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Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies

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SETTING THE TERMS OF A BREAK-UP: THE CONVERGENCE OF FEDERAL MERGER REMEDY POLICIES

TABLE OF CONTENTS

INTRODUCTION

Since the passage of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) in 1976,[1] firms planning mergers of a certain value are required to notify the antitrust agencies in order to make the agencies aware of combinations that may cause competitive issues. Either the Federal Trade Commission (FTC) or Department of Justice Antitrust Division (DOJ) (collectively, "the agencies") will analyze the proposed merger, and if the agency has reason to believe the merger will be anticompetitive,[2] it may consider modifications to the deal that would eliminate competitive concerns or seek an injunction to keep the parties from consummating their merger.[3] The agencies and parties typically seek to modify the deal to preserve or restore the competitive landscape that

1. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a (2006)); *see also* Hart-Scott-Rodino, *Premerger Notification Program*, FED. TRADE COMM'N, http://www.ftc.gov/bc/hsr/index.shtm (last visited Mar. 28, 2012).

2. 15 U.S.C. § 53(b)

3. DEP'T OF JUSTICE & THE FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES § 1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."). Procedurally, parties typically offer a modification or settlement to the agency, and the agency considers that proposal based on agency policy and the particular facts of the merger. *See infra* text accompanying note 18.

existed before the merger[4] by creating a viable competitor to replace the acquired or merged firm.[5]

If the agencies and parties agree on an acceptable modification, they may enter into a binding final judgment, or consent decree, that memorializes their agreement.[6] Courts have the power under the Tunney Act to determine whether a final judgment that the DOJ proposes is "in the public interest."[7] Because courts do not have the power to conduct their own analyses beyond whether a proposed divestiture will be in the public interest, it is the realm of the antitrust agencies to build divestiture packages that will not only be in the public interest, but that will also adequately remedy competitive

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4. *See* DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (2011) [hereinafter 2011 DOJ POLICY GUIDE], *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf ("The goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to preserve competition."); DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 4 (2004) [hereinafter 2004 DOJ POLICY GUIDE], *available at* http://www.justice.gov/atr/public/guidelines/205108.pdf ("Although the remedy should always be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to restore it."); FED. TRADE COMM'N, BUREAU OF COMPETITION, STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (2003) [hereinafter FTC STATEMENT], *available at* http://www.ftc.gov/bc/bestpractices/bestpractices.shtm (describing the FTC's "remedial objective" as "to prevent the anticompetitive effects likely to result from a merger that the Commission has determined is unlawful"). The Supreme Court has agreed that restoring competition is the "key to the whole question of an antitrust remedy." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

5. As former FTC Chairman Timothy Muris noted, the new competitor must be a viable business entity in practice, not just a creation of lawyers. Timothy Muris, Chairman, Fed. Trade Comm'n, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity (Aug. 7, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba. shtm.

6. *See FTC Guide to the Antitrust Laws: The Enforcers,* FED. TRADE COMM'N, http://www.ftc.gov/bc/antitrust/enforcers.shtm (last visited Mar. 28, 2012) ("If the [agency] believes that a person or company has violated the law or that a proposed merger may violate the law, the agency may attempt to obtain voluntary compliance by entering into a consent order with the company.").

7. 15 U.S.C. § 16(b)-(h) (requiring the DOJ to file with the court a proposed consent decree and a competitive impact statement that describes the relief sought); *see also* United States v. W. Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (holding that the "court's function is not to determine whether the resulting array of rights and liabilities 'is one that will *best* serve society,' but only to confirm that the resulting settlement is within the *reaches* of the public interest"). The Tunney Act does not apply to the FTC; there is no review of the FTC consents by a district court because the Commission acts as the trial court. Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, J. COMPETITION L. & ECON. 471, 476 (2007).

problems caused by a merger.[8] When the FTC and DOJ allow a merger to go through with a divestiture, they aim to use the divestiture to recreate the pre-merger competitive landscape.[9] In creating a divestiture package, the policy of both agencies has been to find an acceptable buyer who is financially viable and can use the divested assets to replace the amount of competition lost in the merger.[10] However, "[t]he view persists that the two antitrust agencies approach the issue of merger remedies differently."[11]

Although the agencies tend to downplay the differences in their policies and preferences regarding the level of agency involvement in building a divestiture package, they behave differently in several notable respects. The agencies have different policies on: implementing "fix-it-first" remedies, which allow the parties to restructure their deal before consummating the merger without entering into a consent order;[12] requiring the divesting party to find an "upfront" buyer before agreeing to a consent order;[13] and using "crown jewel provisions," by which the agency requires the merging firms to agree to divest a particular high value asset that in and of itself may not be necessary to restore competition but is more likely to attract desirable buyers.[14] The DOJ's recently published *2011 Policy Guide to Merger Remedies* seems to have closed some of the gaps between the agencies' policies, indicating convergence of FTC and DOJ practices, but differences remain.[15]

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8. *See* Plaintiff's Response to Public Comments at 4, United States v. 3D Sys. Corp., No. CIV 1:01cv01237(GK) (D.D.C. Aug. 16, 2001), *available at* http://www.justice.gov/atr/cases/f10100/10102.pdf ("The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that 'other remedies were preferable.'" (citing United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995))).

9. *See* FTC STATEMENT, *supra* note 4.

10. As noted in both the 2004 and 2011 *Antitrust Division Policy Guide to Merger Remedies*, merging firms have an "incentive to divest fewer assets than are required for the purchaser to compete effectively going forward." 2011 DOJ POLICY GUIDE, *supra* note 4, at 9; *see also* 2004 DOJ POLICY GUIDE, *supra* note 4, at 13. This highlights the necessity of carefully analyzing proposed divestitures in order to achieve the goal of restoring post-merger competition to its pre-merger level. *See id.*

11. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Looking Forward: Merger and Other Policy Initiatives at the FTC (Nov. 18, 2004), *available at* http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf.

12. *See* discussion *infra* Part III.C.1.

13. *See* discussion *infra* Part III.C.2.

14. *See* discussion *infra* Part III.C.3.

15. *See* 2011 DOJ POLICY GUIDE, *supra* note 4.

This Note argues that the agencies should adopt the same approach to divestitures. Consistency between the agencies would allow merging firms more certainty during a process that can be risky and expensive. Federal antitrust enforcement has a major impact on the economy because businesses have a significant financial stake in how their mergers are analyzed. Given the amount of time the agencies spend immersed in a particular product market learning about the adequacy of different firms as competitive forces, the FTC's hands-on approach to divestiture remedies[16] is more effective than that of the DOJ.[17] The agencies should be active and involved when creating a divestiture package that will adequately replace lost competition to ensure that any proposed remedy will be effective. To this end, the agencies should focus their divestiture policies on reducing the risk that a divestiture will be unsuccessful and on trying to eliminate the possibility that consumers will suffer higher prices or lower quality products as a result.

Part I discusses why the agencies view divestitures as the optimal remedy to a potentially anticompetitive merger and examines the background of divestiture remedies. Part II addresses the FTC's success in pursuing a more involved divestiture policy. Part III analyzes the basic similarities and differences between the antitrust policies of the FTC and the DOJ and discusses concerns the antitrust community has raised regarding those differences. Finally, this Note concludes that consistency between the agencies is essential and argues that because the FTC's policy is the stronger of the two, the DOJ should espouse the FTC's more aggressive policy.

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16. *See* discussion *infra* Part III.C.

17. Because actual merger investigations are confidential within the investigating agency and most nonbasic information becomes publicly available only when a matter is taken to court, the research in this Note is necessarily based on limited information. The FTC's 1999 Divestiture Study, discussed in Part II.A, is the only large-scale compilation of data attempting to analyze the success of divestitures; the DOJ has not conducted a similar study. A large-scale study of divestiture success would be beneficial in evaluating which policies are most effective in limiting the anticompetitive effects of mergers.

I. DIVESTITURE AS A PREFERABLE ANTITRUST REMEDY

A. Background

When competing firms plan to merge, an antitrust investigation may reveal competitive concerns. When an antitrust agency expresses such concerns about a proposed merger, the agency and merging firms typically engage in negotiations in an attempt to modify the deal to reduce the risk that the merger will harm competition.[18] The typical modification to a potentially anticompetitive merger is the divestiture, or sale, of overlapping products or assets.[19] Structural remedies, especially divestitures, are usually favored over conduct-based remedies,[20] especially with mergers and acquisitions between large companies, because the competitively overlapping products often represent only a small part of the overall deal.[21] Conduct-based remedies, by contrast, are generally disfavored because they are more regulatory in nature, requiring greater scrutiny and monitoring.[22] In looking for a buyer for the assets to be divested, the agencies do not necessarily favor a certain type of buyer but simply accept a buyer who is ready, willing, and

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18. *See Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N, http://www.ftc.gov/bc/mergerfaq.shtm (last visited Mar. 28, 2012).

