mergers by other firms in the industry. Trends toward concentration would be stopped 'in their incipiency.' Anticompetitive consequences in a relevant market would not, under the Clayton Act, be outweighed by procompetitive consequences in another market. The courts recognized that Congress had sought to narrow the scope of issues and evidence in merger cases, so that they could be disposed of expeditiously without the extended and inconclusive litigation entailed by the Sherman Act rule of reason.")

[9] Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law* 71 CAL. L. REV. 312 (1983).

[10] *Id. at* 347.

The proposed guidelines also take a functional approach to gauging competition. Rather than relying on a formalistic set of theories, they seek to understand the practical ways that firms compete and exert control over markets. Reflecting the multitude of ways that mergers can lessen competition or tend to create a monopoly, they identify several ways to analyze transactions. Key to the proposed revisions is the idea that no single method or tool has primacy, and that the specific context will determine which tools are most effective at assessing harm to competition.

We want the guidelines to incorporate new economic learning and accurately capture how businesses compete in today's economy. To that end, the proposed guidelines address blind spots and lay out a framework for policing mergers in labor markets, in platform and digital markets, and in markets characterized by serial acquisitions.

Public feedback has been a key input throughout our merger review process. Last year, we conducted a series of listening sessions and received over 5,000 comments in response to the initial request for comments. As of Monday, we had gotten over 3,000 public comments in response to the proposed draft. My review so far suggests these comments overwhelmingly support stronger merger enforcement. More significantly, these comments have underscored the high stakes of getting this right. Across sectors and professions, people have shared with us how unchecked consolidation has hurt their paycheck, their job opportunities, their health, their communities.

Take a few stories from people across healthcare. One ER doctor told us about how mergers in his industry had hurt the ability of emergency physicians to provide quality care in life-or-death moments.[11] A healthcare startup told us that healthcare mergers have made it extremely difficult for patients living in rural areas to access critical services for mental health.[12] An organization representing more than 200,000 nurses told us that hospital consolidation had reduced options for employees, and that the resulting "threat of being blacklisted from further hiring in a system that controls many of the hospitals in the area makes workers afraid to file complaints, organize their workplace, or leave before the end of a contract."[13]

Similarly, a writer explained to us that mergers across Hollywood have meant that compensation for scripts is a fraction of what it was 15 years ago—even for writers who produce major hits.[14] Farmers shared an instance where even 15% of the market being foreclosed drove one of the country's largest dairy processor's to bankruptcy, suggesting, they wrote, that "the

[11] Comment Submitted by Mitchell Li, FTC and DOJ Host Listening Forum on Effects of Mergers in Health Care Industry (Apr. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf.
[12] Comment Submitted by Shohini Gupta, Regulations.gov (July 25, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0435.
[13] Nat'l Nurses United, Comment Letter on Fed. Trade Comm'n and Dep't of Justice Draft Merger Guidelines 2 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1485.
[14] Comment Submitted by Jane Lee, Regulations.gov (July 26, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0477.

Agencies should address mergers that increase vertical foreclosure in buyer markets in their incipiency."[15]

Across the country, people know that unlawful mergers aren't a distant abstraction. Rather, they directly threaten peoples' ability to live stable and secure lives.

As enforcers, we have an obligation to listen closely to and learn from these experiences, and I can assure anyone who submitted a comment to us that we will review it carefully as we consider next steps.

Yesterday the FTC filed a lawsuit challenging a scheme by USAP and private equity firm Welsh Carson to roll-up anesthesiology practices across Texas.[16] A primary component of this strategy was a series of smaller acquisitions, which in the aggregate allowed USAP to consolidate control. After rolling up markets, the firms would raise prices—resulting in Texas patients and businesses paying tens of millions of dollars more than they would have absent this scheme. The proposed merger guidelines explain that when we confront mergers that are part of a series of multiple acquisitions, we may look to the series as a whole, rather than assess each deal in a silo. Updating our approach in this way could help ensure we are addressing unlawful roll-ups on the front end and protecting people like those patients in Texas.

More generally, there is growing recognition across government that the old approach—which relied on overly simplistic theories of markets—hasn't served the American people. Across domains—trade, economics, national security—we are seeing the need to revisit one-dimensional, outdated assumptions about how markets work and update our approach to meet the challenges of today. Earlier this year for example, National Security Advisor Jake Sullivan, in a seminal speech, tied unchecked corporate concentration to the fraying of the socioeconomic foundations on which any strong and resilient democracy rests.[17] Our policy frameworks must recognize that questions of market structure and competition determine not just the price and quantity of goods, but also the trajectory of innovation, the shape of economic opportunity, the resiliency of our markets, and the strength of our democracy.

Our proposed revisions to the guidelines not only reflect new learning and new realities in the marketplace, but also fundamentally restore fidelity to statutory text, legislative history, judicial precedent, and congressional intent. As we finalize the guidelines, our goal is to reinvigorate the full scope of the law while ensuring our merger analysis is dynamic enough to address the myriad ways consolidation threatens Americans—as consumers, workers, and businesspeople.

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[15] Comment Submitted by Farm Action, Regulations.gov (Sept. 19, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1515.

[16] Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[17] Jake Sullivan, Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution (Apr. 27, 2023), https://www.whitehouse.gov/briefing-room/speechesremarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economicleadership-at-the-brookings-institution/.

We cannot predict the many ways that markets and business strategies will evolve. But we can commit to staying vigilant, updating our tools and frameworks when the facts call for it, and using the full scope of our authorities to safeguard free and fair competition for the American people.

Thank you.

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SPEECH

Assistant Attorney General Gail Slater Delivers First Antitrust Address at University of Notre Dame Law School

Monday, April 28, 2025

Location
1329 Biolchini Hall Of Law
Notre Dame, IN 46556
United States

Remarks as prepared for delivery, "The Conservative Roots of America First Antitrust Enforcement"

Good afternoon. Thank you so much for having me. It is an honor to be here at Notre Dame to give my first formal address as Assistant Attorney General for the Antitrust Division. I've had many offers to speak since I began my tenure at the Department of Justice, but it seemed appropriate that I present the conservative case for vigorous antitrust enforcement here at Notre Dame Law School. Notre Dame has a storied role in the development of American conservatism's first principles. I hold those principles dear and, as I will discuss today, our enforcement of the antitrust laws will reflect those principles. Indeed, we seek to bring these shared principles to our work every day: they include American patriotism; textualism and adherence to precedent; and a firm commitment to law enforcement.

I also wanted to deliver an address here in Indiana because the state's economic history underscores the importance of those conservative first principles to the work I'm now honored to lead at the Antitrust Division. Indiana also played a role in molding the young President Benjamin Harrison into the man he would become. Although many know President Harrison as the U.S. President with the most impressive beard in American history, he was also the President who signed the Sherman Act of 1890 into law.

But more on that in a minute. Let's begin with some words of thanks.

First, I am deeply grateful to President Trump for entrusting me with the responsibility to lead the Antitrust Division. When he nominated me, President Trump assailed the use of "market power to crack down on the rights of so many Americans."[1] I am so honored to have the chance to defend the American people's rights at this critical juncture in our history.

I am similarly grateful to the 78 Senators, from both sides of the aisle, who voted to confirm me in an incredible show of broad bipartisan support for vigorous antitrust enforcement.

And I am grateful to Attorney General Pam Bondi, Deputy Attorney General Todd Blanche, and all the leadership of the Department for their support and for being so welcoming and for being such strong supporters of the Antitrust Division. And, of course, I'm grateful for the team of Deputies, including my Principal Deputy Roger Alford who is here today, for joining me in this endeavor.

