MERGER REMEDIES MANUAL

ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

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I. Overview

The Antitrust Division ("Division") is charged with enforcing the antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.[1] It is the Division's mission to protect American consumers from mergers and acquisitions ("mergers") that may substantially lessen competition.

Most mergers are not anticompetitive and may benefit consumers. Before seeking a remedy, there should be a sound basis for believing that the merger would violate Section 7 of the Clayton Act and that the resulting harm is sufficient to justify remedial action.[2] The Division should not seek remedies that are unnecessary to prevent anticompetitive effects because that could exceed its law enforcement function, unjustifiably restrict companies' ability to compete, and raise costs to consumers. Consequently, even though a party may be willing to settle early in an investigation, the Division must have sufficient information to be satisfied that there is a sound basis for believing that a violation would otherwise occur before agreeing to any settlement.

If the Division has concluded that a merger may substantially lessen competition, it can address the problem in several ways. The Division may seek an injunction that would prevent the parties from consummating the transaction. Parties frequently seek to avoid litigation by offering to cure the Division's concerns, and in those cases the Division may choose, instead, to agree to a settlement (a consent decree[3]) that allows the merger to proceed with modifications that preserve or restore competition.[4]

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[1] The Division is authorized to challenge mergers under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4.

[2] This manual has no force or effect of law. It does not constitute final agency action, has no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Division's complete discretion. The scope of this Manual is limited to remedies addressing anticompetitive mergers. Conduct that violates the antitrust laws may raise separate and unique considerations with respect to remedies.

[3] A consent decree is an agreement between the Division and defendants that is filed publicly in federal district court and, upon entry, becomes a binding court order. With a fix-it-first remedy, in contrast, the parties cure the Division's concerns upon or before consummation of the transaction. There is no complaint or other court filing. *See infra* Section III.C. Likewise, certain bank mergers can be resolved without a consent decree. *See, e.g.*, U.S. Dep't. of Justice, Antitrust Div., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger.

[4] The Division employs the criteria set forth in this manual when it evaluates the adequacy of a remedy and exercises its prosecutorial discretion in deciding whether to accept a settlement. As required by the Tunney Act, any proposed consent judgment the Division accepts must be filed in federal district court. *See* 15 U.S.C. § 16. After a period of public comment, the court may approve the proposed settlement upon finding that it is in the public interest. As part of this public-interest inquiry, the scope of the Court's review is limited to ensuring that the proposed consent judgment is a "reasonably adequate remed[y] for the alleged harm" in the complaint. *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016) (quoting United States v. Newpage Holdings, Inc., 2015 WL 9982691, at *7). In contrast to the limited public-interest inquiry under the Tunney Act, the Division's prosecutorial discretion encompasses a broader set of considerations, including the facts developed in the investigation, the judgment of the prosecuting attorneys, and the allocation of the Division's limited resources.

The purpose of this manual is to provide Division attorneys and economists with a framework for structuring and implementing appropriate relief short of a full-stop injunction in merger cases. This manual updates the Division's 2004 Policy Guide to Merger Remedies.[5] It focuses on the remedies the Division may consider, and is intended to ensure that those remedies are based on sound legal and economic principles and are closely related to the identified competitive harm. The manual also sets forth issues that may arise in connection with different types of relief, and offers Division attorneys and economists guidance on how to resolve them.

Any remedy must be based on sound legal and economic principles and be related to the identified competitive harm. Tailoring the remedy to address the violation is the best way to ensure that the relief obtained cures the competitive harm.[6] Before proposing a remedy to an anticompetitive merger, the Division should satisfy itself that there is a logical nexus between the remedy and the alleged violation—that the remedy both cures the competitive harm and flows from the theory of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, while preserving competitive markets.

The Division will review proposed remedies before accepting them. If parties propose a remedy, the Division will need adequate time and information to evaluate it. If the parties propose a remedy after a complaint challenging the transaction is filed, the Division may seek to bifurcate the proceeding into a liability phase and a remedy phase. The Division will investigate post-litigation remedies.

While it is useful to use past decrees as a starting point, it is inappropriate to include a provision in a decree merely because a similar provision was included in previous decrees, particularly where there has been no clear articulation of the purpose behind the inclusion of that provision in the decree at issue. There must be a nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions.

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[5] The Division withdrew the 2011 Policy Guide to Merger Remedies on September 25, 2018, and announced that the 2004 Guide would be in effect pending the release of an updated policy. *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., It Takes Two: Modernizing the Merger Review Process, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium 12 (Sept. 25, 2018), https://www.justice.gov/opa/speech/file/1096326/download.

[6] Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947))); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. United States Gypsum Co., 340 U.S. 76, 89 (1950) ("In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) ("The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions."); *cf.* Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981) (Relief barring certain vertical restrictions "goes beyond any reasonable relationship to the violations found."). *See also* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1228 (D.C. Cir. 2004) (In a Section 2 case, "the court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ." (quoting Microsoft Corp., 253 F.3d 34, 106)); United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (Relief "should be tailored to fit the wrong creating the occasion for the remedy."); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 154, 202 (D.D.C. 2002), *aff'd sub nom,* 373 F.3d 1199 (D.C. Cir. 2004).

Once the Division has accepted a remedy and entered into a consent decree, the Division will commit the time and effort necessary to ensure full compliance with the decree. It is contrary to the Division's law enforcement responsibilities to obtain a remedy and then not enforce it. The Division's work is not over until the remedies mandated in its consent decrees have been fully implemented. This requires, in the first instance, that decrees be drafted with sufficient reporting and access requirements to keep the Division apprised of how the decree is being implemented, and then a continuing commitment of Division resources to decree compliance and enforcement. Responsibility for enforcing all of the Division's outstanding judgments lies with the Office of the Chief Legal Advisor (specifically, with the Office of Decree Enforcement and Compliance), as well as the Division's civil litigating sections—to which the judgments are assigned according to the current allocation of industries or commodities among those sections—with assistance from a criminal section in criminal contempt cases.[7]

II. Principles

The following principles apply to structuring and implementing remedies in all Division merger cases, both horizontal and vertical:

- **Remedies Must Preserve Competition.**[8] Once the Division has determined that the merger is anticompetitive, the Division will insist on a remedy that resolves the competitive problem, irrespective of whether the transaction is horizontal or vertical. This assessment necessarily will be fact-intensive. It normally will require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will effectively remedy the competitive harm. Only after these determinations are made can the Division decide whether the proposed remedy will effectively redress the violation and, just as importantly, be no more intrusive than necessary to cure the competitive harm. Accepting remedies without analyzing whether they are sufficient and necessary to redress the violation would be abdicating the Division's responsibility to protect competition and American consumers.

  Although the remedy always should be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to preserve it. Preserving competition is the "key to the whole question of an antitrust remedy,"[9] and preserving competition is the only appropriate goal with respect to crafting merger remedies. Preserving competition requires replacing the competitive intensity that would be lost as a result of the merger rather than focusing narrowly on returning to

[7] *See infra* Section VII.C for a discussion of civil and criminal contempt proceedings.

[8] For simplicity of exposition, this manual uses the phrase "preserving competition" throughout, which should be understood to include the concept of restoring competition, depending on the specific facts of the transaction and its proposed remedy. For example, in the case of consummated mergers, the Division will seek a remedy that will effectively restore competition to the relevant market, including, when appropriate, unwinding a transaction.

[9] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

premerger HHI levels.[10] For example, assessing the competitive strength of a firm purchasing divested assets requires more analysis than simply attributing to this purchaser past sales associated with those assets and calculating HHIs.

- **Remedies Should Not Create Ongoing Government Regulation of the Market.** Merger remedies take two basic forms: one addresses the *structure* of the market, the other the *conduct* of the merged firm.[11] Structural remedies generally will involve the sale of businesses or assets by the merging firms. A conduct remedy usually entails injunctive provisions that would, in effect, regulate the merged firm's post-merger business conduct or pricing authority. Conduct remedies substitute central decision making for the free market. They may restrain potentially procompetitive behavior, prevent a firm from responding efficiently to changing market conditions, and require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure.[12] Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions. Conduct remedies typically are difficult to craft and enforce. For these reasons, conduct remedies are inappropriate except in very narrow circumstances. *See infra* Section III.B.

- **Temporary Relief Should Not Be Used to Remedy Persistent Competitive Harm.** A merger indefinitely changes the incentives of the merged firm and the structure of the market. Structural remedies designed to preserve a competitive market similarly are in effect indefinitely. A consent decree temporarily regulating conduct, on the other hand, does not effectively redress persistent competitive harm resulting from an indefinite change in market structure. Regulating conduct is inadequate to remedy persistent harm from a loss in competition.

- **The Remedy Should Preserve Competition, Not Protect Competitors.** Because the goal is to preserve competition—rather than to pick winners and losers—consent

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[10] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) ("'Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.'" (quoting the Division's 2004 Policy Guide to Merger Remedies)); *see also* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[11] In appropriate circumstances, the Division may consider seeking disgorgement in consummated merger challenges instead of or in addition to unwinding the transaction. In particular, where available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits, the Division may seek disgorgement of those profits. *See* Competitive Impact Statement at 10-12, United States v. Twin America, No. 1:12-cv-08989 (S.D.N.Y. 2015) ([T]his case involves a consummated joint venture that resulted in actual and substantial consumer harm. . . . By awarding disgorgement of Defendants' ill-gotten gain, the proposed Final Judgment will prevent Defendants from being unjustly enriched by their conduct and deter Defendants and others from engaging in similar conduct in the future."). Previously, the Division has sought and obtained disgorgement in an action brought under Section 1 of the Sherman Act. United States v. Keyspan Corp., 2011 WL 338037 (S.D.N.Y. 2011).

[12] Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at the American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

decree provisions should be designed to preserve competition rather than protect or favor particular competitors.[13]

- **The Risk of a Failed Remedy Should Fall on the Parties, Not on Consumers**. Remedies should be designed to limit the risk of failure as much as possible. To the extent any risk of failure remains, that risk should be borne by the parties, who seek to consummate a merger that would otherwise violate Section 7. Consumers should not bear the risk of a failed remedy.