19. *See* FTC STATEMENT, *supra* note 4.

20. *See, e.g.*, 2004 DOJ POLICY GUIDE, *supra* note 4, at 7-8 (stating that structural remedies are preferred over conduct remedies because they provide more certainty and require less government involvement and post-merger monitoring); Proposed Final Judgment at 8, United States v. Ticketmaster Entm't Inc., No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010), 2010 WL 5699134 (noting that FTC sought to require one of the merging firms to license key software to a competitor); *see also* 2011 DOJ POLICY GUIDE, *supra* note 4, at 6.

21. Steven Tenn & John M. Yun, *The Success of Divestitures in Merger Enforcement: Evidence from the J&J-Pfizer Transaction* 2 (Fed. Trade Comm'n Bureau of Econ., Working Paper No. 296, 2009), *available at* http://www.ftc.gov/be/workpapers/wp296.pdf (studying the FTC's investigation of Johnson & Johnson's 2006 acquisition of Pfizer's consumer health division).

22. *See* DEP'T OF JUSTICE, GUIDING PRINCIPLES OF THE ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (2004), *available at* http://www.justice.gov/atr/public/guidelines/205108.htm ("Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.").

able to compete in the relevant market.[23] A "successful" divestiture may be defined as one that modifies the transaction to maintain the pre-merger level of competition.[24]

Certain factors, like expediency, may sometimes outweigh the agencies' wish to create a divestiture package and find a buyer that will leave the competitive landscape exactly the same as it was before a proposed merger. For example, in the recent acquisition of the bankrupt Penn Traffic company by Tops Markets LLC, inflexibility by the FTC could have led to liquidation of Penn Traffic's assets by a bankruptcy court.[25] In this case, the FTC agreed to allow the deal to close on time, and Tops Markets agreed to keep open all Penn Traffic locations until the FTC completed a full investigation and at that point sell off any stores the FTC found necessary to solve competitive issues.[26]

The agencies craft appropriate remedies on a case-by-case basis. In some markets, especially in declining markets, a buyer that can adequately compete in the post-merger market either does not exist or does not step up.[27] The FTC generally disfavors advance settlement agreements because of the amount of uncertainty and inflexibility that remains once the deal has gone through. However, there

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23. The FTC, for example, has found acceptable buyers in

> parties who do not operate in the market, but who have a track record of operating similar assets successfully[,] … parties who have operated other businesses successfully and have brought together a management team experienced in the relevant market[,] … [f]irms operating in different geographic markets but within the same product market[,] … [f]irms who operate in related product markets, either in the relevant geographic market or outside the relevant geographic market[,] ... [and] smaller firms ... operating within the same geographic and product markets.

Frequently Asked Questions About Merger Consent Order Provisions, *supra* note 18.

24. Like most scholarship in the field, this Note evaluates the "success" of merger policy based on the effectiveness of that policy in replacing or restoring competition. Evaluation of success in merger enforcement can also include whether the agencies are investigating and blocking the right mergers, but such considerations are beyond the scope of this Note. *See, e.g.*, Tenn & Yun, *supra* note 21, at 1.

25. *See* Press Release, Fed. Trade Comm'n, FTC Seeks Public Comments on Trustee's Proposal to Divest Two Stores Under Whole Foods Market Inc. Divestiture Order (Mar. 2, 2010), *available at* http://www.ftc.gov/opa/2010/03/wholefoods.shtm.

26. *See id.*

27. *See, e.g.*, Cecile Kohrs Lindell, *Hit the Books*, DEAL MAG., Oct. 16, 2009, http://www.thedeal.com/magazine/ID/030979/insights/hit-the-books.php.

are situations in which a full investigation that might find a more appropriate remedy may be more cumbersome than helpful.

An analysis of divestiture policy is important because the agencies favor divestitures over other types of merger remedies.[28] Without the divestiture option, the decision to approve a merger would essentially be binary—either permit the merger or block it.[29] Putting together an acceptable divestiture package is far easier, more certain, and less costly for merging firms than fighting the antitrust agencies in court; often the problematic asset is only a small part of the overall deal.[30]

As shown by statistics assembled annually for Congress by the FTC and DOJ pursuant to the HSR Act, the majority of filed mergers with which the agencies take issue are resolved with some type of divestiture, whether by consent order or by the parties restructuring their deal to alleviate the agency's antitrust concerns.[31] Over the period of 2003-2007, of 144 reported mergers, 51 percent were settled with consent orders, with an additional 13 percent restructured after the DOJ informed the parties of its concerns.[32] Only 9 percent of challenged mergers were litigated, with the remaining 28 percent abandoned by the parties.[33] The agencies also take into consideration the litigation risks that deeming a proposed

28. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330-31 (1961) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind when a violation of § 7 has been found."); FTC STATEMENT, *supra* note 4; *see also* 2004 DOJ Policy Guide, *supra* note 4, at 7 ("Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market."); Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, ANTITRUST REP., May 2000, at 2, 5.

29. Penelope Papandropoulos & Alessandro Tejana, *The Merger Remedies Study: In Divestiture We Trust?*, 27 EUR. COMPETITION L. REV. 443 (2006) (analyzing a 2005 study published by DG Competition that considered forty recent merger decisions in the European Union).

30. *See* 2004 DOJ POLICY GUIDE, *supra* note 4; FTC STATEMENT, *supra* note 4.

31. *See, e.g.*, FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANN. REP., FISCAL YEAR 2009 at 7, 11 (2009), *available at* http://www.ftc.gov/os/2010/10/101001hsrreport.pdf; FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANN. REP. FISCAL YEAR 2008 at 7, 14 (2008), *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf; FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANN. REP., FISCAL YEAR 2007 at 3 (2007), *available at* http://www.ftc.gov/os/2008/11/hsrreportfy 2007.pdf.

32. *See* sources cited *supra* note 31.

33. *See* sources cited *supra* note 31.

buyer unacceptable would create; as noted in the FTC's Divestiture Study,[34] sometimes the risks of litigation are high enough that the Agency may accept a proposal that is viable but not optimal.[35] Because divestitures are the most common remedy and because it is often unclear which agency will investigate a particular proposed merger, it is important to look at the notable differences in the agencies' divestiture policies.

B. Allocation of Investigations Between the FTC and DOJ

1. The Hart-Scott-Rodino Antitrust Improvements Act

The antitrust agencies have undergone several recent changes in an attempt to make the process of filing a merger more transparent and less risky, beginning after Congress passed the HSR Act in 1976. The objectives of the HSR Act were twofold: first, to limit harm to competition between the time when an anticompetitive merger occurs and the time when the antitrust agencies are able to solve the competitive problem and, second, to enable the agencies to effectively restore competition to its premerger level.[36] Professor Kenneth Elzinga famously pointed out that prior to the passage of the HSR Act, divestitures were often slow and ineffective, leaving the agencies with only "Pyrrhic" victories.[37] Another study by Robert Rogowsky evaluated 104 divestiture orders between 1969 and 1980 and concluded that 80 percent were unsuccessful, mostly due to the amount of elapsed time before the divestiture was put into place.[38] Because of the premerger requirements set forth in the HSR Act, the agencies are now in a better position to evaluate divestitures that will lead to a successful replacement of competition.

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34. *See* discussion *infra* Part II.A.

35. FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 6 (1999) [hereinafter DIVESTITURE STUDY], *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

36. *Id.* at 1 (detailing the FTC's Bureau of Competition's ongoing study of divestiture orders the Commission issued between 1990 and 1994).

37. Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 44, 50-51 (1969).

38. *See* DIVESTITURE STUDY, *supra* note 35, at 1 n.3 (citing R. Rogowsky, An Economic Study of Antimerger Remedies (May 1982) (unpublished Ph.D. dissertation, University of Virginia)) (analyzing mergers in which a divestiture order had successfully been obtained).