My earnest thanks also go to the men and women of the Antitrust Division. My first two months in the building have confirmed that the Antitrust Division employs some of the very best of the very best. Our cases consistently pit a small army of Davids against the Goliaths of Big Law defending Big Business. Yet, as we showed in the Google Ad Tech case, our teams more often than not win the battle on behalf of the American people.

The stakes of that fight are so high. The American people are once again facing a generation of economic and industrial change. We are adapting trade policies to put America First [2] and undertaking deregulation that will unleash innovation in AI and other technologies [3] and reshape our economy.

But we face a choice in who will order this realignment and how. Will the American people shape tomorrow's economy, or will others decide what gets made, where it is made, and who makes it? Will our laws be written by Congress and enforced by politically accountable appointees in the Trump Administration, or by technocrats and lobbyists elsewhere?

Indiana has seen firsthand the consequences of getting these choices wrong for millions of Americans. If recent decades have shown us anything, it is that we need an economy that works for the American people, not the other way around. We also need public policies that afford our fellow countrymen and women the dignity they deserve as American citizens. Of course, antitrust is not a cure-all, but it can surely play an important role in building a more resilient economy going forward.

To better understand what this future might look like we first need to look to the past. As I like to say, the past is prologue. We all know the story of the decline in manufacturing in this state. Indiana was at the heart of the United States' thriving manufacturing industry for much of the 20th century.

But then in the 1960s and '70s the factories started shutting down. The Studebaker factory closed here in South Bend in 1963 [4], and other Indiana cities experienced similar population declines as manufacturing moved overseas. It took decades for cities such as South Bend to recover, and some have still not recovered.

Of course, change is inevitable in a dynamic and innovative economy. Economists call this creative destruction and shrug it off as merely market forces at play. But neoliberal public policy also played a role in enabling this creative destruction, and not always for the better. Policymakers in Washington, D.C. voted for free trade agreements that shipped jobs overseas; they opened up our southern border to mass migration; and they underenforced our century-old antitrust laws for several decades. In D.C., these neoliberal policies are collectively referred to as the "Washington Consensus," and they were the foundation of our economic policy for several decades. They were born out of the optimism that followed the end of the Cold War, sometimes referred to as "the end of history." They promoted globalization and the financialization of the U.S. economy, and they initially spurred economic growth and prosperity. But that growth left many Americans behind, which brings us to today.

Some say that free trade and open borders result in a larger pie. But it begs the question as to the size of the slice that each community in our society received. At the same time that global labor arbitrage traded American jobs for cheap manufacturing abroad, growing profit margins diverted the economic gains for many goods from American consumers and workers to our coastal elites. Too many communities hollowed out here in Indiana and across the nation. This hollowing out in turn created the conditions for a weakened middle class, fractured families, and in some cases deaths of despair. What was good for a few powerful global corporations, it turned out, was often bad for the dynamic businesses and innovators that made us the greatest nation on earth. It was also bad for the communities in which those businesses once thrived.

Treasury Secretary Scott Bessent recently said something incredibly important about all this. "Access to cheap goods," he said, "is not the essence of the American dream."[5] The American Dream "is not 'let them eat flat screens.'" [6] Instead, he said, and I agree with this, that "The American dream is rooted in the concept that any citizen can achieve prosperity, upward mobility, and economic security."[7]

Antitrust law enforcement plays an indispensable role in achieving the American Dream because competitive markets enable individuals to achieve prosperity, upward mobility, and economic security. That's the premise of free market capitalism. In free markets, the American people shape the economy toward their own flourishing by starting and growing their own business, and through their choices in markets as buyers and sellers. Competitive markets enable the American people to build the lives they want, not just as consumers and producers, but as citizens.

That's the main thing I want you to take away from my remarks today. People ask me what my agenda will be. I get asked this question every week — how does antitrust fit in with the realignment underway in the Republican Party?

I tell them it's America First Antitrust.

America First Antitrust empowers America's forgotten men and women to shape their own economic destinies in the free market. We will stand for America's forgotten consumers. We will stand for America's forgotten workers. And we will stand for the small businesses and innovators, from Little Tech, to manufacturing, to family farms, that were forgotten by our economic policies for too long.

How will we accomplish this and what are our guiding principles? I submit we need only look to the past and to our conservative roots to find these principles. America First Antitrust roots are grounded in the Sherman Antitrust Act, but they in fact date back to our nation's founding. Let us not forget that the Boston Tea Party was a protest not only against the British government's taxation without representation, but also against the monopoly granted to the British East India Company.

The Granger Movement at the end of the 19th century planted the early seeds for antitrust enforcement. It was born and raised by conservative hillbillies in the heartland in defense of their fundamental values. Finally, America First Antitrust continues the legacy of the Ohio Republican Senator John Sherman, the namesake of the Sherman Act, a true economic populist who never went to college, was a self-taught engineer, and became a lawyer under the apprenticeship of his brother.

With the remainder of my time today, I'd like to talk about the conservative values that underpin America First Antitrust. This speech is not intended to be an LLM thesis, so I'll address three that matter most immediately to the work of the Antitrust Division:

- First, the protection of individual liberty from both government and corporate tyranny;
- Second, a healthy respect for textualism, originalism, and precedent grounded in a commitment to robust and fair law enforcement; and
- Third, a healthy fear of regulation that saps economic opportunity by stifling rather than promoting competition.

Let me address each principle in turn.

I have to begin with the value that defines both conservatism and America — freedom. We are a nation born from opposition to tyranny in defense of individual liberty. As a new American, I cherish the freedom that comes from being an American citizen. As I testified at my Senate confirmation hearing earlier this year, "In our Constitutional Republic, American citizens can speak their minds, earn a living, and invent new technologies free from unwarranted interference. These freedoms are not guaranteed in so many countries around the world, so they must be cherished and defended by us all."

How does this bedrock American value translate into antitrust?

Antitrust respects the moral agency of individuals by protecting their individual liberty from the tyranny of monopoly.

Here at Notre Dame, the principle of individual moral agency is second nature. And though few were Catholic themselves, the Founders believed philosopher Thomas Aquinas when he argued that humans are *imago dei* — beings made in the image of God whose exercise of individual moral agency defines us.[8] We realize our goodness and define our own flourishing through our freedom of choice. And so the Founders penned the Declaration of Independence, reaffirming that it is "self-evident" that humans are "endowed by their Creator" with the "Rights" to "Life, Liberty, and the pursuit of Happiness."[9]

With that, they threw off the tyranny of King George. In so doing, they rejected his grants of monopolies in the colonies as inconsistent with their natural rights.[10] That same year – 1776 – the Scottish philosopher Adam Smith published his seminal book on economics The Wealth of Nations in which he wrote "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[11]

Ill-gotten monopolies inherently restrain human liberty by depriving individuals of choices as both consumers and producers. That is why popular opposition to the East India Company monopoly led directly to the Boston Tea Party and played an important motivating role in the Founding.[12]

Of course, monopolies at that point in history required the grant of a king, protected by his law. With the success of the Revolution, they largely disappeared from American life for a time. As a result, innovation flourished over the ensuing century, and many new inventions — from the cotton gin to the lightbulb and telephone — launched technological revolutions that improved the lives of all Americans.

But the 19th century also saw the emergence of a new kind of monopoly — a private empire of oil, railroad, and agricultural robber barons.

These private monopolies threatened liberty just as King George once had. Although the identity of the tyrant changed, the threat posed by monopoly to the American people's endowed natural rights to liberty had not.

