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INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- United States --

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This note is submitted by United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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− United States −

1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

1. In the United States, the Department of Justice and the Federal Trade Commission (collectively, "the Agencies"), State Attorneys General, and private parties can challenge mergers and acquisitions under federal and state antitrust laws. The Hart-Scott-Rodino Act, 15 U.S.C. § 18a, Section 7A of the Clayton Act (the "Act" or "HSR Act"), requires that parties to certain mergers or acquisitions notify the Agencies before consummating the proposed acquisition. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions that lack sufficient nexus to U.S. commerce and certain classes of acquisitions that are not likely to raise antitrust concerns are exempted from the premerger notification statute's coverage.[1]

2. If either Agency determines during the waiting period that further inquiry is necessary, the Agency is authorized by the HSR Act to issue a request for additional information and documentary material ("second request"). The second request extends the waiting period for a specified period (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). If competitive concerns remain at the end of the second request waiting period, the Agency and the merging parties may enter into a settlement with remedies designed to address the competitive concerns or the Agency may go to court to seek an injunction prohibiting the transaction. Whereas the Department of Justice ("DOJ") seeks preliminary and permanent injunctions in court, the Federal Trade Commission ("FTC") typically seeks to preliminarily enjoin the transaction in court pending the outcome of an administrative challenge before the Commission, which may result in the Commission's entry of a cease and desist order barring the transaction.

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

3. Although the U.S. premerger notification system subjects most mergers of significant size to premerger competitive review, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act, 15 U.S.C. § 18 – which was enacted many years before the HSR Act – the Agencies can challenge acquisitions of stock or assets, without regard to whether the acquisition requires a premerger notification under the HSR Act, and

[1] *See* 16 CFR 802.50-51 (nexus) and generally 15 U.S.C. § 18a(c) and 16 CFR Part 802.

such challenges can be brought either before or after a transaction is consummated. Indeed, the Agencies have investigated and challenged a number of transactions that were not reportable under the HSR Act.[2] If a consummated merger violates the antitrust laws, the same types of remedies are available as in the case of reportable mergers.[3]

4. The number of challenges to consummated and non-notifiable mergers has increased since 2000, partly as a result of the annual increase in the notification thresholds mandated by amendments made that year to the HSR Act (the thresholds increase based on the change in the gross national product). Following are statistics showing the number of DOJ merger investigations and challenges by fiscal year:

	2009	**2010**	**2011**	**2012**	**2013**
Total Preliminary Inquiries Opened (HSR and non-HSR)	68	64	90	74	65
Non-HSR Preliminary Inquiries	19	9	18	12	15
Consummated Preliminary Inquiries Opened	6	3	4	4	4
Total Merger Challenges	12	19	20	19	15
Non-HSR Challenges	4	6	4	5	3
Challenges of Consummated Transactions	3	0	1	2	0

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

5. As noted in the response to Question 2, in the case of a consummated merger, whether or not it was subject to mandatory notification, the Agencies can obtain the same types of remedies that are available in the case of reportable mergers. Depending on the extent of integration (sometimes called the "scrambling") of the firms' operations, degradation of assets, or other changes in the market – all of which depend to some extent on how quickly after consummation the Agencies become aware of the merger – simple structural remedies may not be available or effective.

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2 The Agencies ordinarily do not make information as to the applicability of the HSR Act to any given transaction public. But it is worth noting that the Agencies have challenged numerous consummated mergers in the period following the enactment of the HSR Act. *See, e.g., FTC and State of Idaho v. St. Luke's Health Sys., Ltd.*, 1:12-cv-00560-BLW-REB (D. Id. filed March 13, 2013), *available at* www.ftc.gov/opa/2013/03/stluke.shtm; *U.S. v. Bazaarvoice, Inc.*, C13-0133 (N.D. Cal., filed Jan. 10, 2013), *available at* www.justice.gov/atr/public/press_releases/2013/291185.htm; *U.S. and State of New York v. Twin America LLC*, 12 CV 8989 (S.D.N.Y., filed Dec. 11, 2012), *available at* www.justice.gov/atr/public/press_releases/2012/290136.htm; *In the Matter of Polypore International, Inc.*, Docket No. 9327 (Complaint issued Sept. 10, 2008), *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/polypore-international-inc-corporation-matter.