The HSR Act prohibits the acquisition of voting securities and assets of a certain value without filing notice to, and gaining approval from, the antitrust agencies.[39] The HSR Act aimed to strengthen the agencies' ability to enforce antitrust laws by creating notification and waiting period requirements for firms planning mergers and acquisitions.[40] Without these premerger requirements, the remedial measures merging firms took were often inadequate to solve anticompetitive problems, leaving the agencies to "unscrambl[e] the eggs" after an anticompetitive merger had already been consummated.[41] Under the HSR Act, after the parties file, they must wait thirty days before consummating their merger;[42] this requirement gives the agencies a chance to evaluate the potential risks to consumers of a proposed merger and, if necessary, to negotiate with the parties to modify the deal and mitigate likely anticompetitive effects. If necessary, the HSR Act allows the agencies time to gather adequate information to meet the burden of proof required to preliminarily enjoin a potentially anticompetitive merger.[43]

2. Attempted Reforms to the Clearance Process

Firms planning a merger or acquisition that meets the HSR Act's value threshold must file with both the FTC and the DOJ.[44] Significantly, under the Clayton Act, only one of the antitrust agencies can investigate any specific proposed merger.[45] The agencies decide which will investigate the proposed merger according to formally allocated areas of responsibility, mostly based on expertise

39. 15 U.S.C. § 18a(d)(1) (2006) (requiring firms planning mergers—other than those exempt under subsection C—that would result in the acquiring firm holding in excess of $200 million, adjusted at the beginning of each fiscal year for inflation, to give notice).

40. *The Clayton Act and the FTC Act: A Response to Dissatisfaction with a Broad Antitrust Statute*, Antitrust Laws & Trade Reg. (MB) § 9.03[4][f][I] (1997).

41. S. REP. NO. 94-803, pt. 1, at 61 (1976).

42. 15 U.S.C. § 18a(b)(1).

43. H.R. REP. NO. 94-1373, at 8 (1976) ("[W]ithout advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare a case, the government often has no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7.").

44. Clayton Antitrust Act of 1914 § 7A, 15 U.S.C. § 18a(d)(1).

45. *See* 15 U.S.C. § 18a(f); Media Release, Fed. Trade Comm'n, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance.shtm.

and experience in a given industry.[46] The agencies occasionally disagree as to which will analyze a given merger, especially in high-profile mergers and mergers in "gray area" industries that may fall into the expertise area of both agencies.[47]

Since 1948, the agencies have had a policy not to proceed with an investigation until one had "cleared" it with the other.[48] The clearance process is generally seen as creating contention between the agencies, often causing significant delay in investigations.[49] Leading up to 2002, the clearance process was especially "non-transparent," making it very difficult for merging firms to determine which agency would review their merger.[50] Following a period of "deteriorat[ion]" in the clearance process, from about 1999 until 2002, officials from the agencies collaborated to negotiate and issue a more transparent policy.[51] These negotiations led to the 2002 Clearance Agreement.[52]

The 2002 Clearance Agreement, which allocated product markets and related products to one agency or the other based on clear expertise, was the subject of much criticism from consumer groups that felt the FTC should enjoy a wider subject matter allocation.[53] For example, when the agreement allocated media and entertainment mergers to the DOJ, some commentators, like Timothy Muris, argued that the FTC's investigation of the AOL/Time Warner merger gave it a "superior claim to expertise" in media and commu-

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46. *See Number of Enforcement Actions and Substantial Investigations by DOJ and FTC, by Industry, FY 1997 – Present*, FED. TRADE COMM'N, http://www.ftc.gov/opa/2002/02/clearance/clearchart.htm (last visited Mar. 28, 2012) (detailing, by industry, the number of enforcement actions and substantial investigations by each agency and to which agency the 2002 Clearance Agreement allocated the product market); *Overview of the FTC/DOJ Clearance Agreement*, FED. TRADE COMM'N, http://www.ftc.gov/opa/2002/04/clearanceoverview.shtm (last visited Mar. 28, 2012) ("The allocations in the draft clearance agreement were developed based on three criteria: prior expertise; the benefit of one agency evaluating all segments within a specific industry; and an effort to divide matters between the agencies evenly.").

47. *See, e.g.*, Timothy J. Muris, Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission 2-5 (Nov. 3, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf.

48. *See Overview of the FTC/DOJ Clearance Agreement*, *supra* note 46.

49. *See id.*

50. *See id.*

51. *Id.*

52. *See id.*

53. *See id.*

nications.[54] In the end, uncertainties created by the 2002 Clearance Agreement did not matter because the agreement was abandoned shortly after it was publicized.[55] The agreement's failure returned federal antitrust enforcement to the status quo and the contentiousness that naturally arises out of the dual jurisdiction shared by the FTC and DOJ.[56]

Despite the agencies' efforts to create bright-line allocation rules, boundaries between industries often remain unclear.[57] Although the agencies have agreed on which will handle some cases, such as in situations in which one agency has clear expertise over the other,[58] many merging firms are left guessing as to whether their merger will be investigated by the FTC or the DOJ. Ideally, firms planning mergers within certain industries would have a clear idea of which agency would evaluate their merger, for planning purposes. The continuing opacity of the clearance process, especially in industries like energy and media in which there is considerable disagreement over which agency should prevail, presents extra hurdles by "preclud[ing] the parties from approaching an agency before filing a premerger notice to begin identifying and addressing competitive concerns."[59]

54. *See, e.g.*, Muris, *supra* note 47, at 14.

55. *See* Lauren Kearney Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1334-35 (2007) (discussing the downfall of the 2002 Clearance Agreement and the lack of clarity created by the overlapping jurisdictions of the two agencies).

56. As Former FTC Chairman Timothy Muris suggested after the Clearance Agreement was abandoned, the lack of agreement between the agencies may even lead to skewed incentives. When the agency decides whether to investigate a merger, it may issue a second request to strategically stake a claim to similar mergers in the future. Muris, *supra* note 47, at 2.

57. *See Overview of the FTC/DOJ Clearance Agreement*, *supra* note 46 ("For example, because the DOJ historically has investigated electricity, while the FTC has investigated all other energy matters, convergence mergers between electricity and natural gas companies have led to contentious disputes regarding which agency should investigate. Moreover, although the FTC predominantly has investigated computer hardware and the DOJ has investigated computer software, matters involving both have become increasingly common, resulting in clearance disputes.").

58. *Id.*

59. *See* Muris, *supra* note 47, at 7.

II. THE SUCCESS OF THE FTC'S DIVESTITURE POLICY

A. The 1999 FTC Divestiture Study

The most recent comprehensive internal study of divestiture "success" is the FTC Bureau of Competition's 1999 Study of thirty-seven divestitures that occurred from fiscal year 1990 to fiscal year 1994.[60] In the Study, the FTC analyzed case studies and interviewed divestiture buyers to determine whether the buyer had been able to quickly become a viable competitor in the relevant market.[61] Based on these criteria, the FTC Study found that twenty-eight of the thirty-seven divestitures had successfully met the divestiture objectives.[62]

The FTC studied a number of factors that led to the success or failure of a divestiture, including firm size and relationship with the divesting firm, the "respondent."[63] The FTC identified three factors that impeded a successful divestiture. First, respondents wanted the smallest possible divestiture package.[64] The Study found that because of this, in hindsight, some packages were not adequate to serve the remedial purposes of the divestiture.[65] Second, respondents wanted to divest to weak buyers.[66] Respondent firms are required to propose "acceptable" buyers and typically do not make a point of choosing those who would be competitive forces in the post-merger market.[67] In fact, the Study found that many buyers believed they had specifically been chosen because they would not pose a

60. A number of smaller studies and surveys have been conducted after specific mergers or regarding particular product markets. For a list and brief descriptions of these studies, see Tenn & Yun, *supra* note 21, at 4-5 & n.4.

61. *See* DIVESTITURE STUDY, *supra* note 35, at 8.

62. *Id.* at 9-10.

63. *Id.* at 10-15.

64. *Id.* at 16.

65. *Id.*

66. *Id.* at 17.

