Draft: February 1, 2023
Forthcoming (subject to revisions) in the Antitrust Law Journal

Fixing "Litigating the Fix"

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Merging firms have been increasingly asking trial courts to determine the legality of their merger "as remedied" by a voluntary "fix," rather than based on the merger agreement in the original Hart-Scott-Rodino (HSR) submission.[1] These fixes typically involve remedy proposals that the reviewing antitrust agency has rejected. This procedure has been termed "Litigating-the-Fix" (LTF).[2] LTF remedies may involve the buyer divesting assets to a third party,[3] the seller retaining assets in a business that *competes* with a buyer business,[4] the buyer committing to

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[1] For some recent examples, *see, e.g.*, Memorandum, United States v. Booz Allen Hamilton Co. et al., 1:22CV01603 (Jun. 29, 2022); United States v. Bertelsmann SE & Co., 1:21CV02886 (D.D.C. 2022) (Penguin RandomHouse/Simon & Schuster); United States v. UnitedHealth Group, Inc., 1:22CV00481 (D.D.C. 2022); Initial Decision, In re Illumina, Inc. and GRAIL, Inc., Docket No. 9401 (Sept. 9, 2022).

[2] *See, e.g.*, Steven H. Schulman & E. Marcellus Williamson, *Litigating the Fix: FTC v. Libbey, Inc.- A Private Party Perspective*, A.B.A. ANTITRUST SECTION, CLAYTON ACT NEWSLETTER, Vol. III, No. 1 (Dec. 2002); Richard Liebeskind, *Litigating the Fix: FTC v. Libbey, Inc.- A Government Perspective*, A.B.A. ANTITRUST SECTION, CLAYTON ACT NEWSLETTER, Vol. III, No. 1 (Dec. 2002).

[3] *See, e.g.,* FTC v. Arch Coal, 329 F. Supp. 2d 109, 114 (D.D.C. 2004) (Arch Coal entered an agreement to sell off one of the coal mines it intended to acquire); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 15 (D.D.C. 2015) (defendants proposed to divest a collection of regional food distribution facilities to the third-largest distributor in the United States); United States v. Aetna Inc., 240 F. Supp. 3d 1, 8 (D.D.C. 2017) (Aetna proposed divestiture of a portion of its Medicare Advantage business to third-party health insurance company); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) (divesting Canadian plant).

[4] *See* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 41 (D.D.C. 2002) (amended merger agreement provided seller would transfer subsidiary Anchor's foodservice business to another division, sell two glassmaking factories to Libbey, and buy glassware from an outside source).

certain conduct duties or constraints,[5] or some combination thereof.[6] These remedies may be unilateral promises; commitments placed into an amended merger agreement; or formal agreements with a divestiture buyer, customers, or others.

This trend will increase if the agencies demand stronger consent decrees or if the agencies adopt a "just say no" policy of refusing to negotiate consent decrees.[7] Either way, the merging parties have the incentive to request judicial assessment of proposed remedies to combat what they see as agency overreach. Courts generally have denied agency motions *in limine* to exclude consideration of these remedies, at least where the merging parties have offered a definite remedy with sufficient time for the reviewing agency to investigate.[8]

This article proposes a judicial procedure for managing cases in which the merging parties attempt to LTF. Our recommendations flow from our analysis of LTF case law, the merger enforcement record, the language and goals of Section 7 of the Clayton Act, and economic analysis of the incentives LTF creates for merging parties and the agencies. Our recommended procedure allows LTF in most instances but mitigates the potential for anticompetitive effects from doing so. We build on the analysis and proposals of other scholars

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[5] *See, e.g.*, Memorandum Opinion and Order, *Penguin Random House/Simon & Schuster*, 1:21CV02886 (D.D.C. 2022) (Penguin promised an internal bidding policy, whereby its separate publishing divisions would compete post-merger); Memorandum, United States v. Booz Allen Hamilton Co., 1:22CV01603 (Oct. 11, 2022) (sister businesses would bid competitively post-merger); In re Illumina, Inc. and GRAIL, Inc., Docket No. 9401 (Sept. 9, 2022) (Illumina committed to an "open offer" supply agreement with Grail's competitors); United States v. AT&T, Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018) (agreement to arbitrate for dissatisfied customers and no supply blackouts during negotiations); United States v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009) (merging parties proposed revising software license with a smaller competitor to remove restrictions); United States v. Franklin Electric Co., Inc., 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000) (remedy proposal was a third-party licensing program).

[6] *See, e.g.*, *Libbey*, 211 F. Supp. 2d 34 (seller would retain business and buyer would provide inventory for a period); *UHG/Change*, 1:22CV00481 (D.D.C. 2022) (divestiture plus firewall to prevent downstream foreclosure).

[7] *See* AAG Jonathan Kanter, *Opening Remarks at 2022 Spring Enforcers Summit* (April 4, 2022); AAG Jonathan Kanter, *Antitrust Enforcement: The Road to Recovery*, Remarks as Prepared for Delivery (April 21, 2022); Assa Abloy AB's Answer and Defenses, United States v. Assa Abloy and Spectrum Brands Holding, Inc., 1:22CV02791 (Oct. 14, 2022) (answer to complaint).

[8] *See. e.g.*, *Arch Coal*, 329 F. Supp. 2d 109; *Aetna*, 240 F. Supp. 3d 1; *Sysco*, 113 F. Supp. 3d 1; *Libbey*, 211 F. Supp. 2d 34; *CCC Holdings*, 605 F. Supp. 2d 26. The most notable exception is *Ardagh;* the court there excluded consideration of an "11th hour suggestion" of a proposed divestiture after discovery, expert reports, and briefing, and the proposal included neither a signed agreement, a price, nor a plan for how the divested assets would be employed to preserve competition. *See* Transcript of Pre-Hearing Conference, FTC v. Ardagh, No. 13-1021 (D.D.C. 2013) at Tr. 13:19-25.

and commentators.[9] Our proposed procedure has some features that are similar to a recent proposal by professors Kwoka and Waller but is more defendant-friendly.[10]

In general, district courts have required merging firms to propose definite remedies with sufficient time for the agencies to investigate. They have not, however, consistently allocated the parties' respective evidentiary burdens. When the defendants propose a *behavioral remedy* and the structural presumption of illegality based on post-merger concentration would apply to the unremedied merger, courts have generally (sometimes implicitly) placed the burden on the defendants to rebut the presumption.[11] But they have been less consistent in their approach when the proposed remedy includes divestiture or leaving certain seller assets out of the acquisition.[12]

In developing our procedure, we have been guided by Section 7 of the Clayton Act, which is concerned with preventing competitive harm in its "incipiency."[13] As the Supreme Court stated in *California v. American Stores*, "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'"[14] The "incipiency standard" has been

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[9] *See, e.g.,* D. Bruce Hoffman, *Remedial Self-Help in Merger Litigation After Arch Coal*, 19 ANTITRUST 32 (2005); Thomas J. Horton. *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S. DAK. L. REV. 165, 191 (2010); Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647 (2013); David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10 (2016).

[10] John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, 2 COMP. POL. INT. 1 (2021).

[11] *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 26; *Franklin Electric*, 130 F. Supp. 2d 1025 at 10 ("Plaintiff bears the burden of showing the reasonable probability that the proposed joint venture will result in a substantial impairment of competition. That burden never shifts to defendants. However, defendants have the burden of proving their contention that because of the proposed licensing and supply agreements with Environ the number of competitors will not change.").

[12] *See e.g.*, Mem. Opinion Denying FTC's Motion *in Limine*, FTC v. Arch Coal, No. 1:04CV00534, at 7 (D.D.C. July 7, 2004) (on file with authors) (evaluating the merger as modified by the divestiture, stating that "Section 7 of the Clayton Act requires the Court to review the *entire* transaction in question."); *Sysco,* 113 F. Supp. 3d 1 at 57 (applying the structural presumption to the merger as modified in the HSR filing and assigned defendants the rebuttal burden of establishing that the divestiture was sufficient to maintain competition); *Libbey*, 211 F. Supp. 2d 34 at 47-50 (finding that the surviving business would face higher costs and other competitive impediments, implying that competition likely would be decreased, since the surviving business would find higher costs and other impediments).

[13] Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962); United States v. Phil. Nat'l Bank, 374 U.S. 321, 362 (1963).

[14] 495 U.S. 271, 284 (1990).

interpreted in terms of probabilities.[15] In *Brown Shoe v. United States*, the Court stated the standard as requiring a showing of only a "reasonable probability"—a standard that has also been described as requiring an "appreciable danger,"[16] or a "reasonable likelihood"[17] of anticompetitive harm. Such a showing is less than that which a plaintiff must make to establish a violation of Section 1 of the Sherman Act.[18] Section 7 requires a "prediction of its impact upon competitive conditions in the future."[19] As Judge Posner wrote in *FTC v. Elders Grain, Inc.*, "doubts are to be resolved against the transaction" in making this prediction.[20] Thus, it is not necessary for the government to show that the merger is more likely than not to lessen competition, only that there is "a reasonable probability" or "appreciable danger" that it will do so.[21]

In decision theoretic terms, this incipiency standard amounts to placing greater value on avoiding harmful mergers (false negatives) at a cost of sometimes preventing beneficial mergers (false positives)—*i.e.*, it is better to err on the side of over-deterrence rather than under-deterrence.[22] This is not to say that false positives do not matter, only that false negatives matter more.[23]

There are several economic reasons for placing greater emphasis on avoiding false negatives. First, the cost of false negatives is the long-term competitive harm. In contrast, the cost of false positives is the loss of efficiencies and synergies, which often can be mitigated or eliminated through internal growth by the buyer or the acquisition of the target by a buyer that

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[15] *See Brown Shoe*, 370 U.S. 294 at 323; *Philadelphia Nat'l Bank*, 374 U.S. 321 at 363. A separate interpretation of the incipiency standard is that a trend towards increasing concentration in a market enables the acquisition and exercise of increasing market power and should be thwarted before such power is realized. *Brown Shoe* at 323.

[16] Hospital Corp of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir 1986).

[17] *United States v. Penn-Olin Co.*, 378 U.S. 158, 171 (1964); United States v. Marine Bancorp, Inc., 418 U.S. 602, 622-23 (1974).

[18] *Id*. at 323 n.39.

[19] *Phil. Nat'l Bank*, 374 U.S. 321 at 362.

[20] 868 F.2d 901, 906 (7th Cir. 1989).

[21] For a recent summary statement, see Mem. Opinion, U.S. v. Bertelsmann SE & Co., 1:21CV02886 (D.D.C. Nov. 2, 2022) at 21.

[22] Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L. J. 269 (2015); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 315 (1960).

[23] *FTC v. Actavis* places a premium on avoiding false negatives even in the context of Section 1 and where the likelihood of patent invalidity represented a "small risk"; as the Court explained, "the payment … likely seeks to prevent the [small] risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm." 570 U.S. 136, 157 (2013).

raises less competitive concern. Second, merging firms that anticipate increased profits from market power have incentives to dramatically outspend the agency in litigation, which skews litigation outcomes in their favor and makes false negatives more likely.[24] Third, it is often difficult for the agencies to prevent harm through consent decrees because the merging firms have informational advantages in those negotiations.

This analysis of incipiency and false negatives also is relevant for LTF. In *United States* v. *E.I. du Pont de Nemours & Co.*, the Court opined that "all doubts as to the remedy are to be resolved in [the government's] favor."[25] While that case involved a remedy *after* liability had been found, the point remains relevant here when the structure of existing pre-merger competition is eliminated with certainty and the claim that the proposed remedy will prevent harms from that lost competition is speculative.

False negative concerns likely are increased by a more permissive (*i.e.*, defendant-friendly) LTF procedure. The historical evidence suggests that negotiated consent decrees have often been insufficient.[26] An FTC self-study published in 2017 found a worrisome number of consents to be failures or achieved success only after substantial delays.[27] If LTF leads courts to ratify LTF proposals that are even weaker than those the agencies have rejected, the risk of false positives will be decreased but the risk of false negatives will be exacerbated.

An LTF procedure that provides the agencies with inadequate notice or excessive evidentiary burden would lead to similar concerns regarding underenforcement. In addition to the risk of losses at trial, a more permissive LTF procedure would cause the agency to have less relative bargaining leverage in negotiating consent decrees, which would tend to lead to weaker consent decrees and under-deterrence of merger proposals that raise significant anticompetitive risks.

