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Strict(er) Scrutiny: The Impact of Failed Divestitures on U.S. Merger Remedies

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Abstract

Antitrust review of mergers and merger remedies, in particular, have been the topic of much recent conversation both in the legal world and popular political discourse. A recent string of failed divestitures has driven the U.S. antitrust agencies to analyze proposed remedies and proposed divestiture buyers with increasing scrutiny as they seek to avoid similar outcomes. This article details the history of recent divestiture failures and explores how the agencies have adapted their remedy vetting process in response through longer investigations, enhanced focus on particular aspects of buyers' qualifications, and an increased insistence on up-front buyers, as well as the agencies' success in persuading courts that proposed divestitures and/or buyers were inadequate in a series of recent litigated merger challenges. Against this backdrop, this article offers practical guidance for merger parties and would-be buyers to navigate the approval process amid the agencies' heightened sensitivities to the qualifications of divestiture buyers. Finally, it suggests that there is little empirical support for the notion that the most concrete, observable agency responses will reduce the risk of divestiture failures in the future.

Keywords

Antitrust, mergers, remedies, divestiture, FTC, DOJ

Parties to a large merger or acquisition must devote time and attention to dozens of important considerations from negotiating the key terms of the deal itself to securing shareholder approval, managing public relations and press coverage, and planning for postclosing integration. For transactions with an antitrust component, securing clearance from the Federal Trade Commission (the FTC) or the Antitrust Division of the Department of Justice (the DOJ) either without conditions or with the smallest possible remedy is an additional key step on the path to closing. One aspect of obtaining that approval in transactions with a competitive overlap significant enough to warrant a remedy has become more complex in recent years—namely, securing the relevant agency's approval of a divestiture package and the purchaser of that divestiture. Merger parties and prospective divestiture buyers must be attuned to the agencies' heightened sensitivity to buyer qualifications in order to maximize their chances of

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bucking the trends toward increased insistence on up-front buyers and longer merger review timelines that have followed on the heels of prominent divestiture failures.

I. Background on U.S. Merger Remedies

With limited exceptions, the U.S. antitrust agencies review all transactions valued at or above an annually adjusted threshold, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[1] The great majority of reportable transactions are approved after an initial 30-day waiting period, with the agencies determining that a more extensive investigation into the competitive effects of the deal is unnecessary.[2] However, when the agency has significant questions about the competitive effects of the transaction, it may extend the waiting period while it conducts a lengthier investigation, including issuing an extensive request for additional information, documents, and data known as a "Second Request."[3] If the agency concludes that the transaction would, in the absence of a remedy, be likely to cause substantial harm to competition, the deal will not receive antitrust approval unless and until the parties commit to a remedy designed to restore the competition that would otherwise be lost as a result of the merger.[4] This commitment takes the form of a consent decree settling the agency's charges that the transaction violates the antitrust laws.[5]

While settlement in the form of a consent decree is the most common outcome, parties sometimes refuse to agree to a remedy as extensive as the agency believes necessary, and in other cases, an agency concludes that *no* remedy exists that would fully restore competition. In such cases, the agency can file a lawsuit seeking an injunction prohibiting the merger.[6] It is not uncommon for merger parties to

1. *See* 15 U.S.C. § 18a(a). The notification threshold, originally set at $50 million, was most recently raised to $90 million. *See* Press Release, FTC, FTC Announces Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates (Feb. 15, 2019).
2. The agencies have typically received between 1,300 and 1,800 HSR filings per year over the last decade, with a high of 2,052 in 2007 and a low of 716 in 2009. *See* FTC Bureau of Competition & U.S. Dep't of Justice Antitrust Div., Hart-Scott-Rodino Annual Report, Fiscal Year 2017 (2018) Appendix B. In each fiscal year from 2008 to 2017, the agencies cleared more than 95% of transactions without a Second Request. *Id.* at 6. While such actions are much rarer, the agencies can and do challenge nonreportable transactions, even if already consummated. *See, e.g.*, Complaint, Otto Bock Healthcare North America, Inc., Docket No. 9378 (Dec. 20, 2017) (FTC example); Complaint, United States v. Transdigm Group, Inc., No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017) (DOJ example). Moreover, in an even less common move, the DOJ recently pursued a postclosing investigation of a transaction that had been reported pursuant to the HSR Act but which did not receive a Second Request. *See* Complaint, United States v. Parker-Hannifin Corp., Case No. 1:17-cv-01354-UNA (D. Del. Sept. 26, 2017).
3. Pursuant to 15 U.S.C. § 18a(e), the initial 30-day waiting period may be extended until 30 days after the parties comply with the Second Request. As a practical matter, parties frequently enter timing agreements with the agency that permit the agency a longer period of time to complete its investigation after Second Request compliance.
4. The Horizontal Merger Guidelines published jointly by the FTC and DOJ set forth the agencies' approach to evaluating horizontal mergers and provide useful guidance about when the agencies are likely to conclude that a merger may substantially harm competition in the absence of a remedy. The most recent iteration of the Guidelines, published in 2010 (hereinafter "Horizontal Merger Guidelines"), is available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.
5. Specifically, the agency's complaint generally charges that the deal violates Section 7 of the Clayton Act, which prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. *See, e.g.*, Complaint, Emerson Electric Co. and Pentair PLC, Docket No. C-4615 (Apr. 27, 2017) (FTC example); Complaint, United States v. Danone S.A. and the White Wave Foods Co., Case No. 1:17-cv-00592 (Apr. 3, 2017) (DOJ example).
6. *See* U.S. Dep't of Justice Antitrust Div., Antitrust Div. Policy Guide to Merger Remedies 3 (2011) (hereinafter "2011 DOJ Remedies Guide") ("Where a remedy that would effectively preserve competition is unavailable, the [Antitrust] Division will seek to block the merger."). For instance, an agency may conclude that no prospective divestiture buyer would have the same ability and incentives to compete aggressively as one of the pre-merger parties. *See, e.g.*, Complaint, United States v. Halliburton Co., No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016) (hereinafter "Halliburton Complaint"). While the Division announced its withdrawal of the 2011 remedies guide in September 2018 and reinstatement of its earlier

abandon a transaction in the face of an agency suit to block the deal rather than pursue litigation through a trial decision.[7] The agencies have a strong recent track record of securing injunctions in litigated cases,[8] but persuading a court that an agency's predictions of competitive harm are flawed is not an impossible task.[9] Litigation is typically the last resort after the parties have been unable to persuade the agency either (1) that their proposed remedy is sufficient or (2) that no remedy is necessary.[10] As former FTC Bureau of Competition Director Deborah Feinstein put it, "litigation typically occurs in the merger context where the only viable remedy [in the agency's eyes] involves all or nearly all of what the buyer hoped to obtain through the deal."[11]

Merger remedies are typically classified as structural or behavioral. A structural remedy prevents harm by *altering the market structure* that the transaction would create, restoring the competitive conditions to the pre-deal status quo. It thus seeks to prevent anticompetitive conduct by removing firms' ability and incentives to engage in that conduct.[12] By contrast, behavioral remedies *directly*

2004 guide while it assess its remedies policy, the 2004 guide is consistent with this approach. *See* U.S. Dep't of Justice Antitrust Div., Antitrust Div. Policy Guide to Merger Remedies 14-15 (2004) (hereinafter "2004 DOJ Remedies Guide") ("blocking the entire transaction rather than accepting a divestiture may be the only effective solution" in some instances).

7. Recent examples of high-profile mergers abandoned as a result of actual or threatened lawsuits by federal antitrust enforcers include the proposed tie-ups of General Electric and Electrolux (abandoned mid-trial), AT&T and T-Mobile (abandoned after DOJ filed suit), Halliburton and Baker Hughes (same), DraftKings and FanDuel (abandoned after FTC filed suit), Comcast and Time Warner (abandoned after DOJ announced intention to file suit), Applied Materials and Tokyo Electron (abandoned after DOJ informed parties it would not accept their remedy proposal), and Walgreens and Rite Aid (restructured as acquisition of limited subset of Rite Aid stores in response to FTC concerns about proposed divestiture to Fred's).
8. *See, e.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015) (blocking merger of food distributors Sysco and U.S. Foods); FTC v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C. 2016) (blocking merger of office supply chains Staples and Office Depot); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 181 (D.D.C. 2017) (blocking merger of health insurers Anthem and Cigna); United States v. Aetna, Inc., 240 F. Supp. 3d 1 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017) (blocking merger of health insurers Aetna and Humana).
9. *See, e.g.*, Memorandum Opinion, United States v. AT&T Inc., et al., Case No. 17-2511 (RJL) (D.D.C. Jun. 12, 2018) (denying DOJ request for injunction enjoining merger of AT&T and Time Warner); FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015) (denying FTC motion for preliminary injunction enjoining merger of Steris Corp. and Synergy Health).
10. For instance, the parties may believe that the agency is defining the market too broadly and that their respective products do not constrain each other's pricing. Conversely, the parties could be advocating that the agency's market definition is too narrow and artificially excludes additional products and competitors that will continue to constrain their pricing postmerger.
11. Deborah L. Feinstein, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts (Sept. 17, 2013). One notable exception to this generalization is the DOJ's recent challenge to the proposed merger of AT&T and Time Warner, where the parties were unwilling to agree even to more modest structural remedies (which the DOJ reportedly insisted on) because they believed that behavioral remedies like those imposed in other vertical transactions, such as Comcast/NBC-Universal, should have been sufficient in their deal as well. *See, e.g.*, Brent Kendall & Drew FitzGerald, *Justice Department Files Lawsuit Challenging AT&T-Time Warner Deal*, Wall Street J. (Nov. 20, 2017), https://www.wsj.com/articles/justice-department-expected-to-file-lawsuit-challenging-at-t-time-warner-deal-1511210955.
12. The main theories of competitive harm in horizontal merger cases are typically divided into "unilateral effects" and "coordinated effects." Unilateral effects theories consider the merged firm's ability to exercise market power by raising prices due to the reduced availability of satisfactory alternatives to customers, either presently (reduced actual competition) or in the future (reduced potential competition). Coordinated effects theories posit an increased risk of collusion due to the greater ease of coordinating and enforcing a cartel among a smaller number of competitors. In addition to these traditional theories, the agencies have increasingly become interested in theories of harm based on reduced incentives to innovate and develop new or improved products postmerger. *See, e.g.*, Horizontal Merger Guidelines § 6.4; Terrell McSweeney, Understanding Innovation and Its Role in U.S. Merger Review (Mar. 16, 2017). It remains to be seen what sort of remedy the agencies might seek in order to address harms to innovation, as well as whether courts would enjoin mergers based solely or primarily on innovation theories of harm in a litigated challenge. For example, it may be difficult for the relevant agency to establish (1) that innovation is a significant basis of competition in the relevant industry; (2) that any reduction in incentive to innovate would not be offset by efficiencies that increase the ability of the merged firm to innovate; and/or (3) that a particular innovation effort would develop or continue in the absence of the merger. *See, e.g.*, *Steris*, 133 F. Supp. 3d at 983–84 (concluding that merger party's decision to abandon plans to launch a

forbid specific conduct likely to have anticompetitive effects. The prototypical structural remedy is divestiture of one party's business in the area of horizontal overlap, while behavioral remedies may include restrictions on information sharing, requirements not to discriminate among suppliers or customers, or mandatory licensing provisions.

The focus of this article is on remedies for horizontal mergers, where both the FTC and DOJ nearly always insist on a divestiture as the remedy for the competitive harm. The DOJ has stated that "Structural remedies are preferred to conduct remedies in merger cases"[13] and the FTC likewise "prefers structural relief in the form of a divestiture" for horizontal merger cases.[14] The agencies often include comparatively minor conduct provisions (such as requirements to provide transitional assistance and/or short-term supply agreements) to ensure the smooth transfer of the divestiture business, but structural change is the core of the remedy and is relied upon to provide a permanent fix for the competitive problem.

A principal benefit of divestitures is that they require far less ongoing monitoring and agency involvement than behavioral remedies. As Assistant Attorney General Makan Delrahim recently observed, the extended supervision required to enforce behavioral remedies takes the agencies out of their law enforcement role into that of a regulator, threatening to make them "roving ombudsm[en] of the affairs of business," a part they are ill-equipped to play.[15] By contrast, the work necessary to ensure a divestiture's effectiveness is done up front by defining a sufficient package of assets to be divested and assessing the buyer's qualifications. Once the parties have closed the divestiture, the agency has little need to monitor the remedy—it need only let the market take its course. As a result, the agencies may insist on structural relief even in vertical transactions, particularly where they believe that any alternative behavioral remedies would smack of regulation and prove difficult to enforce.[16]

The fundamental goal of merger remedies is to restore fully the competition that would be lost as a result of the transaction, a principle that animates the agencies' analysis of every aspect of the remedy process.[17] Fully restoring competition means preserving the premerger status quo in terms of the *competitive process*, not market outcomes or results for particular customers.[18] In the case of a divestiture, this means that the buyer should effectively step into the position that one of the merging parties held before the deal. For example, the agencies generally start from the position that the package of assets divested must include everything (including personnel, intellectual property, and contractual relationships) that the divesting party used in the relevant business premerger, placing the

potentially disruptive new technology was driven not by merger-related considerations but by the failure to obtain customer support for the new technology and by the high capital costs associated with the project).

13. 2004 DOJ Remedies Guide, *supra* note 6, at 7.
14. Bureau of Competition of the FTC, Negotiating Merger Remedies 5 (2012) (hereinafter "FTC Remedies Statement").
15. Makan Delrahim, Antitrust and Deregulation (Nov. 16, 2017) at 8. *See also id.* at 5 ("Instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.").
16. The DOJ's recent challenge to the merger of AT&T and Time Warner, where the DOJ rejected a slate of behavioral remedies proposed by the parties and based on the similar remedies imposed in the 2010 merger of Comcast and NBC-Universal, is an illustrative example. *See* Trial Brief of the United States, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C., Mar. 12, 2018) at 61–67. Notably, however, both District Judge Richard Leon and a panel of the D.C. Circuit concluded that failure to consider the parties' voluntary commitment to submit to "baseball-style" arbitration with distributors who failed to reach an agreement with the merged company was a major flaw in the DOJ's case. *See* Memorandum Opinion, United States v. AT&T Inc., et al., Case No. 17-2511 (RJL) (D.D.C. Jun. 12, 2018) at 149 n. 51; United States v. AT&T, Inc., et al., No. 18-5214 (D.C. Cir. Feb. 26, 2019) at 4, 22–23, 33.
17. *See, e.g.*, 2004 DOJ Remedies Guide, *supra* note 6, at 4 ("Restoring competition is the 'key to the whole question of an antitrust remedy,' and restoring competition is the only appropriate goal with respect to crafting merger remedies.") (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961)).
18. 2004 DOJ Remedies Guide, *supra* note 6, at 5 ("Because the goal is reestablishing competition – rather than determining outcomes or picking winners and losers – decree provisions should promote competition generally rather than protect or favor particular competitors."). *See also* David Gelfand, Preserving Competition: The Only Solution, Evolve (Apr. 24, 2015).

burden on the parties to demonstrate that a buyer will be competitive without any assets the parties wish to retain. Likewise, a divestiture buyer will only be acceptable to the agency if, once it holds the divested assets, customers will consider it a viable option on par with the relevant premerger party.

II. The Present State of U.S. Merger Remedies

Under the Obama administration, the U.S. antitrust agencies displayed a firm commitment to vigilant merger enforcement and an increased appetite for litigation. While some of that enforcement uptick may be attributable to more aggressive dealmaking,[19] there can be no doubt that the FTC and DOJ have been stalwart in their response, challenging a long series of high-profile transactions in industries ranging from wireless phone service and cable TV (AT&T/T-Mobile, Comcast/Time Warner) to semiconductor technology (Applied Materials/Tokyo Electron) to food distribution (Sysco/U.S. Foods). To date, that trajectory has not changed significantly under the Trump administration. Indeed, the highest profile action of Trump-appointed DOJ leadership was its ultimately unsuccessful suit to block the vertical merger of AT&T and Time Warner,[20] which sent a strong signal that merger enforcement was not headed for the significantly more permissive atmosphere that some popular commentary initially predicted,[21] notwithstanding the agencies' insistence that the move to block a vertical deal is not especially novel.[22]

Regardless of the overall enforcement climate, recent areas of focus within the agencies' review process are likely to remain priorities for staff reviewing proposed transactions. One such trend is a significant increase over the past several years in the agencies' scrutiny of proposed divestiture buyers. To anticipate the concerns most likely to be raised and forge the quickest path to agency approval, merger parties and prospective buyers must understand the reasons for this heightened sensitivity.