67. *Id.*

viable competitive threat.[68] Third, respondents acted in ways to limit the success of the buyer in the relevant market.[69]

These reactions seem to be logical, given that the respondent firm is essentially helping to create a new competitor for itself. The FTC identified several additional problems on the buyer side: (1) buyers lack information and expertise in the relevant market, (2) some buyers felt they lacked bargaining power against respondent firms, (3) buyers often do not communicate with the FTC about issues they face in negotiation, and (4) the buyers' incentives differ from those of the FTC.[70]

The FTC Divestiture Study proposed a number of solutions to the identified problems, including a more active role in ensuring the success of the buyer of the divested portion.[71] The FTC Study recommended changing the incentives of the respondent firm by appointing divestiture trustees or monitor trustees, authorizing crown jewel provisions in the case of an uncooperative respondent, and requiring consequential damages.[72] Additionally, it suggested facilitating the success of the buyer by giving the buyer easier access to important and accurate information before asking the buyer to compete in a complex market and giving the buyer certain requirements beyond basic due diligence.[73]

Ultimately the Study recommended choosing a knowledgeable, experienced, and committed buyer.[74] It reiterated the well-established need for an "appropriate buyer" in a way that underlined a key difference between the FTC's and DOJ's policies.[75] The Study's key findings point to the necessity of a more active role of the

68. *Id.* ("They are not required to choose the person likely to be the strongest buyer, and many buyers reported they had the impression they were chosen because respondent did not expect them to be a strong competitor.").

69. *See id.* at 18. For example, in one case, the buyer acquired the rights to manufacture a product and contracted with the seller so that the seller would continue to supply the buyer with that product until the buyer could manufacture the product on its own. However, after the acquisition, the seller was unable to deliver the product for a significant period of time, which the buyer suggested may have been an intentional impediment to the buyer's ability to compete. *Id.*

70. *Id.* at 20-27.

71. *Id.* at 29-37.

72. *Id.* at 29-31.

73. *Id.* at 32.

74. *Id.* at 32-34.

75. *Id.* at 33.

agency in finding a buyer who will adequately replace competition after the merger.[76]

The Divestiture Study provided the background for the FTC's policy and goals for maintaining competitive levels through a successful divestiture package. Its conclusions also justify the FTC's frequent requirement of up-front buyers as a means of facilitating a quick divestiture.[77] The Study further maintains that buyers are more likely to be successful when an entire line of business is divested—rather than just selected assets—a conclusion that has been incorporated into many FTC divestiture orders.[78] The DOJ has not, to date, conducted a similar study of its own ordered divestitures.

The 1999 FTC Divestiture Study was the last broad retrospective examination of the success of divestiture approaches.[79] As such, considering a select number of cases in which divestitures were considered successful or unsuccessful is helpful in analyzing which methods are actually most useful.

B. Agency Involvement Has Led to Divestiture Success

A number of recent FTC cases emphasize the agency's determination to stick to its more involved practices. In several recent instances, the FTC rejected as inadequate a fix-it-first approach that the merging parties had proposed.[80] The FTC's stance in General Mills' acquisition of Pillsbury, the proposed acquisition of Seagram Spirits by Diageo and Pernod Ricard, Libbey's proposed acquisition of Anchor Hocking, Arch Coal's proposed acquisition of Triton, and the proposed merger of CCC Holdings and Mitchell

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76. *Id.* ("The Commission generally allows the respondent the first opportunity to market the assets (although it must do so within a specified period of time). This, however, gives the respondent an opportunity to seek weak buyers. As a consequence, the Commission needs to be able to identify which buyers are likely to succeed and which are not. The decision is always fact specific, but the case studies offer some helpful rules of thumb.").

77. *See infra* Part III.C.2.

78. *See* DIVESTITURE STUDY, *supra* note 35, at 42; *see also* Tenn & Yun, *supra* note 21, at 5 (describing the impact of the FTC Study on divestiture orders).

79. *See* Tenn & Yun, *supra* note 21, at 4-5 & n.4.

80. *See* Casey R. Triggs, *Shielding Consumers from Risk: FTC Divestiture Policy*, 17 ANTITRUST, Fall 2002, at 75 (discussing several examples of matters in which the FTC adhered to an involved remedy policy in order to reduce consumer risk).

International are several such examples.[81] The FTC commissioners expressed concerns about a number of aspects of the parties' proposed fix in General Mills' acquisition of Pillsbury, including the mix-and-match nature of the asset package, the up-front buyer's ability to replace competition, and continued entanglements between remaining competitors over the ability to market the Doughboy brand.[82] Although the Commissioners ultimately deadlocked over whether to bring an enforcement action—hence the nickname "Doughboy Deadlock"—the Commissioners' concerns highlighted the FTC's resolve in maintaining its policy of demanding adequate settlements to minimize risk to consumers.[83]

In Diageo PLC and Pernod Ricard S.A.'s, proposed joint acquisition of Seagram Spirits and Wine the FTC authorized its staff to seek a preliminary injunction to block the acquisition after the parties were unwilling to divest a sufficient asset package.[84] A crown jewel provision was included in the asset package that the FTC ultimately accepted, and a divestiture trustee was appointed to make sure that the competitive value of the assets was maintained.[85]

In Libbey's proposed acquisition of its primary competitor—Anchor Hocking—from Newell Rubbermaid, the merging parties attempted to circumvent the FTC by amending their agreement and taking the fix directly to the district court.[86] The court found that the amended merger agreement would "potentially have the same anti-competitive effect that the initial merger agreement would have had on the market" and granted a preliminary injunction.[87] This result shows that not only are merging parties unlikely to try to evade the FTC by taking an inadequate fix to court but also that the FTC will likely maintain its position.[88]

81. *Id.* at 77.
82. *Id.*
83. *Id.*
84. *See id.*; Press Release, Fed. Trade Comm'n, FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A. (Oct. 23, 2001), *available at* http://www.ftc.gov/opa/2001/10/diageo.shtm.
85. *See* Triggs, *supra* note 80, at 77.
86. FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 38 (D.D.C. 2002).
87. *Id.* at 55.
88. *See* Triggs, *supra* note 80, at 77.

In the case of Arch Coal's proposed acquisition of Triton Coal, the parties attempted a pre-merger fix by showing their intention to divest a coal mine.[89] The FTC rejected this proposed fix and sought a preliminary injunction in district court.[90] Although the court ultimately accepted a fix that the FTC had rejected, the case showed the FTC's willingness to litigate fixes that it deemed inadequate.[91]

In *FTC v. CCC Holdings, Inc.*, the merging firms—CCC Holdings and Mitchell International, both competitors in the market for automobile estimatics software—offered a fix to remedy the anticompetitive concerns posed by a three-to-two merger in the market.[92] The parties amended their deal to rework a restrictive license of Mitchell's web-based estimatics system to a much smaller competitor, Web-Est, which Mitchell owned in part.[93] The FTC rejected the fix and took the case to court, pointing out that the proposed fix was inadequate due to the huge difference between the sizes and the revenues of the merging firms and Web-Est.[94] The court noted that Web-Est would not truly be an independent competitor because of its continued relationship with Mitchell and because Web-Est would continue to license Mitchell's database for up to five years.[95] The FTC won a preliminary injunction, after which the parties abandoned the merger.[96]

C. Past "Unsuccessful" FTC Divestitures

The FTC has not always been aggressive in its divestiture policy; its 1999 Divestiture Study notes several past "failed" divestitures that may have led the FTC to become more involved in its divesti-

89. Katherine A. Ambrogi, Note, *The Elephant in the Courtroom: Litigating the Pre-Merger Fix in* Arch Coal *and Beyond*, 47 WM. & MARY L. REV. 1781, 1781 (2006).

90. *Id.* at 1784.

91. *Id.* at 1793 (arguing that courts should give deference to the FTC's expertise in the case of proposed fixes).

92. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 56 (D.D.C. 2009).

93. *Id.* at 56-57.

94. *Id.* at 58 (suggesting that comparing Web-Est to the merged CCC-Mitchell would be comparing "an ant to an elephant").

95. *Id.* at 59.

96. *Id.* at 77; *see also* Jay S. Brown, Federal Trade Commission v. CCC Holdings – *The Beginning of a New Era for the FTC?*, MAYER BROWN (June 25, 2009), http://www.mayerbrown.com/publications/article.asp?id=6884&nid=6.

tures.[97] For example, in *Flowers*, the chosen buyer "scrapped the divested assets and resold them for a profit rather than go into business."[98] In another case, the Institut Merieux failed to comply with an FTC consent order that required a divestiture trustee.[99]

Despite the FTC's efforts, some recent cases have not turned out entirely as planned. For example, in the FTC's recent case against Whole Foods, a consent order initially required Whole Foods to divest thirty-two stores.[100] But eventually the FTC approved the sale of only three by a divestiture trustee because buyers could not be found for the rest.[101] The buyer subsequently removed one of the stores that was sold from the market.[102]

A federal court recently fined Boston Scientific $7 million for "flouting" a consent order with the FTC that required the company to license intravascular ultrasound technology to a competitor, which may have caused the competitor to leave the relevant market.[103] Although this particular divestiture was not effective, the court's decision highlighted the importance of compliance with FTC orders, vindicated the authority of the FTC, and pointed out the obligation of the parties to follow the FTC staff's interpretation of the order.[104] Ultimately, although the FTC's more aggressive approach to divestitures has been unable to prevent all competitive problems, the FTC has studied its past failures, and its firm stance continues to gain respect from courts and merging firms alike.