Based on the history of antitrust enforcement against mergers, the content of Section 7, and our economic and decision theoretic analysis, we recommend that courts adjudicating proposed remedies adopt case management procedures to safeguard against competitive harm. Our proposal addresses four important procedural features: (i) timing and notice of the parties' remedy proposal, (ii) definitiveness of the proposal, (iii) evidentiary burdens placed on the parties, and (iv) certainty of execution and enforcement of the remedy. We also suggest several

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[24] *Infra*, Section III.

[25] 366 U.S. 316, 334 (1961).

[26] *Infra,* Section III.

[27] Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, at 7 (Jan. 2017), *available at* https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf [https://perma.cc/DLS2-AW7N] [hereinafter "FTC STUDY"].

possible refinements to the procedure, including exclusion of certain types of remedy proposals. Since this procedure can be mandated by a district court, additional legislation is unnecessary.

We appreciate the rationale for prohibiting all LTF proposals. Allowing LTF can encourage the parties to hide competitive problems rather than voluntarily disclosing and remedying problems in the transaction that is notified in their HSR filing. This failure to self-disclose problems increases costs and raises the risk of the agency overlooking the problem, thereby increasing the risk of false negatives. It also increases the likelihood of false negatives by reducing agency bargaining leverage. However, because the merging parties always have the option of withdrawing their HSR submission and filing an HSR for an amended agreement, they will always have an opportunity for a second bite of the apple. Thus, a complete prohibition of LTF would make little practical difference.

We therefore recommend that courts entertain LTF proposals, even those made after a complaint is filed. We do not require the parties to file a new HSR submission when they propose to LTF. Instead, we propose a parallel case-management process for LTF, whereby the parties would be required to make a "remedy filing" *(analogous to an HSR notification)* that details the parties' proposed remedial provisions with specificity and then permit the agencies to issue an information request *(analogous to a second request)* within 30 days. After the parties certify compliance with the information request, the court would mandate a second waiting period *(again, analogous to the HSR process)* before the commencement of the trial proceedings. This process will ensure that the agencies have sufficient time and opportunity to engage in discovery to investigate a definite proposal and the court to have adequate information to evaluate the effects. These additional delays also will incentivize earlier voluntary disclosure.

Our procedure focuses on the effect of the merger *as modified* by the proposed remedy. But we nonetheless recommend that the government be permitted to satisfy its *prima facie* evidentiary burden by focusing on the merger as *proposed*. Specifically, we recommend that the government be deemed to have met its burden by (i) establishing that the transaction would satisfy the structural presumption under the assumption that the buyer hypothetically would acquire all the seller's assets and there would be no other remedies, or (ii) providing sufficient other evidence of probable harm. We make this recommendation because there are many technological, managerial, and market reasons why the divestee would not provide the same competitive intensity as did the seller. In addition, the merging firm chooses the divestee and has the incentive to choose a weak divestee that will not constrain its market power. These competitive issues reinforce the overriding concerns about false negatives.

The defendant can then rebut the *prima facie* case by showing either that concentration is improperly measured or by providing other evidence that its remedy or other factors will make competitive harm unlikely. We recommend that the court require defendants to produce substantial rebuttal evidence to ensure a high degree of confidence before accepting the defendant's rebuttal claims.

Promises to operate different vertical divisions of a vertically integrated firm as though the businesses are separate entities (or with non-discrimination promises) conflict with economic incentives. Thus, they should only be accepted if they involve legally binding commitments, including specific behavioral constraints. It is also necessary that a court can verify with confidence the firm's compliance over time. Furthermore, we strongly recommend that promises to maintain competition among divisions of a corporation be excluded from consideration altogether. Such remedies are extraordinarily difficult to enforce and inconsistent with *Copperweld Corp. v. Independence Tube Corp.*[28] and *United States v. Trenton Potteries*.[29]

The remainder of this article is organized as follows. Part II reviews the LTF case law. Part III reviews merger enforcement statistics and merger retrospective studies, which provide evidence of under-enforcement. Part IV sets forth our economic analysis, which explains how permitting unconstrained LTF increases the likelihood of insufficient remedies, weakens agency bargaining leverage in negotiating consent decrees, and reduces deterrence. Section V presents our proposed LTF procedure and discusses certain types of remedy proposals that courts should treat with skepticism or not entertain at all. Section VI concludes.

I. "LITIGATING THE FIX" CASELAW

Defendants asking courts to allow LTF in merger litigation is not new.[30] In general, courts have been willing to adjudicate defendants' proposed remedies and have denied motions to exclude evidence relating to these proposals.[31] Their willingness is understandable: if the circumstances surrounding a merger have changed, the court should analyze those changed circumstances, even if the remedial proposal is made after the complaint is filed. As the district court explained in *FTC v. Libbey*,[32]

> Operating on what appears to be a clear slate, the Court concludes that parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns. And when they do so under circumstances as occurred in this case,

[28] 467 U.S. 752 (1984).

[29] 273 U.S. 392 (1927).

[30] Chemetron Corp. v. Crane Co., No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. 1977) (explaining that defendant's offer of a curative would not be credited, since it was made without specificity during a hearing); *see also* Consol. Gold Fields, P.L.C. v. Anglo Am. Corp. of S. Afr. Ltd., 698 F. Supp. 487, 502 (S.D.N.Y. 1988).

[31] *See, e.g.*, Gelfand & Brannon, *supra* note 9; *see also RAG-Stiftung*, 436 F. Supp. 3d 278; *UHG/Change*, 1:22CV00481 (D.D.C. 2022); *Penguin Random House/Simon & Schuster*, 1:21CV02886 (D.D.C. 2022).

[32] 211 F. Supp. 2d 34 (D.D.C. 2002).

> it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.[33]

From the LTF case law, three issues have emerged as most salient: (i) the timing of the remedy proposal and the extent to which it provides the antitrust agency with sufficient notice, (ii) the definitiveness of the proffered remedy, and (iii) the assignment of the parties' respective evidentiary burdens.

A. Timing and Sufficient Notice

District courts have been willing to consider evidence relating to defendants' proffered remedy when the timing of the proposal provides the agency sufficient time to consider it, even if the formal proposal is made after the complaint is issued. For example, in *Libbey*, the defendants amended their merger agreement about one month after the FTC filed its complaint. The amended agreement provided that Libbey would no longer purchase Anchor's food service business. In response, the FTC voted out an amended complaint. The district court rejected the FTC's argument that the defendants were seeking to "evade FTC and judicial review," concluding instead that the defendants were attempting to address the FTC's concerns, and noting that the agency remained capable of vetting, and indeed did vet, the merger as modified.[34]

Similarly, in *United States v. United Healthgroup, Inc.* (*UHG/Change*),[35] the court found that the defendants' proposal provided the agency with sufficient time to evaluate the revised merger. The defendants proposed a divestiture, a firewall, and other commitments before the DOJ filed its complaint and subsequently reached a somewhat revised, signed divestiture agreement post-complaint, and the agency had more than four months to conduct discovery before the hearing. The court rejected the DOJ's motion *in limine* to exclude evidence of the revised remedy proposal and ultimately found the remedy sufficient to avoid liability.[36]

Likewise, in *FTC v. Arch Coal*, the defendants proposed a divestiture; the FTC rejected the proposal and filed a complaint two months later seeking a preliminary injunction.[37] The court denied the FTC's motion *in limine*, seeking to exclude evidence relating to the proffered

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[33] *Id.* at 46; *see also* Mem. Opinion Denying FTC's Motion *In Limine*, FTC v. Arch Coal, Inc., No. 1:04CV00534, at 7 (D.D.C. July 7, 2004) (on file with authors) ("Section 7 of the Clayton Act requires the Court to review the *entire* transaction in question.").

[34] *Libbey*, 211 F. Supp. 2d 34 at 46.

[35] Redacted Mem. Opinion, United States v. UnitedHealth Group, Inc., 1:22CV00481 (D.D.C. 2022).

[36] *Id.* at 10.

[37] *Arch Coal*, 329 F. Supp. 2d 109 at 114. In May 2003, Arch Coal agreed to acquire Triton, with assets that included two mines. In July 2003, the parties made their HSR notification, and, in August 2003, the FTC issued a second request. In response to the FTC's concerns, Arch signed an agreement to sell one of the Triton mines in January 2004. After further analysis, the FTC filed a motion for preliminary injunction in April 2004 seeking to enjoin Arch from consummating the acquisition.

divestiture, concluding that "the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement. . . . Thus, the FTC has assessed and is in reality challenging the merger agreement including [the proposed changes to the initial merger]."[38]

In contrast, when remedies have been proposed very late in the process, courts have been less willing to entertain them. For example, in *FTC v. Ardagh*, defendant proposed its remedy in the eleventh hour and the court refused to allow introduction of evidence relating to it.[39] Similarly, in *Chemetron Corp. v. Crane Co.,* a private case, the court likewise refused to consider evidence relating to a remedy proposal that was submitted during the hearing.[40] In *United States v. Franklin Electric Co.*, the court permitted evidence of a proposed post-acquisition third-party licensing scheme that was proffered before trial, but the defendant amended the proposal several times throughout the trial and the court ultimately rejected it.[41]

B. DEFINITIVENESS

Courts have been unwilling to consider proposals that are too indefinite for the agency and court reliably to evaluate. In *Ardagh*, for example, the defendant had not identified a buyer of the assets to be divested or a plan for how those assets would be employed in the market to maintain competition.[42] The district court concluded that it would not consider defendant's remedy, explaining "I just don't think the negotiations are far enough along the line, and I don't think it's fair to the other side to ask them to do that."[43]

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[38] Mem. Opinion Denying FTC's Motion *In Limine*, No. 1:04CV00534 (D.D.C. July 7, 2004).

[39] *See* Transcript of Pre-Hearing Conference, FTC v. Ardagh, No. 13-1021 (D.D.C. 2013) at Tr. 13:19-25.

[40] No. 77 C 2800, 1977 WL 1491 at *7 (N.D. Ill. 1977).

[41] 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000).

[42] *See* Transcript of Pre-Hearing Conference, *supra* note 8, at Tr. 14:17- 15:1 (Ardagh conceding it had not identified a buyer, the sale price of the assets, or whether the plants could be combined into a viable business); 21:12-17 (Ardagh's counsel stating that there is not yet a binding contract but a sale is being negotiated); 28:6-23 (Ardagh's counsel stating that the firm is negotiating with two or three potential buyers).

[43] *See id.* at Tr. 29:10-22; *see also id.* 35:20-22 ("[W]e will not be discussing any divestiture of plants that one side sort of knows about and the other side doesn't."); *cf.* Chemetron Corp. v. Crane Co., No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. Sep. 8, 1977) (refusing to credit defendant's divestiture offer in suit by target of hostile takeover against firm making the tender offer, explaining that the offer was made during a hearing without specificity, and that undefined proposals should not be considered in the midst of a preliminary injunction hearing). *But see Arch Coal*, Mem. Opinion (denying FTC's motion *in limine* to exclude evidence regarding defendants' proposed remedy and rejecting FTC's argument the divestiture agreement was not definitive and could be renegotiated).

C. EVIDENTIARY BURDENS

A decision that the court will adjudicate the modified transaction, rather than the one the parties notified under HSR, does not determine how the court will allocate the litigants' evidentiary burdens or how it should apply the structural presumption. Must the agency as a part of its *prima facie* case establish that the defendants' proposal does not resolve the anticompetitive issues the merger raises? Or is the burden, instead, on the defendants to establish that the proffered remedy resolves the potential anticompetitive effects of the merger as initially proposed? Regarding the structural presumption,[44] where the proposed remedy includes a divestiture, should the court calculate market concentration using the merging firms' pre-merger market shares, such that the burden shifts to the defendant to prove that the merger, as modified, is not likely to substantially lessen competition if the structural presumption is satisfied? Or should the court assume the proposed divestiture will restore competition to pre-merger levels and, consequently, calculate market concentration using the post-divestiture market shares? There is no consensus among the district courts on these issues.