A. Recent Developments: Failures of Divestiture Buyers

While the agencies constantly seek to refine their understanding of what is necessary for a successful divestiture, the aftermath of two transactions in particular likely lies behind much of the renewed focus on the qualifications of divestiture buyers, and a third seems likely to further amplify the agencies' attentiveness to this area.[23]

19. *See, e.g.*, James Fontanella-Khan, *Blocked US Deals a Sign that Mergers Have Become More Aggressive*, Fin. Times (May 11, 2016), https://www.ft.com/content/7608d102-177c-11e6-b197-a4af20d5575e?mhq5j=e5.
20. Complaint, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017) (hereinafter "AT&T Complaint"). The antitrust agencies have historically been far more apt to challenge horizontal merger that eliminate direct competition between the merger parties than vertical deals, which are often procompetitive because they generate significant efficiencies, do not remove a competitor from the market, and rarely involve market power sufficient to create a real threat that the merged company would have the ability and incentives to foreclose one of the parties' rivals. *See, e.g.*, Christine Varney, Vertical Merger Enforcement Challenges at the FTC (Jul. 17, 1995) ("Vertical integration can lower transaction costs, lead to synergistic improvements in design, production and distribution of the final output product and thus enhance competition. Consequently, most vertical arrangements raise few competitive concerns"). For a list of recent vertical enforcement actions, see Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994-2016* (Jun. 30, 2017), http://scholarship.law.georgetown.edu/facpub/1529.
21. *See, e.g.*, Matt Porzio, *Trump Appointments Signal Shift on Mega-Mergers, Antitrust Enforcement*, Forbes (Jan. 17, 2017), https://www.forbes.com/sites/mattporzio/2017/01/17/trump-appointments-signal-shift-on-mega-mergers-antitrust-enforcement/#a07eb966d57e; Ali Breland, *Mega-Mergers Poised to Get Green Light Under Trump*, The Hill (Jan. 15, 2017), http://thehill.com/policy/technology/314313-mega-mergers-poised-to-get-green-light-under-trump.
22. AT&T Complaint ¶ 10. *See also* Bruce Hoffman, Vertical Merger Enforcement at the FTC (Jan. 10, 2018) at 8.
23. While the three FTC-reviewed transactions discussed in detail here have garnered the most popular attention and have likely had the greatest impact on agency thinking about remedies, both agencies are cognizant of any negative remedy outcome, regardless of which agency reviewed the transaction in question, and suboptimal outcomes have also occurred in DOJ-ordered divestitures. For example, the DOJ-mandated divestiture in Grupo Bimbo's acquisition of Sara Lee required the

1. Hertz/Dollar Thrifty. In August 2012, Hertz Global Holdings Inc. ("Hertz") announced its acquisition of Dollar Thrifty Automotive Group Inc. ("Dollar Thrifty").[24] Hertz was the second largest domestic car rental company by fleet size while Dollar Thrifty was the fourth largest company. Following a bidding war with Avis Budget Group dating back to April 2010, Hertz paid approximately $2.3 billion for Dollar Thrifty.[25] The U.S. rental car market, particularly at airports, had undergone substantial consolidation in the preceding decade, moving from a fragmented space with nine major players[26] to one where Hertz and Dollar Thrifty were two of the four companies that collectively controlled 98% of airport car rentals.[27] To address the competitive issues raised by the transaction, the FTC required Hertz to sell its Advantage Rent A Car ("Advantage") business and 29 Dollar Thrifty on-airport locations to Franchise Services of North America ("Franchise Services").

At the time the proposed settlement was released, Sandy Miller, the co-CEO of Franchise Services and a former CEO of Budget Rent-A-Car, was expected to run the new Advantage brand.[28] However, in December 2012, Franchise Services fired Miller, alleging financial misconduct.[29] Miller subsequently warned the FTC to not give final clearance for the deal, arguing that Franchise Services lacked the industry knowledge and expertise to effectively compete with Hertz.[30] In a presentation to the FTC, Miller also claimed that Advantage was mismanaging its fleet of more than 20,000 rental cars leased from Hertz and was likely to fail without additional financing.[31]

Whatever the facts surrounding his termination, Miller proved prophetic regarding the future of Advantage, which filed for bankruptcy only 4 months after its FTC-mandated sale to Franchise Services.[32] In its bankruptcy filings, Advantage blamed Hertz for overvaluing the fleet of cars it leased to Advantage and for refusing to renegotiate a lease agreement for the fleet.[33] Some industry experts, however, suggested that Advantage was simply not prepared to compete under the business plan crafted for the company's postdivestiture operations,[34] while other commentators have questioned whether Advantage could have operated successfully as a stand-alone business under any circumstances, given a past history that included a 2009 bankruptcy that led to its initial acquisition by Hertz.[35]

appointment of a divestiture trustee and was not completed until February 23, 2013, just over a year later than the original deadline set in the final judgment. *See* Final Judgment, United States v. Grupo Bimbo, S.A.B., No. 1:11-cv-01857-EGS (D.D.C. Feb. 16, 2012), ECF No. 18, at 12; Joint Status Report Regarding the California Assets, *id.*, ECF No. 91.

24. Michael de la Merced & Peter Lattman, *After Long Pursuit, Hertz to Buy Dollar Thrifty for $2.3 Billion*, N.Y. Times (Aug. 26, 2012), https://dealbook.nytimes.com/2012/08/26/hertz-on-the-verge-of-buying-dollar-thrifty/.
25. John Kell, *FTC Approves Hertz's Takeover of Dollar Thrifty*, Wall Street J. (Nov. 15, 2012), https://www.wsj.com/articles/SB10001424127887323551004578121432785734960.
26. *Id.*
27. Press Release, FTC, FTC Requires Divestitures for Hertz's Proposed $2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (Nov. 15, 2012).
28. Dennis Schaal, *Hertz' Spinoff of Advantage Rent A Car Was Doomed from the Start Says Insider*, Skift (Nov. 30, 2013), https://skift.com/2013/11/30/hertz-spinoff-of-advantage-rent-a-car-was-doomed-from-the-start-says-insider/.
29. Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, Wall Street J. (Dec. 8, 2013), https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951. Miller denied the allegations and sued an investor backing the deal, claiming that the investor had sought to oust him in order to seize control of Advantage. *Id.*
30. *Id.*
31. Schaal, *supra* note 28.
32. Kendall & Palank, *supra* note 29.
33. Eric Hornbeck, *Blaming Hertz Lease Deal, Advantage Rent A Car Hits Ch. 11*, Law 360 (Nov. 5, 2013), https://www.law360.com/articles/486266/blaming-hertz-lease-deal-advantage-rent-a-car-hits-ch-11.
34. Kendall & Palank, *supra* note 29.
35. Press Release, Hertz Corp., Hertz Purchases Advantage Rent A Car (Apr. 1, 2009), http://www.marketwired.com/press-release/hertz-purchases-advantage-rent-a-car-nyse-htz-1235144.htm.

Advantage's second bankruptcy, following the failed divestiture, resulted in the company selling 10 of its locations back to Hertz and 12 locations to Avis Budget, another of the three large airport car rental competitors,[36] while Advantage itself was acquired by the Catalyst Group Inc., a Canadian investment firm.[37] The bankruptcy generated criticism of the FTC's review and approval of the remedy, though at least one former agency official defended the outcome, saying that although "the first buyer didn't succeed, . . . there is competition in a significant percentage of those markets that were initially at issue" after a subsequent buyer purchased the divested locations.[38] These justifications notwithstanding, Advantage's failure under Franchise Services' management seemingly fell far short of the FTC's expectations, and the remedy was widely viewed as unsuccessful.

2. Albertsons/Safeway. Less than 6 months after Advantage filed for bankruptcy, in March 2014, the parent company of Albertson's LLC ("Albertsons") announced plans to purchase rival grocery chain Safeway Inc. ("Safeway") for $9.4 billion.[39] The merger between the two supermarket giants drew significant scrutiny from the FTC. Prior to the merger, Albertsons was the fifth largest grocer in the United States and operated approximately 1,075 supermarkets in 29 U.S. states, while Safeway was the second largest and operated more than 1,300 stores nationwide.[40]

After approximately 10 months of investigation into the transaction, the FTC identified 130 local markets in western and mid-western states where it alleged that the merger would be anticompetitive.[41] To resolve the FTC's concerns, Albertsons and Safeway agreed to divest 168 supermarkets in the relevant geographic markets. Haggen Holdings, LLC ("Haggen") was the largest buyer of the divested stores, acquiring 146 Albertsons and Safeway stores in Arizona, California, Nevada, Oregon, and Washington.[42] A much smaller chain, Haggen had operated as an independent family-owned grocery retailer in the Pacific Northwest for many years before its 2011 acquisition by the Comvest Group ("Comvest"), a private investment firm.[43] Comvest largely financed its purchase of the divested stores through the sale and leaseback of the underlying real estate.[44]

Following the divestiture, Haggen almost immediately encountered problems in the newly converted stores. Consumers began complaining about high prices, and sales subsequently dropped.[45] Haggen particularly struggled in Southern California and Nevada, where its prices were significantly higher than those of its competitors.[46] Industry experts estimated that "the average family of five in

36. Press Release, FTC, FTC Approves Franchise Services of North America's Application to Sell Certain Advantage Rent A Car Locations to Hertz and Avis Budget Group (May 30, 2014). The FTC would later approve Franchise Services' sale of four additional Advantage locations, two more to Avis Budget and two to Sixt Rent A Car. *See id.*; Press Release, FTC, FTC Approves Sale of Airport Car Rental Assets in Portland, Oregon and San Jose, California (Sept. 5, 2014).
37. *Id.*
38. Charles McConnell, *An Interview with Deborah Feinstein*, Global Competition Rev. (May 8, 2017), http://globalcompetitionreview.com/article/1140838/an-interview-with-deborah-feinstein.
39. Brian Solomon, *Cerberus Buys Safeway, Merges It With Albertsons for Over $9 Billion*, Forbes (Mar. 6, 2014), https://www.forbes.com/sites/briansolomon/2014/03/06/cerberus-buys-safeway-merges-it-with-albertsons-for-over-9-billion/#5cb8df04481c.
40. *Id.*
41. Complaint, Cerberus Institutional Partners V, LP, AB Acquisition LLC, and Safeway, Inc., Docket No. C-4504 (Jan. 27, 2015).
42. Press Release, FTC, FTC Requires Albertsons and Safeway to Sell 168 Stores as Condition of Merger (Jan. 27, 2015).
43. Laura Gunderson, *The Comvest Group Buys Majority of Grocer Haggen Inc.*, Oregonian (Feb. 17, 2011), http://www.oregonlive.com/business/index.ssf/2011/02/the_comvest_group_buys_majorit.html.
44. Angel Gonzalez, *Judge Approves Sale of Haggen to Albertsons*, Seattle Times (Mar. 29, 2016), http://www.seattletimes.com/business/retail/judge-approves-sale-of-haggen-to-albertsons/.
45. Hannah Madans & Nancy Luna, *Haggen Bankruptcy: Failure is the 'Fastest' in Modern Grocery History*, Orange County Reg. (Sept. 10, 2015), http://www.ocregister.com/2015/09/10/haggen-bankruptcy-failure-is-the-fastest-in-modern-grocery-store-history/.
46. *Id.*

Southern California [was] paying $1,000 more a year to shop at Haggen compared with rival chains."[47] The pressure mounted throughout the summer of 2015, leading Haggen to begin selling some of its stores. Finally, in September 2015, a mere 7 months after the FTC announced the divestiture, Haggen filed for bankruptcy.

One possible reason for Haggen's failure is that it grew too quickly. The acquisition was a quantum leap for Haggen, which grew from 18 to 164 stores, an "audacious move" that the company may not have been prepared for.[48] Other observers opined that Haggen underestimated the competitive pressure from specialty and discount chains like Trader Joe's, Costco, and Wal-Mart, failed to invest in the marketing necessary to create brand awareness in a region where Haggen had not previously operated, and more generally lacked a feel for the California market.[49]

Following Haggen's bankruptcy, Albertsons bought back 33 of the stores it had divested less than a year earlier.[50] Because of the stores' financial liabilities, Albertsons' successful bids were as little as $1 in some cases.[51] Media reports following the buyback often noted the failure of the divestiture as a remedy for Albertsons' merger with Safeway.[52] As with the fallout from Hertz's repurchase of Advantage locations, the FTC's response was somewhat muted, with the agency maintaining that it had "not objected to Albertsons buying back stores that other supermarket operators were not interested in" because this was preferable to the stores closing.[53] The failure of a second divestiture close on the heels of Hertz/Dollar Thrifty, though, was a public blow for the FTC and appears to have prompted the agency to begin taking a closer look at its evaluations of divestiture buyers.

3. Dollar Tree/Family Dollar. The $8.7 billion acquisition of Family Dollar Stores, Inc. ("Family Dollar") by Dollar Tree Inc. ("Dollar Tree") in January 2015 (following a bidding war that also saw Dollar General attempt a takeover of Family Dollar)[54] presents a less dramatic, but also relevant series of events. Dollar Tree operated over 5,000 stores where all products were priced at a dollar or less, while Family Dollar's 8,000 stores sold goods and groceries at a larger range of discount prices.[55] Nevertheless, the FTC raised competitive concerns about the merger, and in July 2015, Dollar Tree agreed to sell 330 Family Dollar stores in 35 states to Sycamore Partners ("Sycamore"), a private equity firm, as a condition of closing the deal.[56]

47. *Id.*
48. *Id.*
49. *Id.* Haggen, however, blamed its failure on Albertsons. Around the same time it filed for bankruptcy, Haggen also filed a lawsuit against Albertsons in federal district court, arguing that Albertsons made false representations to eliminate competition. Among other claims, Haggen alleged that Albertsons (1) misused confidential information about the sequence of store conversions to coordinate advertising campaigns; (2) overstocked perishable inventory of meat and produce to disrupt Haggen's store transition; (3) provided inaccurate and misleading price information, which caused Haggen to tag products with inflated prices; and (4) failed to perform routine maintenance on stores and equipment. Complaint, Haggen Holdings, LLC v. Albertson's LLC, 2015 WL 5138125 (D. Del. Sept. 1, 2015). The suit, which originally sought $1 billion, was settled for only $5.75 million. Angel Gonzalez, *Albertsons Settles Haggen's $1 Billion Lawsuit for $5.75 Million*, Seattle Times (Jan. 22, 2016), http://www.seattletimes.com/business/retail/albertsons-settles-haggens-1-billion-lawsuit-for-575-million/.
50. Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger with Safeway*, Wall Street J. (Nov. 24, 2015), https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.
51. *Id.*
52. *Id.*; Gonzalez, *supra* note 44.
53. *Id.*
54. Paul Ziobro, *Dollar Tree Wins the Battle for Family Dollar*, Wall Street J. (Jan. 22, 2015), https://www.wsj.com/articles/dollar-generals-quest-for-family-dollar-ends-1421937864.
55. *Id.*
56. Press Release, FTC, FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger (Jul. 2, 2015).

Less than 2 years later, in a March 30, 2017, FTC filing, Sycamore said that its vehicle for operating the divestiture business, Dollar Express LLC ("Dollar Express"), "could no longer viably operate as a standalone business,"[57] and less than a month later, the FTC approved Sycamore's application to sell Dollar Express's 323 stores to Dollar General.[58] Sycamore attributed Dollar Express's failure to "an overall decline in sales in the dollar store industry, targeted attacks by competitors, and other unanticipated costs eroding margins," such as wage inflation and "higher than anticipated corporate and supply chain costs."[59] Despite Sycamore's claim of industry-wide decline in the dollar store business, Dollar General saw same-store sales continue to rise in the period following the divestiture and continued to open new stores each year, with a net increase of more than 1,500 stores in 2015 and 2016.[60] These continued positive results for a third-party competitor suggest that Dollar Express's narrative of overall industry decline does not fully explain its collapse and could lead some to question whether it was simply less prepared than its competitors to respond to the changing market conditions it cited.[61]

B. Ensuing Focus on the Adequacy of Divestitures and Buyers

The postdivestiture problems in the Hertz/Dollar Thrifty, Albertsons/Safeway, and Dollar Tree/Family Dollar transactions in particular exposed the FTC to varying degrees of criticism for having approved divestiture remedies that did not produce the intended results and coincided with more general criticism of conventional merger remedies policy and the effectiveness of antitrust enforcement.[62] The repurchase of divested assets by Albertsons and Hertz in particular directly unwound significant portions of the agency's remedy in each case, and the failure of Dollar Express likewise represents an instance where a competitive force the FTC believed would preserve the competitive status quo failed to do so. And while agency officials have justifiably defended the subsequent resale of divestiture assets either back to the merger parties or to third parties as the best option available under the circumstances, the results are certainly suboptimal from the perspectives of consumers and the agency

57. Application for Approval of Proposed Sale of Dollar Express Assets and Request for Expedited Treatment, Dollar Tree, Inc. and Family Dollar Stores, Inc., Docket No. C-4530 (Mar. 30, 2017).

58. Press Release, FTC, FTC Approves Sycamore Partners II, L.P. Application to Sell 323 Family Dollar Stores to Dollar General (Apr. 27, 2017).