The Grangers were among the first to point this out. In the 1860s, midwestern farmers — known then as grangers — began to unite against railroad and grain elevator monopolies that deprived farmers of fair, competitive returns for their crops.

In 1873, the Grangers echoed our founding principles in their "Farmer's Declaration of Independence."[13] "The history of the present railway monopoly," the Grangers declared, "is a history of repeated injuries and oppressions, all having in direct object the establishment of an absolute tyranny over the people of these states unequalled in any monarchy of the old world…."[14] And so they called for government action to constrain private tyranny. This was the perspective that, in 1890, drove an Ohio Republican from the foothills of the Appalachians to draft the nation's first federal antitrust law constraining private monopolization. Senator Sherman saw his bill as an extension of the Founders' rejection of the tyranny of monopoly in defense of liberty. "If we will not endure a King as a political power," Sherman said, "we should not endure a King over the production, transportation, and sale of the necessaries of life."[15]

To ensure care and precision in using government power against private monopolies, the Sherman Act preserves liberty by promoting economic competition that benefits consumers, workers, inventors, and other trading partners in the free markets.

We are now in the midst of another fundamental change in the nature of monopoly. While the Grangers and Senator Sherman saw the first emergence of privately organized monopolies, we are experiencing the emergence of new durable forms of monopoly power altogether, the likes of which the Grangers and Senator Sherman could not even begin to fathom. These monopolies are driving a Republican realignment away from big business and — under President Trump's leadership — toward the working class that is reconnecting the party with its roots, recognizing antitrust as a critical tool in protecting individual liberty.

In Senator Sherman's day, a monopoly could control prices and exclude competition. Today's online platforms can do so much more. They control not just the prices of their services, but the flow of our nation's commerce and communication. These platforms play a critical role in our digital public square. They are key not only to the ordinary citizen's free expression, but also to how elections are won or lost, and how our news is disseminated or not.

This point is being made again and again by members of the new right who are driving the realignment in antitrust policy. Sohrab Ahmari points out that just as conservatives fear Tyranny.gov, they should fear Tyranny.com.[16] Oren Cass underscores how "[c]onservativism is hugely skeptical of power."[17] Senate Antitrust Subcommittee Chair Mike Lee has explained that "concentrated economic power can be just as dangerous as concentrated political power,"[18] and other influential Senators like Josh Hawley and Chuck Grassley similarly support robust antitrust enforcement aimed at tackling unchecked market power. Vice President Vance has been similarly outspoken — he has decried the "weird idea that something can't be tyrannical if it comes through the operation of a free market" amidst an environment where companies "control the flow of information" in our society.[19]

I echoed this growing sentiment on the right at my confirmation hearing earlier this year when I testified that "we have grown to appreciate that personal liberty and economic liberty are closely connected; that in many ways they are two sides of the same coin. And Americans have also come to see that economic liberty often hinges on competitive markets."

So that's the first principle of America First Antitrust — antitrust enforcement serves the deep-rooted conservative goal of protecting individual liberty from the tyranny of coercive monopoly power. And it serves those goals where it matters most, to protect our liberty online and to ensure that we protect Americans on pocketbook issues such as housing, healthcare, groceries, transportation, insurance, entertainment, and similar markets that directly impact their lives.[20]

Antitrust law enforcement should adhere to the rule of law and respect binding precedent and the original meaning of the statutory text.

The next core conservative value underpinning our antitrust enforcement begins with the important acknowledgement that government itself can be a coercive force that threatens our liberty. This is the so-called Tyranny.gov I just talked about. Conservatives have long been skeptical of government regulation that deprives businesses of their economic freedom and makes our economy less dynamic and prosperous. We must respect originalism and the rule of law and ensure that our enforcement derives from the will of the democratically elected Congress as interpreted by the courts.

A truly conservative approach to antitrust law starts with first principles and text. This means that antitrust agencies should enforce the laws passed by Congress, not the laws they wish Congress had passed. Perhaps most importantly, antitrust in the United States is law enforcement. It is not regulation. Congress enacted the antitrust laws as a legal regime, declined to provide any authority to regulate the details of the Sherman or Clayton Acts, and instead gave the Attorney General the duty to pursue cases before the courts as she does any other action.[21] To recognize federal antitrust law as law enforcement in the American tradition requires a strong commitment to our Constitutional separation of powers, including Executive enforcement prerogative, statutory meaning, and judicial precedent. A faithful humility to law's limits is the cornerstone of much conservative legal theory. If we are true to our principles, antitrust cannot be an exception.

In the play *A Man for All Seasons*, Saint Thomas More discusses an England "planted thick" with the common law and says he would "give the Devil benefit of law" before accepting the lawless reality of a society without them.[22]

The English common law tradition of Saint Thomas More has more to do with federal antitrust enforcement than many realize. Senator Sherman designed the Sherman Act to incorporate a general body of common law in the American states and England on restraints of trade and monopoly.[23] That is why the Act used specific terms of art from the common law, including "restraint of trade" and "monopolize," whose original public meaning must be understood with respect to the common law that they emerged from. In so doing, the Sherman Act incorporated prohibitions on price-fixing and concerns with restraints of trade harming both workers and end consumers, among many other foundational principles of the common law.[24] The antitrust laws must be interpreted in light of their purpose and context to codify the common law and state antitrust laws.

Respecting the rule of law critically requires giving meaning to the statutory text and applying the binding precedents interpreting it — both old and new. Innovations in economic theory and practice may shape more recent law, but they do not render older precedent a dead letter. That is the Supreme Court's prerogative.

As we move forward with merger enforcement, there will be important debates about the weight we should place on older versus newer precedent as we make enforcement decisions. Those are important debates to have, and I have an open mind. But at the end of those discussions, our merger enforcement will apply our prosecutorial discretion based on the best interpretations of the laws on the books, and analysis of economic facts and data, respecting the original public meaning of the statutory text and the binding nature of Supreme Court and other relevant precedent. This is a deeply conservative position and there is nothing radical about it. To the contrary, what is radical is the notion that we should as antitrust enforcers ignore the text of the law and divorce ourselves from binding precedent, old and new alike.

Respecting the statutory text also helps us defend ordinary Americans who need competition for their work to raise wages and improve working conditions. When Congress prohibited restraints of trade, the term was understood to include restraints on working a trade, as Justice Story explained in his commentaries on the common law.[25] Or as Justice Kavanaugh recently said in Alston, "price-fixing labor is price-fixing labor."[26]

Our recent Las Vegas nursing case is a great example. A jury convicted a Nevada man of a three-year conspiracy to fix the wages of home healthcare nurses by capping their wages.[27] Hundreds of hard working nurses were affected, and they deserved better. Nursing work is not only important and difficult, but it is a backbone of our middle class and our communities. I am so proud of our team for standing up for those nurses — that is what America First Antitrust is all about.

We will also stand up for workers when dominant firms impose restraints of trade, whether directly on workers or on the businesses who employ workers for them. Because the antitrust laws protect labor market competition, any conduct that harms competition for workers can violate not only the spirit but the letter of the antitrust laws.

Antitrust law enforcement should support deregulation by enabling free market competition that prevents the need for government regulation of consolidated power.

The last conservative value I'd like to talk about today is a preference for litigation over regulation. Conservatives abhor anticompetitive government regulations that unnecessarily sap the free markets of dynamism. Aggressive antitrust enforcement supports a competitive process that enables markets to regulate themselves, providing a bulwark against market power that often leads to regulatory intervention.