There are nuanced issues regarding how courts should treat proposed divestiture remedies. The issue of burden allocation is intimately bound up with the applicability of the structural presumption based on pre-merger market concentration. Judge Nichols raised this precise issue in *UHG/Change.*[45] The court's preferred position was that the proposed divestiture made the structural presumption inapplicable, so the government would have the burden to prove its *prima facie* case with non-structural evidence rather than the presumption. In contrast, the government argued that the structural presumption should apply, based on market shares that were not modified to account for the proposed remedy. Without determining the burden issue, the court chose to use the government's preferred approach and then found for the parties under this more pro-plaintiff standard. Treating the large increase in the "unremedied" Herfindahl-Hirschman (HHI) index as satisfying the *prima facie* case under the *United States v. Baker Hughes Inc.*[46] burden-shifting approach, the court then analyzed the evidence and concluded that the parties had carried their burden to rebut DOJ's structural case based on the proposed remedy.[47]

As we discuss in detail below,[48] we do not recommend that courts adopt Judge Nichols' approach. Most courts have placed the burden on defendants to establish that their proffered remedies would nullify the anticompetitive effects that would otherwise result from the merger.

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[44] *Philadelphia Nat'l Bank*, 374 U.S. 321 at 363; *Baker Hughes* 908 F.2d at 982-83.

[45] Redacted Mem. Opinion, *UHG/Change*, No. 1:22CV0481 at 17-20.

[46] 908 F. 2d 981, 991 (D.C. Cir. 1990).

[47] *UHG/Change*, No. 1:22CV0481 at 19-20, 30.

[48] *Infra,* text at n.100.

In *FTC v. Sysco Corp.* [49] and *United States v. Aetna Inc.*,[50] the district courts applied the structural presumption to the merger as originally notified in the HSR filing and assigned defendants the rebuttal burden of establishing the proposed divestiture was sufficient to maintain competition. In *Sysco,* the defendants' proposed remedy was divestiture of 11 distribution centers and a commitment by the buyer of those assets to develop more distribution centers, with the defendants arguing that the business acumen and experience of the divestiture buyer's leadership would ensure that the divestiture replicated pre-merger competition.[51] In *Aetna*, the court similarly considered Aetna's proposal to divest its Medicare Advantage business in some geographic areas as a rebuttal argument.[52] In both cases, the courts rejected the "fix," concluding the divestiture buyers would face impediments that would prevent them from replicating the intensity of pre-merger competition.

In *Libbey*, the district court also assessed the merger as modified by a proposed remedy.[53] The proposed remedy provided that Libbey would no longer acquire Anchor's food service business and would instead only acquire Anchor's plants and retail and specialty glassware businesses. The surviving business would use a contract manufacturer to supply products. The court focused on the amended merger agreement. The court was concerned that the business the seller would have retained lacked a factory, so the seller would have needed to procure its product from a contract manufacturer. The court found that the surviving business would face higher costs and other competitive impediments, implying that competition likely would be decreased. These deficiencies meant that the proposed remedy would not replicate the level of competition pre-merger. The court then calculated the increase in concentration flowing from the transaction as originally proposed, placing the burden on the defendants to rebut the FTC *prima facie* case based on the structural presumption. The court explained,

> [T]he best evidence of [the merger's] potential effect is the impact of the original agreement because the post-merger landscape could quite possibly be similar to the terrain that would have been created if Libbey had acquired all of Anchor's business, assuming, as the FTC argues, that RCP [the

[49] 113 F. Supp. 3d 1 at 57.

[50] 240 F. Supp. 3d 1 at 59 ("Defendants 'next rebuttal argument is that the proposed divestiture of certain assets to Molina Healthcare would counteract any anticompetitive effects of the merger.").

[51] *Sysco*, 113 F. Supp. 3d 1 at 15.

[52] *Aetna*, 240 F. Supp. 3d 1 at 70, 72-73. The court concluded that the proposed divestiture buyer lacked the internal capacity (including IT infrastructure, personnel who can manage star ratings, and management and staff with relevant expertise) to successfully operate the divested business. The court was also concerned that Molina had repeatedly tried to enter the Medicare Advantage space repeatedly but failed.

[53] *Libbey*, 211 F. Supp. 34 at 50.

> company that would have owned the retained business] may prove to be an ineffective competitor.[54]

For proposed conduct remedies, the courts generally have required defendants to rebut the agency's evidence that the as-notified merger is sufficiently likely to be anticompetitive. For example, in *Franklin Electric*, the proposed remedy was a licensing arrangement.[55] The court continued to rely on the structural presumption and placed the burden on the defendant, explaining that "[t]he presumption the government starts with, which is that a merger of the only two competitors in the market is a violation of § 7, remains unrebutted."[56] Similarly, in *FTC v. CCC Holdings Inc.*, the proposed remedy involved revising a software license agreement between defendant and a smaller competitor with the objective of easing the smaller competitor's barriers to expanding its competitive significance. The court determined that the proposed license revision could serve as *rebuttal* evidence, thereby placing the burden on defendant.[57]

II. MERGER ENFORCEMENT HISTORY SUPPORTS CONCERNS REGARDING FALSE NEGATIVES

The caselaw is useful in understanding how LTF affects the litigation dynamics of antitrust agency challenges to mergers. But to fully appreciate the implications and proper treatment of LTF, the procedure should be analyzed in context. Specifically, the analysis of LTF must account for the evidence regarding the effectiveness of current agency merger enforcement under the HSR process. When this evidence is considered, the implication is that LTF raises false negative concerns.

A. AGENCY BUDGET CONSTRAINTS AND UNDER-ENFORCEMENT

The agencies today are budget constrained, which forces them to engage in triage.[58] Over the twenty-year period from fiscal year 2001 to 2020, there were a total of 31,500 HSR filings

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[54] *Libbey*, 211 F. Supp. 34 at 50.

[55] 130 F. Supp. 2d 1025 at 1026.

[56] *Id.*

[57] 605 F. Supp. 2d 26, 47 (D.D.C. 2009).

[58] *See., e.g.*, Robert B. Bell and Amanda L. Butler, *Institutional Factors Contributing to the Under-Enforcement of Merger Law*, ANTITRUST SOURCE 7-8 (October 2020); Michael Kades, *The State of U.S. Antitrust Enforcement* (2019) at Tables 7-9, *available at* https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true [https://perma.cc/84EV-VRSN]; Appropriation Figures for the Antitrust Division: Fiscal Years 1903-2021), *available at* https://www.justice.gov/atr/appropriation-figures-antitrust-division [https://perma.cc/84EV-VRSN]; Testimony of Daniel Francis, The U.S. Senate Committee on The Judiciary Subcommittee on Competition Policy, Antitrust, And Consumer Rights (Feb. 2, 2022), *available at*

that reached outcomes by the end of 2020.[59] Of these filings , only 969 cases—about 3.1%—led to second requests and the proportion of transactions leading to second requests has trended down. A high percentage of second requests lead to challenges. In only 272 (28.1%) of these 969 cases was the merger cleared as proposed. These figures indicate that typically it is the most problematical transactions that receive second requests. Of the rest, 367 (37.9%) were resolved by consent decrees entered simultaneously with a complaint. Another 254 (26.2%) were abandoned or restructured, suggesting that the parties concluded that litigation was not in their interest. Only 77 (7.9%) of the 969 second requests were not resolved in one of these ways. Of the 77, 11 (14.3%) led to a negotiated settlement outside of the consent decree process, 34 (44.2%) were abandoned or restructured, while 3 (3.9%) were withdrawn by the agency as mooted. Only 29 cases (37.7% of the 77) reached a litigated decision, and the government won 18 (62.1%) while losing 11 (37.9%).

Recently, under the Biden administration, DOJ has begun to change its policy. In fiscal year 2022, it issued 12 complaints but only 5 of these were settled simultaneously with consent decrees.[60] Of the rest, 1 was subsequently abandoned and 6 went to trial. The DOJ lost 3 and won 1 of the cases at trial, while 2 others are still pending. The FTC has litigated fewer cases. In fiscal year 2022, the FTC issued 18 complaints and 9 of these were settled simultaneously with consent decrees.[61] Of the rest, 5 was subsequently abandoned and 3 were subsequently settled with consent decrees. Only *Illumina/Grail* went to trial and the ALJ found for the parties.[62] As of this writing, the case is pending before the Commission.[63]

B. INADEQUATE CONSENT DECREES

A consent decree does not ensure that competition will be preserved. There have been some striking examples of failed divestitures. When Safeway and Albertsons merged, the FTC

https://www.judiciary.senate.gov/download/daniel-francis-2222-testimony [https://perma.cc/3KLU-JEPL].

[59] For a more detailed description and analysis of this data see Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. __ (2023)

[60] The agency annual reports were not issued at the time of this writing, so these figures may not be perfectly accurate.

[61] The agency annual reports were not issued at the time of this writing, so these figures may not be perfectly accurate.

[62] *In re* Illumina, Inc., Docket No. 9401 (Sept. 9, 2022).

[63] Complaint Counsel's Appeal of the Initial Decision, In re Illumina, Inc., Docket No. 9401 (Oct. 4, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/D09401%20-%20COMPLAINT%20COUNSEL_S%20APPEAL%20OF%20THE%20INITIAL%20DECISION%20-%20PUBLIC%20%281%29.pdf.

consent decree required divestiture of 168 stores.[64] Haggens, a chain of 18 stores, acquired 146 of these stores. Later that year, Haggens declared bankruptcy, and the FTC subsequently approved Albertson's re-acquisition of 29 of the stores.[65]

Hertz's acquisition of Dollar Thrifty in 2012 is also illustrative. Hertz agreed to divest its Advantage rental car business and to supply vehicles to Advantage for a period of time.[66] Advantage declared bankruptcy some months after the final order, and the FTC permitted Hertz and Avis to purchase some of its airport locations.[67]

The FTC's 2017 self-study reports more systematic evidence of insufficient consent decrees. The study analyzed a significant number of (unidentified) mergers settled with consent decrees between 2006 and 2012.[68] The study found that many orders were insufficient.[69] Among all horizontal merger consent decrees, 19% failed to restore or preserve competition.[70] Another 15% were only "qualified successes" because they took longer than 2 to 3 years to restore competition.[71] Together, these data indicate there was some significant competitive harm suffered in 34% of the consents. As to remedies in unconsummated mergers, 19% were considered "failures" and another 6% were only "qualified successes." Divestitures of entire ongoing businesses were more successful than those that involved only the sale of "selected

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[64] This divestiture included more than one-quarter of the 630 stores owned by Albertson's pre-merger, though some divested stores were not Albertson's. Press Release, FTC, *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of* Merger (Jan. 27, 2015), *available at* https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger [https://perma.cc/WZ8M-MSBM].

[65] *Bankrupt Haggen's $106M Store Sale to Albertsons OK'd*, Law360 (Mar. 29, 2016), *available at* https://www.law360.com/articles/777361/bankrupt-haggen-s-106m-store-sale-to-albertsons-ok-d [https://perma.cc/JFN5-3E5K].

[66] Press Release, FTC, *FTC Approves Modified Final Order in Hertz Acquisition of Dollar Thrifty* (Jul. 11, 2013), *available at* https://www.ftc.gov/news-events/news/press-releases/2013/07/ftc-approves-modified-final-order-hertz-acquisition-dollar-thrifty [https://perma.cc/2Z8J-5UUW].

[67] Press Release, FTC, *FTC Approves Franchise Services of North America's Application to Sell Certain Advantage Rent a Car Locations to Hertz and Avis Budget Group* (May 30, 2014), *available at* https://www.ftc.gov/news-events/news/press-releases/2014/05/ftc-approves-franchise-services-north-americas-application-sell-certain-advantage-rent-car-locations [https://perma.cc/Y8G9-ALDB].

[68] FTC STUDY, *supra* note 27, at 7.

[69] The FTC study classified a remedy as a "success" if market competition remained at its pre-merger level or returned to that level in a short time (two to three years) after the order. A remedy was classified as a "qualified success" if it took more than two to three years to restore competition, but ultimately did so. A remedy that did not maintain or restore competition was classified as a "failure." *Id*. at 15.

[70] *Id*. at 18 (Table 3).

[71] *Id.*

assets."[72] By the FTC's definition, 100% of the orders involving divestitures of ongoing businesses were "successes."[73] But only 56% of the "selected asset" orders were "successes" and 33% were "failures."[74] All in all, this evidence suggests a significant number of false negatives, where the FTC accepted a remedy that did not adequately address the merger's anticompetitive effects.

