2011

2011 Professor's Update to Antitrust Analysis, Problems, Text, and Cases

Philip Areeda, *Harvard University*

Louis Kaplow, *Harvard University*

Aaron S. Edlin, *University of California, Berkeley*

**2011 Professor's Update to
ANTITRUST ANALYSIS**

Problems, Text, Cases

**(This update supplements the 2010 supplement, which covers developments
between 2004 and July, 2010)**

**Phillip Areeda
Late Langdell Professor of Law
Harvard University**

**Louis Kaplow
Finn M.W. Caspersen and Household International Professor of
Law and Economics
Harvard University**

**Aaron Edlin
Richard W. Jennings Professor of Law and
Professor of Economics
University of California, Berkeley**

Aspen Law & Business

Copyright © 2011 by Aspen Law & Business

Teachers who adopt Antitrust Analysis by Areeda, Kaplow, and Edlin as required reading for courses are hereby licensed to reproduce and distribute these teaching materials to students in such courses, until such time as the next Supplement or new edition may appear, provided that any charges to the students are limited to the cost of reproduction and distribution.

Contents

Chapter 3. Monopoly

3B. Monopoly Power

Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, August 19, 2010.

Chapter 5. Mergers.

5C. Horizontal Mergers

Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, August 19, 2010

Appendix

Antitrust Division Policy Guide to Remedies, June, 2011

Chapter 3

Monopoly

3B. Monopoly Power

Replace ¶351 with the following.

351. Market definition and measurement under 2010 government merger guidelines.

In 2010, the Justice Department and Federal Trade Commission jointly promulgated new guidelines stating their enforcement intentions with respect to horizontal mergers, which, like monopolization cases, require an appraisal of power over price, which is to say market power. Conventionally, defining a market is the first step in proving market power, whether in a monopolization case or a merger case. A notable development in the 2010 Merger Guidelines, however, is the realization that agencies can sometimes identify significant increases in market power without defining a market.¹

The market power inquiry is not always identical for monopolization and merger purposes. In particular, monopolization cases ask whether the defendant already possesses market power, whereas merger cases ask instead whether combining two firms will newly create market power or greater opportunities for express or tacit coordination that did not previously exist.² Likewise market definition is not identical for monopolization and merger cases.³ Nevertheless, many of the topics pursued in the Merger Guidelines procedure for market definition illuminate the market definition process generally and therefore merit examination here.⁴

¹ On the role of market definition generally, see L. Kaplow, Why (Ever) Define Markets, 124 Harv. L. Rev. 437 (2010), and L. Kaplow, Market Definition and the Merger Guidelines, Rev. Indus. Org. (forthcoming).

² See Chs. 2C, 5C.

³ In particular, if markets are defined in monopolization cases using the hypothetical monopoly test of the merger guidelines, the relevant benchmark price for the hypothetical monopoly test is the competitive price, whereas for mergers it is existing prices.

⁴ See Ch. 5C for portions outlining the government's analysis of horizontal mergers.

DEPARTMENT OF JUSTICE AND FEDERAL TRADE
COMMISSION HORIZONTAL MERGER GUIDELINES
August 19, 2010

...

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to

make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

Example 4: Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be

identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (“hypothetical monopolist”) likely would impose at least a small but significant and non-transitory increase in price (“SSNIP”) on at least one product in the market, including at least one product sold by one of the merging firms.⁴ For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

Example 5: Products A and B are being tested as a candidate market. Each sells for \$100, has an incremental cost of \$60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to \$110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP, and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

⁴ If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter’s control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

Example 6: In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of \$100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

Example 7: In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.⁵ If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The SSNIP is intended to represent a “small but significant” increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify “small but significant” adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a “small but significant” increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms’ positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five

⁵ Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

Example 8: In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants, notably:
 - sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to

relative changes in price;

- industry participants' behavior in tracking and responding to price changes by some or all rivals;
- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;
- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;
- evidence from other industry participants, such as sellers of complementary products;
- legal or regulatory requirements; and
- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a “critical loss analysis” to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this “breakeven” analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The “critical loss” is defined as the number of lost unit sales that would leave profits unchanged. The “predicted loss” is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.⁶ Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition.

⁶ While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

Example 11: Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 *Geographic Markets Based on the Locations of Customers*

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.⁷ Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations.

Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage, e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

Example 13: Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

Example 14: Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

Example 15: Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

⁷ For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

Example 16: Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.

Example 17: Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.⁸ However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm's historical market share overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a

⁸ If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

Example 18: The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

Chapter 5

Mergers

5C. Horizontal Mergers

Replace ¶519 with the following.

519. Horizontal Merger Guidelines: introduction. Parts of the latest Guidelines – the 2010 Horizontal Merger Guidelines – are reprinted below. The Guidelines have changed over the years in reaction to changes in economic thinking and merger enforcement.²³ (Portions relevant to horizontal mergers are excerpted here. Portions on market definition and measurement appear in Section 3B and should be reviewed now.)

²³ For economic analysis of horizontal mergers that bears on the methods used in the Merger Guidelines, see J. Farrell & C. Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, 10 The B.E. J. of Theoretical Econ. Article 9; R. J. Epstein and D. L. Rubinfeld, Understanding UPP, 10 The B.E. J. of Theoretical Econ. Article 21; J. Farrell & C. Shapiro, Upward Pricing Pressure in Horizontal Merger Analysis: Reply to Epstein and Rubinfeld, 10 The B.E. J. of Theoretical Econ, Article 41; J. Farrell & C. Shapiro, Horizontal Mergers: An Equilibrium Analysis, 80 Am. Econ. Rev. 107 (1990); G. Hay & G. Werden, Horizontal Mergers: Law, Policy, and Economics, 83 Am. Econ. Rev.: Papers & Proc. 173 (1993); R. Willig, Merger Analysis, Industrial Organization Theory, and Merger Guidelines, Brookings Papers on Econ. Activity: Microeconomics 281 (1991). The first Justice Department Guidelines issued in 1968 were much stricter. They suggested that the government "ordinarily challenge [d]" acquisitions of a firm with 5 percent market share when the acquiring firm had 5 percent market share. If the acquiring firm's share increased or if the market were already concentrated, the standard was even stricter. See 1 CCH Trade Reg. Rep. I4430 (1968). Such relatively low levels of concentration would not be challenged under later Guidelines. In fact, Professor Fox applied the 1982 Guidelines (which are more similar to the present version than to the 1968 version) to prior Supreme Court cases that held mergers to be illegal and concluded that the government probably would not have sued in a number of historic cases, including *Brown, Shoe, Von's*, and *General Dynamics*. E. Fox, The New Merger Guidelines-A Blueprint for Microeconomic Analysis, 27 Antitr. Bull. 519, 590-591 (1982).

DEPARTMENT OF JUSTICE AND FEDERAL TRADE
COMMISSION HORIZONTAL MERGER GUIDELINES
August 19, 2010

1. Overview

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

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

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

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

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

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

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

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

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

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

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. This section discusses several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers. The list provided here is not exhaustive. In any given case, reliable evidence may be available in only some categories or from some sources. For each category of evidence, the Agencies consider evidence indicating that the merger may enhance competition as well as evidence indicating that it may lessen competition.

2.1 Types of Evidence

2.1.1 Actual Effects Observed in Consummated Mergers

When evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future. Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight. The Agencies evaluate whether such changes are anticompetitive effects resulting from the merger, in which case they can be dispositive. However, a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers.

2.1.2 Direct Comparisons Based on Experience

The Agencies look for historical events, or “natural experiments,” that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.

The Agencies also look for reliable evidence based on variations among similar markets. For example, if the merging firms compete in some locales but not others, comparisons of prices charged in regions where they do and do not compete may be informative regarding post-merger prices. In some cases, however, prices are set on such a broad geographic basis that such comparisons are not informative. The Agencies also may examine how prices in similar markets vary with the number of significant competitors in those markets.

2.1.3 Market Shares and Concentration in a Relevant Market

The Agencies give weight to the merging parties’ market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger. See Sections 4 and 5. Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

2.1.4 Substantial Head-to-Head Competition

The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. Such evidence can be especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition. See Section 6. This evidence can also inform market definition. See Section 4.