3 *See* U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), *available at* www.justice.gov/atr/public/guidelines/272350.pdf, and Bureau of Competition, Fed. Trade Comm'n, Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), *available at* www.ftc.gov/tips-advice/competition-guidance/merger-remedies.

6. Following are some examples of Agency challenges to consummated mergers that were not subject to HSR notification.

7. On January 10, 2013, DOJ filed a lawsuit in U.S. District Court for the Northern District of California challenging the June 2012 acquisition of PowerReviews, Inc. by Bazaarvoice Inc. The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival in the market for product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. DOJ began investigating the transaction within days of its closing after it learned of the consummated deal. On January 8, 2014, following a three-week trial, the District Court found that the acquisition would likely have anticompetitive effects and therefore violated Section 7 of the Clayton Act. While Bazaarvoice argued that PowerReviews was a "weak and unworthy competitor," the Court found that portrayal "belied by the plethora of documents showing that, prior to the merger, Bazaarvoice considered PowerReviews its strongest and only credible competitor, that the two companies operated as a duopoly, and that Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor." The Court also rejected arguments by Bazaarvoice that any number of technology companies could enter the market, observing that: "The marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are somehow more easily overcome. To conclude otherwise would give eCommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, Facebook, or any other successful technology company stands ready to restore competition to any highly concentrated market." Remedy proceedings are currently in progress.[4]

8. On January 2, 2014, DOJ filed a lawsuit and proposed settlement challenging the acquisition by Heraeus Electro-Nite LLC of certain assets of Midwest Instrument Company Inc. that substantially lessened competition in the market for sensors used in the steel manufacturing process. DOJ learned of the non-reportable transaction after it occurred in September 2012, and acquired assets already had been integrated into Heraeus's business, supply contracts had been terminated, and foreign production facilities had closed. To restore competition, the proposed consent decree requires Heraeus to divest certain acquired assets to a pre-approved buyer. Heraeus is required to waive non-compete provisions it had imposed on some former employees, and provide the new entrant with information about former personnel who might be available. Heraeus must also give advance notice of any future non-reportable acquisitions in the sensor market, and agree to provide training and technical support regarding the divested assets. Finally, to overcome a customer qualification process barrier to entry, Heraeus must allow customers of the new entrant to use Heraeus products for testing and qualification purposes.[5]

9. In October 2011, the FTC issued a consent order resolving charges that Cardinal Health, Inc.'s acquisition of three nuclear pharmacies from Biotech reduced competition for low-energy radiopharmaceuticals in Las Vegas, Nevada (radiopharmaceuticals are used in hospitals and cardiology clinics to diagnose and treat various diseases). The Commission's order required Cardinal Health to reconstitute and sell the acquired nuclear pharmacies to an FTC-approved buyer along with related intellectual property and permits. In addition, the order required Cardinal Health to provide the Commission with advance notice of future acquisitions in the relevant markets.[6]

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4 *See* "At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement," Remarks by DAAG Renata B. Hesse (Jan. 22, 2014), *available at* www.justice.gov/atr/public/speeches/303152.pdf.

5 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Heraeus Electro-Nite Co., LLC, available at* www.justice.gov/atr/cases/heraeus.html.

6 *See In the Matter of Cardinal Health, Inc.,* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/04/cardinal-health-inc.