In recent decades, we have seen markets tilt toward regulation as they became more concentrated. The poster child here is the regulatory intervention that followed the 2008 financial collapse. You all were mostly kids when the 2008 financial collapse wreaked havoc on the economy, but those of us living in D.C. saw financial institutions that were considered "too big to fail" rapidly succumb to new regulation in the wake of the collapse.

For many, an important question that arose was less about the merits or demerits of the regulations that followed in the wake of 2008, and more about how these financial institutions became "too big to fail" in the first place. Relatedly, many questioned whether these regulations could have been avoided had these markets not become so highly concentrated. Finally, they questioned the role antitrust played in allowing this state of affairs to exist.

This view was at the heart of the enforcement philosophy of one of my most famous predecessors as AAG, Robert Jackson who earned public acclaim as the lead Nuremberg prosecutor after World War II and as a Supreme Court associate justice. In a 1937 speech, then-AAG Jackson noted that "[t]he antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices."[28] Through the antitrust laws, he said, "[i]t was hoped" that the government could "confine its responsibility to seeing that a true competitive economy functions."[29] As Robert Jackson noted then, enforcement of the antitrust laws "is the lowest degree of government control that business can expect."[30] This is a limited role I am happy to take on and defend today.

As I have analogized, antitrust is a scalpel, and regulation is a sledgehammer. Free markets often fail, and one cannot wish away monopolies and cartels with false economic theories of self-correction. The scalpel is necessary to make targeted, incisive cuts to remove the cancer of collusion and monopoly abuse. That is America First conservatives' preferred approach to cure market ills. It imposes government obligations only on parties that violate the law, and only for the limited time necessary to restore competition. In contrast, ex ante regulations cover all parties in an industry for time immemorial, permanently distorting the free market rather than merely curing diseases that were destroying the market.

Worse still, a system of anti-competitive regulation can be co-opted by monopolies and their lobbyists, such that the state's power actually amplifies, rather than diminishes, corporate power, and leads to the proliferation of government regulations that serve corporate interests rather than the people and drown out new innovations. Scholars like George Stigler have explored regulatory capture and how an industry can "use the state for its purposes," seeking regulations that operate primarily for the industry's benefit, for example to control entry or insulate prices.[31] Corporate lobbyists using their power to undermine free markets is ubiquitous in our system, and small but powerful groups can dominate regulatory processes at the expense of the diffuse interests of individual citizens.[32] The alliance of Big Business and Big Government must be broken.

To combat against such laws and regulations that stifle rather than promote competition, we have launched the Anticompetitive Regulations Task Force. Consistent with the Trump Administration's deregulatory efforts,[33] the Antitrust Division's Task Force will seek to identify and eliminate laws and regulations that undermine the operation of the free market and harm consumers, workers, and businesses.[34] We look forward to working with the FTC and with partner agencies throughout the government on these efforts.

Let me finish where I started, with an appreciation for the economic conditions here in the Midwest and a healthy dose of humility at the challenges we face re-centering the American people in the functioning of our economy. America First Antitrust cares deeply about the average American in the heartland, and our efforts will focus on those markets that most directly affect their lives. We are here to serve all Americans and wish to move away from the deeply technocratic and elitist mindset that has imbued antitrust law and enforcement for several decades.

I humbly submit that if a farmer in Indiana or Iowa cannot make sense of our work, the fault lies with us, not with the farmer. I may not be invited to cocktail parties in Georgetown or speaking engagements at Stanford or Cornell Law School following my remarks here today, but I will gladly trade this for coffee with Senator Grassley at Cracker Barrel or his own beloved Dairy Queen whenever he can fit me in his schedule.

We will not restore the vitality to our long-forgotten communities overnight. It will take complementary work across many domains — from trade to antitrust to deregulatory policy and so many others.

But with President Trump's clear commitment to fight in all those arenas for this country's forgotten people, and with deep-rooted conservative principles to guide us, I believe we can build a truly great future for our children.

I look forward to that work.

Thank you.

[1] Donald J. Trump (@realDonaldTrump), Truth Social (Dec. 4, 2024, 12:21 PM), https://truthsocial.com/@realDonaldTrump/posts/113595703893773894.

[2] *See* Exec. Order No. 14,266, *Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment*, 90 Fed. Reg. 15625 (Apr. 9, 2025).

[3] *See, e.g.*, Exec. Order No. 14,267, *Reducing Anti-Competitive Regulatory Barriers*, 90 Fed. Reg. 15629 (Apr. 9, 2025); Exec. Order No. 14,262, *Strengthening the Reliability and Security of the United States Electric Grid*, 90 Fed. Reg. 15521 (Apr. 8, 2025); Exec. Order No. 14,192, *Unleashing Prosperity Through Deregulation*, 90 Fed. Reg. 9065 (Jan. 31, 2025); Exec. Order No. 14179, *Removing Barriers to American Leadership in Artificial Intelligence*, 90 Fed. Reg. 8741 (Jan. 23, 2025).

[4] Jeff Rea, *Handful of Studebaker Buildings Serve as Reminders of Great Loss to the Community*, S. Bend Trib. (Dec. 8, 2023 5:13 AM), https://www.southbendtribune.com/story/business/2023/12/08/studebakers-closing-had-ripple-effects-for-decades/71803942007.

[5] Press Release, US Dep't of Treasury, Treasury Secretary Scott Bessent Remarks at the Economic Club of New York (Mar. 6, 2025), https://home.treasury.gov/news/press-releases/sb0045.

[6] Jing Pan, *Treasury Secretary Scott Bessent Says the American Dream Isn't "Let Them Eat Flat-Screens" or "Cheap Baubles from China,"* Yahoo Finance (Mar. 22, 2025), https://finance.yahoo.com/news/treasury-secretary-scott-bessent-says-121000641.html.

[7] Press Release, US Dep't of Treasury, Treasury Secretary Scott Bessent Remarks at the Economic Club of New York (Mar. 6, 2025), https://home.treasury.gov/news/press-releases/sb0045.

[8] Thomas Aquinas, Summa Theologiae, pt. I, q. 93, art. 4 ("Since man is said to be the image of God by reason of his intellectual nature, he is the most perfectly like God according to that in which he can best imitate God in his intellectual nature. Now the intellectual nature imitates God chiefly in this, that God understands and loves Himself.").

[9] The Declaration of Independence para. 2 (U.S. 1776).

[10] *Id.*

[11] *Wealth of Nations* (1776) bk. 1, ch. 10, pt. 2

[12] *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 1007 (2013).

[13] Farmers' Declaration of Independence (1873), https://declarationproject.org/?p=255.

[14] *Id*.

[15] 21 Cong. Rec. 2457 (daily ed. Mar. 21, 1890) (statement of Sen. John Sherman)).

[16] *See* Sohrab Ahmari, Tyranny Inc.: How Private Power Crushed American Liberty — and What to Do About It (2023).

[17] Zaid Jilani, *The New Trustbusters*, Wash. Examiner (July 23, 2021 3:00 AM), https://www.washingtonexaminer.com/news/business/165455/the-new-trustbusters.

[18] 167 Cong. Rec. S4520 (daily ed. June 14, 2021) (statement of Sen. Mike Lee).

[19] J.D. Vance, Vice President, United States, Keynote Address at RemedyFest 2024 (Feb. 27, 2024).

[20] *See* Bureau of Labor Statistics, Consumer Expenditures — 2023 (Sept. 25, 2024), https://www.bls.gov/news.release/cesan.nr0.htm (highlighting consumer expenditures by category).