- **The Remedy Must Be Enforceable.** A remedy is inadequate if it cannot be effectively enforced.[14] Remedial provisions that are too vague to be enforced or that could be construed in such a manner as to fall short of their intended purpose can result in inadequate relief, which would render ineffective the enforcement effort that went into investigating the transaction and obtaining the decree.

  A defendant will scrupulously obey a decree only when the decree's meaning is clear, and when the defendant and its agents know that they face consequences if they do not comply with the decree. Decree provisions should be as clear and straightforward as possible, always focusing on how a judge not privy to the settlement negotiations is likely to construe those provisions at a later time.[15] Likewise, care must be taken to avoid vague language or potential loopholes that might lead to attempted circumvention of the decree. Decrees should include provisions designed to facilitate the Division's future enforcement of the decree.

  Similarly, a decree that fails to bind a person or entity necessary to implementing the remedy may be ineffective.[16] As a result, attention must be given to identifying those persons who must be bound by the decree to make all of the proposed relief effective

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[13] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("[I]t is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990); Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 116-17 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Massachusetts v. Microsoft Corp., 373 F.3d at 1211, 1230; United States v. Microsoft Corp., 253 F.3d at 58.

[14] *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76, 137 (D.D.C. 2002), *aff'd sub nom*. Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) ("Plaintiffs' definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs' remedy which are reliant on this definition to be largely unenforceable.").

[15] *See* New York v. Microsoft Corp., 224 F. Supp. 2d at 100 ("Moreover, the case law counsels that the remedial decree should be 'as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know [ ] their duties and unintended contempts may not occur.'" (quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1947))).

[16] *Cf.* Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that the government, Bayer, Monsanto, and BASF stipulated to the joinder of BASF, the divestiture buyer, as a party to the action for purposes of the divestiture); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

and to ensuring that the judgment contains whatever provisions are necessary to ensure fulfillment of their responsibilities.

III. Structuring the Remedy

The goal of a divestiture is to ensure that the purchaser[17] possesses both the means and the incentive to maintain the level of premerger competition in the market[18] of concern.[19]

A. A Divestiture Must Include All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor

Any divestiture must include the assets necessary to ensure the efficient current and future production and distribution of the relevant product or service and thereby preserve the competition that would have been lost as a result of the merger. A structural remedy requires a clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long term. The necessary assets may be tangible (factories capable of producing automobiles or raw materials used in the production of some other final good) or intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots). Any divestiture should address whatever obstacles that, absent the divestiture, lead to the conclusion that a competitor would not be able to discipline a merger-generated increase in market power.[20] For example, if the divestiture buyer lacks a distribution system or necessary know-how, effective relief may require that the divestiture include such assets. Effective relief may also require the divestiture of "pipeline" products or R&D necessary to ensure the future competitive significance of the divested assets.[21] That is, the divestiture assets must enable the purchaser to compete effectively[22] and maintain the premerger level of competition, and should

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[17] The use of "purchaser" in this manual refers to the third-party purchaser of the divested assets from the merging firms.

[18] In this manual the singular term "market" should be construed to include both the singular and plural.

[19] *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'. . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.") (citation omitted).

[20] S*ee, e.g.*, White Consol. Indust., Inc. v. Whirlpool Corp., 612 F. Supp. 1009 (N.D. Ohio 1985), *vacated on other grounds*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986) (court analyzes sufficiency of a proposed divestiture package to restore effective competition); Fed. Trade Comm'n v. Sysco Corporation, 113 F. Supp. 3d 1, 72-8 (D.D.C. 2015) (analyzing the proposed divestiture's ability to preserve competition in the relevant market).

[21] *See, e.g.*, Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("[B]ecause Bayer and Monsanto compete to develop new products and services for farmers, the proposed Final Judgment requires the divestiture of associated intellectual property and research capabilities, including 'pipeline' projects, to enable BASF to replace Bayer as a leading innovator in the relevant markets.").

[22] *See infra* Section IV.B for a discussion of purchaser approval.

be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.[23]

If, for example, a potential entrant or small incumbent would be constrained by the time or the incentive necessary to construct production facilities, then sufficient production facilities should be part of the divestiture package. If the assets being combined through the merger are valuable brand names or other intangible rights, then the divestiture package should include a brand or a license that enables its purchaser to compete quickly and effectively, both in the short term and as the companies continue to innovate.[24] In markets where an installed base of customers is required in order to operate at an effective scale, the divested assets should either convey an installed base of customers to the purchaser or quickly enable the purchaser to obtain an installed customer base.

A critical asset may be intangible, such as when firms with alternative patent rights for producing the same final product are merging.[25] In those cases structural relief must provide one or more purchasers with rights to that asset, either by sale to a different owner or through a fully paid-up license.[26]

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[23] *See* Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (D.D.C. 2015) (quoting the Division's 2004 and 2011 Policy Guides to Merger Remedies); Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶ 61717 at 72930, 1977 WL 1491 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture preserves competition at the premerger level. However, if the divestiture of one firm's assets would not preserve competition, then the other firm's assets must be divested. For example, if firm A's productive assets can operate efficiently only in combination with other assets of the firm, while firm B's productive assets are free standing, the Division likely would require the divestiture of firm B's assets.

[24] *See* Competitive Impact Statement at 14, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (noting that the purchasers will receive a transitional license for the TruMoo chocolate milk brand and a perpetual license to the intellectual property, product formulas, technology, and know-how for TruMoo because "consumers value the taste of the TruMoo milk and the divestiture buyers will benefit from the ability to perpetually offer chocolate milk with the same taste").

[25] A critical asset is one that is necessary for the purchaser to be an effective long-term competitor in the market. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

[26] United States v. Nat'l Lead Co., 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division will generally insist on fully paid-up licenses rather than running royalties for two reasons. First, running royalties require a continued relationship between the merged firm and the purchaser, which could soften competition between them. The result will be less competition than the two merging firms previously had been providing. Second, running royalty payments, even if they are less expensive to the licensee over the lifetime of the license, add a cost to the licensee's production and sale of incremental units, tending to increase the licensee's profit-maximizing price. The Division may consider the use of running royalties, however, if (a) no deal otherwise would be struck between the merged firm and the licensee (perhaps because the firms differ greatly in their estimates of future revenue streams under the license), (b) blocking the deal entirely likely would sacrifice significant merger-specific efficiencies worth preserving, and (c) the Division is persuaded that the running royalties will completely cure the

In addition, certain intangible assets likely should be conveyed whenever tangible assets are divested. These may include intangible assets that provide valuable information to the purchaser—for example, documents and computer records providing the purchaser with customer information or supply or production information, research results, computer software, and market evaluations. Other intangible assets that likely should be conveyed include those pertaining to patents, copyrights, trademarks, other IP rights, licenses, or access to key intangible inputs (for example, access to a particular range of broadcast spectrum) that are necessary to allow for the most productive use of any tangible assets being divested.[27]

The package of assets to be divested must not only allow a purchaser to preserve the competition that would have been lost due to the merger, but also provide it with the *incentive* to do so.[28] Unless the divested assets are sufficient for the purchaser to become an effective and efficient competitor, the purchaser may have a greater incentive to deploy them outside the relevant market. In addition, there should be no *disincentives* associated with shifting the divested assets or employees to the purchaser. For example, employees should not suffer a financial disadvantage when they leave the seller to become employed by the purchaser.

In some circumstances there may be a trade-off between requiring a somewhat smaller, less valuable package of divestiture assets and accepting greater risk that the remedy will prove inadequate, or demanding a more substantial divestiture in order to be confident that post-merger competition will be preserved. Because consumers should not bear the risk of a failed remedy and the Division must be confident that the merger will not harm competition, the Division's preference is to demand a remedy that is sufficiently robust to provide this confidence. Accordingly, it also may be necessary for the parties to warrant that the divestiture assets are sufficient for the divestiture buyer to maintain the viability and competitiveness of the divested businesses.[29]

1. Divestiture of an Existing Standalone Business Is Preferred

To best achieve the goal of preserving the competition that would have been lost as a result of the merger, the Division has a preference for requiring the divestiture of an existing standalone business, because it has demonstrated success competing in the relevant market.[30] In

competitive harm. Also, the Division generally will not require royalty free licenses since parties ordinarily should be compensated for the use or sale of their property, intangible as well as tangible. *See id.* at 349 ("[T]o reduce all royalties automatically to a total of zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion."); Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1231 (D.C. Cir. 2004).

[27] If tangible assets are not being divested because they already are in the hands of the purchaser, intangible assets that are necessary to allow for the most productive use of those tangible assets may need to be conveyed.

[28] *See infra* Section IV.B. for a further discussion of the characteristics of an acceptable purchaser.

[29] *See, e.g.*, Final Judgment at 21, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[30] The Federal Trade Commission's study of merger remedies found that divestitures of ongoing businesses succeeded at higher rates than divestitures of selected assets. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-

addition, an existing standalone business typically possesses all of the physical assets, personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product.[31] Parties proposing to divest a standalone business should be prepared to show that the business to be divested includes all of the components necessary to operate such business, that it operates or has in the recent past operated as a standalone business, and that it can be sold to a divestiture buyer who will be able to preserve competition. Where an existing business lacks these characteristics, additional assets from the merging firms will need to be included in the divestiture package.[32]

2. Divestiture of More than an Existing Standalone Business May Be Required When It Is Necessary to Preserve Competition

Divesting an existing business, even if the divestiture includes all of the production and marketing assets responsible for producing and selling the relevant product, will not always give the purchaser both the ability and incentive to preserve the competition threatened by the merger. Where divestiture of an existing standalone business is insufficient to resolve the competitive issues raised by the proposed merger and preserve competition, additional assets from the merging firms will need to be included in the divestiture package. For example, in some industries, it is difficult to compete without offering a "full line" of products.[33] In such cases, the Division may seek to include a full line of products in the divestiture package, even when the antitrust concern relates to only a subset of those products.[34] Similarly, to address competitive problems in a United States market, divestiture of a world-wide business or assets outside of the United States nevertheless may be required, including when necessary to give the purchaser the scale and scope needed to preserve competition.[35] More generally, integrated firms can provide

economics/p143100_ftc_merger_remedies_2006-2012.pdf [hereinafter FTC Merger Remedies Report]. In some cases, an existing business may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

[31] *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017).