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97. *See* DIVESTITURE STUDY, *supra* note 35, at iii.

98. *Id.* at 6 n.14 (citing FTC Docket No. 9148, 102 F.T.C. 1700 (1986) (decision and order), *modified*, 107 F.T.C. 403 (1986), *preliminary injunction granted*, 1988-1 Trade Cas. (CCH) ¶ 67,950 (M.D. Ga. 1988), *vacated & remanded for dismissal*, 849 F.2d 551 (11th Cir. 1988), *pet. for reh'g denied*, 858 F.2d 746 (11th Cir. 1988)).

99. *See id.* at 7 n.14.

100. *See* James Rowley & Chris Burrit, *Whole Foods to Sell 32 Wild Oats Natural-Food Stores*, BLOOMBERG (Mar. 6, 2009, 5:03 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7uuO6vwl4jU.

101. *See* Press Release, Fed. Trade Comm'n, FTC Approves Whole Foods Market's Divestiture of Three Stores and Wild Oats Intellectual Property, Denies Sale of Wild Oats Intellectual Property to Topco Associates (June 18, 2010), *available at* http://www.ftc.gov/opa/2010/06/foodinternet.shtm.

102. *Id.*

103. Press Release, Fed. Trade Comm'n, Federal Judge Issues Record $7 Million Fine Against Boston Scientific Corporation (Mar. 31, 2003), *available at* http://www.ftc.gov/opa/2003/03/bostonsci.shtm.

104. *See id.*

III. CONVERGENCE OF THE FTC'S AND DOJ'S DIVESTITURE POLICIES

A. Common Ground Between the Agencies

In looking for an acceptable buyer, the two agencies consider many of the same criteria. To begin with, both agencies strongly prefer divestitures over conduct-based remedies.[105] Both agencies cite a preference for the divestiture of discrete business units, finding that divesting less than a full business unit often fails to create an effective long-term competitor and noting that such proposals will be subjected to higher scrutiny.[106] The *2010 Horizontal Merger Guidelines*, which the FTC and the DOJ jointly compiled to clarify the calculus behind government merger review, state that, depending on the relationship between the relevant market and other "inextricably linked" markets, a partial divestiture might be unsatisfactory.[107]

Additionally, the agencies seek similar criteria in buyers. The DOJ often refuses to accept a buyer with significant presence in the relevant market, requires that the buyer have an incentive to use the divestiture asset to compete in the relevant market and not to compete in a different market, and subjects buyers to a "fitness" test to check the buyer's skill, expertise, and long-term financial ability to compete effectively in the relevant market.[108] The FTC similarly looks at the skill and expertise of the buyer in the relevant market, the buyer's commitment to the market, and the buyer's size.[109]

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105. *See* Logan M. Breed & David J. Michnal, *Merger Remedies: The DOJ's New Guide to Old Differences with the FTC*, 19 ANTITRUST, Spring 2005, at 37, 37 & n.3 ("For example, the Division filed 55 consent decrees in merger cases from 1997–2000; all but four of the decrees involved divestiture."); *see also* ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS 295–96 (Ilene K. Gotts ed., 2d ed. 2001).

106. *See* 2011 DOJ POLICY GUIDE, *supra* note 4, at 8-10 (describing the DOJ's preference for divestiture of discrete business units but noting that there may be some situations in which divestiture of less than a full business unit may be appropriate); *see also* FTC STATEMENT, *supra* note 4.

107. 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 3, at 30 n.14.

108. 2004 DOJ POLICY GUIDE, *supra* note 4, at 30-32.

109. DIVESTITURE STUDY, *supra* note 35, at 34-35.

B. Structural Differences Between the Agencies

The goals, then, of divestiture at both antitrust agencies are the same. From a general economic perspective, the purpose of a divestiture is simply to create a new entity that has the same ability to compete and the same incentives to innovate and expand as the firm that disappears due to the merger.[110] However, after the passage of the HSR Act, the two agencies have often been perceived to espouse different approaches regarding the creation of a successful divestiture package.[111] Substantial differences remain between the divestiture preferences of the agencies, and because firms do not have control over which agency will investigate and analyze a particular merger, they are still faced with a discomforting level of uncertainty. Carl Shapiro and Michael Sohn note that "[f]amiliarity with the consent decree process—the philosophy behind the agencies' settlement posture, as reflected in public statements by officials and negotiated consent decrees—can ... be critically important."[112] As long as inconsistencies between the agencies persist, it is indeed essential that merging firms familiarize themselves with the different policies they will face when negotiating with the FTC and the DOJ.

Inherent in the merger investigation process and the negotiation of an appropriate divestiture is considerable uncertainty, which creates risk that must be accounted for by merging firms.[113] The agencies should seek to create policies that reduce risks to competition by trying to promote quick and effective divestitures.[114] The merging parties, of course, face different risks in the face of a

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110. *See id.* at iii (detailing a study done by FTC staff of divestiture orders that the Commission issued between 1990 and 1994).

111. *See supra* text accompanying note 11.

112. Carl Shapiro & Michael Sohn, *"Crown Jewel" Provisions in Merger Consent Decrees*, 12 ANTITRUST, Fall 1997, at 27, 27.

113. *See id.*

114. *See id.* ("The agencies generally seek to reduce three types of risk to competition that can arise out of divestiture decrees: (a) the risk that a slow divestiture will harm competition during an interim period and/or cause the divested assets to wither; (b) the risk that no strong buyer will appear to purchase the divested assets; and (c) the risk that foot-dragging by the merged company will undermine the ability of the divestee to compete effectively.").

divestiture, all of which may lead to an unprofitable transaction.[115] For example, one risk to which Shapiro and Sohn point is the possibility that the agency will appoint a divestiture trustee who will attempt to create a more attractive divestiture package by selling one of the merging firms' valuable assets, a "crown jewel."[116] This policy shifts a great amount of risk from the agency onto the merging firms and has been increasingly favored by the FTC.[117] Structural and product market differences could account for this difference in willingness to become more involved in creating and carrying out a divestiture remedy.

The two agencies' different approaches to divestiture remedies may derive in part from the agencies' notable structural differences. The FTC has a separate section—or "shop"— dedicated to compliance, which negotiates consent decrees alongside the investigation staff and takes care of the administration of consent decrees on its own.[118] The DOJ does not have a separate section, so the staff members who investigate the merger are also responsible for negotiating and administering consent decrees.[119] The fact that the FTC has a separate shop to deal with remedies may lead the FTC to be more willing to require remedies that involve more agency involvement.

The product market in which a merger occurs may also affect the success of a divestiture. In their investigations, the agencies deal with different industries, which may cause industry-specific differences in divestiture packages and policies. Although the agencies agreed in March 2003 to assign some industries to one or the other agency,[120] because of the clearance process, this agreement does not

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115. *See, e.g.*, *id.* (listing various risks, including "(a) the risk that the appointment of a trustee to sell the assets will lead to a fire-sale price; (b) the risk that the divestiture will disrupt efficiencies; and (c) the risk that the trustee will choose to augment the asset package to attract a buyer").

116. *Id.* at 30.

117. *See infra* Part III.C.3.

118. Michael H. Byowitz & Lori S. Sherman, U.S. Antitrust Merger Remedies: FTC vs. DOJ? 31 (Mar. 11, 2009) (unpublished manuscript), *available at* http://apps.americanbar.org/intlaw/calendar/spring2006/papers/WED230410BYOWITZ_516.DOC.

119. *Id.*

120. Media Release, Fed. Trade Comm'n, *supra* note 45 (allocating to the FTC "airframes; autos and trucks; building materials; chemicals; computer hardware; energy; grocery manufacturing; the operation of grocery stores; healthcare; industrial gases; munitions; pharmaceuticals and biotechnology; professional services; the operation of retail stores; satellite manufacturing and launch vehicles; and textiles[;]" and allocating to the DOJ

necessarily make it clear to merging firms which agency will approve their merger.