[21] *See* 15 U.S.C. §§ 4, 25.

[22] Robert Bolt, A Man for All Seasons: A Play in Two Acts 39 (1960) ("This country is planted thick with laws from coast to coast – Man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.").

[23] *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 50-51 (1911).

[24] *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990); *United States v. Kozminski*, 487 U.S. 931, 951 (1988); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 346 (1982); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940); *Standard Oil Co.*, 221 U.S. at 59.

[25] As Justice Story wrote, contracts "in general restraint of trade" "are universally prohibited" because "all general restraints of trade have a tendency to promote monopolies and to

discourage industry, enterprise, and just competition, and thus to do mischief to the party by the loss of his livelihood and the subsistence of his family, and mischief to the public by depriving it of the services and labors of a useful member." 1 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America § 407 (14th ed. 1918); *see also Alger v. Thacher*, 19 Pick. 51, 51, 54-55 (Mass. 1837); *Lawrence & King v. Kidder & Sweet*, 10 Barb. 641, 648, 654-55 (N.Y. Sup. Ct. 1851); *Callahan v. Donnolly*, 45 Cal. 152, 153 (1872); *Mandeville v. Harman*, 42 N.J. Eq. 185, 189 (Ch. 1886).

[26] *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring).

[27] Press Release, US Dep't of Justice, Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation (Apr. 14, 2025), https://www.justice.gov/opa/pr/jury-convicts-home-health-agency-executive-fixing-wages-and-fraudulently-concealing-criminal.

[28] Robert H. Jackson, *Should the Antitrust Laws Be Revised?,* 71 U.S. L. Rev. 575 (1937) (Address Before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937), available at https://www.roberthjackson.org/wp-content/uploads/2015/01/Should_the_Antitrust_Laws_Be_Revised_.pdf.

[29] *Id.* at 576.

[30] *Id.*

[31] George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 4-6 (1971).

[32] Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 35 (1998).

[33] *See, e.g.*, Exec. Order No. 14,192, *Unleashing Prosperity Through Deregulation*, 90 Fed. Reg. 9065 (Jan. 31, 2025); Exec. Order No. 14,219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, 90 Fed. Reg. 10583 (Feb. 19, 2025).

[34] Press Release, US Dep't of Justice, Justice Department Launches Anticompetitive Regulations Task Force (Mar. 27, 2025), https://www.justice.gov/opa/pr/justice-department-launches-anticompetitive-regulations-task-force.

Speaker

Former Assistant Attorney General

The HSR Premerger Notification Act

THE MERGER REVIEW PROCESS: A SHORT OVERVIEW

Premerger review exists because of a hard lesson: once a problematic merger closes, the damage is difficult to undo. The acquiring firm fires key employees, shuts or sells facilities, ends research programs, and integrates operations in ways that permanently weaken the acquired business, so that even a later divestiture order cannot reliably restore the competition that existed before the deal. As the principal House sponsor put it, unwinding a consummated merger is often "like trying to unscramble an omelet."[1] The Hart-Scott-Rodino Act of 1976 answers that problem with an early-warning system: parties to large transactions must notify the antitrust agencies and wait before closing, giving the Department of Justice and the Federal Trade Commission a chance to investigate—and, if a deal threatens to substantially lessen competition, to sue to block it—*before* the assets are scrambled.[2]

Two points frame everything that follows. First, the HSR Act is *purely procedural*. It does not change the substantive standard under Section 7 of the Clayton Act, does not confer any immunity, and is not jurisdictional. The agencies can investigate and challenge transactions that fall below the reporting thresholds, that are exempt from the Act, or that have already closed. Second, because almost every significant merger enforcement action today arises after an HSR filing, the statutory steps below define not just the mechanics of review but the practical timeline and leverage that govern how deals get done.

The process moves through five stages.

Step One: Notify and Wait

A transaction may be reportable when it exceeds the annually adjusted size-of-transaction threshold ($133.9 million for 2026), satisfies any applicable size-of-person requirement, and is not otherwise exempt.[3] Transactions valued above the higher statutory threshold ($535.5 million for 2026) are reportable regardless of the size-of-person test, unless an exemption applies. Both the acquiring person and the acquired person are required to file their respective HSR notification forms with the DOJ and the FTC and then observe an initial waiting period before closing—30 calendar days for most transactions and 15 days for all-cash tender offers and bankruptcy acquisitions. Ordinarily, the initial waiting period does not begin to run until both sides have filed. But in an *open market transaction*—one in which the acquiring person acquires the target's voting securities from someone other than the target itself, such as by buying shares on an exchange or through a cash tender offer—the initial waiting

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1 122 Cong. Rec. 25,051 (1976) (statement of Rep. Peter W. Rodino, Jr.). The foundational empirical study is Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969) (finding that most postclosing divestiture remedies were unsuccessful or deficient).

2 Clayton Act § 7A, 15 U.S.C. § 18a.

3 Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 FED. REG. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026).

period begins to run when the acquiring person files its form. (This prevents a target from blocking an unwanted takeover by simply failing to file its HSR form.) What form a deal takes turns on how the target's shares are acquired, not on whether the parties negotiated: a friendly, fully negotiated acquisition structured as a tender offer is still an open-market transaction. In 2026, the maximum civil penalty for a violation of the Act's reporting or waiting-period requirements is $53,088 per day.[4]

We will examine reportability, the exemptions, and the contents of the HSR form in more detail in Unit 2. For now, what matters is that the filing starts the running of the initial waiting period and frames the agencies' initial look at the deal.

Step Two: Clearance to One Agency

The parties file with both agencies, but a transaction is investigated only if one of them requests to review it, and in most reportable transactions, neither does. When neither agency requests a matter, no investigation occurs, and the agencies are likely to grant *early termination* of the waiting period upon request, allowing the parties to close without waiting out the full period. When an agency is interested, responsibility is sorted out through the interagency *clearance process*. If only one agency requests to investigate a transaction, the matter is assigned to it. If both agencies request to review the same transaction, their staff will negotiate which agency will take it, normally awarding the matter to the agency with more experience in the relevant industry or with one of the merging parties. The FTC generally reviews consumer-facing sectors—retail, consumer goods, food and beverage, health care, software, and consumer electronics—while the DOJ handles regulated and industrial sectors, including telecommunications, transportation, agriculture, defense, autos, and heavy industry. The merging parties have no formal role in clearance and cannot choose their reviewer. Most allocations are routine, but when both agencies strongly want to investigate—often in technology, media, and health care—a clearance dispute between the agencies can itself delay the start of review even as the initial waiting period continues to run.

Step Three: The Initial Waiting Period Investigation

Once clearance is resolved, the assigned agency opens a preliminary investigation. Staff will review the filings, the parties' public materials, and trade reporting. Staff will also contact the parties to inform them of the investigation, request additional documents and data through a *voluntary access letter*, and typically invite the parties to make a presentation explaining why the deal raises no competitive concern. During the rest of the initial waiting period, staff will interview customers and competitors to

[4] 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 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)). There was no adjustment in 2026. *See* Cancellation of Penalty Inflation Adjustments for 2026, Regarding the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, OMB No. M-26-11 (Apr. 17, 2026).

test the parties' claims. The initial waiting period investigation ends in one of three ways:

1. *Close the investigation.* If staff are satisfied that there is no meaningful concern, the investigating agency will close its investigation without taking further action. Most initial investigations are closed at the end of the initial waiting period. In some cases where the investigation quickly reveals that the transaction is nonproblematic, the investigating agency will grant early termination of the remaining waiting period.
2. *Pull and refile.* If the review is nearly complete but needs a little more time, staff may ask the parties to withdraw and refile their HSR forms, restarting a new initial waiting period.
3. *Issue a second request.* If the deal raises significant concerns or is too complex to assess in the initial period, the agency will issue a "second request" for additional documents, data, and narrative interrogatory responses.