[32] *See infra* Section III.A.2.

[33] *See, e.g.*, Competitive Impact Statement at 20, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (explaining that divestiture of Bayer's R&D programs associated with wheat was required: "Because seed and trait innovations can often be applied across multiple crops, a broader seed and trait portfolio will provide the promise of higher returns on investment and increase the incentive to innovate. [The divestiture of Bayer's wheat programs will] preserve the scope efficiencies that Bayer enjoys today by keeping these businesses together.").

[34] *See, e.g.*, Competitive Impact Statement at 11, United States v. Transdigm Group, Inc., No. 1:17-cv-02735 (D.D.C. 2017) (proposed remedy required divestiture of business unit developing and manufacturing commercial aircraft passenger restraints, including plants in Florida and Germany, to remedy competitive problems in specific types of restraints).

[35] *See* Dep't of Justice & Fed. Trade Comm'n, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 5.1.5 (2017) ("An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis.") (citations omitted), https://www.justice.gov/atr/internationalguidelines/download [hereinafter International Guidelines]; Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1218-19 (11th Cir. 2012).

scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant product.[36] When the evidence suggests that this is likely to be the case (such as where only large integrated firms manage to remain viable in the marketplace), suing to block the entire transaction rather than accepting a divestiture may be the only effective solution.

3. An Asset Carve-Out Consisting of Less than an Existing Standalone Business May Be Considered in Limited Circumstances

The Division should scrutinize critically a merging firm's proposal to sell less than the entirety of an existing standalone business. The merging firm may have an incentive to divest fewer assets than are required for the purchaser to compete effectively going forward. Further, at the right price, a purchaser may be willing to purchase and monetize these assets even if they are insufficient to produce competition at the premerger level. A purchaser's interests are not necessarily identical to those of the consumer, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or enabling it to produce weak or short-term competition in the relevant market), it may be willing to buy them at a discounted price regardless of whether they remedy the competitive concerns.

An asset carve-out consisting of less than an existing standalone business may be considered if: (1) there is no existing standalone business smaller than either of the merging firms and a set of acceptable assets can be assembled from one of the merging firms, or (2) certain of the entity's assets are already in the possession of, or readily obtainable in a competitive market by, the divestiture purchaser. As discussed above, the Division will scrutinize these divestitures carefully, and any risk of failure should be borne by the merging parties.[37] If the Division is not satisfied that the parties have addressed the risk of a failed remedy, a more appropriate course may be to sue to block the transaction.

The Division also may approve the divestiture of less than an existing standalone business if the evidence clearly demonstrates that the purchaser does not want or need some of the entity's assets, for example because the purchaser already is in the possession of, or can readily obtain in a competitive market, similar assets, such as non-specialized services like general accounting or computer programming. For example, if the likely purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create unnecessary and costly redundancy. If the potential purchaser

[36] *See, e.g.*, Modified Final Judgment, United States v. Parker-Hannifin Corp., No. 1:17- cv- 01384 (D. Del. 2017 (divestiture of international assets necessary to remedy harm in U.S. market); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("the proposed Final Judgment requires the divestiture of additional assets that will give BASF the scale and scope to compete effectively today and in the future").

[37] The Division will pay close attention to asset carve-outs where certain customer contracts are divested to the purchaser and others are retained by the seller. In such cases, the Division may require the waiver of any contractual prohibitions on the purchaser soliciting customers during the term of those contracts, or may require the seller to permit customers to switch to the purchaser without penalty. *See, e.g.*, Final Judgment at 11, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (requiring Defendants to release customers from contractual obligations and otherwise applicable termination fees).

is given the option of purchasing such assets and declines to do so, divesting only the assets required to design and build the relevant product efficiently may be appropriate. Of course, in those circumstances, the Division would need to know the purchaser's identity in advance and likely would require an upfront buyer.[38]

There may be situations where there is no obvious existing standalone business or collection of assets from a single firm to divest. Although disfavored, in limited circumstances, it may be possible to assemble the full set of assets necessary to preserve competition from both of the merging firms. The Division regards such "mix and match" asset packages with skepticism. The Division will not accept mix-and-match divestitures when there is reason to believe that they will not effectively preserve competition, such as when interoperability or brand are important. Because the assets in a "mix and match" divestiture package are not being operated by the same owner as an existing business, they likely will require some reconfiguration by the buyer, and it is more difficult to determine whether the selected assets are appropriate and can be operated efficiently together. The parties must demonstrate to the Division's satisfaction that the divestiture of these assets will create a viable entity that will preserve competition. In such cases, the Division likely will require an upfront buyer to ensure that the package gives the buyer everything it needs to preserve existing competition.

4. All Assets to Be Divested Must Be Specified in the Consent Decree

Division policy requires that any proposed consent decree include a precise description of the package of assets that, when divested, will resolve the Division's competitive concerns by maintaining competition at premerger levels.[39] The package of assets typically should comprise all assets owned by or used to operate the divested business. If the parties propose to exclude any such assets from the divestiture package, they must demonstrate that the absence of such assets will not affect the purchaser's ability and incentive to maintain the level of premerger competition in the market of concern. The consent decree ordinarily will identify a single set of divestiture assets. In rare circumstances, the decree may include a description of more than one set of assets the divestiture of which would be acceptable to the Division, with the defendant permitted to sell any of the described asset packages during the initial divestiture period.[40] If, at any time after the decree is filed, the Division and the defendant agree that the sale of an asset package not described in the consent decree will resolve the competitive concerns raised by the proposed transaction, the consent decree must be modified to describe this new divestiture

[38] In circumstances in which there are many potential purchasers that possess or could acquire in a competitive market the assets necessary to effectively preserve competition despite purchasing less than an existing standalone business, the Division may not need to know the identity of the purchaser in advance. The Division also might approve divestiture of less than an existing standalone business in matters involving industries where there has been a substantial history of success with divestitures of this kind. *See, e.g.*, Competitive Impact Statement at 8, United States v. CenturyLink, Inc., No. 1:17-cv-02028 (D.D.C. 2017) (explaining that the assets to be divested "are attractive assets that should draw suitable acquirers with sufficient expertise to accomplish the divestitures expeditiously").

[39] Nothing, however, prohibits the merged firm from selling *additional* assets not specified in the decree.

[40] The decree may specify that a selling trustee have similar flexibility to sell the alternative sets of assets or may require the trustee to sell only one of the described sets of assets.

package and the reasons this new divestiture is appropriate must be set forth in the moving papers.[41]

In rare cases, it may be appropriate to permit flexibility in the specification of the divestiture assets. Although the appropriate identification of the divestiture assets is sometimes obvious, either due to the nature of the business or the homogeneity of potential purchasers, this is not always the case. When an upfront buyer is not required, the circumstances of potential bidders may vary in ways that affect the scope of the assets each would need to be an effective competitor. For example, one potential purchaser might require certain distribution assets and another may not. In other cases, the Division may be indifferent between alternative sets of divestiture assets—for example, a manufacturing facility owned by merging firm A versus a similar facility owned by merging firm B, or even differently configured sets of assets, either of which would enable a purchaser to maintain the premerger level of competition in the affected market. The Division recognizes the need for flexibility in defining the divestiture assets in such cases.

5. Permitting the Merged Firm to Retain Access to Divested Intangible Assets May Present a Competitive Risk

When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm can retain rights to these assets, such as the right to operate under the divested patent. Because intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, there may be no cost to allowing the seller to retain the same rights as the purchaser. In such cases, the Division may require the merging parties to divest the intangible asset, and then require the purchaser to license it back to the merged firm.[42] Doing so will ensure the purchaser's independence from the merged firm, and will ensure that the purchaser has the same incentive to deploy or invest in the asset that the seller did.

Permitting the merged firm to retain access to critical intangible assets, however, may also present a competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may be more difficult for it to differentiate its product from its rivals' and therefore it may be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. For example, the purchaser may face greater risks of misappropriation by its rival of future "add on" investments or marketing activities. Where the purchaser is unable effectively to differentiate its offering from that of the merged firm, this may

[41] A minor deletion of assets from the divestiture package, however, may not require a decree modification.

[42] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (dividing certain "shared" intangible assets, some of which were to be sold with the divested assets and licensed back to Thales, while others were required to be licensed for use with the divested assets); Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring Bayer to divest intangible assets related to its digital agriculture business, and requiring BASF, the divestiture buyer, to license certain intangible assets back to the merged firm "for the limited purpose of allowing Bayer to sell outside North America" certain digital agriculture products).

weaken its ability and incentive to compete as aggressively as the two formerly independent firms had been competing premerger. Moreover, where multiple firms have rights to the same trademark or copyright, *none* may have the proper incentive to promote and maintain the quality and reputation of the brand. Finally, this type of ongoing entanglement may create close and persistent ties between the merged firm and the purchaser that may serve to enhance the flow of information or align incentives, which may facilitate collusion. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to critical intangible assets will hinder the purchaser from preserving competition and, accordingly, the Division will require that the merged firm relinquish all rights to the critical intangible assets.[43]

There may be other circumstances, however, when the merged firm needs to retain rights to the intangible assets to achieve demonstrable efficiencies—which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture—and a non-exclusive license is sufficient to preserve competition and assure the purchaser's future viability and competitiveness.[44] Under these circumstances, the merged firm may be permitted to retain certain rights to the critical intangible assets and may only be required to provide the purchaser with a non-exclusive license.[45]

B. Structural Relief Is the Appropriate Remedy for Both Horizontal and Vertical Mergers

Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government entanglement in the market. A carefully crafted divestiture decree is "simple, relatively easy to administer, and sure" to preserve competition.[46] Almost all merger remedies are structural. There are limited circumstances, however, when conduct remedies may be appropriate.