10. In December 2010, the FTC, in an administrative proceeding, found that Polypore International, Inc.'s consummated acquisition of Microporous Products likely harmed competition in several markets for battery separators (which are key components of lead-acid batteries) and was therefore unlawful. The Commission ordered Polypore to divest Microporous to an FTC-approved buyer, and ordered a variety of ancillary relief provisions in support of the divestiture.[7]

11. In September 2009, Election Systems & Software, Inc. ("ES&S") acquired Premier Election Solutions, Inc., combining the two largest providers of voting equipment systems in the U.S. DOJ learned of the acquisition after consummation, and sued in March 2010, simultaneously filing an Asset Preservation Stipulation and Order, and a proposed Final Judgment. Given the diminution and dismantling of the Premier assets since ES&S acquired the company, relief that replicated the condition of Premier prior to the acquisition was not available. The final judgment required ES&S to divest (1) all the assets needed for an acquirer to compete in the voting equipment systems market, including intellectual property related to the Premier systems it had purchased; (2) tooling and fixed assets used to manufacture those systems; and (3) existing inventory and parts related to the Premier systems. ES&S was also required to divest a fully paid-up, non-exclusive, irrevocable license to certain products previously licensed to Premier. Other conditions intended to facilitate the acquirer's ability to compete included a waiver by ES&S of non-competition agreements for employees, and contractual terms that might otherwise prevent customers from selecting the acquirer for voting equipment services.[8]

12. In July 2008, Microsemi Corporation acquired most of the assets of Semicoa, Inc. DOJ learned of the transaction after consummation, and filed a complaint in December 2008 alleging that the transaction significantly lessened competition in the market for certain signal transistors and diodes used in aerospace and military applications. The court entered an order that month to preserve and maintain the relevant assets. A consent decree was entered in January 2010 that required the divestiture of essentially all the assets acquired in 2008. In addition, Microsemi was ordered to provide DOJ with advance notice of any future acquisitions in the relevant markets.[9]

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

13. One obvious difference between investigations of notifiable and non-notifiable mergers is the manner in which the Agencies learn of the transaction. In the absence of an HSR notification, the Agencies become aware of possibly anticompetitive mergers through news reports, complaints from competitors or customers, information from other investigations, or, in some cases, self-reporting by the parties.

14. The statutory waiting periods described above in the answer to Question 1 do not apply to a merger that is not subject to the HSR Act. Investigative procedures are largely the same for non-notifiable mergers as for notifiable ones, although there is no second request procedure. Compulsory process in the form of civil investigative demands is available to obtain the same information from the parties, but if they have already consummated the merger, they may not have the same incentives to cooperate with the Agencies in order to expedite Agency review.

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7 *See In the Matter of Polypore International, Inc.*, Docket No. 9327 (Complaint issued Sept. 10, 2008), www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/polypore-international-inc-corporation-matter.

8 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Election Systems & Software, Inc.*, *available at* www.justice.gov/atr/cases/ess.html.

9 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Microsemi Corporation, available at* www.justice.gov/atr/cases/microsemi.htm.

15. Timing issues are critical in the absence of the statutory waiting periods. If the transaction has just been consummated, the Agencies will proceed rapidly in order to avoid changes in the disposition of assets that would make it more difficult to restore competition in the event the transaction is deemed to violate the law, but the process is in practice no different than if the parties had not yet merged. The Agencies are likely to seek a timing agreement for the review process, and may seek an agreement from the parties to maintain the status quo; the Agencies can also seek a hold separate order from the court pending completion of the investigation.

16. If an Agency opens an investigation months after consummation, there may be evidence of actual anticompetitive effects that occur after the closing; in fact, those effects may be the reason why the Agency decided to investigate. Importantly, the legal standard does not change in the review of consummated mergers -- no proof of actual anticompetitive effects is required.[10] Although "post-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit,"[11] the converse is not true. Indeed, the Supreme Court has stated that the probative value of post-acquisition evidence offered by a defendant has been "found to be extremely limited."[12] "The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 merger divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behaviour when such a suit was threatened or pending."[13]

3. Review of mergers that should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

17. Under Section 7A(g)(1) of the Act, 15 U.S.C. § 18a(g)(1), the United States can sue any person that fails to comply with the Act's notification and waiting period requirements for a civil penalty of up to $16,000 for each day the violation continues. The Agencies examine the circumstances of each violation to determine whether penalties should be sought and the appropriate amount.[14] All of the civil penalty cases brought by the United States have been settled by consent decrees. Civil penalties can be and have been sought even if the underlying transaction is not anticompetitive. In addition to seeking penalties for failure to comply with the HSR Act's notification and waiting period requirements, the Agencies have the

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10 *See* Memorandum Opinion at 138, *United States v. Bazaarvoice*, No. 3:13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014) (rejecting argument that "the government cannot carry its burden if post-merger evidence shows continued price competition and innovation or if 'affected customers have testified the merger is not harmful'"), *available at* www.justice.gov/atr/cases/f302900/302948.pdf.