Behavioral remedies are generally less likely to succeed than divestitures because behavioral remedies are unable to cover all the potential conduct of the merging firms that can impede competition and because they are difficult to enforce.[75] Of the remedies the FTC examined in its study, four included information firewalls in the context of vertical mergers; the agency deemed all four successful, although the staff's main measure of success was "whether respondents effectively monitored and enforced them."[76] Relying on the fox to monitor and report whether it raided the henhouse is a poor way to enforce a remedy and an equally poor way to gauge its success.[77]

That only 66% of the reported mergers were classified as "successes" suggests that the agencies approve consent decrees that have insufficient likelihood of preserving competition.[78] The FTC did not report if these "successes" increased competition or simply prevented

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[72] *Id.* at 22 (Table 7); *see also* FTC Statement, *Negotiating Merger Remedies*, Federal Trade Commission at 5 (Jan. 2012), *available at* https://www.ftc.gov/advice-guidance/competition-guidance/negotiating-merger-remedies (divestiture of "an autonomous, on-going business unit that comprises at least one party's entire business in the relevant market…. will most immediately eliminate the competitive problems created by the merger by preserving or re-creating the competitive status quo, and it entails the least amount of risk.").

[73] *Id*. It appears that none of these divestitures involved vertically integrated firms or firms where there were other multi-market synergies.

[74] Another 11% were considered qualified successes. *Id*.

[75] Merger Remedies Manual, Antitrust Division: U.S. Department of Justice at 4 (Sept. 2020), *available at* https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/48X6-SNS8] ("Conduct remedies . . .require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure. 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.").

[76] FTC. STUDY at 16. The study also included two cases of horizontal mergers that involved provisions to facilitate entry, both of which it deemed successful. *Id.* at 19.

[77] The FTC study does not report on other remedy provisions, such as non-discrimination or duty-to-deal requirements, for vertical mergers.

[78] *Compare* Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems*, 69 GEO. WASH. L. REV. 932, 937-940 (2001) to Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 190 *and* Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2676 (2013).

competition from worsening. But if one assumes the latter, and considers those cases together with the 34% of instances where the remedy failed to sufficiently replicate pre-merger competition (some for 2 to 3 years and some longer), these data raise the question of whether the set of evaluated remedies have led *on average* to worse market outcomes than would have been the case in a counterfactual world where all of the mergers were prohibited, an issue the FTC's 2017 study did not address.

A weaker remedy may be appropriate if the risk of anticompetitive effects from the merger is low. But agencies may feel compelled to accept potentially insufficient consent decrees even in more worrisome cases because constrained agency budgets limit the amount of litigation the agencies can undertake. Losing a trial, with the merger going forward with no remedy at all, is worse for competition than a somewhat insufficient settlement. The financial returns to completing an anticompetitive merger are very high; defendants therefore have an incentive to devote significant resources to litigation—more than a budget-constrained agency can devote. These asymmetric stakes and budgets tend to skew litigation outcomes away from the merits in favor of the merging firms and thus increase false negatives.[79]

These are the general circumstances facing the agencies and merging parties in litigation. And as we explain below, LTF further influences these dynamics.

III. ECONOMIC ANALYSIS OF LTF IMPACT ON TRIAL OUTCOMES, CONSENT DECREES, AND MERGER PROPOSALS

LTF raises additional concerns about false negatives. As discussed, history suggests that there is underenforcement in merger reviews because of agency resource constraints and negotiated consent decrees often are not fully successful. Allowing parties to propose even weaker LTF proposals to the court (and have some probability of winning) will further reduce the agency's bargaining leverage in consent decree negotiations, leading to even weaker negotiated consent decrees. There will also be reduced deterrence of proposals for mergers with significant anticompetitive risks.

These false negative concerns and the potentially exacerbating effects of LTF can be explained by analyzing the five stages of the HSR process. In stage 1, the firm decides how much antitrust enforcement risk to assume for the merger it will propose, as gauged by the probability and magnitude of the merger's anticompetitive effects and the likelihood the reviewing agency will detect the effect. For simplicity, we assume the reviewing agency issues a second request. In stage 2, the agency either clears the merger as notified or accepts a consent decree that may be more or less substantial in changing the terms of the transaction.[80] In stage 3,

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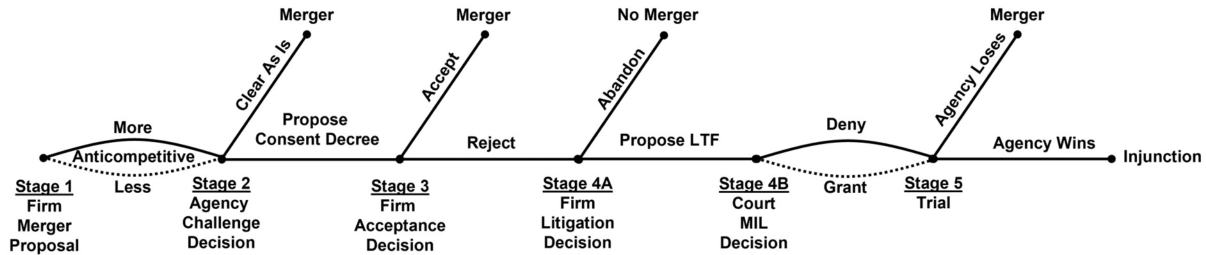
[79] Erik Hovenkamp & Steven C. Salop, *Litigation with Inalienable Judgments*, __ J. LEGAL STUD. __(2022) (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4072927 [https://perma.cc/HRQ5-P3C9].

[80] We put aside the issue of the agency simply moving directly to trial.

the firm either accepts or rejects a negotiated consent decree.[81] In stage 4A, the firm may abandon (or restructure) the transaction or proceed to court with or without an LTF proposal. Assuming it proposes an LTF, in stage 4B, the agency may file a motion *in limine* (and we assume that it will), which the court either grants or denies. In stage 5, there is a trial and an outcome.

These decision stages and choices are summarized in the Figure below.



Knowledge that the court will deny the motion *in limine* in stage 4B and permit LTF will affect behavior and outcomes at every earlier stage of the process. Because behavior at every stage depends on the anticipated outcomes at later stages, it is useful to focus first on the last stage and then work backwards. That is, the participants and analysts must "look ahead and reason back."[82]

Assuming that an LTF remedy is proposed and the motion *in limine* is denied (stage 4B), an imperfectly informed court (stage 5) may, at trial, end up accepting a firm's LTF remedy that would lead to a substantially more anticompetitive outcome than would occur absent the merger.[83] This "false negative" outcome is more likely if the LTF procedure is more permissive.

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[81] At this point, the agency might withdraw its complaint, or the parties might renegotiate, but these possibilities can be ignored here.

[82] Avinash Dixit & Barry Nalebuff, THINKING STRATEGICALLY, THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 34 (1991).

[83] Suppose that the merger as remedied is anticompetitive, but less anticompetitive than the merger as proposed. Since the trial court faces imperfect information, it is reasonable to expect that it will more likely permit the remedied merger than it would the more anticompetitive as-proposed merger, despite that both are anticompetitive. To illustrate, consider a court with imperfect information evaluating whether the merger creates a reasonable probability of substantially lessening competition. Suppose there are two possible effects, either -100 or -10. If the court relies on an imperfect "signal" of the merger's effect, based on the evidence, it is more likely to find that the merger does not threaten to substantially lessen competition if the actual effect is -10 than if the effect is -100.

While "false positives" may be reduced somewhat by a more permissive LTF procedure, "false negatives" are of greater concern under Section 7's incipiency standard.[84]

The effects of an agency's increased risk of a loss at trial from a more permissive procedure that makes a court more likely to accept a firm's LTF remedy can be traced back to earlier stages of the process. If the firm anticipates that the court will deny the motion *in limine* (stage 4B), it will have incentives (and be more likely) to reject the agency's proposed consent decree (stage 3) and propose its own, weaker LTF remedy (stage 4A) and be less likely to abandon the transaction (stage 4A).[85] This analysis all stems from the fact that a more permissive (*i.e.*, more defendant-friendly) LTF procedure makes it more likely that the court will ultimately accept the firm's possibly weak remedy rather than enjoin the merger (stage 5).

Most importantly, such a permissive LTF procedure will also likely lead the agency to accept a weaker consent decree (stage 2) for two reasons. First, the agency will perceive a greater probability of losing at trial because the court will probably determine that the merger with the remedy will likely result in less harm to competition than the unremedied merger. Second, the agency will understand that it has less downside risk because a loss at trial at least achieves the LTF remedy.[86] The merging firm also can anticipate that its higher chance of winning at trial will lead the agency to accept a weaker consent decree (stages 2-3). LTF will also incentivize the firm to propose mergers that have higher risk of harming competition (stage 1).

A more permissive LTF procedure increases false negatives in a second way—by incentivizing merging firms to hide potential competitive problems rather than self-disclosing. This self-disclosure could involve notifying a transaction in the original HSR filing that contains a proposed divestiture, leaving certain assets with the seller, or proposing another remedy. Allowing late-stage LTF proposals also incentivizes firms to attempt to gain a litigation advantage by reducing the amount of time and information available to the agencies to investigate the proposed remedy.

In short, a more permissive LTF procedure weakens the agency's relative litigation position and bargaining leverage while strengthening the merging firm's.[87] These changes lead to more false negatives, weaker consent decrees, and less deterrence of anticompetitive merger proposals. It also may lengthen the investigation period.

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[84] *Supra*, text accompanying nn.24-29.

[85] The firm has less to lose by rejecting the agency's offer because now the firm has the LTF alternative. In decision theory jargon, the firm's "best alternative to a negotiated solution" (BATNA) has improved. The firm's BATNA similarly increases, and the agency's BATNA decreases, at every decision stage.

[86] Gelfand and Brannon, *supra* note 9

[87] For examples of the technical literature, see John Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950); Ken Binmore et al., *The Nash Bargaining Solution in Economic Modeling*, 17 RAND J. ECON. 176 (1986).

A different type of false negative concern led to passage of the HSR Act. The Act provided a procedural solution to an under-enforcement problem that stemmed from the enforcement agencies lacking sufficient notice and time to evaluate and block anticompetitive mergers before they were consummated. These delays led to what Kenneth Elzinga called "pyrrhic" victories.[88] The HSR Act reduced these twin problems of "midnight mergers" and "unscrambling the eggs" by requiring pre-merger notification, second requests, and waiting periods.[89] A procedural solution similarly can reduce the type of false negative concerns raised by LTF.

IV. PROPOSED PROCEDURE

Our proposal is designed to permit courts to consider LTF proposals and evidence while avoiding excessive false negatives. Our recommendations are driven by our economic analysis, the language and goals of Section 7, LTF case law, and the history of negotiated consent decrees.

We appreciate the rationale for prohibiting LTF proposals.[90] Permitting LTF encourages the parties to hide competitive problems, rather than self-disclosing them perhaps by reporting a transaction in the original HSR filing that is structured to avoid competitive concerns. Non-disclosure and post-complaint LTF proposals may increase agency investigation costs. It also raises the risk of false negatives by reducing the agency's bargaining leverage and allowing the defendant to bet on the court erring in its favor, or even tailoring the LTF proposal according to the judge assigned to the case.

However, we believe that, as a practical matter, prohibiting post-complaint LTF proposals would not make much difference for several reasons. Even if LTF were prohibited, the parties could always withdraw their old agreement and file a new HSR notification; they would therefore still have a practical opportunity for a second bite of the apple at little additional cost.[91] Moreover, significant benefits from the merging party self-disclosing potential competitive issues may not be realized. For example, it often will be impossible to line up a divestiture buyer in advance of filing the HSR notification, particularly if the divestiture transaction is made contingent on the agency demanding it. Federal courts have the authority to

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[88] Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?,* 12 J. L. ECON. 1, 43 (1969), *available at* https://www.journals.uchicago.edu/doi/abs/10.1086/466659?journalCode=jle [https://perma.cc/BMR8-UN85].

[89] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in 15 and 28 U.S.C. (2000)).

[90] Kwoka & Weber Waller, *supra* note 10; Salop, *supra* note 9.