[43] For example, the Division required the divestiture of rights to trade dress and other intellectual property relating to certain brands of hair care products in *United States v. Unilever N.V.* Competitive Impact Statement at 11, United States v. Unilever N.V., 1:11-cv-00858 (D.D.C. 2011).

[44] These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks. This is because the purchaser is almost certain to rely on the latter to distinguish its products from incumbent products. In contrast, patented production technology that is shared, in addition to having the beneficial effect of lowering both producers' marginal costs, is less likely significantly to affect competition since the production process generally does not affect the purchaser's ability to differentiate its product.

[45] *See, e.g.*, United States v. 3D Sys. Corp., 2002-2 Trade Cas. ¶ 73738, 2001 WL 964343 (D.D.C. 2001).

[46] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961); *see generally* California v. Am. Stores Co., 495 U.S. 271, 280-81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition.").

1. Conduct Relief to Facilitate Structural Relief

Tailored conduct relief may be useful in certain circumstances to facilitate effective structural relief.[47] Temporary[48] supply agreements, for example, may be useful when accompanying a structural remedy.[49] If the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured, product mixes are altered, licenses are applied for or transferred, or new supply contracts are negotiated), a temporary supply agreement can help prevent the temporary loss of a competitor from the market.[50] The Division will scrutinize supply agreements to confirm that they prevent the flow of competitively sensitive information between the parties.

Similarly, divestitures normally involve the transfer of personnel, and *temporary* limits on the merged firm's ability to re-hire these employees may be necessary. Incumbent employees often are essential to the productive operation of the divested assets, particularly in the period immediately following the divestiture. For example, they may have unique technical knowledge of particular manufacturing equipment or may be the authors of essential software. While knowledge is often transferrable or reproducible over time, the immediate loss of certain

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[47] *See, e.g.*, Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

[48] The Division pays close attention to the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. The Division does not have a one-size-fits-all limit on how long a temporary supply agreement can be, but rather assesses the duration of a proposed supply agreement in the context of the product at issue. Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise competitive issues. First, given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for products or key inputs are likely to be disadvantaged in the long term. Contractual terms are difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to preserve competition. Second, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Third, long-term supply agreements may put the buyer at a competitive disadvantage, for example by being locked in to a non-competitive price.

[49] The Division also considers carefully the pricing terms of these supply agreements. Pricing terms that require the purchaser to pay a markup above the cost incurred by the divestiture business prior to the merger may compromise the purchaser's ability to preserve competition by putting the purchaser at a competitive disadvantage relative to the pre-merger status quo. On the other hand, pricing at the divestiture business's pre-merger cost may reduce the purchaser's incentive to secure an alternative source of supply—and compete as an independent entity—as quickly as possible. The Division evaluates these considerations in the context of the product at issue. For example, if the purchaser's post-divestiture cost is higher than the divestiture business's pre-merger cost, whether and to what extent that higher input price limits the purchaser's ability to compete will depend on the relative significance of the cost of the input to the price of the downstream product or service.

[50] *See, e.g.*, Final Judgment, United States v. United Technologies Corp., No. 1:18-cv-02279 (D.D.C. 2018) (requiring Defendants to supply manufacturing services at the purchaser's option); Competitive Impact Statement at 17, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (noting that interim supply and transition services agreements are "aimed at ensuring that the [divestiture] assets are handed off in a seamless and efficient manner. . . [and that divestiture buyer] BASF can continue to serve customers immediately upon completion of the divestitures.").

employees may substantially reduce the prospect that the divestiture will preserve competition, at least at the outset. To protect against this possibility, the Division may prohibit the merged firm from re-hiring these employees for some limited period.[51]

Restricting the merged firm's right to compete in final output markets or against the purchaser of the divested assets, even as a transitional remedy, is disfavored. Such restrictions directly limit competition in the short term, and any long-term benefits are inherently speculative. For this reason, the Division is unlikely to impose them as part of a merger remedy. When the purchaser appears incapable of surviving or competing effectively against the merged firm without such restrictions, the Division is likely to seek a full-stop injunction against the transaction.[52]

Firewall provisions[53] are designed to prevent the dissemination of information within a firm that could facilitate anticompetitive behavior, such as coordination between competitors.[54] Firewalls are infrequently used because, no matter how well crafted, the risk of collaboration in spite of the firewall is great. They occasionally have been used, however, in limited circumstances to facilitate structural relief or where significant efficiencies could not be achieved without the merger or through a structural remedy.[55]

In considering whether a firewall is appropriate, the Division is careful to ensure that the provision fully prevents the targeted information from being disseminated. Time and effort are devoted to identifying potentially problematic types of information and to considering how to effectively cordon off that information. Effective monitoring also is required to ensure that the firewall provision is adhered to and effective. A necessary aspect of any firewall provision is a carefully designed enforcement mechanism with meaningful consequences for violations.

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[51] *See, e.g.*, Final Judgment, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019) (prohibiting Defendants from hiring certain employees hired by the acquirer of the divested assets for a period of one year); Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2019). Of course, in a situation in which there are a limited number of key employees who are essential to any purchaser competing effectively in the market, the Division will scrutinize carefully whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, a more appropriate action may be to sue to block the transaction.

[52] When divestitures are required in a consummated transaction, however, the Division may consider such a provision as a transitional remedy if it is necessary to give the purchaser time to become established as a competitor.

[53] For purposes of this section, the term "firewall provisions" refers to long-term obligations imposed by a Final Judgment as a part of a remedy. This term does not include short-term obligations included in Asset Preservation or Hold Separate Stipulations and Orders, which operate under different incentives and time frames.

[54] While coordination is perhaps the chief concern in such instances, such information sharing could also lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation. Further, information sharing could lead to unilateral anticompetitive effects.

[55] *See, e.g.*, Competitive Impact Statement at 18-19, United States v. Northrop Grumman Corp., 1:02-cv-02432 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses); Competitive Impact Statement, United States v. Lehman Bros. Holdings, Inc., 1:98-cv-00796 (D.D.C. 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defense technologies).

2. Stand-Alone Conduct Relief

Stand-alone conduct relief is appropriate only when the parties prove[56] that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.[57]

Mergers present the potential to create efficiencies or benefit consumers.[58] Where cognizable efficiencies[59] are significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies. In such situations, a stand-alone conduct remedy may be appropriate to consider. For the prospect of potentially attainable efficiencies to justify accepting a conduct remedy, however, the efficiencies in question need to be cognizable[60] (rather than merely asserted), they must mitigate the merger's potential to harm consumers in the relevant market, and they must be unattainable in the context of a structural divestiture.

Mergers may also present the situation where any possible structural remedy that would undo the competitive harm would result in the loss of pre-existing internal efficiencies, i.e., efficiencies already achieved by a merging firm, prior to the merger, that are not due to the merger. For example, in order to minimize costs a firm may use the same distribution system for both the widgets and the gadgets that it produces. A divestiture that requires breaking up the distribution system into a widget distribution system, entirely separate from the gadget distribution system, may eliminate efficiencies that had been created by their original consolidation. The Division will consider a conduct remedy that retains these efficiencies if it

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[56] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., 'Harder Better Faster Stronger': Evaluating EDM as a Defense in Vertical Mergers, Remarks as Prepared for Delivery at George Mason Law Review 22nd Annual Antitrust Symposium 9-10 (Feb. 15, 2019), https://www.justice.gov/opa/speech/file/1132831/download.

[57] *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. of Justice, Antitrust Div., Antitrust and Deregulation, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/file/1012086/download.

[58] Horizontal and vertical mergers often produce different types of efficiencies. Examples of possible horizontal-merger-related efficiencies include achieving economies of scale or scope, and rationalization of sales forces, design teams, and distribution networks. For a discussion of the efficiencies that can arise from a horizontal merger, *see* Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES § 10 (2010), https://www.justice.gov/atr/file/810276/download [hereinafter Horizontal Merger Guidelines]. Vertical mergers may benefit consumers through the elimination of double marginalization (i.e., the vertically integrated firm may have an incentive to set lower downstream prices if it can self-supply an input rather than paying an independent upstream firm for the input at a price that includes a markup over the upstream firm's marginal cost), or through the creation of other efficiencies that may benefit competition and consumers. *See* Dep't of Justice & Fed. Trade Comm'n, VERTICAL MERGER GUIDELINES § 6 (2020), https://www.justice.gov/atr/page/file/1290686/download.

[59] If, absent the transaction, assets of the acquired firm otherwise would exit the market, maintaining these assets in the marketplace may be considered a type of economy of scale or scope.

[60] Cognizable efficiencies are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Horizontal Merger Guidelines, *supra* note 58, § 10.

completely cures the anticompetitive harm arising from the proposed merger, and can be effectively enforced.[61]

In deciding whether a conduct remedy is appropriate, the Division will also consider the costs of monitoring and enforcing the remedy. Monitoring and enforcing a conduct remedy may be easier in markets in which regulatory oversight is already employed and data on the merged firm's conduct would be collected regularly and audited in any event. Although those regulators will not generally have the same incentives and goals as the Division, the greater transparency of market conduct that they permit can lower the cost to the Division and the courts of monitoring and enforcement.[62]

C. A Fix-It-First Remedy Must Fully Eliminate the Competitive Harm

A fix-it-first remedy is a structural solution[63] implemented by the parties that the Division accepts before a merger is consummated.[64] An acceptable fix-it-first remedy eliminates the Division's anticipated (and yet to be determined) competitive concerns and therefore the need to file a case.[65]

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[61] In rare circumstances, the Division has accepted a waiver of legal rights as a remedy to cure anticompetitive harm. For example, when an agricultural cooperative with certain antitrust exemptions under the Capper-Volstead Act acquired assets not exempt under the Act, the Division obtained an injunction prohibiting the merged firm from asserting the exemption with respect to the acquired assets. *See, e.g.*, Final Judgment at 8-9, United States v. Dairy Farmers of America, No. 00-1663 (E.D. Pa. 2000); Competitive Impact Statement at 2, *Dairy Farmers of America*, No. 00-1663 ("Moreover, because both DFA and Land O'Lakes are agricultural cooperatives they are entitled to federate their branded butter businesses under the Capper-Volstead Act, 7 U.S. C. §291, which exempts from antitrust scrutiny collective marketing by or on behalf of agricultural production cooperatives. SODIAAL, however, does not have the benefit of the Capper-Volstead exemption. Thus, DFA's acquisition of the SODIAAL assets would bring the important SODIAAL brands under the control of an exempt cooperative."); *see also* Competitive Impact Statement at 30-31, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020). Such a waiver is more akin to a structural remedy because it preserves independent competition among existing competitors that otherwise would have been lost as a result of the merger.