Step Four: The Second Request and the Final Waiting Period

The second request is the pivot point of the entire process, and its defining feature is burden. The agency gets only one second request per party and must issue it before the initial period expires. As a consequence, the agency asks for everything conceivably relevant to assessing the potential competitive effects of the transaction: sweeping demands for "all documents relating to" the transaction and the relevant markets, across dozens or hundreds of custodians and years of files. Complying typically takes the merging parties six to nine months or more and can often cost each $10–20 million for attorneys, experts, and document production and review. A second request automatically extends the waiting period until the parties substantially comply, after which the final waiting period begins. As with the initial waiting period, the final waiting period ordinarily does not begin to run until both parties have substantially complied. In a tender offer and certain court-approved bankruptcy sales, however, the final waiting period runs from the acquiring person's substantial compliance, even if a second request to the acquired person remains outstanding. The final waiting period itself runs 30 calendar days—10 days for a cash tender offer or certain court-approved bankruptcy sale—before the transaction may close.

Because that final period is rarely long enough for the agency to complete its review or for the parties to present their defenses, the two sides almost always enter into a *timing agreement*: a contractual commitment by the parties not to close for an agreed period after the statutory HSR waiting period expires. The precise standard for what counts as compliance is contested, but the dispute is almost always negotiated rather than litigated. Indeed, no court has ever adjudicated an HSR Act violation on the merits—every enforcement action to date has settled by consent decree—though the pending government suit against KKR may become the first.[5]

[5] *See* Complaint, United States v. KKR & Co., No. 1:25-cv-00343 (S.D.N.Y. filed Jan. 14, 2025) (seeking more than $650 million in penalties for alleged systematic HSR violations).

Step Five: Outcomes

At the end of its review, the agency reaches one of four outcomes:

1. *Close the investigation* and let the deal proceed without challenge.
2. *Negotiate a consent decree*, typically requiring the divestiture of overlapping businesses to a acquiring person approved by the agency.
3. *Sue to block the deal.* The DOJ litigates in federal district court; the FTC, which tries the merits in its own administrative proceeding, first goes to district court under Section 13(b) of the FTC Act for a preliminary injunction to stop the deal pending that trial.
4. *Abandon the deal.* The parties may simply terminate the transaction and walk away if they see the agency will challenge the deal and there is no mutually acceptable settlement to resolve the agency's concerns.

If, before the final waiting period expires, the investigation reveals that the transaction is nonproblematic or the parties successfully negotiate a consent decree settlement to resolve the agency's concern, the agency can grant early termination of the remaining waiting period.

Crucially, closing the investigation—what practitioners loosely call "clearance"—does not provide the transaction with immunity from a subsequent agency challenge. The agencies, state attorneys general, and private plaintiffs can all challenge a transaction *after* it closes, under the same Section 7 standard that would apply preclosing.

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 outcome and the precedent it sets 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 that the transaction does not violate Section 7, either because they determine 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 reopen investigations into the same transaction if circumstances change or new evidence emerges.[1] Nor does the closure of a federal agency investigation preclude a state attorney general or a private plaintiff from bringing a challenge if they have statutory authority, standing, and sufficient evidence.

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. At the DOJ, the settlement is ordinarily embodied in a *proposed final judgment* filed with the complaint and later submitted to the court for entry after Tunney Act review. At the FTC, the settlement is embodied in an *administrative consent order*, usually accepted subject to public comment and then finalized by Commission vote. In either form, no evidence is taken, no findings of fact are made, and the order ordinarily states that the parties do not admit a violation of law. Before the Biden administration, consent settlements were by far the most common outcome when the agencies identified competitive problems but concluded that restructuring relief could preserve competition. During the Biden administration, the agencies—especially the DOJ—

[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).

became far less willing to resolve merger investigations through negotiated consent decrees. Since the beginning of the Trump 2.0 administration, however, both agencies have again used consent settlements in merger matters, making settlement a central practical outcome once more, even as the agencies continue to litigate transactions they conclude cannot be adequately remedied.

In practice, divestiture sales usually occur at heavily discounted “fire sale” prices because there are typically only a few interested firms acceptable to the investigating agency as divestiture buyers. These buyers understand that they serve as the merging parties’ gateway to closing the main deal, providing them with enormous 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 give the investigating agency significant leverage in negotiating 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 conclusion 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, merging parties have pursued a strategy known as “litigating the fix.” To litigate the fix, the merging parties typically present 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 defined 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]

With the agencies in the second Trump administration more willing to accept consent settlements, litigating the fix is likely to become less common than during the Biden administration.[3] As a general matter, merging parties would much rather accept a consent settlement than incur the delay, expense, and uncertainty of litigation, even if they believe they might obtain a more favorable divestiture solution at trial. But the strategy will remain available when the parties believe the agency has rejected a remedy that a court is likely to find sufficient.

Litigation itself can produce several different practical outcomes. If the agency obtains a preliminary injunction, the parties usually abandon the transaction unless they are willing to continue litigating while the deal remains blocked. If the agency loses, the parties may close the transaction, subject to any remaining contractual or regulatory conditions, although the agency may still appeal. Litigation also can end in a post-complaint settlement, particularly when the trial record or pretrial rulings change the parties' assessment of litigation risk. Finally, in FTC cases, a preliminary-injunction proceeding in district court may be only the first stage; if the transaction remains alive, the FTC may continue its administrative case to seek permanent relief. For merging parties, these possibilities make litigation not simply a binary choice between winning and losing, but a strategic process that can lead to abandonment, closing, settlement, or continued proceedings.

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,

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2 For cases in which the merging parties succeeded in litigating the fix, either by obtaining a judgment on the merits for the restructured transaction or by pressing the fix in litigation until the agency accepted it in settlement, see United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022) (UnitedHealth/Change); FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023) (Microsoft/Activision), *aff'd*, 136 F.4th 954 (9th Cir. 2025); United States v. ASSA ABLOY AB, No. 1:22-cv-02791-ACR, Final Judgment, ECF No. 143 (D.D.C. Sept. 13, 2023) (ASSA ABLOY/Spectrum Brands). For cases in which the merging parties failed to persuade the court to accept the proposed fix and the transaction was enjoined, see United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mass. 2024) (JetBlue/Spirit); FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (Tapestry/Capri); FTC v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024) (Kroger/Albertsons).

3 *See* Mark R. Meador, Comm'r, Fed. Trade Comm'n, Procedural Integrity in the Merger Review Process 1–2, 5–6 (May 20, 2026) (criticizing the prior administration's litigation-first approach for discouraging remedy engagement during the premerger review process).

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.[4] 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.[5] 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 so that the problematic assets remain 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.[6] With the second Trump administration's 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, which 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

[4] 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.

[5] 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* Press 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).

[6] 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. 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).

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 for each is essential to practice merger antitrust law effectively.

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.

… 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

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.

Office of Commissioner
Melissa Holyoak

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

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

[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.

Remedies: Fashioning Divestiture Solutions

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Consent Decrees Re-enter the Merger Enforcement Landscape: What Does This Mean for Merging Parties?