[91] One difference is that there is no filing fee under our proposal. But we do not expect that a $280,000 fee would have much effect on a $1 billion transaction. See Federal Trade Commission, *Filing Fee Information* (Mar. 3, 2022) [https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information.](https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information)

fashion remedies and have routinely adjudicated merger remedy proposals; and we see no legal bar to them adjudicating such proposals.[92] Thus, we do not recommend prohibiting LTF.

Instead, we recommend a policy that requires a process of discovery and waiting periods that is analogous to the HSR process. This will prevent the agency from having too little time or information to evaluate potential shortcomings with the proposed remedy and may encourage some earlier self-disclosure to avoid later delays. To avoid false negatives, our recommended policy places evidentiary burdens on the merging parties to show that the fix is sufficient to preserve competition.

A. BASIC PROPOSAL

Our basic procedure has the following features: (i) it provides ample time for agency investigation; (ii) it ensures that the agency and court have sufficient information regarding a definitive remedy proposal; and (iii) it allocates the evidentiary burden to the merging parties to establish that the proposal is sufficient to eliminate anticompetitive effects, even in cases involving divestitures or the seller retaining certain assets. It also includes provisions that a court can apply to post-judgment enforcement.

1. *Timing and Sufficient Notice*

Suppose that the proposed remedy is not reflected in the original HSR notification. To ensure that the agency receives sufficient notice and time to evaluate the proposed remedy, we recommend that as part of its case management order, the court require the merging parties to submit a "remedy filing" that articulates the terms of the remedy. We recommend a process that is very similar to the HSR process. The remedy filing would trigger a thirty-day waiting period (analogous to the HSR waiting period) during which the agency would gain compulsory process and the power to issue a subpoena for further information (analogous to a second request). The briefing and trial would then be delayed (and the parties would not be permitted to close the deal) for a sufficient period determined by the court *(*analogous to the HSR waiting period*)* after compliance with the subpoena.[93]

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[92] Professor Horton argues that the federal courts' jurisdictional grant under Section 15 of the Clayton Act does not extend to considering remedies that defendants proffer because the statute provides that the proceedings may be initiated "by way of petition setting for the case," evidencing Congress's intention to leave "the shaping of 'the case' under the Clayton Act to the executive branch." *See* Thomas Horton, *supra* note 9, at 90. No court has ever construed Section 15 in such a limited way. And we do not believe such a construction is justified. Courts routinely accept jurisdiction and treat the LTF provisions as revised merger transactions. Courts also routinely analyze and order antitrust remedies. *See, e.g.*, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 77-83 (1911). The most contentious issue instead appears to be how the court should apply the structural presumption when the LTF remedy is a divestiture.

[93] These waiting periods would supplement the waiting period under the original HSR filing.

This procedure could cause some delays if the proposal comes late in the process. But the merging parties can mitigate delays by disclosing the LTF remedy earlier in the process and beginning to collect the relevant information during the initial thirty-day period.[94] Thus, the fear of delays has benefits. If the transaction reported in the original HSR submission or as modified by the parties early in the agency's investigation resolves the potential competitive concerns (*e.g.*, with a divestiture), that would avoid any delay in a subsequent litigation. Earlier disclosure to avoid later delay would result in the agency and the merging parties possessing more common knowledge, thereby reducing the parties' reliance on trial to resolve uncertainties.[95]

2. *Definitiveness*

To ensure the agencies have sufficient information to review the remedy, we recommend that the parties be required to specify the proposed remedy in detail. In the case of a divestiture, the filing should identify the divesture buyer; the assets included in the divestiture package; the terms of the agreement; and any post-divestiture dealings or other entanglements between the merging party and the divestiture buyers (or seller in the case of retained assets). These entanglements could include contractual or behavioral restrictions such as duties to deal, pricing terms, non-competition or no-poach agreements, as well as unilateral promises.[96] We also recommend that the filing specify how the remedy will be enforced, how its implementation will be monitored, the sanctions that will be levied if the merging party fails to comply with its commitments, and any process for modifying the remedy if it fails or alterations are necessary to promote its success.[97]

3. *Evidentiary Burdens*

The allocation of the evidentiary burdens is the most contentious feature of the LTF procedure. We agree that the court must adjudicate the merger as modified, rather than the one notified in the original HSR submission. However, this focus does not determine the proper allocation of the burden of proof between the government and the merging parties. The evidentiary burdens in a merger case are sensitive to whether the structural presumption applies, and demands for LTF will typically arise when the presumption would apply. For this reason, we focus on transactions where the structural presumption would apply if the buyer obtained all the seller's competing assets.

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[94] Much of the relevant information might already have been submitted as part of consent decree negotiations.

[95] Differential information that leads to asymmetric expectations can make litigation more likely.

[96] If the remedy involves the seller retaining certain assets that compete with the buyer, the filing should contain similar details.

[97] If the remedy is proposed before a court is involved, including all these disclosures would prevent further delays later in the process.

Even if the focus is placed on the merger as modified, one possible approach would amount to a two-stage process of liability and remedy. In stage 1, the court would assess the legality of the unremedied merger with the ultimate burden of persuasion placed on the government. This stage would be relevant because the parties typically argue that the original merger did not violate Section 7, not simply that the remedy resolves all competitive concerns. If the unmodified merger is found to violate Section 7, the remedy would be evaluated in stage 2 with the evidentiary burden placed on the defendant. Another possible approach would be to treat the fix as effectively a provision in an amended merger agreement, whereby the burden is placed on the government to show that this amended agreement violates Section 7.

Our recommendation is in-between these two approaches, but closer to the first. In the context of the *Baker Hughes* burden-shifting approach, the government can satisfy its Step 1, *prima facie* case of harm to competition either with the structural presumption (using the pre-merger market shares of the merging firms without regard to a structural remedy) or other evidence. We explain in detail below why we recommend shares should be based on the unremedied proposed transaction. If the government satisfies its burden, the court places the evidentiary burden on the defendant to show the sufficiency of the remedy, in combination with any other rebuttal arguments.[98]

The burden-shifting approach would apply in cases where the parties propose a remedy consisting of the seller retaining certain competing assets, such as in *Libbey*, as well as divestitures, such as in *Arch Coal* or *Sysco*. This approach also would apply to proposed behavioral (conduct) remedies.[99] It would apply both to proposed remedies that are conditioned on the merger being found not to violate Section 7 and when the remedy is unconditional, for example, when it is part of an amended merger agreement.

There are many economic reasons why a divestiture or retention of certain competing assets might not sufficiently replace the competitive intensity of the parties absent the merger. That the remedy is a sufficient replacement of the pre-merger competitive intensity should not be

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[98] *See, e.g.*, United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition 'lost by the merger counteracting the anticompetitive effects of the merger"); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016) (holding that defendants "bear the burden of showing that [the remedy] would negate any anticompetitive effects of the merger.").

[99] Divestitures or behavioral commitments proposed to cure proven competitive effects in mergers that have already been consummated (e.g., *Evanston/Northwestern*) would also be deemed remedies for which the defendants have the burden to demonstrate adequacy. *See* Initial Decision, *Re Polypore International Inc.,* Docket No. 9327 (Mar. 1, 2010) at 337 (discussing the alternative remedy after concluding that the transaction was anticompetitive). Behavioral remedies proposed as part of an amended merger agreement also would be treated in the same way. Those remedies amount to claims that the remedial duties or restrictions will prevent the merged firm from acting on the anticompetitive incentives possibly created by the merger. Redacted Mem. Opinion, UHG/Change, 1:22CV00481 at 39 (discussing how the proposed remedy will provide an alternative set of incentives to avoid anticompetitive behavior).

assumed. Our proposed procedure—with the defendant having the burden to show that its remedy will prevent anticompetitive harm—also reflects our view that there should be more concern about false negatives than false positives in adjudicating LTF, given the history of insufficient consent decrees, the Section 7 incipiency standard, and our economic analysis. This includes the fact that defendants have incentives to outspend the agencies in litigation, which skews litigation outcomes in their favor. Our recommendation also reflects the reality that the merging parties have proposed the remedy and have incentives to choose divestiture buyers that will compete less intensely than the divesture seller did or propose remedies that would provide only limited constraints on their behavior.

Consider the usual case in which the merging parties propose a divestiture as part of their amended merger agreement presented to the court. In this situation, they may argue that the merger litigation structural presumption is not satisfied because the divestiture prevents any increase in concentration. Absent the presumption, the argument would go, the burden should be placed on the government to show likely anticompetitive harm with other evidence. This approach is the one that Judge Nichols preferred in *UHG/Change*—with the government allocated the burden as part of its *prima facie* case to show that the divestiture is insufficient to restore competition.[100]

While we agree that the court should adjudicate the merger as amended by the divestiture, we do not recommend Judge Nichol's preferred approach. We agree that the economic issue is whether or not the divestiture buyer will, in fact, have the ability and incentive to sufficiently replace the competitive intensity of the acquired firm as evaluated by the courts.[101]

But there is no economic basis simply to *presume* at the outset that the divesture buyer will do so and place the initial burden on the government to rebut that presumption. Divestitures do not necessarily create a new competitor that will provide equal (or sufficiently close) competitive intensity to that of the acquired firm pre-merger. [102] Moreover, that the merging party chooses the divestee and has an incentive to choose a weaker competitor reinforces the concern that the divesture buyer will provide substantially less competitive intensity than

[100] *UHG/Change*, Redacted Mem. Opinion, No. 1:22CV0481 at 17-20.

[101] As the court in *RAG-Stiftung* summarized, "To evaluate whether a divestiture will do so, courts consider the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the independence of the divestiture buyer from the merging seller, and the purchase price." *RAG-Stiftung*, 436 F. Supp. 3d 278 at 304 (citing *Aetna*, 240 F. Supp. 3d 1 at 60-74).

[102] *See, e.g., Sysco*, 113 F. Supp. 3d 1 at 72 (quoting Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 5 (Oct. 2004); United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (evaluating whether the divestiture buyer would "successfully replace the competition lost" by the merger); FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 42-3 (D.D.C. 2002) (discussing a concern that the asset would have higher costs and face other impediments, making it not as strong a competitor); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) (stating that defendants have the burden to show that the proposed divestiture will replace the merging firm's "competitive intensity.").

occurred before the merger with independent competition from the divestiture seller. Thus, an approach of *automatically* assuming and predicting that a proposed divestiture[103] will sufficiently replace the lost competition, and consequently exploding the structural presumption, suffers from serious economic and legal flaws.[104]

The likely competitive intensity post-divestiture will depend on the facts. The divesture buyer may be a weaker competitor for various economic reasons: higher costs, lower quality, or less experienced or proficient executives and employees, and so on, as described in the cases discussed below.[105] The risk that the divesture buyer will be a weaker competitor may be even greater if there is a divestiture of selected assets rather than a complete ongoing basis.[106] The conditions for replicating pre-merger competition can be even worse if the divestee remains dependent on the merged firm or must purchase higher cost services or inputs from third parties. Even if the divestee can compete intensely in the short run, it may fall short in the long run by failing to produce innovations on par with what the acquired firm would have produced. These problems may be more severe if the divestee obtains only selected assets. But even if the divestiture buyer obtains an ongoing business, the divestiture may lead to customer losses, possible supplier renegotiation, the need to replace services provided by the seller, resignations

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[103] This same analysis applies when the acquired firm retains certain competing assets after the merger.

[104] For this reason, our recommendation does not conflict either with the text of Section 7 or *Baker Hughes*, as suggested by Judge Nichols in *UHG/Change*, Redacted Mem. Opinion, No. 1:22CV0481 at 18-19. As discussed above, *supra* Part III, the Section 7 standard is whether the merger "*may be*" substantially to lessen competition, a qualifier that Judge Nichols left out, and which translates into a predictive concept of "reasonable probability" or "appreciable danger." The court in *Baker Hughes* never suggested that "reasonable probability" should be equated with "more likely than not" or that the structural presumption should be exploded rather than weakened. As Judge Pan explained in her opinion regarding the Penguin/Simon & Schuster merger, the government must "prove 'by a preponderance of the evidence' that the effect of a challenged merger or acquisition 'may be substantially to lessen competition.' Mem. Opinion, U.S. v. Bertelsmann SE & Co., 1:21CV02886 (D.D.C. Nov. 2, 2022) at n.15. This might be summarized as a requirement to establish a "sufficient probability of a probability."