[62] This will not, however, eliminate all mechanisms through which conduct-regulated firms can evade the conduct remedy. For instance, suppose the Division is considering a conduct remedy partly because a government agency accurately monitors the prices in the industry (but only the prices). One way to comply with the pricing provision (such as a non-discrimination provision) might be to keep prices the same, but decrease quality. However, if quality is not easily altered, or if there are other restraints on the merged firm's incentive to decrease quality, then the conduct remedy may be acceptable.

[63] A fix-it-first remedy usually involves the sale to a third party of a subsidiary or division or of specific assets from one or both of the merging parties.

[64] If the parties *unilaterally* decide to restructure their transaction to eliminate any potential competitive harm, it is not considered a fix-it-first remedy for the purposes of this manual since the Division did not "accept" the fix. Similarly, a one-time action by the parties that eliminates any potential competitive harm and neither regulates ongoing conduct nor requires ongoing monitoring, such as a one-time waiver of a non-compete provision to reduce entry barriers or facilitate entry by a new competitor, would not be considered a fix-it-first remedy.

[65] A fix-it-first remedy does not trigger the Tunney Act process because the statute applies only to "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws." 15 U.S.C. § 16(b); *see also In re* IBM, 687 F.2d 591, 600-03 (2d Cir. 1982) (holding that the Tunney Act does not apply to a stipulated dismissal under Fed. R. Civ. P. 41(a) and noting

A fix-it-first remedy may be inappropriate if it is presented to the Division after the Division has determined that it has a substantial basis for filing a complaint challenging the transaction. Once the Division has made that determination, the Division is unlikely to accept a fix-it-first remedy in lieu of filing a consent judgment in federal district court.[66]

If an acceptable fix-it-first remedy can be implemented, the Division may exercise its prosecutorial discretion to forgo filing a case and conclude its investigation without imposing additional obligations on the parties.

Parties who propose a fix-it-first remedy will be required to give the Division a reasonable period of time and information needed to evaluate it. As part of this process, Division attorneys and economists reviewing fix-it-first remedies will carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy preserves competition indefinitely and contains no less substantive relief than would be sought if a case were filed.[67] The Division, therefore, conducts an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.[68] Indeed, parties should be prepared for the Division to issue compulsory process to identify and evaluate any potential fixes that the merging parties may be considering.

If the parties propose a remedy after a complaint challenging the transaction is filed, the Division reserves its right to seek to bifurcate the proceeding into a liability phase and a remedy phase.

If the competitive harm requires remedial provisions that entail continuing, post-consummation obligations on the part of the merged firm, a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy may be unacceptable if, as part of the solution, the merged firm would be required to provide the purchaser with a necessary or important input pursuant to a supply agreement. In addition, the prospect that the merged firm may reacquire the divested

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constitutional concerns that would arise if the district court were to be involved in the executive branch's decision to abandon litigation). The legislative history of the Tunney Act confirms that the statute applies only to consent decrees filed in civil court cases brought by the United States; indeed, Congress considered and rejected an alternative version of the bill that would have expanded its scope to "any proposed consent judgment or decree *or other settlement*." S*ee In re* IBM, 687 F.2d at 601 (citing S. 1088, 93d Cong. § 2(a) (1973) (emphasis added)).

66 *See supra* note 4.

67 The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail timely to comply with the written agreement.

68 Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. *See* discussion *infra* Section IV.B.

business or assets may make a fix-it-first remedy inappropriate. The Division would insist upon having recourse to a court's contempt power in such circumstances to ensure the merged firm's compliance with the agreement.

D. Remedies for Transactions Challenged Post-Consummation

The Division typically reviews mergers prior to consummation, but it also reviews and challenges consummated transactions.[69] The legal analysis of the competitive effects of a proposed transaction does not differ significantly from that of a consummated deal. Remedying a consummated deal, however, may pose unique issues. The Division's objective in all cases is to eliminate, to the extent possible, the anticompetitive effects that will result or have resulted from the merger. In a consummated transaction, the parties already have acquired, and often integrated, the assets. If the acquired assets are integrated, crafting an effective divestiture to eliminate the anticompetitive effects may be difficult,[70] but nonetheless necessary to undo the illegal effects of the merger.[71] In some cases, unwinding the transaction may be necessary to effectively restore competition in the relevant market.[72] In other cases, divestiture of more than the acquired assets may be required to restore the divested business to the same competitive position it had held prior to the transaction, and transitional assistance for an interim period may be required. In still other cases, divestiture of less than the acquired assets—in particular, of assets necessary and sufficient for smaller competitors or market entrants to restore competition—may be sufficient.[73]

E. Collaboration when Structuring a Remedy

1. Collaboration with International and State Antitrust Enforcers

The Division often interacts with international and state antitrust authorities in merger matters. In many cases, the Division may be able to work collaboratively with other antitrust enforcers to structure remedies that are effective across jurisdictions and that, to the extent

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[69] *See* United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. 2014); United States v. Parker-Hannifin Corp., No. 1:17-cv-01354 (D. Del. 2017); Complaint, United States v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2012).

[70] The difficulty of "unscrambling of the eggs" led Congress to enact the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a.

[71] For instance, in one consummated case in which the respondent had fully integrated the acquired assets, the Federal Trade Commission required the respondent to reorganize the company into two separate, stand-alone divisions, and divest one of them. In the matter of Chicago Bridge & Iron Co. N.V., No. 9300, 138 F.T.C. 1024, *aff'd* Chicago Bridge & Iron Co. v. Fed. Trade Comm'n, 534 F.3d 410 (5th Cir. 2008), http://www.ftc.gov/os/adjpro/d9300/index.shtm.

[72] *See, e.g.*, Final Judgment, United States v. Microsemi Corporation, No. 8:09-cv-00275 (C.D. Cal. 2010).

[73] *See* Competitive Impact Statement at 9, United States and State of New York v. Twin America, LLC, No. 1:12-cv-08989 (S.D.N.Y. 2015) (requiring the divestiture of New York City Department of Transportation bus stop authorizations because "the most intractable barrier to entry is the inability of new firms to obtain bus stop authorizations from NYCDOT at or in sufficient proximity to New York City's top attractions and neighborhoods.").

possible, do not conflict unnecessarily with the remedies of other jurisdictions.[74] Where possible, while the Division continues its investigation of the transaction, it welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies. The Division will not advocate for remedies with international or state enforcement agencies that would not be available to the Division under United States law.

2. Collaboration with Regulatory Agencies

When mergers involve firms in regulated industries, the Division considers the impact of the applicable regulations on the competitive dynamics and any proposed remedy. The existence of regulation typically does not eliminate the need for an antitrust remedy to preserve competition effectively. Just as in unregulated markets, when the Division determines that an antitrust remedy is necessary to eliminate a merger's potential competitive harm in a regulated market, it seeks that remedy.

Whenever the Division is considering a remedy for a merger in a regulated industry, collaboration with the regulatory agency is a best practice. By working together, the Division and the regulatory agency can avoid remedies with inconsistent requirements and can ensure that their remedies work together efficiently and effectively to preserve competition and protect consumers.

F. Characteristics that Increase the Risk a Remedy Will Not Preserve Competition

Based on the Division's experience evaluating remedies, certain characteristics of proposed remedies increase the risk that a remedy will not effectively preserve competition. Proposed remedies that feature one or more of these characteristics are at greater risk of being found by the Division to be unacceptable.

- *Divestiture of less than a standalone business.* The Division prefers the divestiture of an existing standalone business. An existing business typically possesses not only all of the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market. In contrast, divestiture of less than an existing standalone business may not result in a viable entity that will effectively preserve competition.[75]

- *Mixing and matching assets of both firms*. A divestiture that combines assets or personnel that have never operated together increases the risk that the divestiture will not effectively preserve competition.[76]

[74] Additional guidance concerning cooperation with international enforcers regarding merger remedies is available in the International Guidelines, *supra* note 35, § 5.1.5.

[75] *See supra* Sections III.A.1, III.A.3.

[76] *See supra* Section III.A.3.

- *Allowing the merged firm to retain rights to critical intangible assets*. Divestitures must include all assets, tangible and intangible, necessary for the purchaser to be an effective, long-term competitor. Intangible assets have the peculiar economic property that use of the asset by one party need not preclude unlimited use of that same asset by others, so there may be no cost to allowing the merged firm to retain the same rights as the purchaser. Permitting the merged firm to retain access to divested intangible assets, however, may make it more difficult for the purchaser to differentiate its product from its rivals, or may reduce the purchaser's incentive to invest in the business.[77]

- *Ongoing entanglements*. Ongoing entanglements between the merged firm and the purchaser may put the purchaser in the position of having to rely on its rival in order to compete, and therefore call into question the purchaser's position as a truly independent competitor.[78] In addition, close and persistent ties between the merged firm and the purchaser may serve to enhance the flow of information or align incentives, which may facilitate collusion.

- *Substantial regulatory or logistical hurdles*. Divestitures may require the purchaser to establish legal entities or obtain regulatory approvals. Substantial regulatory or logistical hurdles may put competition at risk to the extent the purchaser is unable to fully and independently deploy the divested assets during the interim period.[79]

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[77] *See supra* Section III.A.5.

[78] Fed. Trade Comm'n v. CCC Holdings Inc., 605 F. Supp. 2d 26, 59 (D.D.C. 2009) ("In order to be accepted, 'curative divestitures' must be made to a new competitor that is 'in fact ... a willing, independent competitor capable of effective production in the . . . market.'" (quoting White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir.1986))); Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 77 (D.D.C. 2015) ("As the court observed in *CCC Holdings*, it can be a 'problem' to allow 'continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.'"); United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("Courts are skeptical of a divestiture that relies on a "'continuing relationship[ ] between the seller and buyer of divested assets" because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor.'") (quoting Sysco, 113 F.Supp.3d at 77)).