59. Application for Approval of Proposed Sale, *supra* note 57, at 4–5.

60. Dollar General Corp, Annual Report (Form 10-K) (Mar. 24, 2017) at 6, 23.

61. Notably, however, within a few years, the combined Dollar Tree/Family Dollar faced significant challenges of its own, announcing plans in March 2019 to close nearly 400 Family Dollar stores and convert another 200 to Dollar Tree locations. Sarah Nassauer & Micah Maidenberg, *Dollar Tree to Close or Rebrand Nearly 600 Family Dollar Stores*, Wall Street J. (Mar. 6, 2019), https://www.wsj.com/articles/dollar-tree-to-close-rebrand-nearly-600-family-dollar-stores-11551877482?cx_testId=16&cx_testVariant=cx&cx_artPos=3&cx_tag=rate&cx_navSource=newsReel#cxrecs_s. And like Haggen, Sycamore and Dollar Express also placed blame on the merger parties, claiming a variety of foul play in a June 2017 lawsuit. Among other things, Dollar Express alleged that Dollar Tree misused confidential information to choose locations for new stores, including one directly across the street from a profitable Dollar Express location in Memphis, Tennessee. *See* Katherine Peralta & Rick Rothacker, *Family Dollar's 'Scheme to Kill' Charlotte Retailer Cost Thousands of Jobs, Suit Says*, Charlotte Observer (Jun. 2, 2017), http://www.charlotteobserver.com/news/business/article153904309.html. Dollar Express voluntarily dismissed its suit without prejudice less than a month after filing the complaint.

62. *See, e.g.*, Sen. Elizabeth Warren, *Reigniting Competition in the American Economy* (Jun. 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf; John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2014); Kendall & Palank, *supra* note 29; Chris Sagers, *The Limits of Divestiture as an Antitrust Remedy*, N.Y. Times (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/business/dealbook/the-limits-of-divestiture-as-an-antitrust-remedy.html; Brian Fung, *Sen. Amy Klobuchar: 'We Have a Major Monopoly Problem*,' Washington Post (Mar. 5, 2019), https://www.washingtonpost.com/technology/2019/03/05/sen-amy-klobuchar-we-have-major-monopoly-problem. *Cf.* Edith Ramirez, Keynote Remarks at Global Antitrust Enforcement Symposium (Sept. 20, 2016) at 5–9 (responding to Kwoka and other critics of merger enforcement efforts).

alike. For instance, it seems likely that the FTC would have opposed Dollar General as a divestiture buyer for the Dollar Tree/Family Dollar merger in the first instance (at least in local markets where Dollar General was already present), having identified it as one of the merger parties' primary competitors, along with Wal-Mart, 99 Cents Only, and Fred's Super Dollar.[63]

In the wake of these cases, the agencies have become increasingly sensitive to questions about the viability of proposed divestiture buyers and whether a proposed remedy package will sufficiently equip the buyer to replace the competition lost as a result of a merger. Of course, the related questions of whether a divestiture package and buyer are each adequate create a sort of chicken-and-egg inquiry and are not entirely separable. Whether a particular buyer is capable of being a strong competitor depends in part on what assets it is getting in the divestiture—or to put it the other way, whether a proposed package of assets is enough depends on who is buying them and what that buyer already has.[64]

A series of recent merger litigations where courts sided with the agencies and blocked transactions has put a spotlight on these interrelated questions and demonstrated the agencies' ability to enforce their views on the adequacy of proposed remedies in court. Additionally, even in cases that settle, the agencies have more frequently required up-front buyers and taken greater time to complete their investigations. Finally, the FTC's efforts to design effective remedies are informed by its continued study of the successes and failures of its past remedies.

1. Litigated Merger Challenges. Courts evaluating merger challenges have devoted significant time and attention to assessing the ability of a proposed divestiture buyer to operate the divested business effectively and to replace the competition eliminated by the merger. These courts have been receptive to the agencies' arguments that a buyer lacks the scale, expertise, or other qualifications needed to restore competition and have approached buyers with a critical eye.

a. Aetna/Humana. Amid a flurry of merger talks among the largest U.S. health insurers, two deals were eventually struck, both of which would ultimately be blocked by federal courts as a result of suits brought by the DOJ. While the proposed tie-up of Cigna and Anthem often garnered more attention because of Cigna's surprising strategic decision to rely heavily on an efficiencies defense[65] and the eventual in-fighting that emerged between the parties,[66] the companion case challenging the deal between Aetna and Humana is instructive with respect to the subject of divestiture buyers.

In a marked difference from the defense in Cigna/Anthem, Aetna and Humana raised several more traditional defenses. In addition to a key argument regarding market definition,[67] the parties put forth a

63. Analysis of Agreement Containing Consent Orders to Aid Public Comment, Dollar Tree, Inc. and Family Dollar Stores Inc., File No. 141-0207, p. 2 n. 2.

64. *See, e.g.*, Directorate General of Competition, European Commission, Merger Remedies Study 98 (2005) (hereinafter "EU Merger Remedies Study") ("it is sometimes difficult to distinguish between factors affecting the viability of the divested business and factors affecting the suitability of the purchaser").

65. *See Anthem*, 236 F. Supp. 3d at 181 (district court noting that "Anthem has taken the lead in defending the transaction, and it contends that any anticompetitive effects will be outweighed by the efficiencies it will generate"); 855 F.3d 345, 348 (D.C. Cir. 2017) (appeals court noting that parties "challenge the district court's decision and order primarily on the ground that the court improperly declined to consider the claimed billions of dollars in medical savings").

66. *See, e.g.*, Liz Hoffman & Anna Wilde Matthews, *Anthem, Cigna Privately Bicker as They Seek Merger Approval*, Wall Street J. (May 23, 2016), https://www.wsj.com/articles/anthem-cigna-privately-bicker-as-they-seek-merger-approval-1463909404; David McLaughlin, Andrew Harris & Jeff Feeley, *Anthem, Cigna Blast One Another Over Blocked Insurance Merger*, Bloomberg (Feb. 17, 2017), https://www.bloomberg.com/news/articles/2017-02-18/anthem-cigna-blast-one-another-over-blocked-insurer-merger.

67. The parties argued that "Original Medicare" and "Medicare Advantage" plans were part of a single relevant product market, while the government's challenge asserted that the two were distinct product markets for antitrust purposes, which resulted in significantly higher combined market shares for the parties. *See Aetna*, 240 F. Supp. 3d at 21–42.

proposed divestiture with a signed agreement, arguing that it would remedy any anticompetitive effects that might otherwise result from the merger, even under the government's posited market definition. Specifically, the parties proposed to divest Medicare Advantage plans for approximately 290,000 members in 21 states to Molina Healthcare, Inc. for approximately $117 million.[68] Molina's "core business" was Medicaid plans, which accounted for approximately 3.5 million of its roughly 4.2 million members; by contrast, it had offered individual Medicare Advantage plans in only six counties, all located in California and Utah.[69]

After acknowledging that the divestiture was likely enough to occur that it warranted consideration, Judge John Bates found that Molina would not be able to restore the competition that would be lost as a result of Aetna and Humana's merger, concluding that "although defendants advance much evidence of Molina's capabilities, ultimately each of these arguments is undermined by other contradictory evidence," especially "statements made by Molina executives and board members while the deal was being negotiated."[70] For example, the parties' arguments that Molina would leverage its past care management experience to serve the divestiture business even though it had never before offered a PPO plan was undercut by CFO John Molina's reaction ("[H]ow did we miss this?!") upon learning that 60% of the divested plans were PPOs two weeks after agreeing to purchase the divestiture.[71] Other internal Molina documents contradicted arguments that Molina could handle the divestiture, including an email stating that operating the divestiture business would be a "big fricken lift" for Molina, as well as board members' statements that "this is a very different business from what we do . . . [and] I think we are woefully under-resourced to be able to take this on" because "we don't have the internal talent to run it."[72] Finally, one board member analogized the divestiture to "the dog chasing the car and we are the dog," asking, "What happens if we catch it?"[73]

The court's analysis, however, was not limited to pointing out doubts that had been raised by Molina's internal assessments of its ability to operate the divestiture. Instead, it undertook an independent and rigorous assessment of whether Molina had the capability to operate the divested business as competitively as the merger parties had pretransaction. The court was particularly concerned with Molina's ability to build a provider network in light of its lack of any current presence in the overwhelming majority of the relevant geographies.[74] Observing that Molina would "need to build its non-dual Medicare Advantage provider network essentially from scratch in all 364 complaint counties, in 325 of which it has no presence whatsoever," the court questioned whether Molina could build a provider network within the year or so it would have before the expiration of its transitional assistance agreement with the merger parties, and ultimately concluded that it would not be able to do so.[75]

68. Press Release, Aetna, Inc., Aetna and Humana Agree to Sell Certain Medicare Advantage Assets to Molina Healthcare, Inc. (Aug. 2, 2016), https://news.aetna.com/news-releases/aetna-and-humana-agree-to-sell-certain-medicare-advantage-assets-to-molina-healthcare-inc/.
69. *Aetna*, 240 F. Supp. 3d at 61.
70. *Id*. at 64.
71. *Id*. at 65.
72. *Id*. at 70.
73. *Id*.
74. *Id*. at 65 (noting that Molina had no presence in 89% of the complaint counties and no Medicare presence in 95% of them). The divestiture package did not include Aetna's and Humana's relevant provider contracts, which illustrates how questions about a divestiture buyer's qualifications are inevitably intertwined with questions about the adequacy of proposed divestiture package.
75. Despite more optimistic testimony from Molina personnel, the court reached this conclusion based on the testimony of the president of Aetna's Medicare business, as well as evidence that Molina would not be able to build the value-based network it relied on for its value proposition due to its small size, which would limit its bargaining power. While Aetna and Humana argued that Molina would not be inhibited by its small size because provider rates for Medicare Advantage are relatively

The court also raised the "fire sale" price that Molina agreed to pay for the divestiture[76] as evidence "further support[ing] the conclusion that Molina has serious doubts about its own ability to manage all the divestiture plans but is willing to try given the low risk to the company reflected in the bargain price."[77] Finally, Judge Bates pointed to Molina's failures in past attempts to enter the Medicare Advantage market as further evidence that the divestiture was unlikely to fully restore competition. He emphasized in particular attempts that Molina made to enter Medicare Advantage in Utah and California, where it already had a substantially greater presence than it had in the states where it would acquire divested plans from Aetna and Humana, finding Molina's lack of success in those markets ominous for the prospects of the proposed divestiture.[78]

b. Sysco/U.S. Foods. A proposed divestiture to a much smaller player also failed to resolve agency concerns or persuade a court when the nation's two largest broad line foodservice distributors, Sysco and U.S. Foods ("USF"), attempted to join forces. After more than a year of investigation, the FTC filed a complaint seeking a preliminary injunction to prevent the merger in February 2015, and Judge Amit Mehta blocked the deal. Paralleling Judge Bates' *Aetna/Humana* decision in its thorough, detailed analysis and in the devotion of significant space to a preliminary market definition issue, the *Sysco* opinion goes on to consider and reject the parties' proposed divestiture to their next largest competitor, Performance Food Group (PFG).

As the only two national broad line distributors, Sysco and USF sought to persuade the court that their proposed divestiture of eleven distribution centers to PFG (along with PFG's plans for seven additional distribution centers and capacity expansions at another 16 existing centers) would establish a new national competitor just as effective as the individual merger parties before the transaction.[79] This proved too tall a task, particularly in light of PFG's own rather modest business plan, which projected that PFG would have, several years after the divestiture, less than half of the sales USF had already reported in 2013 and only a 20% market share compared to the 80% that the merged entity would hold.[80]

Judge Mehta also described himself as "skeptical" of the defendants' claim that PFG would be able to serve customers as efficiently (and indeed more cost-effectively in some cases) with far fewer distribution centers than the merged entity, pointing to Sysco's and USF's own steady proliferation of distribution centers over time as evidence that a more dense network is in fact advantageous.[81] With that in mind, the court unsurprisingly concluded that the 35 distribution centers PFG would have postdivestiture were far from sufficient for it to compete effectively against a merged entity that would hold more than 100 such centers.[82] Service of national customers was of particular concern in light of

homogenous and driven by Original Medicare provider rates, the court found that this argument was undermined by evidence that Aetna and Humana themselves sometimes negotiated significantly different rates – evidence that the parties had offered as proof that the merger would generate cost savings (because the merged company could obtain the lower of the two rates going forward). *Id.* at 65–68.

76. Molina agreed to pay $1,400 per member with statutory capital and $401 per member without statutory capital, whereas the evidence showed that typical prices are $7,000–$10,000 with statutory capital and $3,000–$5,000 without. *Id.* at 72.

77. *Id.* at 72. *See also* 2004 DOJ Remedies Guide, *supra* note 6, at 33 (noting that while the DOJ is "not directly concerned with whether the price paid for the divestiture assets is 'too low' or 'too high,'" a price below liquidation value may suggest the purchaser does not intend to continue competing with the assets).

78. *Id.* at 73.

79. *Sysco*, 113 F. Supp. 3d at 72.

80. *Id.* at 73.

81. *Id.* at 74–5.

82. *Id.* As discussed *infra* at note [125], this comparison was an inapposite one, as postdivestiture PFG's competitiveness should have been compared to that of the smaller pre-merger party (USF). Nevertheless, it seems doubtful that Judge Mehta's conclusion would have differed with the correct comparison point, given that even USF alone, with 61 distribution centers pre-merger, had a significantly more extensive distribution network than the divestiture would have given PFG.

both the smaller number of centers and the resulting gaps in PFG's geographic footprint.[83] In keeping with the similarities to the *Aetna/Humana* case, PFG's own contemporaneous documents belied the argument at trial that 11 centers were sufficient, with a board member having written to PFG's CEO that 13 distribution centers were the "bare minimum" needed to compete nationally.[84] The court credited these and other "internal projections over PFG's current position that an additional 11 distribution centers is enough to compete for national customers."[85]

A number of other factors further contributed to the court's conclusion that PFG would not be an effective competitor to the merged entity postdivestiture. First, the court questioned whether PFG could achieve a comparable cost position to the premerger parties, noting that PFG would be purchasing in significantly smaller volumes and therefore would be likely to have a higher cost of goods sold than Sysco and USF.[86] PFG was also unable to match the breadth of the merger parties' offerings, having fewer than half the stock-keeping units available through USF.[87] Finally, the court pointed to PFG's substantially smaller sales force (even after including sales employees who would transfer with the divestiture), lack of expertise in providing value-added services for particular sectors, such as health care customers, and the ongoing long-term dependence on the merged entity created by the divestiture's licensing arrangements and supply agreements as evidence that the proposed remedy was inadequate.[88]

c. Staples/Office Depot. Interrelated questions about the qualifications of a proposed divestiture buyer and the scope of a divestiture package were also at issue in the litigated challenge to the proposed merger of the two largest office supply store chains in the United States. Coming just a few years after Office Depot had merged with then number three competitor OfficeMax, the Staples/Office Depot transaction unsurprisingly generated a probing review by the FTC, and ultimately led to a court challenge, in which the agency notched another victory by securing a preliminary injunction blocking the merger.

Although it was not addressed by the court's opinion for procedural reasons,[89] the parties had made a divestiture offer that the FTC reportedly rejected out of hand. After initially offering to divest contracts that generated more than $1.25 billion, a proposal that Staples said the FTC had scorned "without making a counteroffer," the parties reached an agreement to divest a smaller set of contracts that generated about $500 million of revenue (reverting to an earlier divestiture package the FTC had also rejected) to Illinois-based wholesaler Essendant after the FTC filed its complaint but before the trial began.[90] In its pretrial brief, the FTC urged the court that the proposed divestiture "cannot salvage this Merger" because (1) the divested contracts were short-term partnerships with diversity vendors

83. *Id.* at 74–76 (noting PFG's coverage gaps in "areas where it sought, but did not receive, a distribution center," such as Cincinnati, Omaha, and Oklahoma City, as well as a smaller distribution center in Los Angeles than what PFG had requested).
84. *Id.* at 75.
85. *Id.* at 76.
86. *Id.*
87. *Id.*
88. *Id.* at 77–78.
89. After the conclusion of the government's case-in-chief, the merger parties opted to rest without presenting a defense, arguing that the government had failed to prove its *prima facie* case. As a result, the opinion granting the injunction does not address any affirmative arguments by the parties (such as that the proposed divestiture would resolve any concerns), but instead only assesses whether the government established its case.
90. Kirti Pandey, *FTC Rejected Raised Divestiture Offer for Staples-Office Depot Deal*, Reuters (Dec. 21, 2015), http://www.reuters.com/article/us-office-depot-staples-antitrust-idUSKBN0U41OO20151221; *see also* Megan Woolhouse, *Staples, Office Depot to Divest Operations as They Seek Merger Approval*, Boston Globe (Feb. 16, 2016), https://www.bostonglobe.com/business/2016/02/16/staples-office-depot-divest-operations-they-seek-merger-approval/WNHwdnJ0EfSDJRNKlDMbSO/story.html.

who would be free to return to the combined Staples/Office Depot at the expiration of their contracts; (2) Essendant would continue to depend on the merger parties for numerous services; and (3) Essendant did not currently serve the large customers in the "business-to-business" product market the FTC alleged (and which the court ultimately adopted).[91] The agency further argued that the combination of a limited set of assets and a buyer that was currently a wholesaler rather than a horizontal competitor in business-to-business accounts made the divestiture an "indirect, speculative approach" that relied on the hope that in time, smaller independent retailers that purchase from Essendant would someday compete for large customers' business.[92] In the FTC's view, the plan was a "recipe for disaster" that "would not 'fix' anything."[93]

d. Implications. The cases above illustrate not only the critical importance of having a qualified divestiture buyer, but also how the scope of the proposed remedy package colors the assessment of would-be buyers. While the hypothetical remains just that, it stands to reason that the Sysco/U.S. Foods deal could potentially have been saved if the parties had offered a more robust divestiture package tailored to address PFG's shortcomings. There may not have been a more qualified buyer for the parties to turn to, but beefing up the remedy to address some of the weaknesses the FTC attacked in court might have been enough to persuade the agency (or a court) that a divestiture could resolve the competitive concerns.[94]

The proffered Staples/Office Depot divestiture was likewise attacked on the related grounds that the divested contracts were insufficient to preserve competition (because of their short-term nature) and that the proposed buyer, because it was a wholesaler, would not be a true horizontal competitor to the combined company. And even in *Aetna/Humana*, where the court focused on the buyer's qualifications, one of the crucial obstacles to a successful divestiture was the omission of provider contracts from the divestiture package; including these contracts would have enabled the parties to present a much more plausible case that Molina could restore competition effectively by eliminating Molina's need to build a provider network.