[105] FTC, *A Study of the Commission's Divestiture Process*, at 16-19 (1999), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf;https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf; *see also* U.S. Dep't of Justice, Antitrust Division, Merger Remedies Manual (Sept. 2020), at 23, *available at* https://www.justice.gov/atr/page/file/1312416/download; FTC, Negotiating Merger Remedies (Jan. 2012), at 10, *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

[106] The FTC Study, *supra* note 2772, found that the effectiveness of divestitures depended on the breadth of assets divested. Only slightly more than half of the orders were considered successes when only "selected assets" were divested, whereas all the orders involving divestitures of ongoing businesses were considered successes. The distinction between "selected assets" and "ongoing business" is not a bright line.

of some key executives, or other disruptions that might prevent the divestiture from rapidly restoring competition.[107] A divestee may be disadvantaged if it has a narrower portfolio of products that are sold alongside the divested products, either because it will have higher costs or reduced consumer demand.[108]

A divestee also may have less incentive to compete or innovate as vigorously as the divestiture seller—for example, if the divestee intends to sell a somewhat differentiated product that might appeal to a somewhat different set of customers.[109] Divesting to a firm that competes with the merged firm in a different region might create the potential for coordination through multi-market contact.[110] Similarly, if the divestee is a vertically integrated firm that also supplies certain inputs to the merged firm, it may choose to compete less intensely downstream to avoid alienating its customer.[111]

Alternatively, the divestiture might replace a maverick or aggressive competitor with a divestee that lacks similar competitive incentives. For example, the divestee's business plan may involve a less vigorous competitive approach, as the agencies have recently suggested regarding certain private equity buyers.[112] The divestiture buyer may have a short-run perspective, focused

[107] For an analogous classification of reasons why the divestee may not replicate the pre-merger competitive intensity of the merging parties, s*ee* Deputy Assistant Attorney General Andrew Forman, *Antitrust Merger Enforcement: The Role of M&A Lawyers and Select Enforcement Priorities (Remarks Prepared for Delivery)* (Sept. 17, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust.

[108] The government alleged this latter concern in UHG/Change, but it was rejected by the court. UHG/Change, Redacted Mem. Opinion, No. 1:22CV0481, at 28.

[109] For example, suppose the divestees in the Kroger/Albertsons merger were Trader Joes or Whole Foods, which sell a different product mix to somewhat different groups of customers than Albertsons.

[110] For example, when Miller acquired Coors in the United States, while Molson owned Coors in Canada, it might have been suggested that Miller could punish Molson by lowering its prices in Canada if Molson reduced prices in the U.S.

[111] For example, suppose the proposed divestee in the Kroger/Albertson's merger were Proctor & Gamble.

[112] *See, e.g.*, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of JAB Consumer Partners SCA SICAR, National Veterinary Associates, Inc., and SAGE Veterinary Partners, LLC, File No. 211 0140 (June 13, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioneralvaro-m-bedoya*;* Andrew Foreman*, The Importance of Vigorous Antitrust Enforcement in Health Care (Remarks Prepared for Delivery) (June 3, 2022),* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust. The two notable recent divestiture disasters, the Hertz/Dollar Thrifty divestiture of Advantage and the Safeway/Albertson's divestiture to Haggens, both involved private equity buyers.

more on "milking" the asset rather than growing it by competing more intensely.[113] Such a divestee similarly may place lower value on innovation. Furthermore, a divestee may face fewer reputational constraints to prevent it from raising prices or reducing quality or innovation.[114]

For all these reasons, we recommend that the court evaluate evidence on all these issues rather than assume that divestee will have sufficiently equal incentives to compete as intensely as the divestiture seller. Sufficient competitive intensity cannot be assumed or based on trust. We recommend that the merging firms be allocated a high evidentiary burden because errors can lead to significant competitive harms that are difficult if not impossible to correct later on.

In some cases, courts concluded that the divestee would fully replace or surpass the competition provided by the divestiture seller. For example, in *UHG/Change*, the court rejected the DOJ's argument that the divestee would be disadvantaged by its failure to offer a portfolio of products sold alongside the divested product.[115] And in *Arch Coal*, the court found that the divestee would be an even stronger competitor.[116] In other cases, however, courts concluded that the competition provided by the divestee would fail to provide competition on par with that of the seller. In the *Libbey* amended transaction, Anchor's parent, Newell, maintained ownership of the ongoing food service business. However, Newell no longer would have owned its own production facilities but instead was to rely on a foreign contract manufacturer, which the court found would lead it to face higher costs.[117] In *Sysco*, the proposed divestee had fewer distribution centers and its own market share projections fell short of the acquired firm's pre-

[113] *Eastman Kodak Co. v. Image Technical Services, Inc.* raised an analogous issue, where the defendant may have had incentives to raise aftermarket prices because the number of locked-in consumers was high, relative to the number of new purchasers. 504 U.S. 451, 476 (1992).

[114] *See e.g., Concurring Statement of Commissioner J. Thomas Rosch Federal Trade Commission v. Ovation Pharmaceuticals, Inc.*, *available at* https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf [https://perma.cc/SLQ4-MJBJ].

[115] UHG/Change, *supra* note 1.

[116] Arch Coal, 329 F. Supp. 2d 109 at 149. ("Defendants have shown that the post-merger fringe capacity in the SPRB would be more than sufficient to absorb any increase in demand caused by any production lag coordinated by the "big three" producers—Peabody, Kennecott, and Arch—over the next three years... RAG and Kiewit would both be better able to play the role of maverick in the post-merger market than would Triton if no merger occurred.").

[117] *Libbey*, 211 F. Supp. 2d 34 at 42-43 ("FTC questions whether the manufacturer identified by Newell, Peldar S.A. ('Peldar'), will be a reliable resource for the glassware because it is located in Colombia, a country that currently and has been experiencing for many years civil unrest and internal instability. The FTC opines further that even if RCP can successfully outsource from Peldar, RCP's outsourcing costs will be 4.3 percent higher than Anchor's current manufacturing costs and RCP will have to pass this cost onto its customers, thus hindering its ability to compete with Libbey.").

merger share, suggesting that it would provide less of a competitive constraint than the acquired firm.[118] In *Aetna*, the court made a similar finding.[119]

The 2017 FTC study indicated that some consent decrees involving divestitures failed to restore pre-merger levels of competition, suggesting that consumers suffer long-run harms.[120] Even the divestiture consent decrees that the FTC deemed "successful" may have taken two or three years to restore competition, a period during which there was competitive harm. Other consent decrees classified as "qualified successes" took even longer. And an LTF divestiture remedy that the merging party has proposed, but the agency has rejected based on its good faith analysis, is arguably even less likely to succeed.

That the merging firm selects the divestee reinforces these concerns. The merging firm has incentives to divest the assets to a buyer that will be a weaker, rather than a stronger, competitor, even if there were a buyer that would be a stronger competitor and would be willing to pay somewhat more for the divested asset.[121] The merging firm might even take actions in the pre-divestiture period that reduces the buyer's ability to compete intensely.[122] Anticipating this, the buyer would pay a lower price for the assets. But consumers nonetheless would be harmed. Thus, automatically negating the structural presumption based on a proposed LTF divestiture remedy increases the likelihood of false negatives and insufficient consent decrees.

Our procedure does focus on the effect of the merger as modified by the proposed remedy. But for all these reasons, we recommend that the court approach LTF proposals with substantial skepticism and require a high degree of confidence before accepting the proposed remedy as sufficient. This analysis and historical evidence suggest that an appropriate approach is for the court essentially to presume the divestee will be a weaker competitor than the seller,

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[118] *Sysco*, F. Supp. 3d 1 at 73-76.

[119] *Aetna*, 240 F. Supp. 3d 1 at 72 ("Based on all the evidence concerning Molina's ability to successfully operate the divestiture Medicare Advantage plans, the Court finds that Molina is not likely to be able to replace fully the competition lost by the merger. Two other types of evidence—the low purchase price and Molina's history in Medicare Advantage—also support this conclusion.").

[120] *Supra*, Section II.

[121] The low purchase price was an issue in Aetna, *supra* note 102.

[122] The Schnuck's supermarket chain famously allowed stores to become "dirty, damaged, understaffed and understocked before completing the required divestiture." See FTC Press Release, *Schnucks to Pay $3 Million, Divest Two Additional Stores to Settle FTC Charges of Running Down Supermarkets Before Divesting* (July 30, 1997), https://www.ftc.gov/news-events/news/press-releases/1997/07/schnucks-pay-3-million-divest-two-additional-stores-settle-ftc-charges-running-down-supermarkets.

and thereby place the burden on the defendant of rebutting the presumption that the merger will create an appreciable risk of substantially lessening competition.[123]

The merging parties can rebut the structural presumption by showing that the government's measure of concentration is incorrect because it fails to account for the impact of the divestiture. This rebuttal would be analogous to the situation in *United States v. General Dynamics Corp.*, where the Supreme Court held that the level and increase in concentration were improperly measured.[124] The parties would argue that the harm to competition is non-existent or at least much less than the hypothetical situation where the buyer acquires all the competing assets and there is no divestiture or assets retained by the seller. The government's response would likely be that the competitive harm is still substantial because the divestiture buyer or the seller with retained assets will not replicate competition as it existed before the merger. Thus, it would be incumbent on the merging parties to show that the divestee or the residual owner would not face significant competitive disadvantages or incentives that would result in it failing to replicate competition pre-merger. Both sides can suggest relevant concentration estimates that account for the efficacy or lack thereof of the proposed divestiture.[125]

While this discussion has been framed in terms of the structural presumption, the overarching issue is whether the merger as remedied will cause a reasonable probability of lessening competition. On the one hand, even if the divestee would not face particular impediments, the divestiture package may be insufficient. On the other hand, even if the divestee does not perfectly replicate the divestiture seller, the merger might not violate Section 7. In this regard, rebuttal factors such as product substitution, competition from other rivals, ease of entry, efficiencies, and so on will also be relevant.

Neither the timing of the proposal—regardless of whether to divest or retain some assets—nor whether these provisions are contained in the initial HSR filing should matter. Either way, the economic query is whether the new structure leads to a divestee (or owner of the residual assets) being a weaker competitor than the relevant merging party would have been had it remained independent.

In cases where the structural presumption does not apply, the government might nonetheless be able to satisfy its *prima facie* burden based on other evidence. If it does so, consistent with the *Baker-Hughes* framework, the defendants will still bear the burden of showing that the proposed remedy will eliminate the appreciate risk of lessening competition.

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[123] Because merging firms have the incentive to structure the divestiture to create a weaker competitor than the selling firm, it is appropriate to presume the divestee will face impediments. This requirement addresses the criticism that the defendant must prove a negative.

[124] The argument in *General Dynamics* was that the increase in concentration was improperly measured using production instead of unsold reserves. *See* 415 U.S. 486, 510-11 (1974).

[125] *See infra* at __ for an example using HHIs.

The impact of possible impediments facing the divestee might be conceptualized and gauged in terms of a hypothetical increase in the HHI, expressing the divestee's competitive effectiveness in share terms.[126] For example, consider a hypothetical transaction where the buyer and seller firms have pre-merger market shares of 50% and 20% respectively in the relevant market. At one extreme, if there were no divestiture, the post-merger hypothetical HHI would rise by 2000 points (*i.e.*, 2 x 50 x 20). At the other extreme, if the seller's business is divested and the evidence shows that the divestee would also achieve a 20% market share, the same as the seller, then the post-merger HHI would not increase, and the structural presumption would not be satisfied.