[79] United States v. Aetna Inc., 240 F. Supp. 3d 1, 63 (D.D.C. 2017) (analyzing regulatory hurdles to the parties' proposed divestiture); Complaint at 34, United States v. Halliburton Co. and Baker Hughes Inc., No. 1:16-cv-00233 (D.D.C. 2016) ("[M]any permits and licenses from around the world that are required to engage in the businesses at issue cannot be assigned at all; the divestiture buyer would have to go through a new permitting and licensing process."); *cf*. Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment, United States v. General Electric Co., No. 1:17-cv-01146, (D.D.C. 2017) (outlining the challenges (due to legal hurdles in foreign jurisdictions) to completing the divestiture by the agreed-upon deadline, and proposing modifications that would incentivize GE to complete the divestiture as quickly as possible).

IV. Divestiture Buyers

A. Identifying a Buyer

In most merger cases, the Division will require the divestiture of a specific package of assets to an acceptable buyer that has been identified before the Division enters into the consent decree.[80] In such cases, the parties must identify an acceptable "upfront" buyer and then negotiate, finalize, and execute the purchase agreement and all ancillary agreements with that buyer before the Division enters into the consent decree. Identification of an upfront buyer is particularly important in cases where the Division determines that there are likely to be few acceptable and interested buyers who will effectively preserve competition in the relevant market post-divestiture. For example, upfront buyers are particularly important in cases in which: (1) parties seek to divest assets comprising less than a stand-alone, ongoing business; (2) the assets are susceptible to deterioration pending divestiture (and a hold separate order will not minimize the interim harm); (3) the parties propose to divest primarily intellectual property or other limited assets; or (4) the business is so specialized there are likely to be few acceptable buyers.

This type of arrangement can be beneficial for both the merging parties and the Division. For the parties, resolving a merger's competitive issues with an upfront buyer can provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoids the possibility of a sale dictated by the Division. The Division benefits from avoiding the costs that might be incurred in a longer post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition. An upfront buyer consent decree also must give the Division the right to seek appointment of a trustee to sell the assets, in the event that the pre-approved buyer decides to back out of the arrangement.

In limited circumstances, the Division may decide that an upfront buyer is not necessary. In such cases, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition, and that there will be a sufficient number of acceptable potential purchasers for the specified asset package. Generally, the Division will allow the parties an opportunity to find a purchaser on their own within 60 to 90 days[81] of the entry of the Asset Preservation and/or Hold Separate Stipulation and Order.[82] The

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[80] *See, e.g.*, Final Judgment, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. 2018) (requiring defendants to first attempt to sell the divestiture assets to a specified buyer).

[81] *Cf.* Proposed Final Judgment at 12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestiture within 30 days); Final Judgment at 6, United States v. Nexstar Media Group, Inc., No. 1:19-cv-02295, (D.D.C. 2020) (same); Proposed Final Judgment at 7, United States v. Symrise AG, No. 1:19-cv-03263 (D.D.C. 2019) (requiring divestiture within 45 days).

[82] *Cf.* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) (requiring divestiture by the later of 90 calendar days after the filing of the Complaint or 90 calendar days after receiving all necessary international antitrust approvals); Final Judgment, United States v. Harris Corp., No. 1:19-cv-01809 (D.D.C. 2019) (requiring divestiture by the later of 45 days after the entry of the Hold Separate Stipulation and Order by the Court or 15 calendar days after necessary regulatory approvals have been received); Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (requiring divestiture within 90 days after notice of the entry of the Final Judgment by the Court).

Division reserves the right to approve any purchaser chosen by the parties and/or to appoint a selling trustee to complete the sale if the parties are unable to do so.[83]

B. The Division Must Approve the Proposed Purchaser

The Division's approval of a proposed purchaser will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might be. On the other hand, if the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.[84]

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. Even if the choice of a proposed purchaser does not raise competitive problems, the need for the Division's review arises because the seller has an obvious incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets today in return for selling to a rival that will not be especially competitive in the future. In contrast, if the firm selling the assets is itself exiting the market, its incentive is simply to identify and accept the highest offer.

Because the purpose of a divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets are likely to be redeployed elsewhere.[85] Thus, there should be evidence of the purchaser's intention to compete in the relevant market.[86] Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.[87] In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed

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[83] For a more detailed discussion of selling trustees, see *infra* Section VI.C.

[84] *See, e.g.*, Final Judgment, United States v. US Airways Group, Inc., No. 1:13-cv-01236 (D.D.C. 2014) (remedying the competitive harm associated with the merger of two of the four "legacy" air carriers with divestitures to low-cost carriers). Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.

[85] *See supra* Section III.A.

[86] Restrictions that would prohibit the purchaser from using divested assets outside the relevant market, however, may be disfavored. For example, it may be possible to use assets in different product segments, allowing a company to share costs across segments. If the purchaser is prohibited from doing so while its competitors can, the purchaser may be put at a competitive disadvantage.

[87] Complementary businesses often have a strong independent interest in maintaining competition in the relevant market, because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not also vertically integrated, creation of a vertically integrated rival may serve to disrupt post-merger coordinated conduct. *See* Horizontal Merger Guidelines, *supra* note 58, § 2.11.

purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. In no case, however, will they be given veto power over a proposed purchaser.

Third, the Division will evaluate the "fitness" of the proposed purchaser to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term.[88] As part of this process, the Division will examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity over the long term. It must be demonstrated to the Division's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.[89]

In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition according to the requirements in the consent decree, not that it will necessarily be the best possible competitor.

If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.[90] Ideally, assets should be held by those who value them the most, and in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively. On the other hand, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to compete effectively, then a more rigorous review may be warranted and the Division may reject that purchaser.

The Division will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms. Indeed, in some cases a private equity purchaser may be preferred. The Federal Trade Commission's study of merger remedies found that in some cases funding from private equity and other investment firms was important to the success of the remedy because the purchaser had flexibility in investment

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[88] The Division will consider any evidence that casts doubt on the fitness of a proposed purchaser, including the purchaser's views about its own ability to preserve competition. *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 71 (D.D.C. 2017) ("In short, before even looking at [divestiture buyer] Molina's internal emails, there are reasons to doubt that it has the internal capabilities needed to manage the divestiture plans. Molina executives and board members have the same concerns, at least when expressing their views candidly at the time. It seems more likely that Molina and its board moved forward with the divestiture because, for the price, it was low-risk and high-reward for the company, despite their belief that Molina was not well positioned to be an effective competitor.").

[89] *See, e.g.*, United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019).

[90] The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation. In addition, the Division may, under limited circumstances, require that a selling trustee, such as an investment banker or other intermediary, conduct the shop from the outset when the Division is concerned that the defendant will not complete the divestiture within a reasonable time. See *infra* Section VI.C. for a discussion of the role of a selling trustee.

strategy, was committed to the divestiture, and was willing to invest more when necessary.[91] The study also identified cases in which a purchaser's lack of flexibility in financing contributed significantly to the failure of the divestiture.

Private equity purchasers often partner with individuals or entities with relevant experience, which may inform the Division's evaluation of whether the purchaser has sufficient experience to compete effectively in the market over the long term. The Division also will evaluate any links between purchasers with relevant experience and other competitors to assess whether the purchaser has any disincentive to use the divestiture assets to compete in the relevant market.

V. Terms of the Divestiture Sale

A. A Successful Divestiture Does Not Depend on the Price Paid for the Divestiture Assets

The Division's interest in a divestiture lies in the effective preservation of competition, not with whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is "too low" or "too high." The divesting firm is being forced to dispose of assets within a limited period. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize the full value of the business or assets being sold. On the other hand, if there are many interested purchasers, the divesting firm may get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless, as discussed below, it raises concerns about the effectiveness or viability of the purchaser.

The caveat to this general rule is that the purchase will not be approved if the purchase price and other evidence indicate that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is "too low" may suggest that the purchaser does not intend to keep the assets in the market.[92] A "fire sale" price may indicate that the purchaser has doubts about its ability to operate the divestiture assets, but is willing to try in light of the bargain price. In determining whether a price is "too low," the Division will look at the assets' liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value can be reliably determined and (b) the constraint is needed as assurance that the proposed purchaser intends to use the divestiture assets to compete in the relevant market. Also, a sale at a price below liquidation value does not *necessarily* imply that the assets will be redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other reasons to conclude

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[91] FTC Merger Remedies Report, *supra* note 30, § IV.D.2.

[92] United States v. Aetna Inc., 240 F. Supp. 3d. 1, 72 (D.D.C. 2017) ("An extremely low purchase price reveals the divergent interest between the divestiture purchaser and the consumer: an inexpensive acquisition could still 'produce something of value to the purchaser' even if it does not become a significant competitor and therefore would not 'cure the competitive concerns.'").

that the proposed purchaser intends to compete in the relevant market, the Division will not reject the divestiture solely because the price does not exceed liquidation value. If the Division has other reasons to be concerned about the purchaser's ability to compete in the relevant market, a low purchase price, even if it is above liquidation value, may corroborate those concerns.[93]

A price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. This concern, however, is adequately and more directly addressed by applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, the Division may consider a price that is unusually high when evaluating the financial ability of the purchaser to compete.

B. Seller Financing of the Divestiture Is Strongly Disfavored

The Division generally is opposed to permitting the seller to finance the divestiture. First, seller financing may enable the seller to retain some partial control over the assets, which could weaken the purchaser's competitiveness. Second, seller financing may impede the seller's incentive to compete with the purchaser because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, seller financing may make the purchaser disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, seller financing may give the seller some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information. Finally, seller financing may indicate that the purchaser is unable to obtain financing from banks or other lending institutions, which raises questions about the purchaser's viability. The Division will consider seller financing only when it is persuaded that these potential concerns do not exist or could be eliminated.[94]

In the rare case where the information financial institutions need to evaluate adequately the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, limited seller financing may be considered.