A natural corollary is that when there is concern about whether an agency or court will find a proposed remedy package sufficient, finding a stronger candidate buyer with fewer needs can be a solution for merger parties with a strong desire to minimize the divestiture assets. While an ideal buyer may not always exist, merger parties can tip the sliding scale toward a smaller divestiture by proposing a buyer with more of the necessary assets and personnel already in place and less need for transitional assistance.

Finally, it must be noted that in extreme cases the agencies may take the position that the proffered remedy package cannot fix a deal, regardless of the buyer's identity. The most relevant example is the proposed merger of Halliburton and Baker Hughes, which the parties abandoned after a DOJ lawsuit sought to block the transaction. As two of the "Big Three" oilfield services companies, Halliburton and Baker Hughes faced an uphill battle to persuade the DOJ that sufficient competition would remain after they combined. The parties never signed a divestiture agreement, but described a proposed remedy package in sufficient detail for the DOJ to address the offer in its complaint. After alleging competitive

91. Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, FTC v. Staples, Inc., No. 1:15-cv-02115-EGS (D.D.C. Feb. 19, 2016) (hereinafter "Staples Opening Brief") at 36–38.

92. Reply Memorandum in Further Support of Plaintiffs' Motion for a Preliminary Injunction, FTC v. Staples, Inc., No. 1:15-cv-02115-EGS (D.D.C. Mar. 18, 2016) at 22.

93. Staples Opening Brief, *supra* note 91, at 38.

94. Indeed, two of the five FTC's Commissioners were apparently ready to accept the narrower remedy that was actually offered. The two Republican Commissioners at the time, Joshua Wright and Maureen Ohlhausen, voted against authorizing litigation, presumably content to accept the proposed remedy. *See* Press Release, FTC, FTC Challenges Proposed Merger of Sysco and U.S. Foods (Feb. 19, 2015).

harm in 23 relevant markets, the DOJ was quick to denounce the divestiture proposal as inadequate, regardless of who might ultimately emerge as a buyer.

The DOJ attacked the remedy proposal on several grounds, mostly relating to the divestiture being cobbled together from bits and pieces of Halliburton and Baker Hughes assets and "dividing facilities, R&D, intellectual property and personnel" rather than transferring "intact businesses" to the divestiture buyer.[95] Because the divestiture contemplated numerous instances where the merger parties would retain ownership of facilities or technology, the DOJ contended that the proposal would be highly disruptive to the divested businesses and leave the buyer dependent on the merger parties for essential services and support.[96] Finally, the complaint charged that the divestiture buyer would be unable to provide the same level of competition as the merger parties because the assets proposed for divestiture generally consisted of the less valuable and less significant of the overlapping assets.[97]

2. Settlement Trends. Because substantially more merger cases end with a negotiated settlement than with a court challenge, consent decrees are at least as important for understanding the trajectory of merger review as recent litigations. By nature, settlements provide less insight than the arguments presented to courts, as they only provide the final resolution and not the underlying reasoning and evidence, but a few observations and inferences about the agencies' current priorities can still be gleaned from recent developments.

a. Longer Investigations. First, apart from the substance of the end result, it is taking longer and longer for the antitrust agencies to reach settlements with merger parties. While a 6- to 8-month time frame was typical for an in-depth merger review as recently as the first term of the Obama administration, investigations have dragged on for steadily increasing durations.[98] Now, major deals can expect antitrust review to approach, if not exceed, a year, with in-depth investigations that lead to divestitures or litigation in 2015–2018 lasting an average of nearly 10 months after deal announcement. Of the 101 such investigations, only 15 (all resulting in divestiture orders) were completed in less than 6 months, and over half (53) took 9 months or more.[99]

The DOJ in particular has recognized the reality of longer reviews, and AAG Delrahim announced in September 2018 an admirable series of reforms pursuant to which the DOJ would "aim to resolve most investigations within six months of filing."[100] If implemented consistently, the announced reforms could be important first steps toward a more efficient merger review process, but their effectiveness will depend on how frequently the new targets are adhered to in practice and the degree to which merger parties are willing and able to meet the expectations that AAG Delrahim pointed to as important corollaries.[101] Nor is this the first time an agency has proposed these types of reforms: FTC

95. Halliburton Compliant, *supra* note 6, at ¶ 74.

96. *See id.* at ¶¶ 73–77.

97. *Id.* at ¶ 78.

98. *See, e.g.*, Donald G. Kempf, Jr., Merger Reviews: Do They Take Too Long? (Nov. 17, 2017) at 1 (citing report that significant merger reviews took an average of 11.6 months in 2016, up from just over 7 months in 2011).

99. These figures are derived from public FTC records available at http://www.ftc.gov/enforcement/cases-proceedings, public DOJ records available at https://www.justice.gov/atr/antitrust-case-filings, and from public deal announcements (*e.g.*, press releases or media reports). The time frames include only the time from deal announcement until the agency filed a complaint (either with an accompanying consent decree settling the matter via divestiture or on its own, when seeking to block the transaction) and thus do not include the duration of litigation in the instances where parties continued to pursue a deal after the agency filed suit to block it. Only merger cases involving divestiture remedies or litigation to block the transaction are included, and postclosing challenges are omitted, as they are not indicative of the timeline for a typical in-depth investigation. A full table of the data underlying these figures is included in Tables A1-A4 of the Appendix.

100. Makan Delrahim, It Takes Two: Modernizing the Merger Review Process (Sept. 25, 2018) at 6.

101. Among the key changes laid out by AAG Delrahim are a presumptive limits of 20 document custodians and 12 depositions in Second Request reviews and a 60-day window to conclude the investigation after Second Request compliance in the

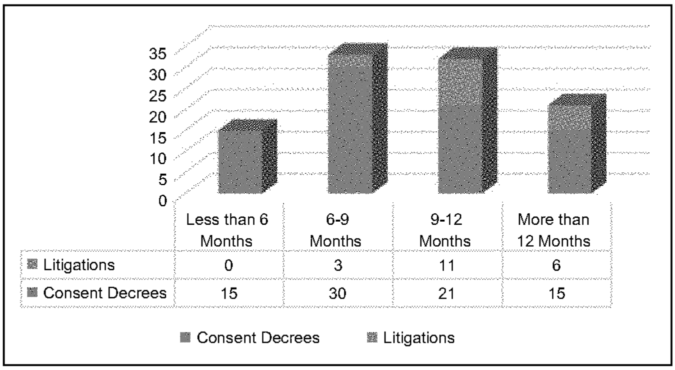

Figure 1. Distribution of complex merger investigation lengths (2015–2018).

Chair Deborah Majoras announced a similar set of reforms[102] in 2006 that ultimately failed to curb increasing review periods.

As indicated in Figure 1 (and the more detailed data in Tables A1-A4 in the appendix), a number of recent high-profile merger reviews ending in divestiture settlements have taken well over a year, although nonantitrust factors may have contributed to the extended timelines in some instances.[103]

Recent 12+ Month Investigations Ending in Divestiture Settlement

Transaction	Reviewing Agency	Months From Signing to Agency Complaint
Praxair/Linde	FTC	22.1
Bedford Labs/Hikma	FTC	20.8
Bayer/Monsanto	DOJ	20.4
Abbott Labs/Alere	FTC	19.9
DaVita/Renal Ventures	FTC	19.1
Dow/DuPont	DOJ	18.1
Ball/Rexam	FTC	16.3
Potash/Agrium	FTC	15.5
Wabtec/Faively	DOJ	15.0
Sherwin Williams/Valspar	FTC	14.2
ChemChina/Syngenta	FTC	14.0
Zimmer/Biomet	FTC	14.0
Koninklijke Ahold/Delhaize	FTC	13.0
Holcim/Lafarge	FTC	12.9
UTC/Rockwell Collins	DOJ	12.9

DOJ's model timing agreement. He noted that "in exchange," the DOJ will expect faster movement by the parties, including producing the bulk of documents and data a number of days before certifying substantial compliance with the Second Request. *See id.* at 9–10.

102. Deborah Platt Majoras, Reforms to the Merger Review Process (Feb. 16, 2006).

103. For example, the well-publicized dispute between Abbott Laboratories and Alere saw each party sue the other before eventually agreeing on a revised deal. *See, e.g.*, Michelle Cortez, *Abbott and Alere Agree to Play Nice With $5.3 Billion Deal*, Bloomberg (Apr. 14, 2017), https://www.bloomberg.com/news/articles/2017-04-14/abbott-said-to-agree-to-buy-alere-at-lower-price-of-51-shr-ft.

While a number of factors are at play in any investigation and each case is unique, the overall uptick in the length of investigations speaks to a more cautious attitude at the antitrust agencies as they work to ensure every remedy is thoroughly vetted before agreeing to settle the case.

b. Increased Use of Up-Front Buyers. The identification and approval of a divestiture buyer can proceed in one of two ways. In many instances, the agency requires that a buyer be identified and approved before entering a consent order and allowing the transaction to close. In this "buyer up-front" scenario, the consent decree identifies the divestiture buyer by name and specifically orders the respondent to divest the relevant assets to the approved buyer in a relatively short time frame, sometimes as little as 10 days.[104] Less commonly, the agency may permit a "post-order" or "no buyer up-front" divestiture by means of a consent decree that requires divestiture within a longer time frame and to any buyer that is approved by the agency. In these cases, the parties may close the merger without a signed divestiture agreement or agency approval of a buyer. The consent decree will also include an order to maintain the divestiture assets and/or to hold them separately from the parties' retained businesses pending divestiture.[105] At the opposite extreme, in at least two recent high-profile mergers with particularly complex divestitures and up-front buyers, the agencies have ordered much broader hold separate arrangements precluding *any* postclosing integration between the merger parties until completion of the divestitures.[106]

The agencies will usually only agree to a post-order divestiture if the parties can demonstrate that multiple qualified buyers are interested in the divestiture assets and that the assets are unlikely to deteriorate in the interim period between the merger closing and the divestiture.[107] Since the remedy failures in the Hertz/Dollar Thrifty and Albertsons/Safeway cases, the agencies have been substantially more reluctant to proceed without a buyer up-front. By way of illustration, up-front buyers were required in only about half of divestiture settlements reached in 2006–2012,[108] but approximately 75% of such settlements in 2015–2018.[109] The shift was particularly pronounced at DOJ, which went from permitting postorder buyers in the overwhelming majority (86%) of 2006–2012 divestiture orders to just 30% of such orders over the last 4 years, as illustrated in Figures 2 and 3.[110] The FTC had far less room for a shift, having already required up-front buyers in most divestitures before Hertz and Albertsons, but it too further tightened the reigns by mandating up-front buyers in 84% of recent orders, up from 73% in the divestitures covered by its study of 2006–2012 remedy orders.

104. *See, e.g.*, Decision & Order, Teva Pharmaceutical Industries Ltd. and Allergan PLC, Docket No. C-4589 (Sept. 7, 2016) ¶¶ II.A.–II.J. (ordering divestitures to various up-front buyers, each within 10 days of the merger closing). In general, the FTC imposes shorter timelines for up-front divestitures than the DOJ, which also frequently provides in the consent decree for the possibility of limited extensions.

105. At least in the current administration, the DOJ has been far more likely than the FTC to require a hold separate arrangement, doing so in seven of eight buyer up-front divestitures and five of seven no buyer up-front (or mixed) divestiture orders in 2017–2018, whereas the FTC has required a hold separate in only two of 37 divestiture orders over the same period (one buyer up-front, one postorder).

106. *See* Order to Hold Separate and Maintain Assets, Linde AG, Praxair, Inc., and Linde PLC, Docket No. C-4660 (Oct. 19, 2018); Stipulation and Order, United States v. Bayer AG and Monsanto Co., No. 1:18-cv-01241 (May 29, 2018).

107. *See* FTC Remedies Statement, *supra* note 14, at 7.

108. *See* FTC Bureaus of Competition and Economics, The FTC's Merger Remedies 2006–2012 (2017) (hereinafter "2017 Remedies Study") at 8. Data for DOJ-reviewed mergers during the same time period were derived from public DOJ records. *See supra* note 99.

109. Figures for both agencies during this time period were derived from public records. *See supra* note 99.

110. Orders classified as "mixed" are those which ordered multiple divestitures and required an up-front buyer for at least one divestiture but allowed a postorder buyer for others. *See, e.g.*, Decision & Order, HeidelbergCement & Italcementi, Docket No. C-4579 (Aug. 15, 2016) (FTC example); Final Judgment, United States v. United Technologies Corp. and Rockwell Collins, Inc., No. 1:18-cv-02279-RC, ECF No. 16 (D.D.C. Jan. 11, 2019) (DOJ Example).

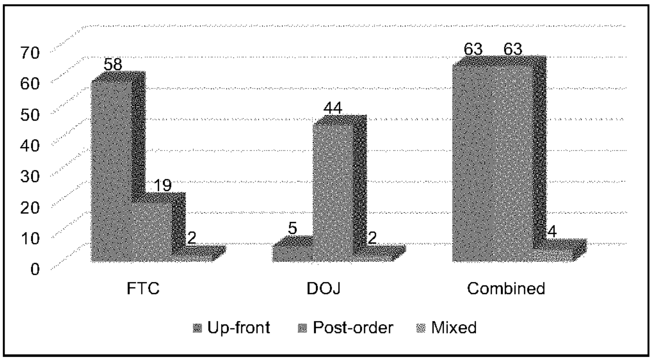

Figure 2. U.S. Divestiture orders (2006–2012).