Most studies of divestiture success have been narrowly focused on specific mergers and the product markets in which they occurred.[121] As Michael H. Byowitz and Lori S. Sherman note, no studies have been conducted to determine whether industry differences lead the agencies to approach divestiture remedies differently.[122] In some markets, a successful competitive solution may require the divestiture of a whole line of products.[123] For example, with pharmaceutical mergers, often an entire line of products must be divested in order to achieve the necessary competitive remedy.[124] On the other hand, both agencies have accepted divestitures of less than discrete business units in product markets when divestiture of a whole business unit was not necessary.[125] Whether the agencies accept proposals of stand-alone assets rather than discrete business units depends on an analysis of the product market and the complications that will be created by breaking up a business unit rather than conducting a "clean sweep."[126]

When the FTC considers a divestiture, it conducts a public comment period during which the public can weigh in on the proposed

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"aeronautics; agriculture and associated biotechnology; avionics; beer; computer software; cosmetics and hair care; defense electronics; financial services, insurance, and stock, option, bond, and commodity markets; flat glass; health insurance; industrial equipment; media and entertainment; metals, mining, and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber; telecommunications services and equipment; travel and transportation; and waste").

121. *See, e.g.*, Tenn & Yun, *supra* note 21, at 4-5 (describing studies looking at two local markets in Connecticut to determine the impact of divestitures related to Royal Ahold's 1996 supermarket acquisition of Stop & Shop; analyzing two 1984 oil mergers (Texaco-Getty Oil and Socal-Gulf Oil); and examining the performance of divested bank branches associated with mergers).

122. *See* Byowitz & Sherman, *supra* note 118, at 30.

123. *See* Tenn & Yun, *supra* note 21, at 2.

124. *See id.*

125. *See, e.g.*, United States v. Premdor, Inc., No. 1:01CV01696, 2002 WL 1816981, at *4-6 (D.D.C. Apr. 5, 2002) (explaining that the DOJ required the acquiring firm, Premdor, to divest one facility and related assets but allowed it to keep remainder of target company's North American business in the related market); Valero Energy Corp., No. C-4031, 2002 WL 254223, at *7 (F.T.C. Feb. 19, 2002) (noting that FTC required divestiture of only one refinery).

126. *See, e.g.*, Deborah Platt Majoras, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Houston, We Have a Competitive Problem: How Can We Remedy It? 7-9 (Apr. 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/11112.htm.

divestiture.[127] The FTC makes available to the public copies of its complaints, consent orders, and analysis—which are available on its website and in hard copy—to aid the public in understanding its rationale.[128] For example, in the FTC's case against Whole Foods Market, the FTC assigned Whole Foods a divestiture trustee, who petitioned for several divestitures in March 2010.[129] After each proposal, the FTC opened a thirty-day period during which the public—interested customers, competitors, and others—was allowed to give its input on the suggested divestiture solution. The FTC received 531 comments on the trustee's proposal to divest a Whole Foods (formerly Wild Oats) store in Portland, Maine, to Trader Joe's.[130] Although the FTC does extensive research into consumers' and competitors' opinions of proposed transactions, the public comment period provides another opportunity for interested parties to give their input. The DOJ does not have a similar mechanism for consumers to comment on a proposed remedy.

C. Areas in Which the Agencies' Policies Diverge

In the decades since the passage of the HSR Act, both agencies have become more proactive in their requirements in premerger divestiture orders.[131] Each agency has begun to favor certain types of provisions in divestiture orders. The agencies have differing policies on "fix-it-first" remedies, which are put into place before the merger is consummated; choosing up-front buyers, which requires the divesting party to find a buyer up front, reducing the risk that the parties will be unable to find an adequate buyer and shortening the time period for potential competitive harm but limiting flexibility of the divestiture package;[132] and crown jewel provisions, by

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127. *See, e.g.*, Press Release, Fed. Trade Comm'n, *supra* note 25; *see generally Public Comments*, FED. TRADE COMM'N, http://www.ftc.gov/os/publiccomments.shtm (last visited Mar. 28, 2012) (listing all matters open for and previously open for public comment).

128. *E.g.*, Press Release, Fed. Trade Comm'n, *supra* note 101.

129. *Id.*

130. *Public Comments on Trustee's Proposal for Sale of Portland, Maine, Store Under Whole Foods Market Inc. Divestiture Order*, FED. TRADE COMM'N, http://www.ftc.gov/os/comments/wholefoodspet2/index.shtm (last visited Mar. 28, 2012).

131. For a fuller description of the evolution of divestiture orders at the FTC, see DIVESTITURE STUDY, *supra* note 35, at 4-6.

132. *See id.* at 3.

which the agency requires additional divestiture of a certain high-value asset or larger group of assets in order to create a larger pool of acceptable buyers if the original divestiture does not occur within the time required in the order.[133] The DOJ favors fix-it-first remedies[134] and tends to shy away from choosing up-front buyers[135] and requiring crown jewel provisions.[136] The FTC, by contrast, favors locking parties into a binding consent order rather than a fix-it-first solution.[137] Indeed, the FTC does not favor fix-it-first proposals, often requires up-front buyers,[138] and frequently uses crown jewel provisions.[139]

1. Fix-It-First Remedies

The DOJ favors fix-it-first remedies, which allow the parties to implement a structural solution to competitive concerns before the merger is consummated, eliminating the need to file a case.[140] In this situation, the agency attempts to "preserve" competition, rather than to replace it, by allowing the parties to fix the problems with their own transaction, thus permitting the merger to go through with minimal changes.[141] The DOJ has stated that it does not discourage the fix-it-first approach and that if the parties' proposed divestiture alleviates competitive concerns, the DOJ will not force them to enter into a binding order.[142] The *2011 DOJ Policy Guide to Merger Remedies* notes the efficiency of allowing the parties to fix potential competitive problems without involving the courts, as well as the flexibility that such a solution allows the parties in proposing a unique set of assets that will make a proposed purchaser competi-

133. *See supra* text accompanying note 116.
134. *See infra* Part III.C.1.
135. *See infra* Part III.C.2.
136. *See infra* Part III.C.3.
137. *See infra* Part III.C.1.
138. *See infra* Part III.C.2.
139. *See infra* Part III.C.3.
140. *See* 2004 DOJ POLICY GUIDE, *supra* note 4, at 1 n.1 ("With a fix-it-first remedy, in contrast [with a binding court order], the parties modify or 'fix' the transaction before consummation to eliminate any competitive concern. There is no complaint or other court filing.").
141. *See id.*
142. *See id.* at 26-27.

tive.[143] As a caveat to the general principle that fix-it-first remedies are acceptable, fix-it-first remedies are deemed unacceptable if post-merger supervision is required,[144] and the DOJ maintains that the fix-it-first remedy must have no less substantive relief than could be obtained through a court.[145] The *2011 DOJ Policy Guide* also adds that fix-it-first solutions will not be acceptable if a consent decree is needed to enforce and monitor ongoing postmerger obligations on the part of the merged firms, such as firewalls.[146]

The FTC, on the other hand, does not have a formal policy on fix-it-first remedies and typically prefers to have a binding order.[147] The FTC often requires a consent decree because the agency then has greater control over the divestiture asset package.[148] In a number of situations, the agencies have been faced with similar cases and reacted differently to fix-it-first solutions.[149] The FTC has recently required consent decrees in several large acquisitions.[150]

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143. *See* 2011 DOJ POLICY GUIDE, *supra* note 4, at 22.

144. 2004 DOJ POLICY GUIDE, *supra* note 4, at 28.

145. 2011 DOJ POLICY GUIDE, *supra* note 4, at 22-23.

146. *Id.* at 23.

147. *See* FTC STATEMENT, *supra* note 4 (stating that the divestiture remedy is required in the majority of mergers).

148. *See, e.g.*, William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestiture Remedy*, 69 GEO. WASH. L. REV. 915, 924 (2001) (discussing a situation in which the FTC used a consent decree to exert greater control over the divestiture package).

149. *Compare* Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment at 1-2, Buckeye Partners, FTC File No. 041-0162 (Sept. 27, 2004), *available at* http://www.ftc.gov/os/caselist/0410162/040927anal0410162.pdf (stating that the parties restructured their agreement in response to FTC concerns, but the FTC required them to enter into a consent order nonetheless), *with* Press Release, Dep't of Justice, Reuters Ltd. and Moneyline Telerate Restructure Proposed Deal to Alleviate Justice Department's Antitrust Concerns (May 24, 2005), *available at* http://www.justice.gov/atr/public/press_releases/2005/209146.pdf (stating that the DOJ allowed the restructured deal between two global providers of financial information to go through without a consent order).