11 *U.S. v. General Dynamics Corp.,* 415 U.S. 486 (1974).

12 *Id.,* at 504-05.

13 *Id. See also* Memorandum Opinion at 108-09, *United States v. Bazaarvoice*, No. 3:13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014) (finding post-acquisition evidence regarding pricing to be "inconclusive" and in any event "manipulatable" and therefore "entitled to little weight"), *available at* www.justice.gov/atr/cases/f302900/302948.pdf; 5 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1205 (3d ed. 2009).

14 The Agencies often have determined not to seek civil penalties when parties have inadvertently failed to file *and* the parties made corrective filings promptly after discovering the failure to file, submitted an acceptable explanation for their failure to file, did not benefit from the violation, and have not previously violated the Act.

authority under Section 7 of the Clayton Act to review and challenge the underlying transaction and have done so in several instances. As noted in the answer to Question 7 below, Section 7 contains no time limit on challenging the underlying transaction.[15]

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

18. The Agencies have authority to investigate and challenge in court under Section 7 a transaction that parties have failed to properly report in accordance with the HSR Act. The remedy available in such circumstances is the same as for any Section 7 matter. The Agencies have obtained divestitures, partial or complete, to resolve competitive concerns in these situations. Over the years, there have been several examples of HSR civil penalties cases involving consummated transactions that have also resulted in successful divestitures after an investigation on the merits. For example, in a transaction involving Mahle GmbH, where the Agencies obtained the maximum civil penalty of more than $5.6 million for an intentional failure to file, the Agencies required the divestiture of the acquired company's U.S. piston business, including two factories and a research and development center, as well as technology outside the United States that supports that business.[16] In a transaction involving Sara Lee Corporation, where the Agencies obtained a $3.1 million civil penalty for failure to file, divestiture of several bands of shoe care products was required.[17]

19. Similarly, the Agencies have obtained substantive relief in addition to civil penalties in instances in which the parties consummated acquisitions after having filed incomplete HSR notifications (*e.g.*, failure to produce required business documents). For example, the Agencies obtained a $4 million civil penalty from Hearst Trust for filing an incomplete premerger notification and also required the company to divest the acquired business.[18] In another matter, the Agencies obtained a $2.97 million civil penalty from Automatic Data Processing for filing an incomplete premerger notification, and required the company to divest the acquired assets and offer a license to necessary data.[19]

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15 *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

16 *U.S. v. Mahle*, 1:97CV01401 (D.D.C. filed June 19, 1997), *available at* www.ftc.gov/news-events/press-releases/1997/06/ftc-obtains-56-million-german-and-brazilian-piston-manufacturers (press release for civil penalty case), and *In the Matter of Mahle Gmb* FTC C-3736 (June 6, 1997), *available at* www.ftc.gov/news-events/press-releases/1997/06/announced-actions-june-6-1997 (press release for divestiture).

17 *U.S. v. Sara Lee Corp.*, 1:96CV00196 (D.D.C. filed Feb. 6, 1996), *available at* www.ftc.gov/opa/1996/02/sara.shtm (press release for civil penalty case); Press Release, Fed Trade Comm'n, Sara Lee Agrees to Pay Record Civil Penalty to Settle Charges Over Shoe-Care Product Acquistion (Feb. 6, 1996), *available at* www.ftc.gov/news-events/press-releases/1996/02/sara-lee-agrees-pay-record-civil-penalty-settle-charges-over-shoe; *In the Matter of Sara Lee Corp.*, *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/1996/02/sara-lee-corporation-united-states-america-ftc.