Authors

Michael L. Weiner, Weisiyu Jiang

Overview

As both the Federal Trade Commission (FTC) and Department of Justice (DOJ) revive the use of consent decrees to resolve competitive issues in proposed mergers and acquisitions, an approach that had been all but abandoned during the Biden administration, we thought it might be useful to review recent developments in consent decree ancillary provisions such as divestiture trustees, monitoring mechanisms, re-acquisition restrictions, and sunset clauses, to see what insights could be gleaned regarding evolving agency strategies and enforcement priorities. What we see is that the ancillary provisions in recent orders reflect, for the most part, a return to the approach in place during earlier administrations – a status that is likely more favorable for transactions than the prior approach, which presented only two alternatives: full clearance or litigation.

There appears to be a significant degree of consistency in the structure and scope of such ancillary provisions. While deal remedies are, of course, tailored to the specific facts of each transaction, the agencies continue to draw from a relatively standardized toolkit of commitments designed to ensure the effectiveness of both structural and behavioral relief:

- Most recent consent decrees include 10-year sunset provisions, although some have built-in review procedures that increase agency flexibility by permitting additional divestiture requirements to be added if initial remedies prove inadequate.
- Divestiture trustee provisions are commonly included in structural remedy cases, even when not immediately activated, to serve as a critical enforcement backstop.

- Monitoring provisions are typical.
- Prior approval requirements have not featured in recent consent decrees, but prior notice obligations are widely used, requiring the merged firm to notify the agency before acquiring assets or businesses in relevant markets, even if the transaction falls below Hart-Scott-Rodino (HSR)'s filing thresholds.
- Although the agencies prefer structural relief, behavioral remedies may be accepted in appropriate circumstances.

Taken together, these developments broadly indicate a return to the consent decree framework that was in place prior to the prior administration's wholesale rejection of settlements. This approach reflects a strategic balancing act, preserving enforcement strength while avoiding potentially overreaching constraints that could chill legitimate business activity.

Recent Key Transactions

1. ACT / Giant Eagle

On August 16, 2024, Alimentation Couche-Tard (ACT) agreed to acquire certain retail and wholesale fuel assets from Giant Eagle, Inc. (Giant Eagle). The FTC alleged that the transaction would substantially lessen competition in 35 local markets for gasoline and 19 for diesel fuel in Indiana, Ohio, and Pennsylvania, violating Section 7 of the Clayton Act and Section 5 of the FTC Act. To remedy these concerns, ACT agreed to divest 35 gas stations to Majors Managements, LLC within 20 days post-closing.[1]

In addition to requiring these divestitures, the consent order also prohibits ACT from re-acquiring the divested assets for a period of ten years and requires ACT to notify the Commission before acquiring any stations identified by the Commission in a confidential Appendix as competitively significant in the local markets of the divested assets, regardless of whether such subsequent acquisitions trigger an HSR filing requirement. The order also includes a provision that allows the FTC to appoint an independent monitor to oversee the parties' compliance with the requirements of the consent order, as well as a sunset provision specifying that the consent decree will terminate 10 years from the date it is issued.[2]

2. Synopsys / Ansys

In January 2024, Synopsys, Inc. (Synopsys), a leading developer and supplier of software used to design semiconductors, proposed to acquire all of the outstanding and issued voting securities of Ansys, Inc. (Ansys), a provider of simulation software tools, in a transaction valued at approximately $35 billion. The FTC determined that the proposed transaction, without divestitures, would be anticompetitive in markets for optical software tools, photonic software tools, and RTL power consumption analysis tools. To address these concerns, the Commission requires the parties to divest Synopsys's optical software and photonic software tools, and Ansys's RTL power-analysis software, to the approved buyer Keysight Technologies, Inc (Keysight), within ten days following closing of the main transaction.[3] The consent also includes a provision that would require additional divestitures if the Commission determines, within 12 months of the order, that Keysight requires additional assets in order to achieve the purposes of the order.

In addition to these divestitures, the consent order also requires the parties to provide a limited amount of transition services to Keysight, authorizes the appointment of an independent monitor to oversee the implementation of the consent order and a divestiture trustee if the parties fail to complete the required divestiture, prohibits Synopsys from re-acquiring any of the divestiture assets for ten years, requires the parties to file compliance reports, and grants the FTC broad access to information and personnel for the purpose of assessing the parties' compliance with the consent order. Like the ACT/Giant Eagle consent decree, the consent decree for Synopsys/Ansys also contains a sunset provision specifying that the order will terminate 10 years from the date it is issued.[4]

3. Keysight / Spirent

On March 28, 2024, Keysight Technologies, a leading provider of communications testing and measurement equipment, announced its proposal to acquire Spirent Communications plc, another major player in the same sector, for approximately $1.5 billion. On June 2, 2025, the DOJ filed a civil antitrust complaint and proposed final judgment resolving concerns in the alleged U.S. markets for three critical product categories: (1) high-speed Ethernet testing equipment; (2) network security testing equipment; and (3) radiofrequency (RF) channel emulators. The proposed Final Judgment requires the divestiture of Spirent's product lines in all three markets, representing approximately 40% of Spirent's total revenues, to DOJ-approved buyer Viavi Solutions, Inc.[5]

The Final Judgment also requires Keysight and Spirent to facilitate Viavi's hiring of key personnel, ensuring continuity and operational effectiveness for the divested business lines. For 12 months following the divestiture, the transaction parties are prohibited from soliciting to rehire any employees who accepted positions at Viavi within 90 days of the divestiture, unless those employees are laid off by Viavi or Viavi provides written consent. Additionally, Keysight and Spirent may not enforce non-compete or non-disclosure agreements against transferring employees, except in limited circumstances.[6]

Although the Final Judgment is set to expire 10 years from the date of entry, it includes a review mechanism allowing the DOJ to reopen the proceeding and seek additional relief at any time during the five-year period following entry of the judgment if, in the DOJ's sole discretion, the initial remedy proves inadequate. Conversely, the DOJ may terminate the decree early after five years from the date of its entry, upon notice to the court and defendants, if it determines that the remedy has fully restored competition and ongoing oversight is no longer necessary. The DOJ may also extend the duration of the Final Judgment upon a finding of noncompliance. To establish a violation, the DOJ need only to meet a "preponderance of the evidence" standard, significantly lower than the traditional "clear and convincing evidence" standard, which the parties expressly waived. Finally, the decree prohibits the parties from reacquiring any of the divested assets during the life of the order without prior DOJ approval but does not impose any prior approval requirement for future acquisitions in the same market.[7]

4. Safran / Collins Aerospace

In the Safran/Collins transaction, the DOJ required Safran S.A. to divest key assets to proceed with its $1.8 billion acquisition of certain flight control and actuation businesses from Collins Aerospace, a subsidiary of RTX Corporation. To address DOJ's concerns that the merger would substantially lessen competition in the market for Trimmable Horizontal Stabilizer Actuators (THSAs), critical components used to control the pitch of commercial aircraft, the proposed Final

Judgment mandates that Safran divest its North American flight control actuation business, including all THSA-related assets, to Woodward, Inc., a DOJ-approved buyer. The divestiture includes all tangible and intangible assets necessary for the design, manufacture, and sale of THSAs, ensuring Woodward can operate as a viable, independent competitor.[8]