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[93] *Id*. at 72 (D.D.C. 2017) ("The low purchase price thus further supports the conclusion that [divestiture buyer] Molina has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price. That does not give the Court confidence in Molina's ability to effectively replace the competition lost by the merger.").

[94] The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing. However, the Division is unlikely to approve any arrangement in which the purchaser's payments to the seller are conditioned on the purchaser hitting benchmarks that can adversely impact the competitive incentives of either the seller or the purchaser.

VI. Decree Terms

Merger remedies are effective only when properly implemented. Several provisions in Division decrees are designed to ensure proper implementation, including provisions governing the time by which the remedy must be fulfilled, those preventing the dissipation of assets before the sale, and those necessary to ensure that the remedy effectively preserves competition in the relevant market after the sale is complete.

The terms of the consent decree govern the parties' obligations to the Division. The seller and purchaser are responsible for ensuring that their purchase agreement is consistent with the consent decree. In the event of a conflict, the parties must comply with the consent decree and assume any risk associated with a breach of the purchase agreement.

A. To the Extent Possible, Divestitures Should Not Be Delayed

The Division will require the parties to accomplish any divestiture as quickly as possible consistent with the objectives of the divestiture. A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process. Hold separate provisions and asset preservation clauses ensure the independence and viability of the divestiture assets, and that competition is preserved while the divestiture is pending.[95]

Depending on the size and complexity of the divestiture, the divesting firm normally will be given 60 to 90 days[96] to complete the divestiture.[97] The Division may consider a longer period to complete the divestiture if it is clear that there will be no interim competitive harm, and no harm to the competitive significance of the divestiture assets. The consent decree may also permit the Division to exercise discretion in granting short extensions when it appears that the divesting firm is making good faith efforts and an extension seems likely to result in a successful divestiture. On the other hand, the Division may insist upon a more rapid divestiture in cases where critical assets appear likely to deteriorate quickly or there will be substantial competitive harm before the purchaser can operate the assets. In situations where an investment banker or other intermediary conducts the shop, the Division may require that the intermediary's compensation be based in part on speed of the sale.[98]

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[95] *See infra* Section VI.B for a discussion of hold separate provisions and asset preservation clauses.

[96] *But see supra* note 81 for several examples of cases in which shorter periods were required.

[97] The Tunney Act provides for a 60-day waiting period before the court can enter a proposed consent decree. 15 U.S.C. § 16(b). The Division will not oppose the sale of the divestiture assets to a purchaser acceptable to the Division before the judgment is entered if (a) the court is notified of the plan to complete the sale before the court enters the judgment and (b) there is no objection from the court. However, under no circumstance will such a sale preclude the Division from proceeding to trial, dismissing the case, or requesting additional or different relief if the court ultimately rejects the proposed decree. *See generally* United States v. BNS, Inc., 858 F.2d 456, 466 (9th Cir. 1988).

[98] *See infra* Section VI.C. for a discussion of the role of a trustee.

In the event that an upfront buyer is not required, the Division recognizes that a comprehensive "shop" of the assets, the need for due diligence by potential purchasers, and Division review of the divestiture and purchaser take time. The Division will balance these considerations in developing an appropriate timetable for the divestiture process.

The Division will require regular reports on the divestiture process in order to ensure good faith efforts and to facilitate a quick review of the proposed settlement. Once a purchaser is proposed, the Division may require additional information to evaluate the purchaser and the process by which the purchaser was chosen. The divesting firm and the proposed purchaser ordinarily will be required promptly to respond to such requests.

In addition, when the proposed remedy is contingent on the approval of a third party, such as a government permitting agency, and that approval will not be obtained prior to the entry of the decree, the decree should include a contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.[99] To the extent the divestiture purchaser's cooperation is required to obtain such third-party approvals, the Division may require that the purchaser be named a party and bound by the decree.[100]

B. Hold Separate and Asset Preservation Provisions Are Necessary for Most Consent Decrees

Consent decrees requiring divestiture after the transaction closes should require defendants to take all steps necessary to ensure that the assets to be divested are separately maintained and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets and to effectively preserve competition in the market during the pendency of the divestiture. The Division also often requires the consent decree to include an asset preservation clause, in which the defendant agrees to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process.

It is unrealistic, however, to expect that hold separate and asset preservation provisions will entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision are unlikely to engage in vigorous competition. Likewise, customers during

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[99] In one case in which divestitures were not completed on the prescribed schedule because the parties had not obtained the necessary licenses from certain international jurisdictions, the Division sought a modified final judgment that contains additional provisions designed to give the parties a financial incentive to complete the divestitures promptly. *See* United States v. General Electric Co. and Baker Hughes Incorporated, 1:17-cv-01146, Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment (D.D.C. 2017).

[100] *See* Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] is appropriate because, after extensive analysis, the United States has determined that BASF is a necessary party to effectuate complete relief; the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on BASF to ensure that the divestitures take place expeditiously and that BASF and Bayer reduce entanglements as quickly as possible after BASF acquires the Divestiture Assets."); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

the period before divestiture may be influenced in their purchasing decisions by the merger, even if the soon-to-be-divested assets are being operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate or asset preservation provision—valuable employees may leave and certain investments may not be made. For these reasons, hold separate and asset preservation provisions do not eliminate the need for a speedy divestiture.

C. Selling Trustee Provisions Must Be Included in Consent Decrees

For a divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.[101] A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and at what price, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly and appropriately. Thus, decrees in Division merger cases should include provisions for the appointment of a selling trustee.[102] Although the trustee's obligation is to the Division, the parties will be responsible for compensating the trustee.

In most cases, the defendant will have a reasonable opportunity to divest the decree assets to an acceptable purchaser before the Division asks the court to appoint a trustee to complete the sale. The expectation is that the defendant, at least initially, is best positioned to have complete information about the operation and value of the assets to be divested and to communicate that information quickly to prospective buyers, thereby facilitating a speedy divestiture to an acceptable purchaser. However, as discussed in Section IV.B. *supra*, because a divestiture may strengthen an existing competitor or introduce a viable new competitor into the market, the defendant also has incentives to delay or otherwise frustrate the ordered divestiture. Therefore, the Division will permit the defendant only a limited time to complete the ordered divestiture before seeking appointment of a trustee.

A defendant may fail to complete a divestiture to an acceptable purchaser for any number of reasons. The defendant's selling efforts may have been dilatory. It may have sought a more favorable price or other terms to which potential purchasers were unwilling to agree. A decree-ordered divestiture may also languish for reasons unrelated to the defendant's diligence in seeking to divest the assets, for example, an inability to obtain necessary approvals from a third

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[101] Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee may be necessary in the event that the ordered sale is not completed for some unforeseen reason. *See* United States v. Mittal Steel Co. N.V., 2007-1 Trade Cas. ¶ 75719, 2007 WL 9431726 (D.D.C. 2007); United States v. Cargill Inc., 1997-2 Trade Cas. ¶ 71893, 1997 WL 599424 (W.D.N.Y. 1997).

[102] In cases where the Division already has determined that the upfront buyer is the only acceptable purchaser, the Division has declined to include provisions for a selling trustee in the consent decree. *See* Final Judgment, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018). In such cases, the more appropriate action may be to seek to block the transaction.

party such as a government permitting agency, or a purchaser that backed out of the deal at the last minute.

Effective divestiture decrees typically provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible.

The immediate appointment of a selling trustee may, however, be required in the rare instance when the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time. For example, immediate appointment may be appropriate if the assets will deteriorate quickly, such that the seller has an especially strong incentive to delay divestiture, or when a defendant has taken an inordinately long time to complete an ordered divestiture in a previous case.[103]

D. Monitoring Trustees May Be Required

A monitoring trustee may be required when technical expertise unavailable within the Division is critical to an effective divestiture. Alternatively, one may be required when there is an unusually high burden associated with monitoring compliance with a decree, for example in the case of a complex global asset carve-out that requires an extended transition period, and that burden is more appropriately borne by the parties than the taxpayers.[104] A monitoring trustee is responsible for reviewing a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. In a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts.

In all cases the trustee's absolute obligation will be to the Division, while the parties will be responsible for compensating the trustee.

E. Restraints on the Resale of Divestiture Assets Ordinarily Will Not Be Required

Although the Division will insist that the purchaser have both the intention and ability to compete in the market for the foreseeable future, the Division generally will not include in the decree a provision that requires that the assets, once successfully divested, continue to be employed in the relevant market indefinitely. Conditions change over time, and the divested assets may in the future be employed more productively elsewhere. The decree should, however,

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[103] *Cf.* Competitive Impact Statement at 4 and 11-12, United States v. Dairy Farmers of America, Inc., No. 1:20-cv-02658, (E.D. Ill. 2020) (requiring divestitures within 30 days in part because the bankrupt seller faced imminent liquidation).

[104] United States v. Thales S.A., No. 1:19-cv-00569 (D.D.C. 2019); Competitive Impact Statement at 27-28, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018).

prohibit defendants from reacquiring or otherwise exerting control over the assets ordered to be divested.[105]

The market for corporate control is imperfect. In unusual cases, an unfit, poorly informed potential purchaser may overbid and win the divestiture assets. The Division is not able consistently to foresee and correct faulty market outcomes. Also, even when in retrospect the market for corporate control has made a mistake, the market itself tends to correct the mistake as long as the purchaser is free to resell the divestiture assets to the firm capable of operating them most efficiently in the relevant market. Therefore, the Division will not attempt to limit the purchaser's ability to resell the divestiture assets, although the purchaser's business plan should indicate its commitment to competing in the relevant market. If, however, the purchaser plans to sell the divestiture assets promptly after acquiring them, any such plan must be disclosed to the Division.[106]

Although restraints on the resale of divestiture assets ordinarily will not be required, they may be warranted in unusual circumstances. For example, if the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would lessen competition, it may seek to limit the purchaser's ability to sell those assets to such an entity. Alternatively, a requirement that the purchaser notify the Division if it sells the divestiture assets may be warranted in cases where the industry is highly concentrated, there are few acceptable divestiture buyers, and the Division has an interest in preventing the purchaser from quickly reselling the assets, and thereby undermining the effectiveness of the remedy. Such a provision may require joining the purchaser as a party to the decree.