2.1.5 Disruptive Role of a Merging Party

The Agencies consider whether a merger may lessen competition by eliminating a “maverick” firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition. Likewise, one of the merging

firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

2.2 Sources of Evidence

The Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.

2.2.1 Merging Parties

The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review. Documents describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions. The business decisions taken by the merging firms also can be informative about industry conditions. For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, see Section 4.1.3³) or that the firm and its rivals are engaged in coordinated interaction (see Section 7). Incremental cost depends on the relevant increment in output as well as on the time period involved, and in the case of large increments and sustained changes in output it may include some costs that would be fixed for smaller increments of output or shorter time periods.

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger. Likewise, the Agencies look for reliable evidence that the merger is likely to result in efficiencies. The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability. The financial terms of the transaction may also be informative regarding competitive effects. For example, a purchase price in excess of the acquired firm's stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition or to achieve efficiencies.

2.2.2 Customers

Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself.

³ High margins commonly arise for products that are significantly differentiated. Products involving substantial fixed costs typically will be developed only if suppliers expect there to be enough differentiation to support margins sufficient to cover those fixed costs. High margins can be consistent with incumbent firms earning competitive returns.

Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence such as historical purchasing patterns and practices. Customers also can provide valuable information about the impact of historical events such as entry by a new supplier.

The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers. In evaluating such evidence, the Agencies are mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.

When some customers express concerns about the competitive effects of a merger while others view the merger as beneficial or neutral, the Agencies take account of this divergence in using the information provided by customers and consider the likely reasons for such divergence of views. For example, if for regulatory reasons some customers cannot buy imported products, while others can, a merger between domestic suppliers may harm the former customers even if it leaves the more flexible customers unharmed. See Section 3.

When direct customers of the merging firms compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers, especially if the direct customers expect to pass on any anticompetitive price increase. A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.

Example 1: As a result of the merger, Customer C will experience a price increase for an input used in producing its final product, raising its costs. Customer C's rivals use this input more intensively than Customer C, and the same price increase applied to them will raise their costs more than it raises Customer C's costs. On balance, Customer C may benefit from the merger even though the merger involves a substantial lessening of competition.

2.2.3 Other Industry Participants and Observers

Suppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry. The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable.

Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

Example 2: Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.

3. Targeted Customers and Price Discrimination

When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer. The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.

For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.

First, the suppliers engaging in price discrimination must be able to price differently to targeted customers than to other customers. This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.

Example 3: Suppliers can distinguish large buyers from small buyers. Large buyers are more likely than small buyers to self-supply in response to a significant price increase. The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed. Such discrimination can occur even if there is no discrete gap in size between the classes of large and small buyers.

In other cases, suppliers may be unable to distinguish among different types of customers but can offer multiple products that sort customers based on their purchase decisions.

Second, the targeted customers must not be able to defeat the price increase of concern by arbitrage, e.g., by purchasing indirectly from or through other customers. Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers. Arbitrage is inherently impossible for many services. Arbitrage between customers at different geographic locations may be impractical due to transportation costs. Arbitrage on a modest scale

may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

. . . [See ¶351 for sections 4, 5.1, and 5.2] . . .

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,⁹ and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies consider both the post-merger level of the HHI and the increase in the HHI resulting

⁹ For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.¹⁰

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a

¹⁰ For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$).

merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. A merger may produce

significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.

Example 19: In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by estimating the diversion ratio from the first product to the second product. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.¹¹

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-

¹¹ For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already

committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

Example 20: Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.¹² This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

¹² Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

Example 21: Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market

outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's

rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares,

if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

Example 22: Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

Example 23: In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of

concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means

having comparable anticompetitive effects. These are termed merger-specific efficiencies.¹³ Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.¹⁴ To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market.¹⁵ In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would

¹³ The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

¹⁴ The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

¹⁵ The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

11. Failure and Exiting Assets

Notwithstanding the analysis above, a merger is not likely to enhance market power if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. This is an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero. If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined.

The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than

does the proposed merger.

Similarly, a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division. The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both of the following conditions are met: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill;¹⁷ and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.

12. Mergers of Competing Buyers

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called “monopsony power.”

To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market. In defining relevant markets, the Agencies focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

The Agencies distinguish between effects on sellers arising from a lessening of competition and effects arising in other ways. A merger that does not enhance market power on the buying side of the market can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts. Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger, as discussed in Section 10.

The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis

¹⁶ Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.

¹⁷ Because the parent firm can allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Agencies require evidence on these two points that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

of effects in the downstream markets in which the merging firms sell.

Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

13. Partial Acquisitions

In most horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them. This elimination of competition is a basic element of merger analysis. However, the statutory provisions referenced in Section 1 also apply to one firm's partial acquisition of a competitor. The Agencies therefore also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction.

When the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger. Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects.

First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.

Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the Agencies consider whether a partial acquisition is likely to create cognizable efficiencies.

Appendix

Antitrust Division Policy Guide to Merger Remedies

In June 2011, the Antitrust Division issued a policy guide to merger remedies which is reprinted below.

DEPARTMENT OF JUSTICE POLICY GUIDE TO MERGER REMEDIES

This Policy Guide to Merger Remedies is intended to provide guidance to Antitrust Division staff in their work analyzing proposed remedies for mergers. This Policy Guide updates the Division's 2004 guidance.¹ The merger landscape has evolved since 2004—globalization has reshaped the face of many modern markets. The Division increasingly reviews complex international and vertical transactions. To carry out our mission effectively and efficiently, the Division's Office of the General Counsel now has principal responsibility for enforcing Division decrees.

As an agency charged with enforcing the antitrust laws, including Section 7 of the Clayton Act, it is the Antitrust Division's mission to protect consumers from anticompetitive mergers. Most mergers are not anticompetitive, and many benefit consumers. However, certain mergers can lessen competition and harm consumers by resulting in a firm's acquisition of market power or increasing the likelihood of anticompetitive coordination. The U.S. antitrust laws are intended to prevent that lessening of competition, and the Division enforces those laws accordingly. Parties frequently seek to avoid litigation by offering to cure the Division's concerns when the Division determines that a proposed merger is illegal, and the Division considers a broad range of potential remedies in ensuring appropriate and effective remedial relief. The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market.² That is the appropriate goal of merger enforcement.

Successful merger enforcement is defined by obtaining effective remedies, whether that means blocking a transaction or settling under terms that avoid or resolve a contested litigation while protecting consumer welfare.³ In situations where a merger remedy can protect consumers while

¹ The Division may update this Guide from time to time to ensure it continues to reflect actual Division practice.

² For simplicity of exposition, this Policy Guide uses the phrase "preserving competition" throughout, which should be understood to include the concept of restoring competition or enhancing consumer welfare, depending on the specific facts of the transaction and its proposed remedy. For example, in the case of consummated mergers, the Division will seek a remedy that will effectively restore competition to the relevant market, including, when appropriate, completely unwinding a transaction.

³ Some have interpreted the Division's 2004 guidance on remedies to mean that if a structural remedy is not available in a particular merger matter, or would be ineffective, the Division must let the transaction proceed. That

otherwise allowing the merger to proceed, appropriate remedies may include a divestiture of assets (to limit the merged firm's ability to use the combined assets to harm competition) or limitations on the firm's conduct (to ensure that consumers will not be harmed by anticompetitive behavior).

In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare. The Division's approach to evaluating the effectiveness of any proposed remedy is discussed below.

I. Tailoring Effective Remedies

A. Key Principles

Mergers come in a wide variety of shapes and sizes. As a consequence, effective merger remedies also come in a wide variety of shapes and sizes. Regardless of the form a particular merger remedy takes, there are certain basic principles that apply to all effective merger remedies.

First, effectively preserving competition is the key to an appropriate merger remedy. Second, the remedy should focus on preserving competition, not protecting individual competitors. Third, a remedy needs to be based on a careful application of legal and economic principles to the particular facts of a specific case.

Once the Division has determined that a merger is anticompetitive, the Division only considers remedies that resolve the competitive problem and effectively preserve competition. As the Supreme Court has stated, restoring competition is the "key to the whole question of an antitrust remedy."⁴ Where a remedy that would effectively preserve competition is unavailable, the Division will seek to block the merger.