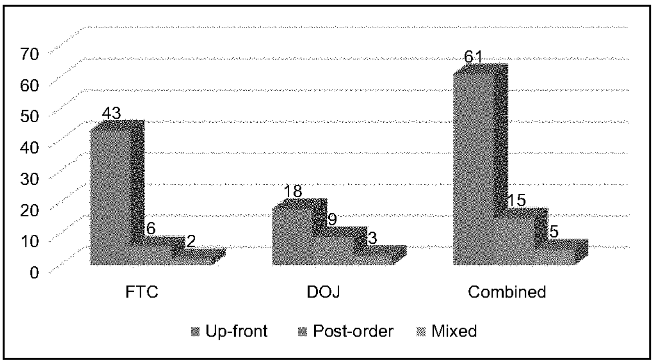

Figure 3. U.S. Divestiture orders (2015–2018).

c. Greater Scrutiny of Buyers' Finances. The FTC's recent study on the effectiveness of its past remedies points to another factor where the agency is focusing more attention: divestiture buyers' financing for the divestiture purchase and overall financial track record. Following on a similar study published in 1999, the FTC released a new study in January 2017 examining the effectiveness of merger remedies the agency imposed from 2006 to 2012. The 2017 study largely reiterates conclusions from the earlier 1999 study, such as the greater likelihood of success for divestitures comprising an existing stand-alone business rather than a carve out. It also asserts the desirability of an up-front buyer for carve-out divestitures, but notably, that claim finds no support in the data.[111]

111. Instead, the study points out that carve out divestitures do not always succeed "even with an up-front buyer," implicitly assuming that postorder divestitures are inherently riskier and would therefore fail even more frequently. *See* 2017 Remedies Study, *supra* note 108, at 5. That assumption, however, is unsupported by the data: all nine buyers of divestitures that the study rated as failures were approved up-front, while every postorder buyer was rated as either a qualified or complete success. *Id.* at 23. Likewise, while the sample size is quite limited, the direct evidence specifically regarding carve out divestitures does not support the idea that up-front buyers are more likely to succeed, as all five postorder buyers of such divestitures were rated as successes (two complete, three qualified), while a third of up-front buyers were rated as failures (nine failures, eleven qualified successes, seven complete successes). *Id.* at 23–24. Finally, even the 1999 study, which expressed preferences both for divestiture of existing businesses and up-front buyers, did not suggest that the two points were related and offered empirical support only with regard to the former. The study preferred up-front buyers not because of any evidence that they were more likely to succeed in the long run, but because they "reduce[d] the opportunity for interim competitive harm by expediting the divestiture process" and "ensure[d] at the outset that there will be an acceptable buyer." Staff of the Bureau of Competition of the FTC, A Study of the Commission's

The new remedy study also provided more detail on the factors that the FTC found most important to a divestiture buyer's likelihood of maintaining or restoring competition (and accordingly, of receiving the agency's approval as a buyer). Perhaps most importantly, the study noted that "because the success or failure of a divestiture depended, in part, on whether the buyer had adequate funding commitments to ensure success, the Commission will examine more closely, among other things, the source of the buyer's financing, its plans if the transaction does not meet its financial goals, what it has done in other instances when acquisitions have not met financial goals, and related issues."[112] In this respect, the FTC expressed its dedication to evaluating "the extent of [a funding source's] involvement and financial commitment" and the desirability of a buyer's "flexibility in investment strategy, commitment to the divestiture, and willingness to invest more when necessary," which it deemed a frequent factor in the success of past divestitures.[113]

d. Increased Focus on Connections to the Relevant Market. The 2017 remedies study also emphasized existing relationships with both upstream and downstream market participants, as well as relevant past experience in its discussion of the keys to a divestiture buyer's viability. The study noted that merger parties were more consistently proposing strong buyers than at the time of its earlier remedies study, and as examples pointed to buyers that "[were] familiar with the market, dealt with many of the same customers and suppliers, had developed thoughtful business plans with realistic financial expectations and sufficient backing, and were well received by market participants."[114] As key indicators of market familiarity, the FTC indicated it would look for buyers active in adjacent geographic or product markets, whose employees are knowledgeable about the relevant market(s) and/or buyers that had previously attempted to enter the same or similar markets.[115] With respect to the importance of credibility with customers and suppliers, the study found in particular that "customers were most likely to switch [to the divestiture buyer] when the buyers were familiar with the customers or had a prior relationship with them."[116]

e. Implications. While these principles are far from novel and have long been reflected in the agencies' review of proposed buyers, their reiteration in the 2017 remedies study provides insight into the agencies' current points of emphasis. One intriguing consequence of these particular emphases is that they may signal a stronger preference moving forward for strategic (rather than financial) buyers. At a minimum, these findings reinforce the agencies' intent to scrutinize whether a private equity or other financial buyer has institutional experience in the industry at issue, including a management team with the expertise and relationships to be a credible competitive factor immediately, and whether it can muster evidence from its past track record or otherwise that it is committed to the relevant market for the long term and not looking to flip the divestiture business for a quick profit. While it would be premature to suggest that private equity buyers will now face an uphill battle or an unfavorable presumption from the agency, it would likewise be imprudent to ignore the 2017 study's emphasis on factors that generally favor strategic buyers over financial ones.

Divestiture Process (1999) (hereinafter "1999 Remedies Study") at 39. A postorder divestiture is equally consistent with these goals, however, when multiple qualified and interested buyers are identified by the parties and the assets are subject to a hold separate and/or asset maintenance order pending divestiture, as is typical.

112. 2017 Remedies Study, *supra* note 108, at 5–6.
113. *Id.* at 24.
114. *Id.*
115. *Id.*
116. *Id.* at 26.

III. Crafting an Acceptable Remedy

As the judicial decisions and agency guidance discussed above illustrate, a merger that the antitrust agencies believe would otherwise substantially reduce competition will not receive approval without a remedy that the relevant agency believes will fully address the competitive harm. To demonstrate that a proposed divestiture will preserve the competitive status quo, merger parties must persuade the agency on two counts: first, that the package of divestiture assets contains all that is needed to be a competitive force equal to one of the premerger parties, and second, that the proposed divestiture purchaser has the ability and incentive to use the assets accordingly.[117] While these two components are intertwined and constitute a sort of sliding scale (*e.g.*, a particularly well-positioned divestiture buyer may need a less robust asset package to be competitive[118]), certain basic requirements commonly apply to each aspect of the remedy.

A. Key Elements of a Divestiture Package

Some common themes point to a variety of typical assets and provisions that the agencies frequently expect to see in divestitures. The following list of such elements is generalized, nonexhaustive, and could be over- or underinclusive in any given divestiture; each case is evaluated based on its unique facts and the guiding principle that a package should include everything a buyer needs to maintain the pretransaction level of competition. Notably, to accomplish this goal, a divestiture need only equip the buyer to step into the shoes of one of the premerger parties and need not necessarily create a competitor with the same scale, efficiency, or other benefits that the parties themselves will enjoy as a result of a synergistic merger.

1. Core Physical and Contractual Assets. The central component of the prototypical divestiture package is a set of physical assets: facilities (*e.g.*, factories, retail stores, or service centers), equipment, inventory, and related tangible property. But positioning a divestiture buyer to step into the shoes of the divesting party typically involves peripheral assets, both physical and intangible, as well. For example, where the divestiture business includes distribution, some or all of the delivery fleet may need to be divested as well, depending on the size of the buyer's existing fleet (if it has one) and its plans for optimizing distribution efficiency. Contractual rights are also frequently included in divestiture remedies, with the buyer being assigned downstream customer contracts and upstream supply agreements for product inputs. Including these contractual rights can help to ensure stability as the buyer takes over by temporarily preserving the business's existing customer base and guaranteeing that the buyer has the requisite inputs to continue operating without interruption.

Divestitures typically also include certain business records (such as customer files)[119] and sometimes encompass additional contractual rights, such as leases (where divested assets, such as facilities or vehicles, are not owned by the merger parties) and transferrable licenses, registrations, and regulatory permits. The latter take on particular importance in highly regulated industries, such as

117. In some cases, the parties may also need to consider the ability of a buyer to develop "next generation" products, particularly where the agencies have expressed concerns about harm to competition in the form of reduced innovation. *See supra* note 12.

118. *See supra* note 18. *See also, e.g.*, EU Merger Remedies Study, *supra* note 64, at 40 (noting that "a business that turned out to be nonviable in the hands of one purchaser could have been viable in the hands of another more suitable purchaser").

119. Where books and records relate to both divested and retained businesses, the parties may be permitted to redact information related to retained businesses and/or to retain copies of the divested records. *See, e.g.*, Decision & Order, Sherwin-Williams Co. and Valspar Corp., Docket No. C-4621 (Jul. 27, 2017) ¶ I.W.9. In some cases, redaction of divested records may be necessary to avoid competitive harm in other markets—for instance, if the merger parties and divestiture buyer are competitors with respect to the relevant retained business.

pharmaceuticals, where rights to applications for FDA approvals and other scientific and regulatory materials can also be included in a divestiture in order to support a buyer's ability to continue bringing a new drug to market and/or pursuing relevant research and development.[120]

2. Intellectual Property. Intellectual property rights (IPR) can also be an important component of a divestiture package, although the significance of IPR will vary with the technological sophistication of the industry at issue. For instance, the IPR divested in a rapidly evolving technology industry could include hundreds of patents, while a few trademarks might be the only IPR necessary in the divestiture of a commodity business where the relevant technology is readily available. As with other types of assets, the agencies generally start from the position that all patents and other IPR related to the divestiture business should be included. It is not uncommon, however, for much or all of the relevant IPR to be necessary for retained businesses as well as the divested business, and the agencies may be prepared to accept licensing of IPR rather than its wholesale divestiture in those cases, provided that the nonexclusive nature of the license does not disadvantage the divestiture buyer.[121] In certain circumstances, the agencies will even consider a divestiture of IPR instead of tangible assets.[122] For example, if a potential buyer has all the requisite inputs, equipment, and capacity to produce a chemical compound, it may need only the "recipe" or formulation process for producing the end product and therefore be able to preserve competition by acquiring only IPR, whether through an outright purchase or a license.[123]

3. Employees and Related Considerations. In most divestitures, the agencies will expect the parties to make relevant employees available to a divestiture buyer as well. Because employees cannot be "divested" in the same manner as tangible assets or contractual rights, the typical mechanism for ensuring that a divestiture buyer has adequate personnel to operate the divestiture business is a consent decree provision requiring that the divesting parties provide the buyer with access to the relevant employees to conduct interviews and make job offers and that the merger parties refrain from interfering with the buyer's efforts to recruit those employees. The noninterference requirement is often accompanied by a nonsolicit period during which the merger parties may not recruit employees who transfer with the divestiture to leave their new employer. In many cases, the agencies also require the merger parties to waive contractual impediments to the acceptance of employment with the divestiture buyer, including noncompete and confidentiality provisions, in order to ensure that the parties cannot seek to punish employees who transfer to the divestiture buyer.[124]

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120. *See, e.g.*, *Teva*, *supra* note 104 ¶ I.U.7.; Decision & Order, Mylan, N.V., Docket No. C-4590 (Sept. 7, 2016), ¶ I.P.5. An important related note in this regard is that the FTC has recently signaled that, in transactions where one party offers a complex pharmaceutical product (specifically, inhalants and injectable drugs) and the other party is developing a competing product, the agency will insist on divestiture of the fully developed product instead of accepting divestiture of the pipeline product as a remedy. *See* Bruce Hoffman, It Only Takes Two to Tango: Reflections on Six Months at the FTC, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum (Feb. 2, 2018) at 6–7.
121. *See* 2004 DOJ Remedies Guide, *supra* note 6, at 15–7; FTC Remedies Statement, *supra* note 14, at 9. The agencies may also consider whether merely licensing IPR rather than owning it would disadvantage the buyer competitively because it would have fewer enforcement rights as a licensee than the parties would as the owners of the IPR. An alternative arrangement is divestiture of the IP with the simultaneous grant of a license back to (or covenant not to sue) the merger parties, in which case any limitations on enforcement rights would impact the merger parties rather than the buyer.
122. *See* FTC Remedies Statement, *supra* note 14, at 8.
123. Of course, in a scenario where entry is that easy for at least some players, there are likely to be strong arguments that no divestiture is needed because new entry postmerger will be likely, timely, and sufficient to prevent any price increase. *See* Horizontal Merger Guidelines, *supra* note 4, at § 9. Merger parties, however, might nevertheless agree to a licensing remedy in order to save the time and cost of the advocacy that would be needed to persuade the agency to clear the transaction without condition.
124. *See, e.g.*, Decision & Order, Agrium, Inc., Potash Corp., and Nutrien Ltd., Docket No. C-4638 (Feb. 5, 2018), ¶ II.E.2.

With these principles well established, remedy negotiations regarding employees tend to center on which employees should be considered in-scope and made available with the divestiture. The parties may successfully argue that employees with responsibilities that straddle both divested and retained businesses (such as shared services employees or sales and marketing employees whose responsibilities include nondivested products) are not necessary for the buyer to be competitive, but the divestiture buyer's support is critical to these negotiations. The number and type of employees needed depends heavily on the buyer's existing personnel, and the buyer's input on the sufficiency of the proposed divestiture package is an important barometer for the agency.

4. Behavioral Elements. Finally, comparatively minor behavioral elements are sometimes woven into the agencies' preferred structural remedy of divestiture. Most commonly, the merger parties may be required to enter, at the acquirer's option, a transition services agreement. Pursuant to such an agreement, the buyer would receive assistance, usually for the first year or less, with shared services, transitioning historical data between systems (*e.g.*, enterprise resource planning and/or customer relationship management data), and any other similar support the buyer may need in order to take over the business without disruption.

If the buyer is not immediately able to produce the end product or a necessary input, the merger parties may be required to enter a supply agreement or contract manufacturing arrangement for the interim period until the buyer has full production capabilities. For example, if production lines must be carved out of a multipurpose facility and transferred to the buyer, the parties may be required to supply the product to the divestiture buyer (usually at cost or a fixed margin) until all the production lines have been transferred and the buyer is independently operating all of the divestiture assets. Conversely, where a significant volume of the divested product was used for internal consumption premerger, the parties may need to enter an agreement to purchase minimum volumes from the acquirer postclosing, in the same way that the contracts of third-party customers are assigned to the buyer.

Notably, the use of transition services agreements and especially of supply or purchase agreements between the divestiture buyer and the merger parties requires a balance of competing objectives. On the one hand, the agencies seek to ensure that a divestiture business is viable immediately, with the buyer fully equipped to maintain the competitive position the business held predivestiture. On the other hand, they are also keen to avoid long-term entanglements, fearing that the divestiture buyer could be left overly dependent on the merger parties.[125] Relatively short-term arrangements are often the compromise used to resolve this tension, but parties must bear these dual goals in mind when proposing a remedy, consider whether other creative arrangements could provide an alternative solution, and be mindful of the risk that a proposed remedy with numerous ongoing entanglements may meet with stiff agency resistance.

B. Choosing an Acceptable Buyer

The qualifications of proposed divestiture buyers have become the target of increasingly thorough analysis in recent years with the disappointing outcomes of the Hertz/Dollar Thrifty, Safeway/Albertsons, and Dollar Tree/Family Dollar divestitures fresh in the minds of the U.S. antitrust agencies. As a result, merger parties should carefully consider a number of competitive qualifications in addition to

125. *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 77 ("A final factor that cuts against the divestiture as a proposed fix is that PFG will be dependent on the merged entity for years following the transaction") (citing FTC v. CCC Holdings, 605 F. Supp. 2d 26, 59 (D.D.C. 2009)); Bill Baer, Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes (Sept. 25, 2013) at 3 (criticizing proposed remedy in Anheuser-Busch's acquisition of Modelo as a "non-starter . . . contain[ing] many problematic elements, including a long-term supply agreement with a U.S. importer, rather than real structural relief" because this arrangement would have left the buyer "totally dependent on ABI").

the prices offered by bidders before settling on a preferred buyer and moving into advanced negotiations on a divestiture agreement.[126]

1. Relevant Expertise. The first and foremost concern with any divestiture buyer is whether it has the requisite knowledge and aptitude to compete as effectively in the industry as one of the merger parties pretransaction. The buyer that requires the least advocacy in this regard is therefore one that has a proven record of success in adjacent markets—that is, with the same products in a different geographic area or with products that are closely related but not direct competitors to the divestiture business. Buyers who can point to "involvement in up-stream or down-stream markets, past attempts to enter the market, or previous expressions of interest in the market" also frequently make a compelling case.[127]

A tension exists between the preference for a buyer with industry experience and the need to avoid a divestiture that would create competitive issues of its own. Thus, a potential buyer that is already a substantial competitive force in the same product *and* geographic market will generally be unacceptable because acquiring the divestiture would be little different than permitting the merger without a remedy.[128] Nonetheless, divesting to an existing player is not necessarily a nonstarter. A company with a low market share in the market at issue may be able to move from a fringe competitor with little or no ability to constrain pricing to a serious competitive force by purchasing the divestiture, thereby restoring competition in accord with the agencies' goals.[129] By the same token, however, experience in related product markets will not always be sufficient in the eyes of the agencies or courts. For example, the Staples/Office Depot and Aetna/Humana mergers both involved proposed divestitures to buyers with experience in closely related businesses, yet were rejected by the FTC and DOJ, respectively. In each case, the agency contended (and in the case of Aetna, persuaded the court)[130] that the proposed buyer's experience (Essendant's as a wholesaler rather than business-to-business retailer and Molina's as a Medicaid rather than Medicare insurer) would not equip it to be a sufficient competitive force.[131] Once again, the opinions of customers and other market participants as to a buyer's qualifications and ability to operate a divestiture business competitively are important sources of evidence for the agency, and their anticipated reactions to a potential buyer should inform the parties' selection process.

2. Financial Capabilities. The FTC in particular has stated an intention to scrutinize more closely the financial arrangements behind a potential divestiture buyer's ability to make the purchase, and both agencies can be expected to probe financing in more depth moving forward.[132] Buyers with the

126. While the approach is not uniform across the globe and the approval process in particular varies, the following considerations are largely commensurate with the expectations for divestiture buyers in other jurisdictions. *See, e.g.*, EU Merger Remedies Study, *supra* note 64, at 99.
127. FTC Remedies Statement, *supra* note 14, at 11. Note, however, that past attempts to enter the market in some cases can be a double-edged sword if the attempts were unsuccessful. *See Aetna*, 240 F. Supp. 3d at 73.
128. *Id.* ("The buyer should not currently be a *significant* market participant or already be pursuing *significant* entry on its own.") (emphasis added).
129. *Id.* (noting that "[a] fringe competitor may be acceptable").
130. As noted earlier, the *Staples* court did not address the proposed divestiture for procedural reasons.
131. Staples Opening Brief at 36–38; *Aetna*, 240 F. Supp. 3d at 73. While the court's concerns seemed more focused on scale than on qualitative differences between the businesses, the rejection of PFG as a divestiture buyer in the Sysco/U.S. Foods merger, in part because it did not serve national customers, can also be thought of as an instance of experience in a related market being found insufficient to demonstrate the ability to compete effectively in the market at issue. *See Sysco*, 113 F. Supp. 3d at 73–77.
132. 2017 Remedies Study, *supra* note 108, at 5–6. The FTC's emphasis on buyers' financial considerations follows a similar observation by the European Commission in its similar study more than a decade earlier. *See* EU Merger Remedies Study, *supra* note 64, at 102. This is not to suggest that the FTC did not previously take financial considerations seriously, as they have long been a part of its buyer selection criteria, but only that this factor will likely be a point of particular emphasis in

financial flexibility to invest in the divestiture business as needed or otherwise adapt to changes in the industry are likely to appear more credible to the agencies than those stretching the limits of their financial capabilities just to acquire the business. Likewise, the FTC and DOJ place a high value on commitment to the divestiture business and would therefore see a candidate buyer with a track record of "cutting losses" by abandoning a struggling investment as less attractive than a buyer with a history of investing in weaker assets or business units to spark a turnaround. At a more basic level, past financial performance may also be used as a measure of competence, with the agencies potentially questioning a proposed buyer's ability to compete effectively if its financial history includes bankruptcies, credit defaults, or a sustained period of losses. While any or all of these potential red flags can be overcome, merger parties should satisfy themselves that the potential buyer will be able to provide the agencies with persuasive explanations of the reasons for these past events and why they are not indicative of the buyer's ability to manage the divestiture business competitively.