Consider next a middle case, where the evidence suggests that the divestee likely would be somewhat weaker (*e.g.*, higher cost) competitor than was the firm divesting assets and would obtain a hypothetical market share of only 15%, with the other 5% being obtained by the acquiring firm in the merger. In this situation, the acquirer and the divestee would contribute 3250 points (*i.e.*, $(50+5)^2+15^2 = 3025 + 225$) to the post-merger HHI. In comparison, the merger buyer and seller contributed 2900 points (*i.e.*, $50^2 + 20^2 = 2500+400$) to the pre-merger HHI. Thus, the increase in the hypothetical HHI from the merger and divestiture would equal 350 points (*i.e.*, 3250 - 2900). While this 350-point increase is much less than the 2000-point HHI increase if there were no divestiture, it still exceeds the 200-point HHI increase identified in the *Horizontal Merger Guidelines* as creating a presumption of increased market power.[127] Thus, if this type of HHI analysis were used to rebut the structural presumption, that rebuttal would fail in this case.[128]

Arch Coal provides an example where this approach was used to rebut an HHI based on the merger as originally proposed. The court reported various HHI calculations based on different measures. It then explained that "although the FTC has satisfied its *prima facie* case burden, the FTC's *prima facie* case is not strong. Certainly less of a showing is required from defendants to rebut a less-than-compelling *prima facie case*."[129]

Instead of using an HHI proxy, courts might directly examine the likely cost increases or other significant disadvantages that the divestiture buyer will face in its evaluation of the strength

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[126] In *Sysco*, the FTC's expert estimated post-divestiture HHI increases under various assumptions. 113 F. Supp. 3d 1 at 53-54.

[127] Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) §5.

[128] As another example, suppose that evidence suggests market shares of 19% and 51% for the divestee and buyer. In that case, these two firms would contribute 2962 points (*i.e.*, 512+192 = 2601 + 361), an increase of only 62 points (*i.e.*, 2962 – 2900) over the pre-merger HHI contributions. This 62-point increase would be too small to satisfy the structural presumption of anticompetitive effects in the *Merger Guidelines*, despite the highly concentrated market.

[129] *Arch Coal*, 329 F. Supp. 2d 109, 129 (D.D.C. 2004) (citations omitted).

of the defendant's rebuttal case. For example, suppose the evidence indicates that the divestee's costs would be 5% higher than the seller's costs absent the transaction. This significant cost disadvantage could support the government's *prima facie* case that the divestee would be a weaker competitor. Regardless of the impact on the HHI, a higher cost seller will lead to a less competitive market

These methodologies can be illustrated with the shares in *UHG/Change*. If, as the DOJ alleged, the divested product would have lower value to customers in the divestee's hands because the divestee has a narrower product portfolio, competitive intensity would be reduced compared to pre-merger levels and consumers would be harmed. This claim could be conceptualized as the divestee having significantly higher costs. But applying the HHI methodology here paradoxically would lead to a hypothetical HHI *decrease,* if the divestee would be a weaker competitor. This decrease would represent an erroneous signal because of the parties' relative market shares (*i.e.*, Change at 70% and UHG at 20%).[130] For example, if Change's divestee's share hypothetically would be 65% and UHG' share would be 25%, the hypothetical HHI would fall, even though the divestee's product is assumed to have lower value, which is what leads its share to fall.[131]

4. *Implementation and Post-Merger Oversight*

If a court finds for the defendants, thereby allowing the merger to proceed, we recommend that the court *order* the remedy to be implemented.[132] This is necessary, given the firm's commitment might be reversed or evaded.[133] To ensure that behavioral restrictions or other provisions of the remedy are not evaded, we recommend that the order also include a court-enforced monitoring and enforcement mechanism and well-specified sanctions for failure to comply. We also recommend that enforcement of the order include provisions and a process for modifying the remedy in the event of failure or a need for changes for the remedy to succeed.[134] These additions can ensure that the goal of the order—restoring competition—is not undone.

B. Refinements and Exclusions

In setting the evidentiary standards, we recommend that courts apply a higher degree of skepticism to certain types of remedies that the merging parties may argue will prevent

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130 Mem. Opinion, *UHG/Change*, 1:22CV00481 (D.D.C. 2022) at 16.

131 The HHI falls because $70^2+20^2 > 65^2 + 25^2$.

132 In *UHG/Change*, the court ordered the divestiture, despite finding that there was no Section 7 violation. Redacted Mem. Opinion at 58 ("The Court enters judgment for Defendants, denies the Government's request for a permanent injunction, and orders that ClaimsXten be divested to TPG.").

133 This concern was raised in *United States v. Dairy Farmers of America*, 426 F.3d 850, 862 (6th Cir. 2005).

134 Steven C. Salop, *Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy*, 31 Antitrust 15, 17 (2016).

anticompetitive effects from their merger. We also recommend the courts exclude consideration of certain remedial proposals.

1. *Divestitures of Selected Assets and Behavioral (Conduct) Remedies*

We recommend that courts apply greater skepticism and impose a relatively high evidentiary burden on defendants to demonstrate that the merger will not result in competitive harm when they propose divestitures of only select (as opposed to all overlapping) assets. Such asset divestitures tend to be less successful.[135] In *Libbey*, for example, the court did not simply accept the defendant's claims but rather engaged in careful analysis and concluded that the food service business retained by Anchor likely would have higher costs and face other post-merger impediments.[136]

Greater skepticism also should apply to remedies that contain substantial behavioral provisions. Behavioral remedies demand that the merged firm engage in conduct that it would prefer to avoid, so it has inherent incentives to evade the requirements. In addition, the remedy often will be difficult, if not impossible, for the agency or court to monitor the conduct to effectively enforce.[137]

2. *Remedies for Consummated Mergers*

We also recommend greater skepticism in accepting LTF remedies in consummated mergers where the parties have already integrated their operations, rather than holding them separate pending outcome of the proceeding.[138] In these cases, it may be more difficult to "unscramble the eggs." The proposed remedies thus may not involve a clean divestiture of an ongoing business but rather divestitures of selected assets. Or they might involve behavioral provisions to support new entry or promises of intra-corporate competition. The 2017 FTC study found that 22-33% of the consent decrees in consummated merger cases were failures and 44-52% were only qualified successes, while only 22-26% were considered successful.[139]

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[135] FTC Study (2017) at 22 (Table 7).

[136] *Libbey*, 211 F. Supp. 2d at 52; s*ee also Sysco*, 113 F. Supp. 3d at 73-5; *Aetna*, 240 F. Supp. 3d at 99.

[137] *Merger Remedies Manual, supra* note 71.

[138] In evaluating a consummated merger in *Otto Bock*, the FTC treated the hold separate agreement as inadequate to protect competition. While it treated the defendant's proposed divestiture as a remedy, the FTC rejected the remedy as inadequate. Opinion of the Commission, *In re Otto Bock Healthcare North America, Inc.,* FTC Docket No. 9378 at 4, 61-63 (Nov. 1, 2019) (final opinion).

[139] FTC Study (2017) at 19 (Table 4).

3. *Price Maximums and Constraints*

Defendants have offered to commit to price constraints in several cases. For example, in *FTC v. Cardinal Health*, the defendants represented that they would not raise prices.[140] In *United States v. H&R Block*, the defendant similarly offered to maintain the target's price for three years.[141] In *FTC v. Advocate Health Care Network*[142] and *FTC v. Penn State Hershey Medical Center,*[143] the hospitals offered to maintain their prices for a period. While pricing promises were not accepted in these cases, in *FTC v. Butterworth Health*,[144] the court accepted the hospital's price commitment. In *T-Mobile*, the defendant also promised not to raise prices in voluntary commitments to the Federal Communications Commission.[145]

We recommend that courts reject all such pricing commitments. These commitments cannot reliably preserve competition. They do not prevent anticompetitive effects if prices would have declined absent the merger. And even if prices are effectively constrained (which often would be unlikely), the merged firm can exercise market power by reducing the functionality or quality of the product while charging the same prices. Moreover, the merged firm could stop marketing the price-constrained product in favor of a new product that is not price constrained.[146] Finally, the constraint normally only lasts for a limited time (*e.g.*, three years in *H&R Block*), while the merger is permanent.

Given all these complications, the court would need to oversee pricing and other dimensions of competition over time and ultimately serve as an ongoing price regulator. The

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[140] 12 F. Supp. 2d 34, 65-66 (D.D.C. 1998).

[141] Proposed Remedies, United States v. H&R Block, Inc., 1:11CV00948 at 2 (Aug. 18, 2011).

[142] Defendants' Post-Hearing Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, FTC v. Advocate Health Care Network, 1:15CV11473 (N.D. Ill.) (stating that the defendants have offered a binding commitment not to raise prices charged to payers under non-risk contracts for inpatient hospital services above the general rate of inflation for seven years).

[143] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 343 (3rd Cir. 2016).

[144] 946 F. Supp. 1285, 1299 (W.D. Mich. 1996) (The acquiror committed that in the first three years following consummation, the merged entity would freeze all hospital charges (both inpatient and outpatient) at current levels, and that in years four through seven, the merged entity would limit increases in charges to no more than the annual percentage increase in the regional all product CPI as computed by the U.S. Department of Labor).

[145] Mem. Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, In re Applications of T-Mobile US, Inc. and Sprint Corp., Docket No. 18-197 at 92 (Oct. 16, 2019).

[146] For one court's discussion of these flaws, *see* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 88-89 (D.D.C. 2011).

Supreme Court in *Trenton Potteries* clearly warned district courts to avoid such remedies that require such oversight.[147]

4. *Vertical Merger Promises of Divisional Separation*

Courts also should be skeptical when parties to vertical mergers promise that their separate vertically-related divisions will act as if they are independent companies and will not favor one another or engage in price or non-price foreclosure of rivals, even if the firm has the ability and incentive to foreclose competition. The agencies rejected such promises, leading to merger abandonments, in *LAM/KLA*,[148] *In re* Nvidia Corp. (*Nvidia/ARM)*,[149] and *In re* Lockheed Martin (*Lockheed Martin/Aerojet Rocketdyne*).[150] But the courts accepted promises in *United States v. AT&T, Inc.* (*AT&T/Time Warner*)[151] and *UHG/Change*.[152] Those courts were persuaded by corporate executives' testimony that they would fulfill their promises to maintain the trust of customers that now would also be competitors. The executives claimed that violating the trust would harm the merged company's reputation and long-term profits. In both cases, there was testimony that the firms had not engaged in foreclosure tactics in the past, though their previous vertical integration was substantially less significant than it would be after the instant transaction. The companies also entered contractual obligations.[153]

These promises assume that the merged firm will behave in conflict with its economic incentives to foreclose rivals, and history is not a reliable guide to future conduct when

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[147] *Trenton Potteries*, 273 U.S. at 397-98 ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

[148] Press Release, DOJ, Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans (Oct. 5, 2016), *available at* https://www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans [https://perma.cc/DPD8-8NPH].

[149] Press Release, FTC, FTC Sues to Block $40 Billion Semiconductor Chip Merger—Vertical deal between chip supplier Nvidia and chip design provider ARM, Salop Statement, Page E-5 (Dec. 2, 2021), *available at* https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger [https://perma.cc/9MP3-LJW4].

[150] Press Release, FTC, FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022), *available at* https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne [https://perma.cc/E344-TKVN].

[151] 310 F. Supp. 3d 161, 164 (D.D.C. 2018) (discussing parties' claim that the merger will increase not only innovation but also competition).

[152] Redacted Mem. Opinion, *UHG/Change*, 1:22CV00481 at 41-50 (discussing the structural provisions, firewalls, and customer contracts designed to prevent sensitive information from being shared among the merged company's divisions).

[153] In *In re Illumina/Grail*, the defendants persuaded the ALJ to accept their contractual provisions and promises, and the matter is now on appeal to the Commission. Docket No. 9401.

circumstances change significantly. When a corporation expands vertically and has market power sufficient to foreclose downstream competition, its decision calculus regarding neutrality towards customers that are rivals is altered[154] Importantly, withholding access to critical inputs may not even be necessary for the firm to harm competition. The customers that are also competitors will understand that the merged firm has gained increased bargaining leverage and so will agree to pay higher prices for inputs.[155] The merged firm will not suffer reputational harm if breaches of the promises cannot be detected. And most importantly, the foreclosed customers must have good alternatives to obtain inputs for the loss of trust to matter.[156]

These impediments to detection of broken commitments are key issues for the court to investigate, even if the promises are made contractual. If the upstream division drives a harder bargain with competitors of the downstream division, a court, arbitrator, or compliance monitor seeking to determine whether the merged firm has breached a commitment often will be unable to distinguish between a foreclosure strategy, on the one hand, and normal bargaining that does not impermissibly disfavor the firm's downstream rivals, on the other.[157] This problem is more severe if most or all customers of the upstream division are competitors of the downstream division because there will be no good benchmark of behavior towards a non-competitor for comparison of pricing or other competitive behavior. Requiring non-discriminatory prices also can give the merged firm the incentive to raise the prices to all its customers.[158]

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[154] *See, e.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement,* 127 YALE L.J. 1962 (2018).