The Division's central goal is preserving competition, not determining outcomes or picking winners and losers. Thus, decree provisions should preserve competition generally rather than protect or favor particular competitors.⁵ The Division will accept merger remedies that protect the competitive landscape by effectively preserving competition without removing the incentive for individual firms to compete.

interpretation does not accurately reflect the policy or practice of the Antitrust Division.

⁴ *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); see also *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

⁵ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-38 (1990); *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 116-17 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1211, 1230 (D.C. Cir. 2004); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

A remedy carefully tailored to the competitive harm is the best way to ensure effective relief.⁶ Before the Division will conclude that a proposed remedy is acceptable, the relief must effectively address each of the Division's competitive concerns. There should be a close, logical nexus between the proposed remedy and the alleged violation—and the remedy should fit the violation and flow from the theory or theories of competitive harm. Effective remedies preserve the efficiencies created by a merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.

The Division's focus is on effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, conduct relief may be the best choice. In still other circumstances, a combination of both conduct and structural relief may be appropriate.

Any remedy assessment is fact-intensive. It normally will require determining (a) what competitive harm the violation has caused or likely will cause and (b) how the proposed relief will remedy that particular competitive harm. Only after these determinations are made does the Division decide whether the proposed remedy will effectively redress the violation. Basing remedies on the application of economic and legal analysis to the particular facts of each case avoids merely copying past relief proposals and is most likely to result in relief effectively protecting consumers.

B. Types of Mergers

Horizontal mergers, vertical mergers, and mergers with both horizontal and vertical dimensions typically present different competitive issues and, as a result, different remedial challenges. In cases in which neither conduct nor structural relief, nor a combination of the two, would effectively preserve competition, the Division will seek to block the transaction.

1. Horizontal Mergers

Horizontal mergers involve firms that are actual or potential competitors. Horizontal mergers can enhance market power by eliminating actual or potential competition between the merging parties, by increasing the risk of coordination among rivals, or both.⁷ In the case of horizontal mergers, enhanced market power is the result of combining similar sets of assets that otherwise would be used to compete. Consequently, if a competitive problem exists with a horizontal merger, the typical remedy is to prevent common control over some or all of the assets, thereby

⁶ Ford Motor Co., 405 U.S. at 575 (In a Section 7 action, relief “necessarily must ‘fit the exigencies of the particular case.’”); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969); United States v. U.S. Gypsum Co., 340 U.S. 76, 89 (1950) (“In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to . . . the circumstances under which the illegal acts occur.”); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944) (“The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions.”); Microsoft, 373 F.3d at 1228 (“[T]he court carefully considered the ‘causal connection’ between Microsoft’s anticompetitive conduct and its dominance of the market”); Microsoft, 253 F.3d at 107 (Relief “should be tailored to fit the wrong creating the occasion for the remedy.”).

⁷ See UNITED STATES DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1 (2010). Enhanced market power resulting from a horizontal merger can result in a variety of harms to consumers, including higher prices and reduced product quality and variety. Enhanced market power also can make it more likely that the merged entity profitably and effectively can engage in exclusionary conduct. *Id.*

effectively preserving competition. Thus, the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers. Divestiture of overlapping assets, usually an existing business entity, can effectively preserve competition that the merger otherwise would eliminate.

2. *Vertical Mergers*

Vertical mergers involve firms that do not operate in the same markets, and may not result in an overlap between the assets of the purchaser and the acquired entity. A purely vertical merger does not itself change the number of firms competing to produce a particular product or service. Nevertheless, vertical mergers can create changed incentives and enhance the ability of the merged firm to impair the competitive process. In such situations, a remedy that counteracts these changed incentives or eliminates the merged firm's ability to act on them may be appropriate. Accordingly, in appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realized. The Division also will consider structural remedies in vertical merger matters—they may be particularly effective when the vertical integration is a small part of a larger deal.

3. *Mergers with Both Horizontal and Vertical Dimensions*

Mergers sometimes have both horizontal and vertical dimensions. These types of mergers can present combinations of the challenges mentioned above. Effective remedies in these situations may require a combination of structural and conduct provisions affecting multiple markets.⁸

II. Types of Remedies

Effective merger remedies typically include structural or conduct provisions.⁹ Each can be used to preserve competition in the appropriate factual circumstances. As discussed below, in some cases an effective remedy may call for a combination of different types of relief. In other cases, an effective remedy may be unavailable. In that circumstance, the Division will seek to block the merger.

Structural remedies generally will involve the sale of physical assets by the merging firms or requiring that the merged firm create new competitors through the sale or licensing of intellectual property rights.¹⁰ Structural remedies in many cases can be “simple, relatively easy to administer, and sure” to preserve competition.¹¹

⁸ The transaction combining Comcast Corp. and NBC Universal, Inc. is a recent example of a merger presenting both horizontal and vertical issues. See *United States v. Comcast Corp.*, No. 1:11-cv-00106, Complaint (D.D.C. 2011), available at <http://www.justice.gov/atr/cases/f266100/266164.htm>.

⁹ Recently, the Division sought and obtained disgorgement in an action brought under Section 1 of the Sherman Act. *United States v. Keyspan Corp.*, 2011 WL 338037 (S.D.N.Y. 2011). In appropriate circumstances, the Division also may consider seeking disgorgement in consummated merger challenges either instead of or in addition to unwinding the transaction. In particular, where available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits, the Division may seek disgorgement of those profits. See also FED. TRADE COMM'N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.shtm>.

¹⁰ *United States v. 3D Systems Corp.*, 2002-2 Trade Cas. ¶ 73,738 (D.D.C. 2001).

¹¹ *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

A conduct remedy usually entails provisions that prescribe certain aspects of the merged firm's post-consummation business conduct. Conduct remedies are a valuable tool for the Division. They can preserve a merger's potential efficiencies, and, at the same time, remedy the competitive harm that otherwise would result from the merger.¹² Conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but, absent a remedy, the merger would harm competition.

A. Structural Remedies

In reviewing a structural remedy and determining whether it will effectively preserve competition, the Division considers a number of factors regarding the assets to be divested. First and foremost, to ensure an effective structural remedy, any divestiture must include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity. This often will require divestiture of an existing business entity.

1. *Divestiture of All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor*

The goal of a divestiture is to ensure that the purchaser¹³ possesses both the means and the incentive to effectively preserve competition.¹⁴

A structural remedy typically requires clear identification of the assets a competitor needs to compete effectively in a timely fashion and over the long-term. The necessary assets may be tangible (factories capable of producing a product or raw materials used in the production of some other final good), intangible (patents, copyrights, trademarks, or rights to facilities such as airport gates or landing slots), or a combination. An effective divestiture addresses whatever obstacles (for example, lack of a distribution system or necessary know-how) led to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power.¹⁵ The divestiture assets must be substantial enough to enable the purchaser to effectively preserve competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.¹⁶ Moreover, the purchaser should have the ability to compete effectively in the relevant

¹² In determining appropriate conduct remedies, the Division appreciates that displacing the competitive decision-making process widely in an industry, or even for a firm, is undesirable. The Division is not a regulatory agency charged with determining how competition should occur in a particular industry. As a consequence, effective conduct remedies are tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process.

¹³ The use of "purchaser" in this Guide refers to the third-party purchaser of the divested tangible or intangible assets from the merging firms.

¹⁴ See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.' . . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." (citation omitted)).

¹⁵ See, e.g., *White Consol. Indust., Inc. v. Whirlpool Corp.*, 612 F. Supp. 1009 (N.D. Ohio 1985), vacated on other grounds, 619 F. Supp. 1022 (N.D. Ohio 1985), aff'd, 781 F.2d 1224 (6th Cir. 1986) (analyzing sufficiency of a proposed divestiture package to effectively preserve competition).