3. Scale. Small firms have proven no less successful on the whole than larger buyers, and it is accordingly "important not to assume that smaller firms will be weaker competitors."[133] Still, the size of the buyer's existing business in proportion to the divestiture can be a factor in assessing its likely ability to integrate and efficiently operate the divestiture assets. The prospect of a divestiture that dwarfs the buyer's current enterprise may recall the struggles that Haggen faced when it sought to grow to nearly 10 times its previous size by acquiring the Safeway/Albertsons divestiture. With the right business plan and a carefully vetted divestiture package, a buyer that will experience step-change growth if approved can be acceptable, but the process of buyer approval may be slower and require more advocacy than when a proposed buyer already manages a comparable or larger set of resources.

Moreover, the issue of fit between the divestiture package and the buyer's needs will come even more to the forefront with a smaller buyer, as the asset package will have to account for the buyer's current scale. For instance, the agencies may insist that more sales, marketing, and shared services employees be made available to the buyer in order to ensure that it does not outgrow its ability to serve customers. More tangible assets, such as manufacturing facilities or distribution warehouses, may also be required for a smaller buyer if the agency believes that the buyer's smaller scale would otherwise prevent it from (1) attaining a cost position comparable to that of the merger parties or (2) effectively serving national, international, or other geographically demanding customers. The court's concern in *Sysco/U.S. Foods* that divestiture buyer PFG would not be able to replace lost competition because the proposed divestiture would give PFG just 35 distribution centers compared to more than 100 for the merged entity, while an inapposite comparison as stated,[134] is a prime example of an instance where

the near future. *See* FTC Merger Remedies Statement, *supra* note 14, at 10–11 (2012 guidance discussing in importance of financial health and ability to make continuing investments in divestiture businesses).

133. 1999 Remedies Study, *supra* note 111, at 14. *See also* EU Merger Remedies Study, *supra* note 64, at 104 (finding that "small and/or new entrant purchasers may sometimes have more incentives to operate and develop a product in competition with the merging parties" and noting one case where "a small new entrant even helped to gradually change the market structure from a concentrated market with a few large players to a market with many smaller competitors").

134. *See Sysco*, 113 F. Supp. 3d at 74–76. In an otherwise meticulously crafted opinion, Judge Mehta made this misplaced comparison to a combined Sysco/USF. The appropriate comparison would be between postdivestiture PFG and the smaller *pre-merger* competitor (USF). As the *Sysco* opinion itself implicitly acknowledges just paragraphs earlier, a merger remedy must replace the competitive intensity lost as a result of the merger by replacing the competitive force that the merger eliminates (*i.e.*, the smaller pre-merger competitor), but it need not create a competitor as large or strong as the combined, postmerger entity. *See Id.* at 73; 2004 DOJ Remedies Guide, *supra* note 6, at 4 ("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."). Indeed, such a standard would undermine the procompetitive efficiencies generated by the economies of scale and scope that frequently flow from synergistic mergers.

the buyer's scale proved relevant, and it illustrates the importance of tailoring a divestiture package to the needs of a proposed buyer.

4. Special Considerations for Financial Buyers. Although most divestitures are purchased by "strategic" acquirers already active in related markets, private equity firms with the right credentials can and should be acceptable buyers.[135] Still, securing approval for a private equity buyer will generally require more advocacy than a strategic buyer, along with a concerted effort to demonstrate that the buyer's plans for the divestiture business are consistent with the agency's objective of restoring competition.

a. Strategic Experience. Like any buyer, a proposed financial buyer must establish that it has the requisite knowledge and expertise to operate successfully in the relevant market. While strategic buyers can point to an established core business in the same or closely related product markets to prove their savvy, the approach of private equity buyers will by necessity be slightly different. Although they are frequently invested in a broad range of industries, financial buyers can nevertheless highlight past or current success managing portfolio companies in the same industry as the divestiture business and any prior experience successfully integrating acquisitions of assets or businesses spun off from larger enterprises. Additionally, financial buyers often bolster their expertise by assembling a proposed management team with significant experience in the same or closely related businesses.

To make the principles above concrete, consider as an example a divestiture of retail clothing stores. A private equity buyer could cite its management of other retail chains as relevant experience in understanding how to maximize consumer foot traffic, utilize online sales platforms while combating purely online competitors, operate efficient supply chains to maintain optimum inventory levels, and manage sales staff. While the most useful experience would be in a closely related type of store, like a chain specializing in shoes or fashion accessories, even experience with an unrelated type of retail chain, such as hardware or grocery stores, would provide significant transferable expertise. Alternatively, a firm that has not managed retail stores in the past might still have relevant experience if some of its holdings operate elsewhere in the clothing industry, perhaps in clothing design or manufacturing. In that case, the buyer would possess a helpful knowledge of fashion trends and consumer preferences as well as valuable relationships and credibility with potential future suppliers and other strategic partners. The buyer would be strongest if it also put together a management team composed of former executives at retail and/or apparel companies.

b. Commitment to the Market. A private equity buyer also usually confronts a greater burden than a strategic buyer in demonstrating its long-term commitment to the divestiture business. For strategic buyers, the agencies are unlikely to question commitment because the divestiture fits naturally into the buyer's core business, but private equity buyers may face questions about whether their interest in the acquisition is motivated by a vision for sustained competitiveness or simply trimming some fat and quickly reselling the streamlined business for a profit or breaking it up through a series of spin-offs.[136] In a similar vein, when multiple products or business lines are being divested, the agencies may have concerns about whether the buyer is equally committed to competing with the less profitable of the divested products as it is to those that are highly profitable.

135. *See, e.g.*, EU Merger Remedies Study, *supra* note 64, at 101–102 (noting success of financial buyers, particularly with respect to divestitures of stand-alone businesses), 161–62.

136. FTC Merger Remedies Statement, *supra* note 14, at 11 (a buyer's business plans should demonstrate, *inter alia*, "that it is committed to the market"); 2004 DOJ Remedies Guide, *supra* note 6, at 31 ("[T]here should be evidence of the purchaser's intention to compete in the relevant market"). *See also* EU Merger Remedies Study, *supra* note 64, at 103–104 (noting three instances where a buyer's incentives were "questionable and damaged the remedy [because] the purchaser quickly sold on the divested business, . . . [which] also rendered the Commission's purchaser approval process useless").

The agency will request the proposed buyer's business plans, and having a vision that clearly and convincingly demonstrates an intent to manage the business for a sustained period of time with continued investment as needed can serve as key evidence that a buyer will operate the business in a manner that preserves competition. As with other criteria, past performance is also viewed as a significant predictor of future behavior, so the most compelling buyers will have a history of long-term commitment to (and continued investment in) portfolio companies rather than one of short-term turnarounds and/or piece-by-piece sales.

c. Potential for Interlocking Directorates. Finally, private equity buyers in particular should be mindful of the antitrust laws' prohibition on interlocking directorates when considering any acquisition, but especially an agency-ordered divestiture. Section 8 of the Clayton Act, with some exceptions, prohibits a person from serving as a director (or as an officer appointed or elected by the Board of Directors) for two corporations that "by virtue of their business and location of operation [are] competitors" such that an agreement between them that restricts competition would violate the antitrust laws.[137] While the law is equally applicable to strategic buyers, potential interlocking directorate issues may be less obvious for financial buyers managing a wide range of interests. Section 8 includes exemptions for very small competitive overlaps,[138] but its restrictions can nevertheless have greater relevance for a private equity firm than for other enterprises, given the large number and variety of portfolio companies that such investment firms often hold and the potential for overlaps that are not immediately apparent between small, noncore aspects of two holdings. The remedy for a Section 8 violation is injunctive relief rather than a fine, and the issue can often be resolved by an overlapping director's voluntary resignation from one board,[139] but firms can still save the time and costs associated with an agency inquiry by proactively managing board memberships and holdings to avoid any potentially prohibited interlocks.

IV. Successful Divestiture Planning

The complexities surrounding approval of a proposed remedy and particularly a divestiture buyer in the current atmosphere at the U.S. antitrust agencies call for thorough and thoughtful planning when a pending merger may raise serious competitive issues in discrete markets. Merger parties and prospective buyers alike should begin their evaluation processes early and bear in mind the agencies' renewed emphasis on buyer qualifications when preparing to propose a divestiture or pursue purchasing one. The following steps, while not an exhaustive checklist for success, can aid in minimizing the time and

137. 15 U.S.C. § 19(a)(1)(B). Courts have disagreed as to whether the term "competitors" as used in Section 8 should be construed to reach companies beyond those that would fall within the same relevant market under a traditional market definition test. *Compare* TRW, Inc. v. FTC, 647 F.2d 942, 947 (9th Cir. 1981) (two companies could be "competitors" within the meaning of Section 8 even if their products were not part of the same relevant market) *with* Am. Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 980–82 (D. Md. 1981) (holding that relevant market test determines whether companies are competitors for Section 8 purposes and finding that two bakeries were not competitors where one sold freshly baked finished products and the other sold mixes and frozen doughs and products). For market definition purposes, the agencies determine whether two products compete primarily by examining cross-elasticity of demand, asking whether a hypothetical monopolist in one product could profitably impose a small but significant nontransitory increase in price (a "SSNIP," usually defined as an increase of at least 5%). If enough customers would respond by substituting to the other products such that the SSNIP would be unprofitable, then the two products are deemed part of the same relevant market. *See* Horizontal Merger Guidelines, *supra* note 4, at § 4.1.1.

138. The *de minimis* exemptions cover situations in which the competitive sales of either corporation are less than $1 million (as adjusted for inflation) or less than 2% of that corporation's total sales, as well as interlocks where the competitive sales are less than 4% of total sales for each corporation. *See* 15 U.S.C. § 19(a)(2).

139. *See* Debbie Feinstein, *How to Comply with the Bar on Horizontal Interlocks*, FTC: Competition Matters (Jan. 23, 2017), https://www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks.

cost associated with divestitures and reduce the risk of significant agency opposition to a proposed merger remedy.

A. Considerations for Merger Parties

1. Starting Early. The divestiture process may seem like a peripheral concern for merger parties, particularly where the assets being divested are trivial in the scope of the merger and/or relate to noncore businesses. But treating the divestiture as an afterthought can have negative consequences for the main transaction and not just the divestiture itself. Most importantly, failure to reach agreement on the divestiture with the relevant agency—and in buyer up-front scenarios, the buyer as well—will delay the closing of the merger, which cannot take place until a consent decree with the agency has been finalized. And because the agencies are more and more frequently requiring up-front buyers, the great majority of cases will require not just an agreement with the agency on the scope and terms of the divestiture, but also the agency's approval of a finalized purchase agreement and buyer—all before the merger may be consummated.

Working backward from a desired closing date, divestiture planning must build in time even after reaching agreement with the agency on the broad strokes of a divestiture for a number of potentially time-consuming steps: buyer due diligence and bid preparation, advocacy regarding the sufficiency of a proposed asset package and qualifications of a proposed buyer, negotiation of a purchase agreement with the buyer and its review and approval by the agency, and the negotiation of the language in a consent decree. Moreover, agency decision-making is itself a multistep process, with the staff's recommendation needing review and approval by management and eventually senior DOJ officials or the FTC Commissioners.[140] With all these items and more on the to-do list, merger parties with a strong desire to close by a date certain cannot afford to treat divestiture planning as anything less than a key component of their broader merger preparations.

2. Communicating Clearly with Potential Buyers. In light of the agencies' increased focus on buyer qualifications, the likelihood that a bidder can be approved without significant delay or difficulty will often be a key consideration for the merger parties in selecting a preferred buyer. The importance of a buyer's likely appeal to the agencies, however, may not be apparent to bidders themselves, particularly those who have not previously been through the merger remedy process. The merger parties may find it helpful to educate prospective buyers on the agencies' expectations and stress their interest in a buyer's ability to present their qualifications clearly to the agencies in early discussions. Educating prospective buyers in this way can create an incentive for those buyers to invest the necessary time and effort in their own preparation, lest they lose out on the opportunity to purchase the divestiture because other bidders present the parties with a smoother path to an on-schedule closing. Along with this emphasis, merger parties should encourage candidate buyers who have not already done so to retain antitrust counsel with the specialized experience to navigate the merger remedies process efficiently. Communicating the importance of antitrust considerations early on can help the parties obtain the information they need to assess buyers' qualifications and encourages buyers to commit sufficient resources to developing a compelling business plan and preparing for the agency's vetting process.

140. Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), the FTC may conduct its enforcement through an administrative adjudication. In merger cases where the parties agree to a remedy, the agency's practice is to simultaneously file an administrative complaint and accept for public comment a consent decree that settles the complaint's charges. Without such an administrative procedure available, the DOJ files its complaints and accompanying consent decrees in federal court, where a judge must approve the settlement.

3. Casting a Wide Net. Merger parties may sometimes enter the divestiture planning process with a particular frontrunner in mind, but even when an obvious candidate is in play, there are benefits to marketing the divestiture business broadly and generating widespread interest. First, having a number of buyers express serious interest can create a bidding war that drives up the sale price, thereby minimizing the negative synergy of divesting the overlapping business. Relatedly, the threat of other interested acquirers can be useful leverage with a preferred buyer that proves inflexible or drags its feet in negotiation of the purchase agreement. Second, a deep pool of qualified and interested buyers is often a prerequisite to agency willingness to forgo the typical requirement of an up-front buyer. The more prospective buyers that are willing to pursue the divestiture package, the greater the agency's confidence can be that if it agrees to a divesture without an up-front buyer, the parties will be able to sell the assets within the allotted time frame to a satisfactory purchaser. Third, the ability to turn to alternative buyers is a valuable contingency plan in case a preferred buyer later revises its offer unfavorably, experiences difficulties with financing or internal approval for the acquisition, or unexpectedly withdraws from negotiation for any other reason. Such a fallback plan is equally valuable in mitigating the risk of proposing a preferred buyer with potential obstacles to agency approval—for example, if the highest bidder has a less than perfect financial track record, an arguable competitive overlap of its own with the divestiture business, or less direct experience in the industry than the prototypical strategic buyer.

4. Understanding Unique Negotiation Dynamics. Agency-ordered divestitures are the products of a three-way, rather than bilateral negotiation. In addition to the buyer and seller(s), the relevant agency must be satisfied with a divestiture agreement, and its interests do not align perfectly with either of the other parties. True, the agencies' objectives are often broadly consistent with those of the divestiture buyer, which the agency is seeking to position as an effective competitor. Nevertheless, the agencies' receptiveness to the narrative that a buyer needs assets to be competitive is not without limit, and the agencies sometimes resist other divestiture terms that the parties agree upon, such as noncompete clauses.[141] The maxim that the antitrust laws exist to protect competition rather than competitors[142] informs the agencies' approach and cautions against an overly buyer-friendly posture even as the agencies seek to ensure a buyer receives all it needs to compete immediately. Complaints by the proposed buyer undermine merger parties' advocacy regarding the sufficiency of their proposed divestiture package, and parties should strive for a productive dialogue with the buyer regarding which assets it needs early in the negotiation process. Of course, the agency will independently evaluate the sufficiency of the divestiture package, but buyers' own assessments of what they need to compete rightly carry significant persuasive weight with agency staff, and buyer support for the proposed package therefore often leads to a smoother approval process.

Divestiture agreements are typically negotiated in parallel with the consent decree that governs the merger parties' obligations vis-à-vis the FTC or DOJ. Antitrust and M&A counsel therefore need to collaborate closely in order to ensure that contractual language is consistent with the proposed consent decree as it evolves. In addition to including all the assets that the consent decree requires the merger parties to divest, the divestiture agreement should be drafted with other consent decree provisions in mind, particularly those regarding employee transfer, transition services and supply agreements, and securing consents to assignment from contractual counterparties where required. Not every consent decree provision will necessarily need to be expressly addressed in the contract, but the agencies will

141. *See, e.g.*, 2004 DOJ Remedies Guide, *supra* note 6, at 19 ("Restricting the merged firm's right to compete in final output markets or against the purchaser of the divested assets, even as a transitional remedy, is strongly disfavored. Such restrictions directly limit competition in the short term, and any long-term benefits are inherently speculative.").

142. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

review the agreement closely to ensure that its provisions do not conflict with any of the requirements in the consent decree.[143]

5. Considering Third-Party Reactions. Because consent decrees typically require the transfer of customer and supplier contracts with the divestiture business, they may also mandate that the merger parties obtain all necessary consents for the transfer of the divestiture assets—including those contracts—before closing.[144] Obtaining consents where necessary to assign contracts can therefore become a gating item for the merger, particularly where contractual counterparties attempt to leverage their power as potential holdouts in order to extract some form of compensation from the assigning party.[145] To minimize the number of resistant counterparties, merger parties should weigh potential buyers' relationships with suppliers and customers as part of their assessment of bidders' overall attractiveness. Other factors being equal, a buyer with a strong reputation in the marketplace for reliability, customer service, and overall credibility can make for a smoother divestiture process as counterparties are more inclined to accept assignment of their contracts without first attempting to exploit the parties' need for consents to assignment.

Positive relationships and credibility throughout the industry will also facilitate the agency's approval of a proposed buyer. The agencies frequently ask the opinions of key customers and other market participants regarding the viability of a proposed divestiture buyer and place substantial weight on the proposed buyer's reputation in the industry. Moreover, the FTC's recent remedy study noted its preference for buyers that "[were] familiar with the market, dealt with many of the same customers and suppliers, . . . and were well received by market participants."[146] Conversely, where other industry players credibly indicate that the proposed buyer would be less competitive than one of the pre-merger parties or a less attractive option than the remaining competitors, that feedback often raises a serious red flag that is difficult, although not impossible,[147] to overcome.

6. Planning for Postclosing Compliance. While the closing of the divestiture (and in other respects, the closing of the merger itself) may feel like the finish line for the merger parties, obligations in the consent decree are ongoing postclosing, and violations of these obligations carry serious consequences. Examples of consent decree provisions that continue to impact the parties postclosing include prohibitions on soliciting employees that transfer with the divestiture, requirements to provide transitional assistance, and obligations regarding the treatment of confidential information about the divested business. Indeed, FTC consent decrees typically incorporate the entire divestiture agreement by reference, such that any violation of the divestiture agreement is also a violation of the consent decree.[148] The FTC can seek civil penalties of more than $40,000 per day for violations of its final orders (including consent decrees),[149] and the DOJ can similarly seek civil contempt fines[150] for

143. The FTC also typically includes language in consent decrees that incorporates the divestiture agreements by reference and provides that the consent decree will govern in the event of any conflict between it and the divestiture agreement. *See, e.g.*, Decision & Order, Alimentation Couche-Tard & Cross America Partners, Docket No. C-4631 (Jan. 5, 2018) ¶ VIII.A.

144. *See, e.g.*, *Sherwin-Williams*, *supra* note 119, at ¶ II.B.

145. *See* EU Merger Remedies Study, *supra* note 64, at 48 (finding cases where "third parties behaved opportunistically and tried to maximise their leverage over the committing parties").

146. 2017 Remedies Study, *supra* note 108, at 24.

147. For instance, the agencies are sensitive to the potential for strategic behavior by respondents who may oppose the merger or proposed buyer for reasons other than genuine competitive concerns.

148. *See supra* note 143. Consent decrees at the FTC, and increasingly at the DOJ, also typically require periodic reports on the steps the parties are taking to comply with their divestiture-related obligations.

149. *See* 15 U.S.C. § 45(l); 16 C.F.R. § 1.98(c). The maximum penalty amount is subject to annual adjustment.

150. *See, e.g.*, Order on Petition by Plaintiff United States for an Order to Show Cause Why Defendant AT&T Inc. Should Not Be Found in Civil Contempt, United States v. AT&T Inc., Case No. 1:07-cv-1952 (ESH) (Jan. 14, 2009) (ordering payment of approximately $2 million civil contempt fine for violations of various confidentiality obligations).

violations of a final judgment ordering divestiture, as with any other court order. The failure to adhere to settlement obligations can also do serious damage to the parties' credibility and reputation with the agencies. Parties should therefore be cognizant of, and act diligently to comply with, their postclosing obligations.

B. Considerations for Potential Buyers

The goals of prospective buyers and merger parties are in one respect aligned: both want a smooth, swift approval for the proposed divestiture. Naturally, however, the two sides may differ on questions like the scope of the divestiture package and certain terms of the divestiture agreement. Moreover, buyers will, at least in some instances, have to fend off other would-be acquirers for the right to purchase the divestiture. Several practical steps can help buyers make a favorable impression with the antitrust agencies, position themselves as attractive candidate buyers to the merger parties, and secure favorable divestiture terms while maintaining a positive working relationship with the other parties involved.

1. Demonstrating Antitrust Savvy. Prospective buyers can help their cause by demonstrating to the merger parties that they are prepared to engage with the antitrust agencies in a timely and cooperative manner. Well-advised merger parties will be familiar with the antitrust agencies' criteria for assessing proposed merger remedies and divestiture buyers, and these parties often have a targeted closing date in mind, thereby putting a premium on keeping the merger review process as seamless as possible. The merger parties' focus on avoiding delays makes a firm grasp on the antitrust process and the agencies' substantive expectations a highly appealing trait in a potential buyer. While purchase price will always be a foremost consideration for merger parties assessing multiple bidders, the ability to navigate the antitrust approval process efficiently can be a powerful differentiating factor when the parties receive several comparable offers.

Prospective buyers can make their antitrust credentials evident in a number of ways. As a first step, retaining antitrust counsel—rather than relying solely on an M&A or general corporate team with only tangential antitrust experience—signals to the merger parties that a bidder understands the significance of antitrust approval, takes the process seriously, and is equipped to move quickly without prodding by the merger parties. Additionally, coming to initial discussions with a well-crafted business plan and a compelling résumé of qualifications will help a buyer demonstrate to the merger parties from the outset that there is a clear path to its approval by the agency. Relatedly, to the extent a buyer may present issues (*e.g.*, if it is a fringe competitor already or has red flags in its financial history), acknowledging those potential questions up front and laying out a plan to address them can go a long way toward allaying concerns that might otherwise deter the merger parties from proceeding with that buyer. Of course, a thorough business plan and persuasive responses to likely questions will help a buyer find favor not only with the merger parties but also with the agency.

2. Expressing Interest Early. Merger parties value a buyer's early interest, which signals more genuine interest and a lower likelihood that the buyer will back out of discussions after preliminary diligence or after testing the waters with a "lowball" offer. A buyer's enthusiasm for the divestiture will also be an asset to the parties, as that zeal is a powerful force in persuading the agency that the proposed package of assets is indeed a viable one. In other words, an informed buyer's assessment that the divestiture represents an attractive target can go a long way toward assuaging any initial concerns antitrust enforcers may have about whether the proposed divestiture will be a successful stand-alone business once severed from the rest of the merger parties' operations. Finally, reaching out to merger parties proactively can help a bidder gain an inside track toward being the preferred buyer and reduce the degree to which the parties feel the need to market the divestiture package to additional prospective bidders.

3. Understanding Leverage and When (Not) to Use It. Throughout the divestiture process, and especially after being chosen as the preferred bidder, divestiture buyers find themselves in a unique situation with regard to negotiating leverage. Two factors in particular weigh in the buyer's favor. First, the merger parties are generally eager to close the main transaction quickly and are therefore highly motivated to sell, often at a lower price than they might demand in an ordinary, nonmandated sale of the same assets. Second, the buyer has an ally (for the most part) in the agency, which typically listens to a buyer's input with a fair amount of deference and can insist that the parties include additional assets or agree to particular terms if persuaded that they are necessary for the buyer to be competitive.

These advantages, however, must be used judiciously. The agencies can sense an opportunistic buyer seeking to manipulate the approval process by demanding unnecessary assets or onerous terms from merger parties, and attempting to do so could damage a buyer's credibility with the agency and undercut its substantive advocacy regarding its qualifications. Likewise, a buyer that constantly tries to press its advantage and extract concessions may jeopardize its working relationship with the merger parties and find itself passed over in favor of a more cooperative buyer. Lastly, with regard to price, even if the merger parties are willing to accept an offer below what they consider the fair value of the divestiture business, a "fire sale" price may signal a lack of real interest and provoke agency skepticism about whether the potential buyer truly plans to operate the business with a view toward long-term competitiveness.[151] With these considerations in mind, buyers should understand both the opportunities created by the context of an agency-ordered divestiture and the dangers of seeking to exploit their leverage through disingenuous tactics.

V. Conclusions

Disappointing outcomes in a series of divestitures have led the U.S. antitrust agencies to examine more closely the qualifications of proposed divestiture buyers to ensure that they are capable of fully restoring competition in the markets affected by horizontal mergers and acquisitions. In an effort to strengthen the buyer vetting process, the FTC and DOJ have taken more time to conclude their investigations, insisted even more frequently on identification and approval of an up-front buyer before the merger closes, and more closely examined buyers' financial condition, relationships with market participants, and strategic expertise.

Most aspects of the agencies' implicit response to the string of dissatisfying divestiture results have been relatively predictable and logical solutions for identifying weaker candidate buyers that pose the risk of a failed merger remedy. Still, as former acting FTC Chairwoman Maureen Ohlhausen has cautioned, a reactionary shift in standards aimed at ensuring a 100% success rate for divestitures would lead to overly draconian remedies that unnecessarily eliminate merger efficiencies, creating a chilling effect on procompetitive transactions.[152] Seeking a perfect "batting average"

151. FTC Remedies Statement, *supra* note 14, at 11 (noting that while the agencies typically do not evaluate the proposed purchase price, "an offer to pay a price that is less than the break-up value of the assets may raise concerns about the buyer's incentives to compete and its commitment to the market"). *See also Aetna*, 240 F. Supp. 3d at 72 (court expressing concerns about implications of fire-sale price); EU Merger Remedies Study, *supra* note 64, at 103 (finding that "remedies were less effective in at least three [instances] where the purchaser had acquired the divested business for free, or at a negative price").

152. Leah Nylen, *'Overly Restrictive' Remedies Not Answer to Concerns About Failed Fixes, Ohlhausen Says*, MLex (May 3, 2017), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=885475&siteid=191&rdir=1. The article quotes Ohlhausen as warning that "the idea that all remedies must work 100 percent and be perfect . . . would counsel for having more restrictive remedies than might be on balance appropriate" because the agency could be "so afraid

as an agency would also ignore the dynamic nature of markets, where business lines and entire companies inevitably fail as a consequence of ordinary market developments apart from any anticompetitive mischief.[153] Moreover, the agencies may be disproportionately fixated on buyer qualifications, as the European Commission's study of its past divestitures, which devoted more attention to identifying the causes of the suboptimal remedy outcomes it identified than did the FTC's studies, found that the choice of divestiture buyer was rarely the culprit for a failed remedy.[154] More rigorous assessment of financial histories and future investment capability may aid in detecting a buyer susceptible to struggling if faced with unexpected difficulties, but past financial challenges do not always indicate present concerns and are sometimes caused by circumstances unlikely to be repeated. Similarly, taking extra time to ensure that no stone is left unturned is hardly a surprising response for agencies faced with a series of disappointing outcomes in recent enforcement, but there are numerous ways that burdens on merger parties can and should be reduced without impacting the agencies' ability to assess a transaction thoroughly.[155]

The agencies' greater insistence on up-front buyers in particular seems ill-suited to prevent to the sorts of problems that impacted the Hertz, Albertson's, and Dollar Tree transactions, given that the buyers in all three cases were approved up-front. Moreover, there is little evidence in existing empirical studies to suggest that requiring an up-front buyer reduces the risk of a failed divestiture as a general matter. The buyers in all nine of the divestitures rated as failures by the FTC's 2017 remedies study were also approved up-front, and the study does not point to any correlation between postorder buyer selection and divestiture failure.[156] If anything, then, the evidence suggests that postorder divestitures may be *more* likely to succeed than those with an up-front buyer, though further direct study of this point could provide valuable clarifying insight. One possible explanation for the greater success of postorder divestitures in the limited existing data is that the agencies may be better positioned to undertake a deliberate and thorough review when the closing of the merger is not held up by their assessment of the buyer and there is accordingly less pressure to hurry the vetting process.[157] In any event, the data support a more flexible approach on the timing of buyer identification,[158]

something might go wrong [that it] might challenge deals or make remedies that are too onerous" and reduce the efficiencies that lead parties to pursue major transactions in the first place.

153. *See supra* note 18.

154. EU Merger Remedies Study, *supra* note 64, at 98 (finding that the choice of purchaser was the "single most important cause for the remedy's ineffectiveness" in only two of the 40 remedies where interviewees raised concerns about the purchaser and selection process, which themselves represented less than half of the remedies analyzed by the study). The study also notes in nine other instances, purchaser selection "may have contributed . . . in combination with other factors" to a less than ideal remedy outcome, though "few of [the comments that raised concerns] related specifically to the suitability of the purchaser." *Id.*

155. *See, e.g.*, Maureen K. Ohlhausen, *Antitrust Policy for a New Administration* (Jan. 24, 2017) at 4–5; Kempf, *supra* note 98; Delrahim, *supra* note 100.

156. 2017 Remedies Study, *supra* note 108, at 23–24.

157. Likewise, one study has suggested that when the parties themselves have less incentive to line up a buyer with undue haste, they may more regularly present highly qualified buyers fully capable of restoring competition, although timing pressure may also counterbalance the parties' natural incentive to propose less competitive buyers with a motivation to offer an unequivocally qualified buyer in order to secure agency approval more quickly. *See* EU Merger Remedies Study, *supra* note 64, at 107–108 ("[S]ome interviewed sellers and purchasers pointed out that requiring an up-front buyer could sometimes produce unwanted negative side-effects on the overall effectiveness of the remedy" because "the seller might be tempted to carry out the sales process in an inordinate rush" by *inter alia*, affording buyers insufficient diligence).

158. This conclusion is further supported by the results of merger enforcement in Europe, where up-front buyers are rarely employed. *See* Patricia Brink, Daniel Ducore, Johannes Luebking & Anne Newton McFadden, *A Visitor's Guide to Navigating US/EU Merger Remedies*, 12 Competition L. Int'l 85, 88 (2016) ("[D]ivestitures with an identified buyer are rare in practice in the E[uropean] C[ommission]"). The EC nevertheless found that its merger remedies succeeded at rates comparable to those of the U.S. agencies. *Compare* EU Merger Remedies Study, *supra* note 64, at 135 (excluding "unclear" results, 64% of divestiture remedies effective, 29% partially effective, 7% ineffective) *with* 2017 Remedies

particularly where the divestiture assets are not prone to deterioration and multiple qualified buyers have expressed interest in the assets, leaving little doubt that a satisfactory divestiture agreement will be reached.[159]

Merger parties and prospective buyers must nevertheless be aware that the agencies are operating against the backdrop of mixed results from recent divestitures and appreciate the agencies' consequent sensitivity to buyer qualifications in order to deliver effective advocacy when seeking approval of a proposed merger remedy. By anticipating the staff's likely areas of focus and underlying concerns, merger parties can better assess the relative strengths and weaknesses of bidders, make a more informed selection of a preferred buyer, and present the agency with focused, compelling evidence to address any potential concerns with their chosen buyer. This more efficient, targeted approach to negotiating merger remedies can streamline the antitrust approval process, removing one key obstacle to major transactions and allowing the parties to focus attention and resources on the other moving parts of the merger as they progress toward closing.

Study, *supra* note 108, at 18 (66% of structural remedies in horizontal mergers rated as successes, 15% qualified successes, 19% failures; in nonconsummated mergers, 75% successes, 6% qualified successes, 19% failures). It is therefore not surprising that the EC's remedies guidance states that divestiture commitments without an identified buyer are "likely to be appropriate in the majority of cases." Comm'n Notice on Remedies Acceptable Under Council Reg. (EC) No. 139/2004 and Under Comm'n Reg. (EC) No 802/2004 (2008) ¶ 52.

159. Moreover, in the unlikely event that the parties do fail to reach an agreement in the required time period, divestiture consent decrees universally give the agency authority to appoint a divestiture trustee to divest the business in such circumstances, thereby further ensuring that the required divestiture will in fact be accomplished. *See, e.g.*, *Sherwin-Williams*, *supra* note 119, at ¶ IV. (FTC example); Final Judgment, United States v. AMC Ent. Holdings, Inc., No. 1:16-cv-02475-RDM (Mar. 7, 2017) § VI (DOJ example).