The Final Judgment also includes detailed personnel and workforce protections to support business continuity and preserve institutional knowledge. Safran must identify all relevant personnel and provide Woodward with full access for recruitment. Woodward must have a fair opportunity to interview and hire these employees. For individuals who accept offers of employment within 180 days of the divestiture, Safran must waive any non-compete, non-disclosure covenants (with limited exceptions) and must vest certain compensation or benefits to facilitate a smooth transition. For 12 months following the divestiture, Safran is also prohibited from soliciting these employees for rehire unless they are terminated or Woodward provides written consent. The Final Judgment also includes robust firewall provisions to prevent the exchange of competitively sensitive information during the transition period. For instance, if Safran personnel temporarily assist Woodward post-closing or remain on-site at shared facilities, they must receive firewall training and written policies designed to prevent the improper disclosure of Woodward's proprietary information to Safran employees.[9]

To ensure compliance, the DOJ will appoint a court-approved independent monitor with authority to investigate and submit periodic reports detailing the parties' adherence to their obligations under the Final Judgment. In addition, the decree prohibits Safran and Collins from financing Woodward's acquisition of the divested assets or reacquiring any interest in the divested business for the duration of the Final Judgment, absent prior DOJ approval. The Final Judgment will remain in effect for 10 years, but it includes a five-year review provision allowing the DOJ, at its sole discretion, to reopen the proceeding and seek additional relief if the remedy proves inadequate. The DOJ retains full enforcement rights, including the ability to seek contempt sanctions under a "preponderance of the evidence" standard. Like the Keysight / Spirent consent decree, Safran and Collins Aerospace also expressly waived any argument that a higher evidentiary threshold, such as the "clear and convincing evidence" standard, should apply.[10]

5. HPE / Juniper

On January 30, 2025, the DOJ filed a civil antitrust complaint challenging Hewlett Packard Enterprise Co. (HPE)'s proposed $14 billion acquisition of Juniper Networks, Inc. (Juniper), alleging that the transaction would substantially lessen competition in the U.S. market for enterprise-grade wireless local area networks (WLANs). On June 27, 2025, the DOJ and defendants filed a Stipulation and Order along with a Proposed Final Judgment to resolve the case. Under the Proposed Final Judgment, HPE must divest its "Instant On" campus and branch networking business, including all associated tangible and intangible assets, to a buyer acceptable to the DOJ within 180 days of the order's entry or five days after closing, whichever is later. HPE is also required to use best efforts to obtain all necessary third-party consents to effectuate the transfer. Concurrently, the parties must conduct an auction to license Juniper's "AI Ops for Mist" source code, a core component of its WLAN platform, to at least one DOJ-approved licensee within the same window. Upon request, the parties must provide transitional support to the licensee, including access to engineers and sales personnel familiar with the technology.[11]

If the parties fail to complete the divestiture or licensing obligations on time or within a DOJ-approved extension, the DOJ may petition the court to appoint a divestiture or license trustee to carry out the remedy and submit monthly progress reports. Other oversight provisions include 30-day affidavits certifying compliance with divestiture and licensing requirements, and a requirement to retain all relevant implementation records for at least one year post-completion. The DOJ also maintains broad inspection and audit authority, including the right to review documents, interview personnel, and require independent audits at the defendants' expense. Like the other recent consent decrees, this Final Judgment also contains an explicit sunset provision specifying that it will remain in effect for 10 years from the date of entry.[12]

6. Omnicom / IPG

On June 23, 2025, the FTC announced that it had accepted a proposed consent order to address competition concerns arising from the proposed $13.5 billion acquisition by Omnicom Group Inc. (Omnicom) of The Interpublic Group of Companies, Inc. (IPG). The FTC alleged that the transaction, which would create the world's largest media buying advertising agency, raised concerns under Section 7 of the Clayton Act and Section 5 of the FTC Act, particularly due to the increased risk of coordinated conduct among media buying agencies. To address these concerns, the consent order prohibits Omnicom and its subsidiaries from coordinating with competitors to steer advertising away from media outlets based on political or ideological viewpoints, unless explicitly directed to do so by the advertiser. It also bars Omnicom from creating or maintaining "exclusion lists" that blacklist publishers based on political or ideological criteria unless such lists are generated at the advertiser's explicit request. Similarly, Omnicom may not use third-party exclusion lists for this purpose unless expressly instructed by the advertiser. Any existing tools, policies, or practices that violate these restrictions must be eliminated as of the order's effective date.[13]

To ensure compliance, Omnicom must notify the FTC within five days of the acquisition's effective date and submit detailed annual compliance reports for five years, verified by a senior corporate officer. These reports must describe the company's media buying practices, any exclusion lists used, how they were developed, and whether they were based on client instructions. Omnicom is also required to retain, for five years, all communications related to advertiser direction on ideological exclusions and to make these records available to the FTC upon request. The FTC retains broad oversight authority under the consent order, including the right to inspect documents and facilities, interview employees and officers, and demand full cooperation from Omnicom in any related investigations. This includes the production of documents, data, personnel, and access to third-party agents. Like other recent consent decrees, this order will also remain in effect for 10 years from the date of entry.[14]

Conclusion

As the FTC and DOJ return to consent decrees as a core enforcement tool, a clearer picture emerges of how merger remedies are being structured to balance durability with enforceability. Across industries, recent consent orders consistently incorporate 10-year sunset provisions, independent monitor and trustee authority, and prior notice requirements that extend regulatory oversight well beyond the deal's closing. While structural remedies remain the agencies' default approach in horizontal mergers, conduct remedies, when imposed, are narrowly tailored and limited in duration. The agencies are also incorporating building in the flexibility to require additional divestitures if competitive conditions so require, in the agency's sole discretion.

Together, these developments reflect a more calibrated enforcement strategy, one that preserves agency supervisory powers while presenting a more nuanced and flexible economic policy approach than the litigation-or-bust approach of the prior administration. For merging parties, successful resolution increasingly depends not only on the viability of proposed divestitures, but also on the scope of anticipated ancillary commitments. As consent decrees re-enter the enforcement toolbox, for merging parties the ability to proactively navigate both the litigation and more regulatory paths will be critical to securing success.

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[1] Decision and Order, In the Matter of Alimentation Couche-Tard Inc., File No. 241-011, Docket No. C-*available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/ACTDOFINAL.pdf.1.pdf; *see also*, FTC, *Analysis of Agreement Containing Consent Orders to Aid Public Comment*, *In the Matter of Alimentation Couche-Tard, Inc*. File No. 241-011, Docket No. C-*available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/ACTGEAAPCFINAL.pdf.

[2] *Id*.

[3] Decision and Order, *In the Matter of Synopsys, Inc., and Ansys, Inc*. Docket No. C-, *available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/241_0059_synopsys-ansys_decision_and_order_redacted_public_version_0.pdf.

[4] *Id*.

[5] *U.S. v. Keysight and Spirent Communications Plc*, Proposed Final Judgement, 1:25-cv-01734 (D.D.C), *available at*: https://www.justice.gov/atr/media/1402406/dl.

[6] *Id*.

[7] *Id*.

[8] *See United States v. Safran S.A., et al*., Proposed Final Judgment, No. 1:25-cv-01425 (D.D.C. June 28, 2025), *available at* https://www.justice.gov/opa/media/1403846/dl.

[9] *Id*.

[10] *Id*.

[11] *United States v. Hewlett Packard Enterprise Co. & Juniper Networks, Inc*., No. 5:25-CV-00951-PCP (N.D. Cal.), Proposed Final Judgement, (Jun. 27, 2025).

[12] *Id*.

[13] *In the Matter of Omnicom Group Inc*. and The Interpublic Group of Companies, Inc., Decision and Order, *available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/Omnicom-DandO.pdf.

[14] *Id*.

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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-

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[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.