¹⁶ See *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. ¶ 61,717 at 72,930 (N.D. Ill. 1977). In a merger between firm A and firm B, the Division generally would be indifferent as to which firm's assets are divested, despite possible qualitative differences between the firms' assets, so long as the divestiture effectively preserves

market.¹⁷

2. *Divestiture of an Existing Business Entity*

Any divestiture must contain the set of assets necessary to ensure the efficient current and future production and distribution of the relevant product, thereby effectively preserving the competition that would have been lost through the merger. To best achieve this goal, the Division often will insist on the divestiture of an existing business entity that already has demonstrated its ability to compete in the relevant market.¹⁸ The Federal Trade Commission Divestiture Study found that divestitures of on-going businesses succeeded at a higher rate than divestitures of selected assets.¹⁹ A major reason for this is that an existing business entity typically possesses not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market. That typically is a good basis for concluding that its divestiture could be an effective remedy.

In structural remedies, the general preference is for the divestiture of an existing business. The Division recognizes that the merging firm may have an incentive to divest fewer assets than are required for the purchaser to compete effectively going forward. A purchaser's interests are not necessarily identical to those of the public, and so long as the divested assets produce something of value to the purchaser (possibly providing it with the ability to earn profits in some other market or to produce weak competition in the relevant market), it may be willing to buy them at a fire-sale price regardless of whether they cure the competitive concerns.

While the foregoing conditions support the Division's preference for divestiture of existing, intact businesses, the Division may consider accepting divestiture of less than an existing business when a set of acceptable assets can be assembled from both of the merging firms. However, the Division must be persuaded that these assets will create a viable entity that will effectively preserve competition. The Division may require either an upfront buyer or a "crown jewel" provision in such circumstances to ensure that the package results in a buyer that will preserve competition in the market.²⁰

In addition, the Division may approve divestiture of less than an existing business entity when certain of the entity's assets are already in the possession of, or readily obtainable in a competitive market by, the purchaser. For example, if the purchaser already has its own distribution system, then insisting that a comparable distribution system be included in the divestiture package may create an unwanted and costly redundancy. In such a case, divesting the

competition. However, if the divestiture of one firm's assets would not preserve competition, then the other firm's assets must be divested. For example, if firm A's productive assets can operate efficiently only in combination with other assets of the firm, while firm B's productive assets are free-standing, the Division likely would require the divestiture of firm B's assets.

¹⁷ See *infra* Part IV.B.4.

¹⁸ In some cases, an existing business entity may be a single plant that produces and sells the relevant product; in other cases, it may be an entire division.

¹⁹ FED. TRADE COMM'N, STAFF OF THE BUREAU OF COMPETITION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS § II.B.3 (1999).

²⁰ See *infra* Parts IV.A.2.a and IV.A.2.b.

assets required efficiently to design and build the relevant product may be sufficient. Of course, in those circumstances, the Division would need to know the purchaser's identity in advance.²¹

The Division also may consider divestiture of more than an existing business entity when necessary to effectively preserve competition. Even if an existing business entity includes all of the production and marketing assets necessary for producing and selling the relevant product, that will not always enable the purchaser to preserve the competition threatened by the merger. Where divestiture of an existing business entity is insufficient to resolve the competitive issues raised by the proposed merger, additional assets from the merging firms will need to be included in the divestiture package. For example, in some industries, it is difficult to compete without offering a “full line” of products. In such cases, the Division may seek to include a full line of products in the divestiture package, even when its antitrust concern relates to only a subset of those products.²² Similarly, although the merger creates a competitive problem in a United States market, divestiture of a world-wide business may be necessary to effectively preserve competition. More generally, integrated firms can provide scale and scope economies that a purchaser may not be able to achieve by obtaining only those assets related to the relevant product(s).

3. *Divesting Rights to Critical Intangible Assets*

Where a critical asset is an intangible one—e.g., where firms with alternative patent rights for producing the same final product are merging— structural relief must provide one or more purchasers with rights to that asset.²³ Such rights can be provided either by sale to a different owner or through licensing.²⁴ There also may be circumstances when licensing the intangible

²¹ In unusual circumstances, in which there are many potential purchasers that possess or could acquire in a competitive market the assets necessary to effectively preserve competition despite purchasing less than an existing business entity, the Division may not need to know the identity of the specific purchaser in advance. See, e.g., *United States v. Unilever N.V.*, 1:11-cv-00858, Competitive Impact Statement 12 (D.D.C. 2011) (explaining that the proposed final judgment does not require divestiture of any manufacturing plants or real property “because many contract manufacturers have the available capacity, plants, and ability to manufacture” the divested products). The Division also might approve divestiture of less than an existing business entity in matters involving industries where there has been a substantial history of success with divestitures of this kind.

²² See, e.g., *United States v. Cookson Group plc*, 1-08-cv-00389, Competitive Impact Statement, 8 n.1 (D.D.C. 2008), available at <http://www.justice.gov/atr/cases/f230700/230742.pdf> (in addition to allowing purchaser to produce products in relevant markets, proposed remedy would allow purchaser “to offer the ‘full line’ of” products offered by one of the merging parties, ensuring that “the purchaser would have the incentive and all the assets necessary to be an effective, long-term competitor in these products”); *United States v. Mittal Steel Co. N.V.*, 1:06cv-01360, Competitive Impact Statement 10 (D.D.C. 2006), available at <http://www.justice.gov/atr/cases/f217400/217491.htm> (proposed remedy would require divestiture of entire plant, which made multiple flat-rolled steel products, where there was a competitive problem with only one of those products).

²³ A critical asset is one that is necessary for the purchaser to compete effectively in the market in question. When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist on the sale or license of rights necessary to effectively preserve competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product. In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.

²⁴ *United States v. National Lead Co.*, 332 U.S. 319, 348 (1947) (courts may order mandatory patent licensing as relief in antitrust cases where necessary to restore competition). When the divestiture involves licensing, the Division generally will insist on fully paid-up licenses rather than running royalties.

assets to multiple firms—or perhaps even to “all comers”—is necessary to effectively preserve the competition threatened by the merger.²⁵

When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm should retain rights to those assets, such as the right to operate under a divested patent. Permitting the merged firm to retain access to critical intangible assets may present a significant competitive risk. Because the purchaser of the intangible assets will not have the right to exclude all others (specifically, the merged firm), it may be more difficult for it to differentiate its product from its rivals’ and therefore it may be a lesser competitive force in the market. Also, if the purchaser is required to share rights to an intangible asset (like a patent or a brand name), it may not engage in competitive conduct (including investments and marketing) that it might have engaged in otherwise. In these circumstances, the Division is likely to conclude that permitting the merged firm to retain rights to critical intangible assets will prevent the purchaser from effectively preserving competition and, accordingly, the Division will require that the merged firm relinquish all rights to the intangible assets.²⁶

However, there may be other circumstances when the merged firm needs to retain rights to the intangible assets to achieve demonstrable efficiencies—which are not otherwise obtainable through an efficient licensing agreement with the purchaser following divestiture—and a non-exclusive license is sufficient to preserve competition and assure the purchaser’s future viability and competitiveness.²⁷ Under these circumstances, the merged firm likely will be permitted to retain certain rights to the critical intangible assets and may be required only to provide the purchaser with a non-exclusive license.²⁸

B. Conduct Remedies

Conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers and also are sometimes used to address concerns raised by horizontal mergers (usually in conjunction with a structural remedy).

As with horizontal mergers, crafting an appropriate remedy for anticompetitive vertical mergers requires identifying the particular competitive concerns raised by a specific transaction. Tailoring a conduct remedy to the particular competitive concern(s) raised by a vertical merger can effectively prevent harmful conduct while preserving the beneficial aspects of the merger. There is a panoply of conduct remedies that may be effective in preserving competition. No matter what type of conduct remedy is considered, however, a remedy is not effective if it cannot be enforced.²⁹ Remedial provisions that are too vague to be enforced, or that can easily be

²⁵ See, e.g., *United States v. Miller Industries, Inc.*, 2001-1 Trade Cas. ¶ 73,132 (D.D.C. 2000); *United States v. Cookson Group plc*, 1994-1 Trade Cas. ¶ 70,666 (D.D.C. 1993).

²⁶ For example, the Division required the divestiture of rights to trade dress and other intellectual property relating to certain brands of hair care products in *United States v. Unilever N.V.*, 1:11cv-00858, Competitive Impact Statement 11 (D.D.C. 2011).

²⁷ These conditions are more likely to be satisfied in, for example, the case of production process patents than with final product patents, copyrights, or trademarks because the purchaser is more likely to rely on the latter to distinguish its products from incumbent products.