[155] U.S. Dep't of Justice, *Vertical Merger Guidelines* (Jun. 2020). In this regard, foreclosure threats generally are made one day at a time, not on a one-time, permanent basis. *See e.g.,* Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash,* 6 J. ANTITRUST ENFORCEMENT 459, 466 (2018) and the Amicus Briefs cited therein.

[156] Skepticism also is warranted because the promises would reduce some of the alleged merger benefits, including elimination of double marginalization. Nor could the two divisions gain the benefit of more intensive cooperation if they are being instructed to act as if they are not part of the same company.

[157] A decisionmaker would need to know the prices charged to competing versus non-competing customers of the upstream division (and similarly for other dimensions of competition). In the *Comcast/NBCU* vertical merger, the DOJ and FCC mandated an arbitration process to ensure that NBCU would not charge higher content prices to Comcast's two pay TV distribution rivals, Dish and DirectTV. The arbitrator could use as a benchmark the prices charged to non-competitors like Charter and Cox. In *AT&T/Time Warner*, AT&T also made a similar promise that Time Warner would not charge higher prices to DirecTV's competitors. But in that case, there was no good price benchmark because DirecTV's satellite service competes with *all* the other distributors. For criticism of the AT&T/Time Warner arbitration remedy, *see* Gene Kimmelman & Steve Salop, *AT&T's Flawed Arbitration Proposal* (Apr. 10, 2018), *available at* https://publicknowledge.medium.com/at-ts-flawed-arbitration-proposal-d020e66b2985 [https://perma.cc/3G9S-7WUJ].

[158] *See, e.g.*, Jonathan Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 ANTITRUST (2013); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 ANTITRUST 15 (Spring 2013).

Simple refusals to supply might be detectable, but little else will be. When products are unique, there also will be no benchmark for comparing the prices charged or the quality of products or services provided to rivals of the merged firm's downstream division. This detection problem is even worse for innovation activities. A court, arbitrator, or compliance monitor would find it nearly impossible to detect if the upstream division is (for example) assigning the A-Team to work with its own downstream division to innovate but assigning the B-Team to the rival.[159] For all these reasons, we are very skeptical that effective detection would be possible.

Given these severe detection problems, if the court chooses to accept behavioral commitments to address vertical anticompetitive concerns, we recommend that it follow a "trust but verify" approach. Effective enforcement requires (i) making the promised remedy legally binding, (ii) mandating a reporting and monitoring mechanism to verify that the promised conduct is adhered to, and (iii) mandating judicially supervised and well-specified (large) sanctions for failure to comply, including judicial discretion to modify the commitments if the remedy fails or modifications are necessary to ensure success. Unless the court has confidence that detection and punishment procedures would deter violations, it should not bless the fix.

5. *Horizontal Merger Promises of Intra-Corporate Competition*

A defendant sometimes may proffer as a remedy the promise that it will instruct its separate divisions to compete as if they were separate firms. The FTC ordered such a remedy in the "highly unusual" *Evanston/Northwestern* merger, which had been consummated years earlier.[160] After that, courts rejected similar intra-corporate competition remedies in both the *In re Promedica Health System, Inc.*[161] and *St. Alphonsus Med. Center Nampa Inc. v. St. Luke's Health System*[162] hospital transactions. A court, however, recently accepted a unilateral promise of continued intra-corporate competition in *United States v. Booz Allen Hamilton Co.*[163] (*Booz Allen/EverWatch*).

The court in *United States v. Bertelsmann SE & Co.* (*Penguin RandomHouse/Simon&Schuster*) rejected a proposed intra-corporate competition promise.[164] The court denied the DOJ's motion *in limine*, opining that the case law does not support a

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[159] And even if the teams were equally competent, the team assigned to the rival might realize that it was not in the company's interest to put its best efforts into helping the rival.

[160] Final Order, In re Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., Docket No. 9315 (Apr. 24, 2008). To our knowledge, the effectiveness of this remedy has never been reviewed.

[161] No. 9346, 2012 WL 1155392, at *48 (FTC Jun. 25, 2012); ProMedica Health System, Inc. v. FTC, 749 F.3d 559, 573 (2014).

[162] 778 F.3d 775 (9th Cir. 2015).

[163] Memorandum, United States v. Booz Allen Hamilton Co., 1:22CV01603 (Oct. 11, 2022)

[164] Mem. Opinion and Order, Penguin Random House/Simon & Schuster, 1:21CV02886 (D.D.C. 2022).

blanket exclusion of such unilateral promises and that "unenforceability of the [proposed intra-corporate] bidding policy goes to weight and not admissibility."[165] In a strongly worded opinion, however, the court concluded that it would "give[] no weight to this unenforceable promise,"[166] finding that the promise would not be profit-maximizing (so the merged firm would have incentives to break it), could be broken at will, and would not prevent the merged firm from keeping its divisions from competing robustly with one another.[167] As author Stephen King characterized the promise in his trial testimony, "You might as well say you're going to have a husband and wife bidding against each other for the same house. It's kind of ridiculous."[168]

We recommend that courts treat such promises as inadmissible. They require the combined firm's corporate divisions to act in direct conflict with the unified firm's fundamental economic incentives and are inherently impossible to enforce as a practical matter. The remedy also is in direct conflict with the rule of *Copperweld*[169] that intra-corporate conspiracies are not actionable because sister components of the same corporations are not independent actors. Overseeing such remedial promises would turn district courts into regulatory commissars to ensure that the separate divisions are truly competing against each other, the sort of role that antitrust courts have rejected since *Trenton Potteries*.[170]

Moreover, this remedy has no limits. Under the logic of the remedy, all the firms in a market could merge to monopoly, so long as the surviving corporation promises that the divisions will continue to compete against each other, perhaps also offering management compensation based on divisional rather than corporate profits. Indeed, if *Copperweld* and *Trenton Potteries* are superseded, then the blanket immunization from attacks on joint price setting by divisions of a corporation also should be rejected.

Furthermore, breaches of promises to engage in intra-corporate competition would be practically unenforceable since they are highly unlikely to be detectable. Comparing the bidding behavior of the separate divisions would fail to uncover breaches because every division has the incentive to lighten up against each other. Rewards or other incentives that chill intra-division

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[165] Transcript of Pre-Trial Conference, U.S. v. Bertelsmann, 23:17-19.

[166] Mem. Opinion, U.S. v. Bertelsmann SE & Co., 1:21CV02886 (D.D.C. Nov. 2, 2022) at 68.

[167] *Id.* at 68-69.

[168] Joseph Wilkinson, *Stephen King Testifies Against Book Publishing Mega-Merger*, New York Daily News (Aug. 2, 2022), *available at* https://www.nydailynews.com/news/national/ny-stephen-king-testifies-book-merger-20220802-uoqdrbca3fd6ndx6rpavxjsjge-story.html.

[169] *Copperweld*, 467 U.S. 752 at 777 (1984) (holding that a corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of the Sherman Act). The same point also would apply to analogous promises by vertically integrated firms.

[170] *Trenton Potteries*, 273 U.S. at 397-98 ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

competition would be very difficult (if not impossible) to detect.[171] Moreover, stock options would have to be prohibited, given they are based on overall corporate profits and performance, not just divisional profits. In short, unless some executive simply admits to violating the rule in emails, there would be no direct evidence. Again, *Trenton Potteries* counsels courts against such an oversight role and instead reject such remedies.

Merging firms might propose a backup arbitration process. However, given the complexity of market forces, customers and arbitrators would face the same extreme difficulties in determining whether the firms' conduct is the result of a breach of the promise rather than independent actions. Simply stated, a "trust but verify" procedure would be highly unlikely to deter violations of these promises.

The recent district court decision in *Booz Allen/EverWatch* was problematic for an additional reason: the customer— the U.S. National Security Agency (NSA)—had chosen to rely on competitive bidding for a new contract to obtain the best offer, and only Booz Allen and EverWatch responded with "Letters of Intent to Bid."[172] The DOJ argued that the pending merger agreement between the two firms would eliminate the incentives of each to compete for the contract because competition would reduce the profits of the to-be-merged company.[173] The DOJ thus alleged that the merger agreement itself would violate Section 1.[174] The court rejected this claim, concluding that the two companies' fear of losing future business from a tarnished reputation and the personal pride and reputations of the managers would be sufficient to ensure post-merger intra-corporate competition.[175] Ignoring the fact that NSA had opted for competitive bidding, the court concluded that NSA would be protected by these reputational factors, despite the inherent change in the bidders' economic incentives.[176]

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[171] For example, it the corporation awards differential bonuses, a monitor could not accurately determine whether this was the result of a violation of the rule as opposed to remuneration for legitimate performance. The same difficulty applies to differential promotions of executives.

[172] Memorandum, United States v. Booz Allen Hamilton Co. et al., 1:22CV01603 at 4 (Oct. 17, 2022).

[173] It follows that the relevant market was competition for this single procurement, a conclusion rejected by the court. *Id.* at 22-3.

[174] Right before the hearing, the NSA released the RFP and the DOJ proposed that the parties would continue to have incentives to bid competitively if the court simply delayed the closing of the merger until the bidding closed and provided EverWatch with a walk-away option. In this way, if EverWatch won the bid, it would have improved bargaining leverage, which would ensure its incentives to compete. Proposed Order Cover Letter to Judge Catherine Blake & Proposed Order, U.S. v. Booz Allen Hamilton Co. et al., 1:22CV01603 at 4 (Sept. 14, 2022). The court rejected this proposal, based on Booz's argument that the delay might kill the deal. Memorandum, *supra* note 1170, at 27.

[175] *Id.* at 13-15.

[176] *See id.* at 13 ("Booz Allen has strong countervailing incentives to maintain a competitive bid. . . . Booz Allen needs a sterling reputation to have a shot at these opportunities.").

Accepting this remedy directly conflicts with the policy articulated in *National Society of Professional Engineers v. United States*.[177] There, the Court made it plain that while a customer certainly can choose to negotiate a sole source contract rather than rely on competitive bidding, it is not permissible for the sellers themselves to make the decision to supersede the customer's decision to use competitive bidding. Nor should a court rely on promises that the firms will continue to compete independently, despite the change in their incentives.

6. *Defendant's Choice of Divestee*

The defendant has an incentive to choose a less competitive divesture buyer. The merged firm's post-merger profits will be reduced if a lower-cost or otherwise more competitive divestee charges lower prices or offers better quality or innovation that the merged firm must match. This raises the question of whether the defendant should have carte blanche to choose any divestee that arguably would preserve competition. As an alternative, the court might require a procedure analogous to the that the agencies use for failing firm defenses, whereby the preferred divestee would be the one that leads to the most competition.[178] While beyond the scope of this article, this is an issue that deserves more study, including as to whether the approach would be consistent with Section 7.

C. IMPLEMENTATION OF THE PROCEDURE

New legislation is not necessary. Courts can incorporate our recommended procedure into their case management. For example, the court can require the defendant to make the remedy filing, provide the agency a timeframe to issue one or more subpoenas, and provide for time after compliance with the discovery requests before commencing briefing and trial. The court also can decide how to apply the structural presumption and allocate evidentiary burdens. A body of law can then develop from courts' treatment of these issues.

In anticipation of the court's adoption of this procedure, the agency and the merging parties have incentives to negotiate agreements during the pre-complaint period that set disclosure, timing, and discovery provisions if there is an LTF proposal, just as they commonly negotiate timing agreements today.

V. CONCLUSIONS

We hope that our proposed procedure can lead to uniformity in how LTF is adjudicated. Our proposal highlights the three key, related dimensions of the procedure and explains why placing the burden on the defendant to justify remedial provisions with evidence is supported by the statute, the case law, merger enforcement experience, and economic analysis. Our analysis also explains why it would not make economic sense simply to assume that a divestee would be

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[177] 435 U.S. 679, 694 (1978).

[178] Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) §11. Darren Bush suggested this to us.

a perfect competitive replacement for the seller, rather than require the defendant to provide that evidence. Our analysis also explains why courts should treat certain types of proposed remedies with skepticism or not consider them at all.