18 *U.S. v. Hearst Trust*, 1:01CV02119 (D.D.C. filed Oct. 11, 2001), *available at* **Error! Hyperlink reference not valid.**www.ftc.gov/news-events/press-releases/2001/10/hearst-corporationsettles-charges-filing-incomplete-pre-merger (press release for civil penalty case), and *FTC v. Hearst Trust*, 1:01CV00734 (D.D.C. filed Dec. 14, 2001), *available at* **Error! Hyperlink reference not valid.**www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge-19-million-and-divest-business-facts-and (press release for divestiture).

19 *U.S. v. Automatic Data Processing, Inc.*, 1:96CV00606 (D.D.C. filed Mar. 27, 1996); *In the Matter of Automatic Data Processing, Inc.*, FTC Docket 9282 (filed June 18, 1997) www.ftc.gov/news-events/press-releases/1997/10/announced-actions-october-24-1997 (press release for consent order).

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

20. In the U.S., the Agencies do not "clear" or "approve" mergers. Although they may issue a public statement upon closing certain investigations without taking enforcement action,[20] this is not in any legal sense an official "approval" and the statement creates no rights for the parties. If the Agencies later conclude that a merger may have anticompetitive consequences, they can file a complaint challenging the transaction.

21. In 1957, the Supreme Court upheld a 1949 DOJ suit challenging stock acquisitions that occurred in 1917-19,[21] although Clayton Act challenges so many years after a transaction are exceptional. The FTC's challenge to Chicago Bridge & Iron Company's (CB&I) acquisition of certain Pitt-Des Moines, Inc. (PDM) assets provides a useful example.[22] In September 2000, the parties notified the Agencies of the proposed acquisition pursuant to HSR. More than 30 days later, but before the parties executed the acquisition, the FTC notified CB&I "that it had significant antitrust concerns about the acquisition and was conducting an investigation."[23] Roughly four months after expiration of the 30-day statutory waiting period, CB&I consummated the acquisition. The FTC subsequently issued an administrative complaint challenging the completed acquisition, and following an administrative trial found that the acquisition substantially lessened competition in four relevant product markets in the U.S., in violation of the Clayton and FTC Acts. To restore competition, the FTC ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. The FTC's decision and order were upheld on appeal.[24] In *Evanston*, too, the FTC subsequently challenged a previously cleared transaction.[25] The HSR Act explicitly provides that the Agencies' decision not to challenge following an HSR review is not a bar to a future Clayton Act case.[26] Remedies available are the same broad equitable remedies that would have been available at the time of the merger, although changes in the markets may make remedies that would have been appropriate at the earlier time no longer suitable.

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20 *See* Antitrust Division, United States Department of Justice, *Issuance of Public Statements Upon Closing of Investigations* (December 12, 2003), *available at* www.justice.gov/atr/public/guidelines/201888.pdf.

21 *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

22 *See* Press Release, Fed. Trade Comm'n, FTC Rules That Chicago Bridge & Iron Company Acquisition Is Anticompetitive (Jan. 6, 2005), *available at* www.ftc.gov/news-events/press-releases/2005/01/ftc-rules-chicago-bridge-iron-company-acquisition-anticompetitive/.

23 *Chicago Bridge & Iron Co. v. F.T.C.*, 534 F.3d 410, 420 and n.2 (5th Cir. 2008).

24 *Id.*

25 *In re* Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Aug. 6, 2007), *available at* www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

26 15 U.S.C. § 18a(i)(1).

22. The Agencies or private parties can also sue a merged firm that later engages in anticompetitive unilateral conduct, if monopoly power has been unlawfully acquired or maintained, under Section 2 of the Sherman Act. In the case of a merger that has been consummated following an Agency challenge and settlement pursuant to a consent decree, the Agencies could in theory petition the court to modify the decree if it were still in effect and circumstances had changed to the point that the merger was later producing anticompetitive effects. The parties and court would have to agree to any changes to the decree. This is different from a failure by a party to comply with the terms of an existing consent decree; the Agencies can always bring such a violation to the court's attention and seek appropriate sanctions and relief.