²⁸ See, e.g., *United States v. 3D Systems Corp.*, 2002-2 Trade Cas. ¶ 73,738 (D.D.C. 2001).

²⁹ See, e.g., *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 137 (D.D.C. 2002) (“Plaintiffs’ definition is vague and ambiguous, rendering compliance with the terms of Plaintiffs’ remedy which are reliant upon this definition to

misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked.

Clear and careful drafting is especially important for conduct remedies. Decrees should precisely and unambiguously spell out a defendant's obligations, so that it is clear what must or must not be done to satisfy the terms. A decree that is not clearly and carefully drafted can be an invitation for a defendant to try to evade the intent of the decree. For that reason, decrees should avoid vague language or potential loopholes that might lead to circumvention of the decree.

The most common forms of conduct relief are firewall, nondiscrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices. When considering using these remedies, and other types of conduct remedies, the Division carefully analyzes the particular factual context to ensure that their use will effectively preserve competition.

1. Firewall Provisions

Firewalls are designed to prevent the dissemination of information within a firm. For example, if an upstream monopolist proposes to merge with one of three downstream firms that compete against one another, the Division may be concerned that the upstream firm will share information with its acquired downstream firm (and perhaps with the two other downstream firms) to facilitate anticompetitive behavior.³⁰ The Division also may be concerned that information shared by an upstream firm with its downstream subsidiary will be communicated to competing upstream firms with which the downstream subsidiary deals. Such communications may in some instances facilitate coordination between upstream competitors. A firewall could prevent these problems. The Division has used firewalls in certain defense industry mergers and in vertical and other non-horizontal mergers when both the loss of efficiencies from blocking the merger outright and the harm to competition from allowing the transaction to go unchallenged are high.³¹

In designing a firewall, the Division is careful to ensure that the provision prevents the targeted information from being disseminated. Time and effort are devoted to carefully identifying potentially problematic types of information and to considering how to effectively cordon off that information. Effective monitoring also is required to ensure that the firewall provision is adhered to and is effective.

be largely unenforceable.”), *aff’d sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

³⁰ While coordination is perhaps the chief concern in these instances, information sharing also could lead rivals concerned about misappropriation of their proprietary information to under-invest in product development and thus stifle innovation. Further, information sharing could lead to unilateral anticompetitive effects.

³¹ See, e.g., *United States v. Northrop Grumman Corp.*, 1:02-cv-02432, Competitive Impact Statement 18-19 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses); *United States v. Lehman Bros. Holdings, Inc.*, 1:98-cv-00796, Competitive Impact Statement (D.D.C. 1998) (establishing certain firewalls between L3 Communications and Lockheed Martin regarding certain defense technologies). See also, *United States v. Ticketmaster Entm't, Inc.*, 2010-2 Trade Cas. ¶ 77,113 (D.D.C. 2010) (prohibiting disclosure of client ticketing data to employees whose principal job responsibilities involve the operation or day-to-day management of defendant's venues, concert promotions, or artist management services).

2. *Non-Discrimination Provisions*

Non-discrimination provisions incorporate the concepts of equal access, equal efforts, and equal terms.³² If, for example, an upstream monopolist proposes to merge with one of three downstream firms competing in the same relevant market, the Division may be concerned that the upstream firm will have an incentive to favor the acquired downstream firm by offering less attractive terms to, or refusing to deal with, the acquired firm's competitors.

In certain circumstances, depending on what information is available regarding competitive prices in the relevant market, the Division will consider employing a non-discrimination clause requiring the upstream firm to offer the same terms to all three downstream competitors. The Division will be careful to ensure that any such provision will effectively protect against the independent downstream firms getting lesser quality product, slower delivery times, reduced service, or unequal access to the upstream firm's products.

When including a non-discrimination clause in a decree, the Division may insist on an arbitration provision that will allow complainants to resolve controversies regarding the merged entity's conduct under the clause without direct Division involvement. The Division will monitor the implementation of the arbitration provision and in all cases retains responsibility for decree enforcement.

3. *Mandatory Licensing Provisions*

In certain circumstances, parties may propose to settle under terms whereby they would license certain technology or other assets on fair and reasonable terms that would prevent harm to competition. Mandatory licensing of this kind raises issues that are related to the issues discussed above regarding divestiture of intangible assets.³³ Licensing terms of this sort may alleviate competitive concerns by enabling competitors to adjust to the change in ownership of a key input necessary to effectively preserve competition.³⁴ Licensing agreements of this type can be enforced through mandatory arbitration provisions.

4. *Transparency Provisions*

The Division on occasion has used so-called transparency provisions as a form of relief in vertical merger cases.³⁵ Such provisions usually require the merged firm to make certain information available to a regulatory authority that the firm otherwise would not be required to provide. For example, a telecommunications firm may be required to inform a regulatory agency of the prices the firm is charging customers for telecommunications equipment, even though the regulatory agency may not have the authority to regulate those prices. The additional information

³² See, e.g., *United States v. Comcast Corp.*, 1:11-cv-00106, Competitive Impact Statement 3033 (D.D.C. 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.pdf>.

³³ See *supra* Part II.A.3.

³⁴ See, e.g., *United States v. Google*, 1:11-cv-00688, Competitive Impact Statement 9-13 (D.D.C. 2011); *Comcast*, 1:11-cv-00106 at 30-33.

³⁵ See, e.g., *United States v. MCI Commc'ns Corp.*, 1994-2 Trade Cas. ¶70,730 (D.D.C. 1994) (requiring disclosure of various data, including prices, terms, and conditions of telecommunications services, volumes of telecommunications services traffic, and average time between order and delivery of circuits between certain entities). In considering requiring a transparency provision the Division will be alert to the possibility that increased transparency could, under some conditions, facilitate coordination in certain industry settings.

can aid the regulatory agency in preventing the firm from engaging in regulatory evasion by, for example, charging telecommunications equipment clients with which it competes for telecommunications services higher prices than it charges its other telecommunications equipment customers.

5. *Anti-Retaliation Provisions*

Another type of conduct remedy that may prove effective in preserving competition is an anti-retaliation provision. These provisions can take different forms. For example, they may bar the merged entity from retaliating against customers or other parties who enter into (or contemplate entering into) contracts or who do business with the merged entity's competitors.³⁶ These kinds of provisions are designed to prevent the merged entity from unreasonably restricting competition. An anti-retaliation provision also may prohibit the merged entity from discriminating or retaliating against an entity for providing information to the Division about alleged non-compliance with a decree or for invoking any of the provisions of a decree or a regulatory agency's rule or order.³⁷ This type of provision helps ensure that potential complainants are not reluctant to step forward and that appropriate decree enforcement is not frustrated by the merged entity.

6. *Prohibitions on Certain Contracting Practices*

In some circumstances, the Division may require prohibitions on restrictive contracting practices by the merged entity. Restrictive or exclusive contracts can be competitively neutral, procompetitive, or anticompetitive, depending on a number of factors. In some situations a merged entity might use restrictive or exclusive contracting anticompetitively to block competitors' access to a vital input. Or, a merged entity might enter into short-term contracts with key customers that include automatic renewal provisions to foreclose or slow entry. In these types of situations, it may be appropriate to impose limits on the merged entity's ability to enter into restrictive or exclusive contracts.³⁸ Prohibitions on restrictive contracting may be particularly appropriate in vertical mergers in which the merged entity will control an input that its competitors must access to remain viable.

7. *Other Types of Conduct Remedies*

While the above provisions are the most common forms of conduct relief, other conduct remedies are also possible. These other types of conduct remedies include notice of otherwise non-reportable mergers,³⁹ supply contracts, and restrictions on reacquisition of scarce personnel assets.⁴⁰ Other forms of arbitration provisions may be employed as well.

³⁶ See, e.g., *United States v. Ticketmaster Entm't, Inc.*, 2010-2 Trade Cas. ¶ 77,113 (D.D.C. 2010).

³⁷ See, e.g., *Comcast*, 1:11-cv-00106, Competitive Impact Statement 34, 40.

³⁸ See, e.g., *id.* at 34-37.

³⁹ See, e.g., *United States v. Chancellor Media Corp.*, 1999-1 Trade Cas. ¶ 72,536 (D.D.C. 1999).