150. *See, e.g.*, Kris Hudson, *FTC Sets Terms for Simon to Buy Prime Outlets*, WALL ST. J., Nov. 10, 2010, http://online.wsj.com/article/SB1000142405274870480450457560689267612822.html (requiring divestiture of one outlet center and removal of certain restrictions on outlet retailers); Press Release, Fed. Trade Comm'n, FTC Requires Universal Health Services to Sell 15 Psychiatric Facilities as a Condition of Acquiring Rival Psychiatric Services (Nov. 15, 2010), *available at* http://www.ftc.gov/opa/2010/11/psychsol.htm (requiring Universal Health Services to divest fifteen psychiatric facilities to approved buyers before approving the merger).

2. Up-Front Buyers

Another method of attempting to prevent competitive harm is requiring the merging firms to propose a buyer at the outset of an investigation. As described in the *2004 DOJ Policy Guide*, the DOJ typically focuses on the assembly of an adequate divestiture package rather than choosing an acceptable buyer, assuming that when the appropriate asset package is put together, an acceptable buyer will be forthcoming.[151] But as the FTC found in the *Whole Foods* case, for example, this is not always the case.[152] The DOJ's test for an acceptable buyer takes into account three factors: (1) the divestiture itself must not cause competitive harm, (2) the potential buyer must have incentive to enter the market in question, and (3) the potential buyer must be "fit" to enter the market in terms of finances and expertise.[153]

The FTC favors requiring firms to propose an acceptable buyer up front. As noted in the FTC's 1999 Divestiture Study, "The requirement of premerger notification enables the antitrust agencies to insist that parties agree to remedies, including divestitures, before they permit the parties to consummate their transactions."[154] As described in the Study, the FTC often insists that firms propose a buyer up front in order to minimize the amount of interim time between the consummation of the merger and the divestiture.[155] Allowing the firms to merge without an acceptable buyer at hand increases the risk that an acceptable buyer will not be found and that the remedy will be unsuccessful.[156] The Divestiture Study also notes that requiring an up-front buyer shifts risk from the buyer, who is otherwise left with a steep learning curve to become a successful competitor, onto the respondent firm, who cannot consummate the merger without the FTC's approval of a viable buyer.[157]

151. 2004 DOJ POLICY GUIDE, *supra* note 4, at 30 n.42 ("[T]he Division focuses on specifying in the decree the appropriate set of assets to be divested quickly rather than on the identification of an acceptable buyer.").

152. *See supra* notes 100-02 and accompanying text.

153. 2004 DOJ POLICY GUIDE, *supra* note 4, at 30-32.

154. *See* DIVESTITURE STUDY, *supra* note 35, at 3.

155. *Id.* at 42.

156. *See supra* notes 37-41 and accompanying text.

157. DIVESTITURE STUDY, *supra* note 35, at 42.

For example, in Johnson & Johnson's 2006 acquisition of Pfizer's consumer health division, an up-front buyer was chosen before the FTC approved the transaction.[158]

3. Crown Jewel Provisions

In its *2004 Policy Guide*, the DOJ indicated that it "strongly disfavors" so-called crown jewel provisions, in which the divesting firm must set aside an additional asset, usually a particularly valuable one, to be divested if the parties are unable to sell the originally agreed-upon divestiture package to an acceptable buyer.[159] The DOJ views such provisions as indicative of accepting something less than the optimal divestiture package—either less or more than is necessary to remedy existing competitive concerns.[160] In the *2004 Policy Guide*, the DOJ explained that the requirement of a crown jewel provision indicates a lack of confidence in the original divestiture package, potentially entails punishment of the divesting firm when restoring competition—not punishing the merging firms—is the objective, and leaves the potential for purchaser manipulation by creating incentives for potential purchasers to delay or underbid.[161] The *2011 DOJ Policy Guide* suggests the possibility that the DOJ may condition acceptance of a proposed package on the inclusion of a crown jewel if an acceptable buyer cannot be found, but does not include extensive discussion of these provisions.[162]

The FTC, on the other hand, clearly favors crown jewel provisions. As explained in the FTC's Divestiture Study, the FTC believes that a crown jewel provision creates the assurance that if the original divestiture package does not sell to an acceptable buyer, a "more saleable" package will draw an acceptable buyer.[163] The Divestiture Study also notes that "[n]o respondent subject to a

158. *See* Tenn & Yun, *supra* note 21, at 2.
159. 2004 DOJ POLICY GUIDE, *supra* note 4, at 36.
160. *Id.*
161. *Id.* at 36-37.
162. 2011 DOJ POLICY GUIDE, *supra* note 4, at 24.
163. DIVESTITURE STUDY, *supra* note 35, at 30; FTC STATEMENT, *supra* note 4, at 22 n.31 ("In any case, it is a package of assets that the staff has concluded will be more readily divested because, for example, the pool of acceptable buyers is larger.").

crown jewel provision has ever failed to divest within the time required by the order," indicating that the crown jewel provision also serves the purpose of creating further incentives for the merging firms to cooperate with the agency.[164] The Study describes the crown jewel provision as a "threat" rather than a punishment.[165] The preference for crown jewel provisions is a clear example of the FTC's more proactive stance in ensuring that the merging firms do not purposely propose a weak divestiture package.

D. Antitrust Community Concerns About the Differences Between the Agencies' Divestiture Policies

Although the FTC and DOJ largely agree as to what makes an effective divestiture, a number of differences—both perceived and actual—persist in the agencies' policies. The DOJ's more hands-off policy seems to leave the decision as to what makes a buyer acceptable in the hands of the merging firms. To illustrate, in a DOJ divestiture order, the divesting party chooses a buyer, and the DOJ generally approves it, absent a legitimate, objective reason not to.[166] The DOJ policy is supported by a more free-market view of competition, which assumes that the market will take care of competition issues and which allows the government only a minimal role in controlling potentially anticompetitive situations.

The FTC's divestiture policy seems less trusting of the free market. The FTC is more involved in choosing a buyer and allows the public to voice its opinion once a buyer has been proposed.[167] Once the divesting party has proposed a buyer, the FTC opens a thirty-day period for public comment during which any party may assert its complaints or concerns about the proposed divestiture.[168]

164. DIVESTITURE STUDY, *supra* note 35, at 30-31 n.35.

165. *Id.*

166. *See* 2004 DOJ POLICY GUIDE, *supra* note 4, at 30 n.42.

167. *See* Dr Pepper/Seven-Up Companies, Inc. v. FTC, 991 F.2d 859, 863 (D.C. Cir. 1993) (stating that in a proceeding for FTC approval pursuant to Rule 2.41(f), the burden of proof is on the party seeking approval to demonstrate that it should be granted); FTC STATEMENT, *supra* note 4, at 20-21 (describing how the FTC evaluates proposed divestitures and acceptable buyers); *Frequently Asked Questions About Merger Consent Order Provisions*, *supra* note 18.

168. *See* FTC STATEMENT, *supra* note 4, at 21.

This difference in attitude affects merging parties' strategies in proposing divestitures; firms are more likely to propose buyers who will present less of a competitive threat when dealing with the DOJ than with the FTC.

Over time, the FTC has gained a reputation for being the more "aggressive" of the two antitrust agencies.[169] Recently, antitrust observers have perceived an uptick in the number of cases both antitrust agencies have challenged, especially the FTC.[170] Shapiro and Sohn, for instance, highlight the "FTC's emerging policies to strengthen its consent orders" noting that "[t]he FTC has become more aggressive in this area, with very real, practical implications for companies considering mergers."[171] Several attorneys from law firms that frequently deal with the antitrust agencies have pointed out that the agencies' "divergent approaches to certain key ... issues have real world consequences for merger parties," including unnecessary delay in integrating the merging firms while consent decrees are being negotiated.[172] Ultimately, merging parties may face higher transaction costs because the differing merger remedy polices create "confusion and uncertainty in the merger review process."[173]

Both the DOJ and FTC have responded to antitrust community concerns about the differences in their divestiture policies by increasing the transparency of the process. In recent years, both agencies have issued statements attempting to clarify the process of negotiating a divestiture.[174] In April 2003, the FTC's Bureau of Competition issued a statement on negotiating merger remedies.[175] In October 2004, the DOJ issued a similar *Policy Guide to Merger Remedies*.[176]

The DOJ's most recent *Policy Guide to Merger Remedies*, published in June 2011, indicates acceptance of more involved policies

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169. Heidi N. Moore, *Beware of the FTC*, N.Y. TIMES, Nov. 5, 2010, http://dealbook.nytimes.com/2010/11/04/beware-of-the-f-t-c/ (noting the FTC's recent "intense activity" and "aggressive stance" on merger enforcement).