There may be circumstances in which the merging firm will be permitted to limit a licensee's further licensing of divested intangible assets. For example, if the remedy includes the right to use a particular brand name in the relevant market but not elsewhere, and the value of the brand name elsewhere is both significant and reasonably dependent on how it is used in the relevant market, the merging firm may have a legitimate interest in limiting the licensee's ability to re-license the brand name rights.

F. Prior Notice Provisions May Be Appropriate

Prior notice provisions require the merged firm to report otherwise non-reportable deals to the Division. Prior notice provisions may be required when there are competitors to the parties whose acquisition would not be reportable under the Hart-Scott-Rodino Act, and when market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction.

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[105] This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture. The typical term of Division merger decrees is 10 years. The decree may, however, permit the merging firm in limited circumstances to retain rights to intangible assets. *See* discussion *supra* Section III.A.5.

[106] To be sure, the Division always should ask whether the divestiture purchaser has any agreements, plans, or intention of selling any part of the divestiture assets.

G. The Decree Must Bind the Entities Against Which Enforcement May Be Sought

For a decree to be effective, it must bind the parties needed to fulfill the objectives of the consent decree. Both parties to the transaction are generally named defendants even if only one will be making the required divestitures.[107] Furthermore, the decree should include language to bind the defendants' successors and assigns, so that a defendant cannot sell its interest in the assets to be divested before divestiture, thereby frustrating the sale of the divestiture package to the approved purchaser. If it is anticipated that a non-party to a decree could be instrumental to its enforcement, consideration should be given to joining that entity as a party,[108] or otherwise obtaining its agreement to be bound by the decree. For example, in some circumstances the purchaser may be subject to certain commitments in the decree, and therefore should be named as a party so that it will be bound by the decree.[109] If other non-parties are needed for effective enforcement, the decree should require that the non-party be given actual notice of the decree.[110]

H. The Consent Decree Must Provide a Means to Investigate Compliance

Consent decrees must include provisions allowing the Division to monitor compliance. For example, they may require defendants to submit written reports and permit the Division to inspect and copy all books and records, and to interview defendants' officers, directors, employees, and agents as necessary to investigate any possible violation of the decree. Division decrees also may require firms to regularly provide to the Division certain data useful for the Division's decree oversight or to self-report decree violations or allegations of violations. Although civil investigative demands may be issued to investigate potential violations,[111] access

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[107] Naming both parties to the transaction as defendants increases the likelihood that (a) the assets to be divested are maintained as separate, distinct, and saleable until they are transferred to the purchaser, (b) the assets to be divested are actually divested, and (c) the Division can obtain appropriate relief in the event the court does not accept the decree or later orders revisions.

[108] 15 U.S.C. § 25; Fed. R. Civ. P. 19.

[109] Competitive Impact Statement at 29-30, United States v. Bayer AG, No. 1:18-cv-01241 (D.D.C. 2018) ("Including [the divestiture buyer] BASF [as a party] is appropriate because, after extensive analysis, the United States has determined that BASF is a necessary party to effectuate complete relief; the divestiture package was crafted specifically taking into consideration BASF's existing assets and capabilities, and divesting the package to another purchaser would not preserve competition. Thus, as discussed above, the proposed Final Judgment imposes certain obligations on BASF to ensure that the divestitures take place expeditiously and that BASF and Bayer reduce entanglements as quickly as possible after BASF acquires the Divestiture Assets."); Stipulation and Order, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. 2019) (stipulating to the joinder of DISH, the divestiture buyer, as a party to the action); Stipulation and Order, United States v. Anheuser Busch InBEV SA/NV, No. 1:13-cv-00127 (D.D.C. 2013) (stipulating to the joinder of Constellation, the divestiture buyer, as a party to the action).

[110] The parties' agents and employees, and others who are in active concert or participation with the parties, their agents, or their employees, will be bound by the decree so long as they receive actual notice of the order. *See* Fed. R. Civ. P. 65(d).

[111] 15 U.S.C. §§ 1311(c), 1312(a).

terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

I. Consent Decrees Must Include Standard Provisions Allowing Effective Enforcement

Consent decrees must include several standard provisions designed to improve the effectiveness of the decree and the Division's ability to enforce it. First, in a decree enforcement proceeding, the Division may establish the violation and the appropriateness of any remedy by a preponderance of the evidence. Second, if a court finds that a party has violated the consent decree, the Division may apply to the court for a one-time extension of its term. Third, the Division may terminate the decree upon notice to the court and the parties that the remedy is complete and continuation of the decree is no longer necessary or in the public interest. The fourth provision governs the interpretation of the decree, and provides that courts can enforce any provisions that are stated specifically and in reasonable detail, whether or not they are clear and unambiguous on their face. The final provision requires the parties to reimburse the Division for the costs it incurred in connection with a successful enforcement effort.

VII. Consent Decree Compliance and Enforcement

It is incumbent upon the Division, pursuant to its responsibility to the public interest, as well as to the court in the case of a consent decree, to ensure strict implementation of and compliance with the agreed-upon remedy. The Division will commit substantial resources to monitor parties' implementation of and compliance with the remedy and will not hesitate to bring actions to enforce consent decrees, typically through the use of civil or criminal contempt proceedings.[112]

A. The Office of the Chief Legal Advisor Oversees Compliance and Enforcement

It is essential to the Division's mission that all merger remedies are strictly enforced. Even the most appropriately tailored remedy is of little value if it is not enforced. The organization of the Division's enforcement efforts seeks to combine case- and industry-specific expertise with specialized remedy expertise. To ensure that the enforcement of merger remedies is rigorous and benefits from learning across the Division, the evaluation of and oversight over all Division remedies resides in the Office of Decree Enforcement and Compliance, which reports to the Office of the Chief Legal Advisor. The Office of Decree Enforcement and Compliance directly oversees the litigating sections' ongoing review of decree compliance and evaluation of potential decree violations and makes recommendations to the Assistant Attorney General. By concentrating remedy expertise in the Office of the Chief Legal Advisor, the Division can efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness. The Office of Decree Enforcement and Compliance, as

[112] Non-parties are not permitted to enforce Division decrees. The court in New York v. Microsoft Corp., 224 F. Supp. 2d 76, 181 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft, 373 F.3d 1199 (D.C. Cir. 2004), likewise noted that "non-parties should not be allowed direct access to the enforcement mechanisms." *See also* Massachusetts v. Microsoft, 373 F.3d at 1243-44.

supported with appropriate assistance by lawyers and economists with industry expertise assigned to a particular matter, oversees the Division's decree compliance efforts.

B. The Division Will Ensure that Remedies Are Fully Implemented

The Division will devote appropriate resources, both before and after a decree is entered, to ensure that the decree is fully implemented. The specific steps necessary to ensure compliance with a decree will vary depending on its nature. For a divestiture decree, staff will closely monitor the sale, including reviewing (a) the sales process, (b) the financial and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationship will inhibit the purchaser's ability or incentive to compete vigorously.

Where a decree requires affirmative acts, such as the submission of periodic reports, Division staff will determine whether the required acts have occurred and evaluate the sufficiency of compliance. With respect to decrees that prohibit certain actions, staff may also conduct periodic inquiries to determine whether defendants are observing the prohibitions.[113]

C. Contempt Proceedings to Enforce Consent Decrees

If the Division concludes that a consent decree has been violated, it will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose—compelling compliance with the court's order or compensating the complainant for losses sustained.[114] Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.[115] Criminal contempt is not remedial—its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.[116] Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a

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[113] Use of special masters for Division decree enforcement is disfavored, Fed. R. Civ. P. 53(b); New York v. Microsoft Corp., 224 F. Supp. 2d at 179-82.

[114] *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-30 (1994); IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973).

[115] *See, e.g.,* United States v. United Mine Workers of Am., 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies may also be available (for example, compensation for harm or disgorgement of profits as a proxy for harm). *In re* General Motors Corp., 110 F.3d 1003, 1019 n.16 (4th Cir. 1997); *see also* Settlement Agreement and Order, United States v. Cal Dive International, No. 1:05-cv-02041 (D.D.C. 2007) (requiring disgorgement of profits after the merging parties delayed divesting assets as required in the consent decree; the delay enabled the merging parties to continue to profit from the divestiture assets, which were in high demand because they were being used in clean-up efforts following Hurricanes Katrina and Rita).

[116] A criminal contempt proceeding may be instituted by indictment, *see* United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, *see* United States v. Gen. Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961).

reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed.[117] The penalty may be a fine, imprisonment, or both.

The Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.[118] In some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment.[119]

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[117] *See, e.g.*, United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52, 54 (D.C. Cir. 1993) ("There are three essential elements of criminal contempt under 18 U.S.C. § 401(3): (1) there must be a violation, (2) of a clear and reasonably specific order of the court, and (3) the violation must have been willful. United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987). The Government carries the burden of proof on each of these elements, and the evidence must be sufficient to establish guilt beyond a reasonable doubt."); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000).

[118] *See, e.g.*, *Work Wear Corp.*, 602 F.2d at 115-16; United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974); United States v. Morton Plant Health Sys., Inc., 2000 WL 33223244 (M.D. Fla. July 14, 2000); United States v. Smith Int'l, Inc., 2000-1 Trade Cas. ¶ 72763, 2000 WL 145129 (D.D.C. 2000); United States v. FTD Corp., 1996-1 Trade Cas. ¶ 71395, 1995 WL 864082 (E.D. Mich. 1995); United States v. N. Suburban Multi-List, Inc., 516 F.Supp. 640 (W.D. Pa. 1981). *See also* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); United States v. NYNEX Corp., 8 F.3d 52 (D.C. Cir. 1993).

[119] *See, e.g.*, United States v. CBS Inc., 1981-2 Trade Cas. ¶ 64227, 1981 WL 2123 (C.D. Cal. 1981).