⁴⁰ See, e.g., *United States v. AlliedSignal, Inc.*, 2000-2 Trade Cas. ¶ 73,023 (D.D.C. 2000); *United States v. Aetna, Inc.*, 1999-2 Trade Cas. ¶ 72,730 (N.D. Tex. 1999); see also *infra* Part II.C. Another type of conduct remedy the Division has used is a so-called competitive-rule joint venture ("CRJV"). A CRJV operates under a set of structural and conduct rules designed to maintain the independence of multiple selling entities by ensuring that they will obtain the relevant product (or key input) at or near true marginal cost. Though theoretically appealing, the technical requirements for a CRJV to perform as advertised are many and subtle, and there are several potential pitfalls. Owners have an incentive to classify some fixed costs as variable costs, thereby increasing participants' marginal

C. Hybrid Remedies

In some circumstances, the most effective remedy will include a combination of structural and conduct provisions. This may be the case, for example, when a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by conduct relief in others. Or, a merger involving one type of market may require both structural and conduct relief. For example, for certain kinds of mergers an effective remedy might involve requiring the merged firm to divest certain customers' contracts (structural relief) and also preventing abusive contracting practices (conduct relief).

In other circumstances, conduct relief will be necessary to help perfect structural relief. For example, the Division might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period (perhaps as plants are reconfigured or product mixes are altered).⁴¹ In those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily. Similarly, limits on the merged firm's ability to reacquire personnel assets as part of a divestiture may be appropriate to ensure that the purchaser will be able to effectively preserve competition. The divestiture of any portion of a business unit normally involves the transfer of personnel from the merging firms to the purchaser of the assets. Incumbent employees often are essential to the productive operation of divested assets, particularly in the period immediately following the divestiture. As a consequence, it may be appropriate to prohibit the merged firm from re-hiring these employees for some limited period.⁴²

Finally, continuing conduct relief may be needed to effectuate or bolster a structural remedy. Examples include instances under the Capper-Volstead Act⁴³ and other statutes where antitrust exemptions could be triggered if the divested assets were to be owned by persons having certain

cost of production and reducing output, and there would be concerns about information sharing that would facilitate collusion. The Division has used a CRJV only once, in *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

⁴¹ The Division pays close attention to determining the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. Long-term supply agreements between the merged firm and third parties on terms imposed by the Division can raise serious competitive issues. Given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for product or key inputs may be disadvantaged in the long term. Contractual terms can be difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to effectively preserve competition. Moreover, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Therefore, supply agreements in Division decrees generally will be short-term and used as a transitional mechanism until the purchaser is able to secure another source of supply. See, e.g., *United States v. Bemis Co., Inc.*, 2010-2 Trade Cas. ¶ 77,096 (D.D.C. 2010) (at purchaser's option, defendant must enter into a supply contract with purchaser for certain products sufficient to satisfy purchaser's obligations under any customer contract for a period of up to one year).

⁴² See, e.g., *AlliedSignal*, 2000-2 Trade Cas. ¶ 73,023; *Aetna*, 1999-2 Trade Cas. ¶ 72,730. When there are a limited number of key employees who are essential to any purchaser competing effectively in the relevant market, the Division will scrutinize whether divestiture is an appropriate remedy. If the Division cannot be satisfied that the key personnel are likely to become and remain employees of the purchaser, it may be appropriate to block the entire transaction.

⁴³ 7 U.S.C. §§ 291-92.

characteristics. In those rare situations, a conduct provision prohibiting the merged firm and the purchaser of the divested assets from selling the divested assets to a person having those characteristics might be appropriate.⁴⁴

III. Additional Considerations in Choosing A Remedy

When determining an appropriate remedy for a particular merger, the Division must be aware of the impact of other entities reviewing the merger, such as regulatory agencies and other antitrust enforcers. The existence of industry regulation can have significant impact on crafting an effective remedy. The same is true regarding other antitrust enforcement agencies.

A. Regulated Industries

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

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

The existence of a regulatory regime and agency can have a practical effect on Division remedies in a number of ways. For example, the Division may not need to include certain provisions in its remedial decree if the regulatory agency's order contains those provisions.⁴⁵ A regulatory regime also can make monitoring a Division decree easier and more efficient. For instance, the regime may require that regulated companies report information to the regulator that the Division can use to monitor the decree. More generally, the regulatory regime often can require a level of transparency that can make Division monitoring more efficient.

B. Other Considerations

In addition to working collaboratively with regulatory agencies, the Division often interacts with international and state antitrust authorities in merger matters. These interactions require the Division to be aware of other jurisdictions' approaches to specific mergers so that, to the extent possible, the Division's remedies do not conflict unnecessarily with the remedies of other jurisdictions. In many cases, the Division may be able to work collaboratively with other antitrust agencies to craft remedies that are effective across jurisdictions. Where possible, the

⁴⁴ An example of such a provision is found in the Final Judgment in *United States v. Dairy Farmers of America*, 2001-1 Trade Cas. ¶ 73,136 (E.D. Pa. 2000).

⁴⁵ See, e.g., Remarks as Prepared for Delivery by Assistant Attorney General Christine Varney at Briefing on Comcast/NBCU Joint Venture (Jan. 18, 2011), available at <http://www.justice.gov/atr/public/speeches/266156.htm> ("I really want to highlight the great cooperation and unprecedented coordination with the FCC. The FCC's order made it unnecessary for the division to impose similar requirements on certain issues. This approach resulted in effective, efficient and consistent remedies.").

Division welcomes opportunities to cooperate with international and state antitrust authorities to enact more efficient and effective merger remedies.

IV. Implementing Effective Remedies: Practical Considerations

Merger remedies are effective only when properly implemented. Proper implementation can raise a number of practical issues, including the timing of the remedy and the steps that may be necessary to ensure that the remedy is executed in a way that effectively preserves competition in the relevant market(s).

A. Timing

Timing can be a critical factor in determining the parameters of an effective remedy. In some cases, the parties may pursue a pre-consummation “fix-it-first” remedy that may resolve the Division’s competitive concerns without requiring the Division to bring suit. In other cases, the parties may propose an upfront buyer for a specific package of divestiture assets. In many other instances, the parties (or a selling trustee) will shop a specific package of assets in an effort to find a buyer. Each of these scenarios raises practical issues for the Division to consider.

1. *Fix-It-First Remedies*

A fix-it-first remedy is a structural solution implemented by the parties that the Division accepts before a merger is consummated.⁴⁶ A successful fix-it-first remedy eliminates the Division’s competitive concerns and therefore the need to file a case.⁴⁷ A fix-it-first remedy is unacceptable if the remedy must be monitored.

If parties express an interest in pursuing a fix-it-first remedy that satisfies the conditions discussed below, the Division will consider the proposal. Indeed, in certain circumstances, a fix-it-first remedy may effectively preserve competition in the market more quickly and effectively than a decree, allowing the Division to use its resources efficiently. Moreover, a fix-it-first remedy may provide the parties with the maximum flexibility in fashioning the appropriate divestiture. Different purchasers may require different sets of assets to be competitive—a fix-it-first remedy allows the assets to be tailored to a specific proposed purchaser. A consent decree, in contrast, must identify all of the assets necessary for any potentially acceptable purchaser to effectively preserve competition.

Before deciding not to file a case, the Division must be satisfied that the fix-it-first remedy will effectively preserve competition. As part of this process, Division attorneys reviewing fix-it-first remedies carefully screen the proposed divestiture for any relationships between the seller and the purchaser, since the parties have, in essence, self-selected the purchaser. An acceptable fix-it-first remedy contains no less substantive relief than would be sought if a case were filed.⁴⁸ The

⁴⁶ The parties always may unilaterally decide to restructure their transaction to eliminate any potential competitive harm. While this may obviate the need for the Division to further investigate the transaction, it is not considered a fix-it-first remedy for the purposes of this Guide.

⁴⁷ A fix-it-first remedy usually involves the sale to a third party of a subsidiary or division or of specific assets from one or both of the merging parties.