170. *See id.* (describing the antitrust agencies as "on the warpath").

171. Shapiro & Sohn, *supra* note 112, at 27.

172. *See, e.g.*, Byowitz & Sherman, *supra* note 118, at 31.

173. *See* Breed & Michnal, *supra* note 105, at 37; Byowitz & Sherman, *supra* note 118, at 31.

174. *See* 2004 DOJ POLICY GUIDE, *supra* note 4, at 1-2; FTC STATEMENT, *supra* note 4, at 1.

175. *See* FTC STATEMENT, *supra* note 4.

176. *See* 2004 DOJ POLICY GUIDE, *supra* note 4.

in DOJ practice.[177] The updated *Policy Guide* provides guidance to attorneys in the Division but also gives merging firms a picture of the type of fixes the DOJ may find acceptable.[178] Changes since the *2004 Policy Guide* show that in actual practice, DOJ attorneys may in fact require up-front buyers or crown jewel provisions, both of which are policies that indicate a shift in risk onto the parties.[179] The DOJ has maintained its stance on fix-it-first remedies, which do not require a court order to bind the parties.[180]

IV. THE FTC'S POLICY IS STRONGER AND THUS SHOULD BE ADOPTED BY THE DOJ

A. Consistency Between the Agencies Is Essential

Economic changes are likely to precipitate more reported mergers and acquisitions, and with its recent challenges to proposed mergers, the FTC has made clear that potentially anticompetitive mergers will face substantial hurdles.[181] In light of this potential increase in antitrust enforcement, concerns regarding lack of transparency and consistency from the agencies may become more acute.[182]

The Obama administration brought a number of well-recognized faces to the leadership of both antitrust agencies, namely Christine Varney as Assistant Attorney General for Antitrust and Jon Leibowitz as Chairman of the FTC, both of whom have extensive track records as enforcement officials.[183] Although Varney has

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177. 2011 DOJ POLICY GUIDE, *supra* note 4, at 1.

178. *Id.*

179. *Id.* at 9, 23-24.

180. *Id.* at 22.

181. *See* Moore, *supra* note 169.

182. *See* Breed & Michnal, *supra* note 105, at 37 ("[D]ifferences between the agencies' approaches to merger remedies may create confusion and uncertainty in the merger review process.").

183. *See* Thomas Catan & Gina Chon, *Antitrust Chief to Step Down*, WALL ST. J., July 7, 2011, http://online.wsj.com/article/SB10001424052702303544604576430171298566868.html (describing Varney as a "tough and politically savvy" antitrust chief who "spearheaded the Obama administration's drive to reinvigorate antitrust enforcement"); Brent Kendall, *Leibowitz Tapped as FTC Chairman*, WALL ST. J., Feb. 28, 2009, http://online.wsj.com/article/SB123578105746497981.html (stating that Leibowitz "has tended to favor aggressive enforcement" and citing his nomination as a "signal of the White House's interest in strong

stepped down, the appointment of new chief federal enforcers may usher in renewed efforts on the part of both agencies to toughen antitrust enforcement.[184] Additionally, both the DOJ and FTC have newly appointed chief economists in their respective economics sections, both of whom are well poised to pursue antitrust policy aggressively.[185]

As a senator, President Obama himself promised to step up merger enforcement and to carefully review merger activity for anticompetitive deals, noting that during the period from 2001 to 2006, the agencies together challenged, on average, less than half as many mergers per year as during the period from 1996 to 2000 and that the DOJ under the Bush administration had not brought a single case for monopolization.[186] As noted by critics of Bush-era antitrust enforcement, the number of preliminary injunctions and administrative complaints brought by the FTC was significantly higher than the number brought by the DOJ during the Bush administration. For example, in 2009, despite a smaller number of filed mergers, the FTC filed a record number of complaints.[187] Thus, the Obama administration and new DOJ leadership have an opportunity to align with the FTC in its more skeptical and more involved stance on divestitures and to present a unified and consistent front of aggressive competition policy. For purposes of predictability, the agencies should aim for consistency in their overall analysis, including their consideration of fix-it-first remedies, up-front buyers, crown jewel provisions, and how they choose an acceptable buyer for a divestiture package.

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antitrust enforcement").

184. *See* Kendall, *supra* note 183.

185. *See* Press Release, Fed. Trade Comm'n, FTC Chairman Jon Leibowitz Appoints Senior Staff (Apr. 14, 2009), *available at* http://www.ftc.gov/opa/2009/04/seniorstaff.htm (stating that newly appointed Director of the Bureau of Economics Joseph Farrell had served as deputy assistant attorney general and chief economist for the Antitrust Division of the DOJ); James Rowley, *Expert Who Supported Microsoft Breakup Joins Justice Department*, BLOOMBERG (Mar. 12, 2009, 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVSy5ioz7EeI (stating that the hiring of Carl Shapiro was "fresh evidence the Obama administration plan[ned] aggressive antitrust enforcement").

186. *See* Senator Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/node/10883.

187. *See* FED. TRADE COMM'N, THE FTC IN 2009: FEDERAL TRADE COMMISSION ANNUAL REPORT 4 (2009).

B. The FTC's Policy of Active Involvement in Divestitures Lowers Risk to Consumers

Ultimately, both agencies should embrace the FTC's more proactive stance in the creation of divestiture packages. Both agencies have experienced problems with compliance with divestiture orders.[188] The most recent study of the effectiveness of divestitures was conducted by the FTC in 1999.[189] Both agencies would likely benefit from another wider study of what makes a divestiture effective and how the economic realities of the current day should weigh in with the factors considered in the assembly of a divestiture package.[190] A 2002 GAO report highlighted the need for an FTC Study to assess the effects of divestitures, given that such a study has not been conducted since the mid-1990s.[191] The GAO recommended that the FTC's Bureau of Competition and Bureau of Economics review the impact of divestiture orders in the retail market and other sectors to look at the current viability of divestiture buyers and competition in the relevant marketplace.[192] The GAO also suggested that the FTC conduct an analysis to determine whether changes to FTC divestiture practices since the mid-1990s have impacted marketplace competition.[193]

CONCLUSION

It is the purview of the antitrust agencies not only to analyze transactions for potential competitive problems but to work with the merging firms to resolve competitive problems that do arise. The

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188. *See, e.g.*, Lindell, *supra* note 27.

189. See *supra* Part II.A for a discussion of the 1999 FTC Divestiture Study.

190. Individuals have conducted independent studies of the effectiveness of divestitures on a smaller scale. *See, e.g.*, Tenn & Yun, *supra* note 21, at 2 ("Despite being a widely used tool in merger enforcement, there have been few studies of whether antitrust divestitures are successful.... We help fill this void by conducting a study of [the divestitures relating to] Johnson & Johnson's ... $16.6 billion acquisition of Pfizer's consumer health division in 2006.").

191. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-02-793, REPORT TO CONGRESSIONAL REQUESTERS: FEDERAL TRADE COMMISSION STUDY NEEDED TO ASSESS THE EFFECTS OF RECENT DIVESTITURES ON COMPETITION IN RETAIL MARKETS 7 (2002).

192. *Id.* at 49.

193. *Id.*

FTC's more aggressive policy of forcing more of the risks associated with a merger onto the merging firms is the most effective means of creating a successful and lasting solution to anticompetitive issues. Courts have supported this more involved position and have not allowed merging firms to circumvent the FTC's potentially demanding orders.

Despite the lack of empirical information about the success of the FTC's policies, it is clear that in order to ensure the maintenance of competition after a merger, the agency should take a hands-on approach to crafting an antitrust remedy to each unique case. The FTC's policy of involvement is a more effective means of making sure a divestiture adequately remedies the competition lost in a merger. Ultimately, the FTC's divestiture policy shifts risk away from consumers, which is the fundamental objective of antitrust enforcement.[194]

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194. *See* Muris, *supra* note 5 ("[W]e must protect consumers, not help [merging parties' counsel] get [their] deal through at consumers' expense.").

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