⁴⁸ The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division

Division, therefore, conducts an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it.⁴⁹

If the competitive harm requires remedial provisions that entail some continuing, post-consummation obligations on the part of the merged firm (e.g., the use of firewalls or other conduct relief), a fix-it-first solution is unacceptable. In such situations, a consent decree is necessary to enforce and monitor any ongoing obligations. For example, a fix-it-first remedy would be unacceptable if, as part of the solution, the merged firm is required to provide the purchaser with a necessary input pursuant to a supply agreement. The Division would insist upon having recourse to a court's contempt power in such circumstances to ensure the merged firm's complete compliance with the agreement.

2. *Post-Consummation Sale*

a. *Upfront Buyers*

In some cases the parties will propose the divestiture of a specific package of assets to a particular buyer. The Division may enter into a consent decree agreeing to this type of upfront buyer proposal in cases where it determines that the proposed sale will effectively preserve competition in the relevant market post-merger.⁵⁰ This type of arrangement can be beneficial for both the merging parties and the Division. For the parties, resolving a merger's competitive issues with an upfront buyer can shorten the divestiture process, provide more certainty about the transaction than if they (or a selling trustee) must seek a buyer for a package of assets post-consummation, and avoid the possibility of a sale dictated by the Division in which the parties might have to give up a larger package of assets. The Division benefits from avoiding the costs that might be incurred in a longer investigation and post-consummation sale process and gains certainty that the divestiture will be effective in preserving competition. An upfront buyer consent decree also must include an alternative relief proposal, in the event that the pre-approved buyer decides to back out of the arrangement.⁵¹

b. *Standard Consent Decree Post-Consummation Sales*

In most merger cases, the Division will require identification of a package of assets to be divested pursuant to a consent decree. The Division typically will seek to ensure that there will be at least one acceptable potential purchaser for the specified asset package. In the absence of an upfront buyer, the Division must be satisfied that the package will be sufficient to attract a purchaser in whose hands the assets will effectively preserve competition.

be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail to timely comply with the written agreement.

⁴⁹ Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser. See discussion *infra* Part IV.B.4.

⁵⁰ See, e.g., *United States v. UnitedHealth Grp., Inc.*, Final Judgment 10 (D.D.C. 2008), available at <http://home.atrnet.gov/subdocs/237613.pdf> (requiring defendants to first attempt to sell the divestiture assets to a specified buyer).

⁵¹ The composition of the alternative asset package will reflect the fact that different assets may appeal to different purchasers.

Parties sometimes dispute what assets are necessary for a divestiture package. To resolve such a dispute, the Division may agree to the parties' proposed package on the condition that, if an acceptable purchaser cannot be found for that package, the parties include additional valuable assets—“crown jewels”—to increase the likelihood that an appropriate purchaser will emerge. Similarly, the parties may proffer a creative solution, but one which may not ultimately result in a successful divestiture. A crown jewel provision may be necessary in those cases to ensure that the remedy will effectively preserve competition.

As discussed below, the Division must approve any proposed purchaser. Generally, the Division will allow the parties an opportunity to find a purchaser on their own within sixty to ninety days. But if the parties are unable to do so, the Division will reserve the right to appoint a selling trustee to complete the sale.⁵²

B. Protecting Divestiture Remedies

Once a divestiture package has been identified, the Division will require certain measures to safeguard the effective implementation of the remedy, including hold separate provisions, provisions for operating, monitoring and selling trustees, and the right to disapprove a proposed purchaser.

1. *Hold Separate Provisions*

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

However, in some cases hold separate and asset preservation provisions will not entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision may not engage in vigorous competition. Likewise, customers may be influenced in their purchasing decisions by the merger, even if the soon-to-be-divested assets are being operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate or asset preservation provision—valuable employees may leave and certain investments may not be made. For these reasons, hold separate and asset preservation provisions do not eliminate the need for a speedy divestiture.

2. *Operating and Monitoring Trustees*

An operating trustee is responsible for day-to-day management of all or part of a business ordered to be divested pursuant to the terms of a decree and for assuring that the hold-separate business will be operated competitively. The Division will consider appointing an operating trustee if it believes that the defendant has the ability and incentive to mismanage the assets during the typical divestiture period and thereby reduce the likelihood that the divestiture will

⁵² For a more detailed discussion of selling trustees, see *infra* Part IV.B.3.

effectively preserve competition. Appointment of an operating trustee might be warranted, for example, when intangible property, such as computer software, has been ordered divested, and under-investment in the development and improvement of the software in a rapidly changing business environment may irreparably impair the value of the assets.

The Division also may opt to appoint a monitoring trustee to review a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. The Division also will consider appointing a monitoring trustee to oversee compliance with a conduct remedy involving ongoing obligations, especially when effective oversight requires technical expertise or industry-specific knowledge. A monitoring trustee with industry experience can reduce the burden on the Division and the parties while ensuring that the parties adhere to the decree. The monitoring trustee should provide frequent updates to the Division.

3. *Selling Trustees*

For divestiture to be an effective merger remedy, the Division will appoint a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree.⁵³ A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and at what price, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly and appropriately. Thus, every decree in a Division merger case must include provisions for the appointment of a selling trustee.

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

Effective divestiture decrees typically provide that whenever a divestiture has not been completed by the prescribed deadline for any reason, the Division may promptly nominate, and move the court to appoint, a trustee with responsibility for completing the divestiture to a purchaser acceptable to the Division as soon as possible. In addition, when the proposed remedy is contingent on the approval of a third party, such as a government permitting agency, and that approval will not be obtained prior to the entry of the decree, the decree should include a contingency provision setting forth alternative relief in the event that the required approval ultimately is not forthcoming.

⁵³ Indeed, even in cases in which a defendant has been ordered to divest the assets to a designated buyer, a trustee is necessary in the event that the ordered sale is not completed for some unforeseen reason. See *United States v. Mittal Steel Co. N.V.*, 2007-1 Trade Cas. ¶ 75,719 (D.D.C. 2007); *United States v. Cargill, Inc.*, 1997-2 Trade Cas. ¶ 71,893 (W.D.N.Y. 1997).

In rare circumstances, in which the Division has reason to believe at the outset that a defendant will not complete an ordered divestiture within a reasonable time, the Division may require the immediate appointment of a selling trustee. For example, immediate appointment may be appropriate if the assets will deteriorate quickly, such that the seller has an especially strong incentive to delay divestiture, or when a defendant has taken too long a time to complete an ordered divestiture in a previous case.

4. *Proposed Purchaser Approval*

The Division must approve any proposed purchaser. Its approval will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. For example, if the concern is that the merger will enhance an already dominant firm's ability unilaterally to exercise market power, divestiture to another large competitor in the market is not likely to be acceptable, although divestiture to a fringe incumbent might. If the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set.⁵⁴

Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. The seller has an incentive not to sell to a purchaser that will compete effectively. A seller may wish to sacrifice a higher price for the assets in return for selling to a rival that will not be especially competitive in the future. This is in contrast to a situation in which the firm selling the assets is itself exiting the market. The incentive of the latter firm is simply to identify and accept the highest offer.

Because the purpose of divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets will be redeployed elsewhere.⁵⁵ Thus, there should be evidence of the purchaser's intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product.⁵⁶

Third, the Division will perform a "fitness" test to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. As part of this process, the Division will examine the purchaser's financing to ensure that the purchaser can fund the acquisition, satisfy any immediate capital needs, and operate the entity over the long term. Divestiture decrees state that it must be demonstrated to plaintiff's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets.⁵⁷

⁵⁴ Indeed, if harmful coordination is a concern because the merger is removing a uniquely positioned maverick, the divestiture likely would have to be to a firm with maverick-like interests and incentives.

⁵⁵ See *supra* Part II.A.1.

⁵⁶ Complementary businesses often have a strong independent interest in effectively preserving competition in the relevant market because higher prices in that market would impact them adversely as sellers of complementary goods or services. Further, if others in the relevant market are not vertically integrated, creation of a vertically integrated rival may serve to disrupt post-merger coordinated conduct.

⁵⁷ See, e.g., *United States v. Amcor Ltd.*, 2010-2 Trade Cas. ¶ 77,186 (D.D.C. 2010).

In determining whether a proposed purchaser is “fit,” the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to the purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will effectively preserve competition in the market. If the divestiture assets have been widely shopped and the seller commits to selling to the highest paying, competitively acceptable bidder, then the review under the incentive/intention and fitness tests may be relatively simple.⁵⁸ Ideally, assets should be held by those who value them the most and, in general, the highest paying, competitively acceptable bidder will be the firm that can compete with the assets most effectively. However, if (a) the seller has proposed a specific purchaser, (b) the shop has been narrowly focused, or (c) the Division has any other reason to believe that the proposed purchaser may not have the incentive, intention, or resources to compete effectively, then a more rigorous review may be warranted or the Division may reject that purchaser.

C. Divestiture Contract Terms

1. Divestiture Assets

The Antitrust Division’s interest in divestiture lies in the effective preservation of competition, not in whether the divesting firm or the proposed purchaser is getting the better of the deal. Therefore, the Division is not directly concerned with whether the price paid for the divestiture assets is “too low” or “too high.” The divesting firm is being forced to dispose of assets within a limited time frame. Potential purchasers know this. If there are few potential purchasers to bid up the price, the divesting firm may fail to realize full competitive value. However, if there are many interested purchasers, the divesting firm actually may get a price above the appraised market value. In either event, the Division will not consider the price of the divestiture assets unless it raises concerns about the effectiveness or viability of the purchaser.

For example, in some cases, the Division will not approve a purchaser if the purchase price clearly indicates that the purchaser is unable or unwilling to compete in the relevant market. A purchase price that is “too low” may suggest that the purchaser does not intend to keep the assets in the market. In determining whether a price is “too low,” the Division will look at the assets’ liquidation value. Liquidation value is defined here as the highest value of the assets when redeployed to some use outside the relevant market. Liquidation value will be used as a constraint on minimum price only when (a) liquidation value reliably can be determined and (b) the constraint is needed as assurance that the proposed purchaser intends to use the divestiture assets to compete in the relevant market. In many cases, however, liquidation value is difficult to determine reliably. Also, sale at a price below liquidation value does not necessarily imply that the assets will be redeployed outside the relevant market. It may simply mean the purchaser is getting a bargain. Therefore, if the Division has other sufficient assurances that the proposed purchaser intends to compete in the relevant market, the Division will not require that the price exceed liquidation value.

A price that appears to be unusually high for the assets being sold could raise concerns for two reasons. First, it could indicate that the proposed purchaser is paying a premium for the acquisition of market power. However, this concern is adequately and more directly addressed

⁵⁸ The Division may identify specific firms that the seller should contact when the staff has learned of potential purchasers in the course of its original investigation.

by applying the fundamental test that the proposed purchaser must not itself raise competitive concerns. Second, a purchaser who pays too high a price might be handicapped by debt or lack of adequate working capital, increasing the chance of bankruptcy. Thus, the Division may take into account a price that is unusually high when evaluating the financial ability of the purchaser to compete.

2. *Restraints on the Resale of Divestiture Assets*

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

However, in unusual circumstances, where the Division is confident that during the life of the consent decree the resale of the divestiture assets to a particular entity or type of entity would harm competition, it may seek to limit the purchaser's ability to sell those assets to such an entity.⁵⁹

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

3. *Seller Financing of Divestiture Assets*

Seller financing of divestiture assets, whether in the form of debt or equity, raises a number of potential problems.⁶⁰ First, the seller may retain some partial control over the assets, which could weaken the purchaser's competitiveness. Second, the seller's incentive to compete with the purchaser may be impeded because of the seller's concern that vigorous competition may jeopardize the purchaser's ability to repay the financing. Similarly, the purchaser may be disinclined to compete vigorously out of concern that it may cause the seller to exercise various rights under the loan. Third, the seller may have some legal claim on the divestiture assets in the event the purchaser goes bankrupt. Fourth, the seller may use the ongoing relationship as a conduit for exchanging competitively sensitive information.

Finally, the purchaser's inability to obtain financing from banks or other lending institutions raises questions about the purchaser's viability.

⁵⁹ Division decrees also prohibit defendants from reacquiring the divested assets. This prohibition on reacquisition of assets is the key reason that the term of the decree in merger cases exceeds the completion of the divestiture.

⁶⁰ The Division may permit the purchaser to make staggered payments to the seller, such as disbursement out of an escrow account pending final due diligence. This is typically not considered seller financing. However, the Division is unlikely to approve any arrangement in which the purchaser's payments to the seller are conditioned on the purchaser hitting volume-based or other types of benchmarks. That kind of arrangement can adversely impact the competitive incentives of both the seller and the purchaser.

For these reasons, the Division is unlikely to permit the seller to finance the sale of the divestiture assets. The Division will consider seller financing only when it is persuaded that none of the possible concerns discussed above exist. For example, in the relatively rare case where the information financial institutions need to evaluate the purchaser's business prospects is either unavailable or costly to obtain relative to the amount of the financing, very limited seller financing may be considered.

V. Compliance

A. Compliance Enforcement

To ensure that the enforcement of merger remedies is rigorous and benefits from learning across the Division, the evaluation of and oversight over all Division remedies has been placed in the Office of the General Counsel. The General Counsel's Office directly oversees the litigating sections' ongoing review of decree compliance and evaluation of potential decree violations and makes recommendations to the Assistant Attorney General. By concentrating remedy expertise in the General Counsel's Office, the Division can efficiently develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness.

It is essential to the Division's mission that merger remedies, whether they are structural or conduct, are strictly enforced. Even the most appropriately tailored remedy is of little value if it is not enforced. The organization of the Division's enforcement efforts seeks to combine case- and industry-specific expertise with specialized remedy expertise. The Office of the General Counsel, as supported with appropriate assistance by lawyers and economists with industry expertise assigned to a particular matter, oversees the Division's decree compliance efforts.

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

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

B. Reporting and Inspection Requirements

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

Although civil investigative demands also may be issued to investigate compliance,⁶¹ access terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

C. Contempt

If the Division concludes that a consent decree has been violated, it will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose—compelling compliance with the court’s order or compensating the complainant for losses sustained.⁶² Staff may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved.⁶³ Criminal contempt is not remedial—its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.⁶⁴ Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed. The penalty may be a fine, or imprisonment, or both.

The Antitrust Division has instituted a number of contempt proceedings to enforce its judgments and will continue to do so where appropriate in the future.⁶⁵ In some situations, where the correct interpretation of a judgment is disputed, rather than seeking sanctions for contempt, it may be appropriate simply to obtain a court order compelling compliance with the judgment.⁶⁶

⁶¹ 15 U.S.C. §§ 1311(c), 1312(a).

⁶² 62 See *United Mine Workers v. Bagwell*, 512 U.S. 821, 826-30 (1994); *IBM v. United States*, 493 F.2d 112, 115 (2d Cir. 1973).

⁶³ See, e.g., *United States v. United Mine Workers*, 330 U.S. 258 (1947); *United States v. Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979). Moreover, courts have recognized that, under appropriate circumstances, other equitable remedies also may be available (for example, disgorgement of profits as a proxy for harm). In re *General Motors Corp.*, 110 F.3d 1003, 1019 n.16 (4th Cir. 1997).

⁶⁴ A criminal contempt proceeding may be instituted by indictment, see *United States v. Snyder*, 428 F.2d 520, 522 (9th Cir. 1970), or by petition following a grand jury investigation, see *United States v. Gen. Dynamics Corp.*, 196 F. Supp. 611 (E.D.N.Y. 1961).

⁶⁵ See, e.g., *Work Wear Corp.*, 602 F.2d 110; *United States v. Morton Plant Health Sys., Inc.*, 2000 WL 33223244 (M.D. Fla. July 14, 2000); *United States v. Smith Int’l, Inc.*, 2000-1 Trade Cas. ¶ 72,763 (D.D.C. 2000); *United States v. FTD Corp.*, 1996-1 Trade Cas. ¶ 71,395 (E.D. Mich. 1995); *United States v. N. Suburban Multi-List, Inc.*, 1981-2 Trade Cas. ¶ 64,261 (W.D. Pa. 1981); see also *United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998).

⁶⁶ See, e.g., *United States v. CBS Inc.*, 1981-2 Trade Cas. ¶ 64,227 (C.D. Cal. 1981).