Appendix

Table A1. Duration of FTC Merger Reviews Resulting in Litigation or Divestitures (2015–2018)[a]

Matter	Date transaction announced	Date of consent decree (or litigation) press release	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Marathon Petroleum/Express Mart	4/16/2018	10/25/2018	192	6.3	Consent Decree	Up-front	N/A	
Linde/Praxair	12/20/2016	10/22/2018	671	22.1	Consent Decree	Up-front	N/A	
Penn National Gaming/Pinnacle Entertainment	12/18/2017	10/1/2018	287	9.4	Consent Decree	Up-front	N/A	
Grifols/Biotest	12/22/2017	8/1/2018	222	7.3	Consent Decree	Up-front	N/A	
CRH/Ash Grove	9/20/2017	6/14/2018	267	8.8	Consent Decree	Up-front	N/A	
Amneal Pharmaceuticals/Impax Laboratories	10/17/2017	4/27/2018	192	6.3	Consent Decree	Up-front	N/A	
Air Medical Group/AMR Holdco	8/8/2017	3/7/2018	211	6.9	Consent Decree	Up-front	N/A	
7-Eleven/Sunoco	4/6/2017	1/19/2018	288	9.5	Consent Decree	Up-front	N/A	Divestiture amounted to asset swap in particular locations
Potash/Agrium	9/12/2016	12/27/2017	471	15.5	Consent Decree	Up-front	N/A	
Becton, Dickinson/C.R. Bard	4/23/2017	12/22/2017	243	8.0	Consent Decree	Up-front	N/A	
ACT/Holiday Companies	7/10/2017	12/15/2017	158	5.2	Consent Decree	Postorder	N/A	
ACT/Jet-Pep	8/7/2017	11/22/2017	107	3.5	Consent Decree	Postorder	N/A	
RedVentures/BankRate	7/3/2017	11/3/2017	123	4.0	Consent Decree	Postorder	N/A	
Abbott Labs/Alere	2/1/2016	9/28/2017	605	19.9	Consent Decree	Up-front	N/A	
Integra/Johnson & Johnson	2/15/2017	9/27/2017	224	7.4	Consent Decree	Up-front	N/A	
Mars/VCA	1/9/2017	8/30/2017	233	7.7	Consent Decree	Up-front	N/A	
Baxter/Claris	12/15/2016	7/20/2017	217	7.1	Consent Decree	Up-front	N/A	
ACT/CST	8/22/2016	6/26/2017	308	10.1	Consent Decree	Up-front	N/A	
Sherwin Williams/Valspar	3/20/2016	5/26/2017	432	14.2	Consent Decree	Up-front	N/A	
Emerson/Pentair	8/18/2016	4/28/2017	253	8.3	Consent Decree	Up-front	N/A	
ChemChina/Syngenta (China National Chemical Corp.)	2/3/2016	4/4/2017	426	14.0	Consent Decree	Up-front	N/A	
DaVita/Renal Ventures	8/24/2015	3/28/2017	582	19.1	Consent Decree	Up-front	N/A	
C.H. Boehringer Sohn AG	6/27/2016	12/28/2016	184	6.0	Consent Decree	Up-front	N/A	
Abbott Labs/St. Jude Medical	4/28/2016	12/27/2016	243	8.0	Consent Decree	Up-front	N/A	
ON Semiconductor Corp.	11/18/2015	8/25/2016	281	9.2	Consent Decree	Up-front	N/A	
Teva/Allergan	7/27/2015	7/27/2016	366	12.0	Consent Decree	Up-front	N/A	
Mylan/Meda	2/10/2016	7/27/2016	168	5.5	Consent Decree	Up-front	N/A	
Koninklijke Ahold/Delhaize Group	6/23/2015	7/22/2016	395	13.0	Consent Decree	Up-front	N/A	
Ball/Rexam	2/19/2015	6/28/2016	495	16.3	Consent Decree	Up-front	N/A	
Heidelberg Cement/Italcementi	7/28/2015	6/17/2016	325	10.7	Consent Decree	Mixed	N/A	

(continued)

Table A1. (continued)

Matter	Date transaction announced	Date of consent decree (or litigation) press release	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Energy Transfer Equity/The Williams Companies	9/28/2015	6/9/2016	255	8.4	Consent Decree	Postorder	N/A	
Air Liquide/Airgas	11/17/2015	5/13/2016	178	5.9	Consent Decree	Postorder	N/A	
Hikma Pharmaceuticals, PLC	7/28/2015	2/26/2016	213	7.0	Consent Decree	Up-front	N/A	
Bedford Labs/Hikma	5/28/2014	2/19/2016	632	20.8	Consent Decree	Up-front	N/A	
Lupin Ltd., et. al.,	7/23/2015	2/19/2016	211	6.9	Consent Decree	Up-front	N/A	
U.S. Renal/DSI Renal	8/22/2015	12/30/2015	130	4.3	Consent Decree	Up-front	N/A	
ArcLight Energy Partners	5/15/2015	12/28/2015	227	7.5	Consent Decree	Up-front	N/A	
NXP Semiconductors N.V.	3/1/2015	11/25/2015	269	8.8	Consent Decree	Up-front	N/A	
Mylan/Perrigo	4/8/2015	11/3/2015	209	6.9	Consent Decree	Up-front	N/A	
Wright Medical Group/Tornier N.V.	10/27/2014	9/30/2015	338	11.1	Consent Decree	Up-front	N/A	
Endo International	3/18/2015	9/25/2015	191	6.3	Consent Decree	Up-front	N/A	
Pfizer/Hospira	2/5/2015	8/24/2015	200	6.6	Consent Decree	Up-front	N/A	
Dollar Tree/Family Dollar	7/28/2014	7/2/2015	339	11.1	Consent Decree	Up-front	N/A	
Zimmer/Biomet	4/24/2014	6/24/2015	426	14.0	Consent Decree	Up-front	N/A	
Reynolds American/Lorillard	7/15/2014	5/26/2015	315	10.4	Consent Decree	Up-front	N/A	
ZF Friedrichshafen/TRW	9/15/2014	5/5/2015	232	7.6	Consent Decree	Postorder	N/A	
Holcim/Lafarge	4/7/2014	5/4/2015	392	12.9	Consent Decree	Mixed	N/A	
Impax Laboratories, et. al.	10/9/2014	3/6/2015	148	4.9	Consent Decree	Up-front	N/A	
Novartis, AG (GlaxoSmithKline)	4/22/2014	2/23/2015	307	10.1	Consent Decree	Up-front	N/A	
Sun Pharmaceutical	4/7/2014	1/30/2015	298	9.8	Consent Decree	Up-front	N/A	
Albertsons/Safeway	3/6/2014	1/27/2015	327	10.8	Consent Decree	Up-front	N/A	
CDK Global/Auto/Mate	5/24/2017	3/20/2018	300	9.9	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed complaint
JM Smucker/Conagra	5/30/2017	3/5/2018	279	9.2	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed complaint
Wilhelmsen/Drew Marine	4/26/2017	2/23/2018	303	10.0	Litigation	N/A	Court blocked deal	Parties abandoned deal after court granted PI
Tronox/Cristal	2/21/2017	12/5/2017	287	9.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Sanford Health/Mid Dakota Clinic	8/22/2016	6/22/2017	304	10.0	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
DraftKings/FanDuel	11/18/2016	6/19/2017	213	7.0	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed federal court complaint

(continued)

Table A1. (continued)

Matter	Date transaction announced	Date of consent decree (or litigation) press release	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Superior/Canexus	10/6/2015	6/27/2016	265	8.7	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed administrative complaint
Advocate/Northshore	9/12/2014	12/18/2015	462	15.2	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Penn State Hershey/Pinnacle Health	6/26/2014	12/8/2015	530	17.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Staples/Office Depot	2/4/2015	12/7/2015	306	10.1	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Cabell Huntington Hospital/St. Mary's Medical Center	11/11/2014	11/6/2015	360	11.8	Litigation	N/A	Litigation withdrawn	FTC withdrew litigation following passage of new state legislation
Steris/Synergy Health	10/13/2014	5/29/2015	228	7.5	Litigation	N/A	Court allowed deal	FTC withdrew litigation after court denied motion for PI
Sysco/U.S. Foods	12/9/2013	2/19/2015	437	14.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
		Consent Decree Average	294.2	9.7	Up-Front	43	84.3%	
		Litigation Average	328.7692308	10.8	Postorder	6	11.8%	
		Overall Average	301.3	9.9	Mixed	2	3.9%	

Note. FTC = Federal Trade Commission.
[a]Excludes postclosing challenges.

Table A2. Duration of DOJ Merger Reviews Resulting in Litigation or Divestitures (2015–2018).[a]

Matter	Date transaction announced	Date of Complaint and/or Proposed Final Judgment	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Gray Television/Raycom Media	6/25/2018	12/13/2018	171	5.6	Consent Decree	Up-front	N/A	
CVS/Aetna	12/3/2017	10/10/2018	311	10.2	Consent Decree	Up-front	N/A	
UTC/Rockwell	9/4/2017	10/1/2018	392	12.9	Consent Decree	Mixed	N/A	
Disney/Fox	12/14/2017	6/27/2018	195	6.4	Consent Decree	Postorder	N/A	
CRH/Pounding Mill	3/26/2018	6/22/2018	88	2.9	Consent Decree	Up-front	N/A	
Bayer/Monsanto	9/14/2016	5/29/2018	622	20.4	Consent Decree	Up-front	N/A	
Martin Marietta/Bluegrass Materials	6/26/2017	4/25/2018	303	10.0	Consent Decree	Mixed	N/A	
Vulcan Materials/Aggregates USA	5/25/2017	12/22/2017	211	6.9	Consent Decree	Up-front	N/A	
CBS/Entercom	2/2/2017	11/1/2017	272	8.9	Consent Decree	Up-front	N/A	
Century Link/Level 3 Communications	10/31/2016	10/2/2017	336	11.0	Consent Decree	Postorder	N/A	
SDK/SGL Carbon	10/20/2016	9/27/2017	342	11.2	Consent Decree	Up-front	N/A	
Dow/DuPont	12/11/2015	6/15/2017	552	18.1	Consent Decree	Postorder	N/A	
GE/Baker Hughes	10/30/2016	6/12/2017	225	7.4	Consent Decree	Up-front	N/A	
Danone/White Wave	7/6/2016	4/3/2017	271	8.9	Consent Decree	Postorder	N/A	
Smiths Group/Morpho Detection	4/20/2016	3/30/2017	344	11.3	Consent Decree	Postorder	N/A	
Clear Channel/Fairway Media	3/3/2016	12/22/2016	294	9.7	Consent Decree	Up-front	N/A	
AMC/Carmike Cinemas	3/3/2016	12/20/2016	292	9.6	Consent Decree	Postorder	N/A	
Wabtec/Faiveley	7/27/2015	10/26/2016	457	15.0	Consent Decree	Up-front	N/A	
Nexstar Broadcasting/Media General	1/27/2016	9/2/2016	219	7.2	Consent Decree	Up-front	N/A	
Anheuser-Busch/SAB Miller	11/11/2015	7/20/2016	252	8.3	Consent Decree	Up-front	N/A	
GTCR Fund/PRN (Cision/Agility)	12/14/2015	6/10/2016	179	5.9	Consent Decree	Up-front	N/A	
Iron Mountain/Recall	6/8/2015	3/31/2016	297	9.8	Consent Decree	Mixed	N/A	
BBA Aviation/Landmark Aviation	9/23/2015	2/3/2016	133	4.4	Consent Decree	Postorder	N/A	
Gray Television/Schurz Communications	9/14/2015	12/22/2015	99	3.3	Consent Decree	Up-front	N/A	
AMC/Starplex Cinemas	7/13/2015	12/15/2015	155	5.1	Consent Decree	Postorder	N/A	
Springleaf/OneMain Financial	3/2/2015	11/13/2015	256	8.4	Consent Decree	Up-front	N/A	

(continued)

Table A2. (continued)

Matter	Date transaction announced	Date of Complaint and/or Proposed Final Judgment	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Cox Automotive/Dealertrack	6/12/2015	9/29/2015	109	3.6	Consent Decree	Up-front	N/A	
GE/Power Systems Mfg. (Alstom)	11/4/2014	9/8/2015	308	10.1	Consent Decree	Up-front	N/A	
Entercom/Lincoln Financial	12/7/2014	7/14/2015	219	7.2	Consent Decree	Up-front	N/A	
Waste Management/Deffenbaugh Disposal	9/17/2014	3/13/2015	177	5.8	Consent Decree	Postorder	N/A	
AT&T/Time Warner	10/22/2016	11/20/2017	394	13.0	Litigation	N/A	Court allowed deal	
Energy Solutions/Waste Control Specialists	11/18/2015	11/16/2016	364	12.0	Litigation	N/A	Court blocked deal	
Deere/Monsanto	11/3/2015	8/31/2016	302	9.9	Litigation	N/A	Abandoned pre-trial	
Aetna/Humana	7/2/2015	7/21/2016	385	12.7	Litigation	N/A	Court blocked deal	
Anthem/Cigna	7/23/2015	7/21/2016	364	12.0	Litigation	N/A	Court blocked deal	
Halliburton/Baker Hughes	11/16/2014	4/6/2016	507	16.7	Litigation	N/A	Abandoned pre-trial	
Electrolux/GE	9/7/2014	7/1/2015	297	9.8	Litigation	N/A	Abandoned mid-trial	
		Average for Consent Decree	269.4	8.9	Up-Front	18	60.0%	
		Average for Litigation	373.3	12.3	Postorder	9	30.0%	
		Overall Average	289	9.5	Mixed	3	10.0%	

Note. DOJ = Department of Justice.
[a]Excludes postconsummation challenges.

Table A3. Duration of U.S. Merger Reviews Resulting in Litigation or Divestitures (2015–2018).[a]

Matter	Agency	Date transaction announced	Date of consent decree	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Gray Television/Raycom Media	DOJ	6/25/2018	12/13/2018	171	5.6	Consent Decree	Up-front	N/A	
Marathon Petroleum/Express Mart	FTC	4/16/2018	10/25/2018	192	6.3	Consent Decree	Up-front	N/A	
Linde/Praxair	FTC	12/20/2016	10/22/2018	671	22.1	Consent Decree	Up-front	N/A	
CVS/Aetna	DOJ	12/3/2017	10/10/2018	311	10.2	Consent Decree	Up-front	N/A	
Penn National Gaming/Pinnacle Entertainment	FTC	12/18/2017	10/1/2018	287	9.4	Consent Decree	Up-front	N/A	
UTC/Rockwell	DOJ	9/4/2017	10/1/2018	392	12.9	Consent Decree	Mixed	N/A	
Grifols/Biotest	FTC	12/22/2017	8/1/2018	222	7.3	Consent Decree	Up-front	N/A	
Disney/Fox	DOJ	12/14/2017	6/27/2018	195	6.4	Consent Decree	Postorder	N/A	
CRH/Pounding Mill	DOJ	3/26/2018	6/22/2018	88	2.9	Consent Decree	Up-front	N/A	
CRH/Ash Grove	FTC	9/20/2017	6/14/2018	267	8.8	Consent Decree	Up-front	N/A	
Bayer/Monsanto	DOJ	9/14/2016	5/29/2018	622	20.4	Consent Decree	Up-front	N/A	
Amneal Pharmaceuticals/Impax Laboratories	FTC	10/17/2017	4/27/2018	192	6.3	Consent Decree	Up-front	N/A	
Martin Marietta/Bluegrass Materials	DOJ	6/26/2017	4/25/2018	303	10.0	Consent Decree	Mixed	N/A	
Air Medical Group/AMR Holdco	FTC	8/8/2017	3/7/2018	211	6.9	Consent Decree	Up-front	N/A	
7-Eleven/Sunoco	FTC	4/6/2017	1/19/2018	288	9.5	Consent Decree	Up-front	N/A	Divestiture amounted to asset swap in particular locations
Potash/Agrium	FTC	9/12/2016	12/27/2017	471	15.5	Consent Decree	Up-front	N/A	
Becton, Dickinson/C.R. Bard	FTC	4/23/2017	12/22/2017	243	8.0	Consent Decree	Up-front	N/A	
Vulcan Materials/Aggregate USA	DOJ	5/25/2017	12/22/2017	211	6.9	Consent Decree	Up-front	N/A	
ACT/Holiday Companies	FTC	7/10/2017	12/15/2017	158	5.2	Consent Decree	Postorder	N/A	
ACT/Jet-Pep	FTC	8/7/2017	11/22/2017	107	3.5	Consent Decree	Postorder	N/A	
RedVentures/BankRate	FTC	7/3/2017	11/3/2017	123	4.0	Consent Decree	Postorder	N/A	
CBS/Entercom	DOJ	2/2/2017	11/1/2017	272	8.9	Consent Decree	Up-front	N/A	
Century Link/Level 3 Communications	DOJ	10/31/2016	10/2/2017	336	11.0	Consent Decree	Postorder	N/A	
Abbott Labs/Alere	FTC	2/1/2016	9/28/2017	605	19.9	Consent Decree	Up-front	N/A	
Integra/Johnson & Johnson	FTC	2/15/2017	9/27/2017	224	7.4	Consent Decree	Up-front	N/A	
SDK/SGL Carbon	DOJ	10/20/2016	9/27/2017	342	11.2	Consent Decree	Up-front	N/A	
Mars/VCA	FTC	1/9/2017	8/30/2017	233	7.7	Consent Decree	Up-front	N/A	
Baxter/Claris	FTC	12/15/2016	7/20/2017	217	7.1	Consent Decree	Up-front	N/A	
ACT/CST	FTC	8/22/2016	6/26/2017	308	10.1	Consent Decree	Up-front	N/A	
Dow/DuPont	DOJ	12/11/2015	6/15/2017	552	18.1	Consent Decree	Postorder	N/A	
GE/Baker Hughes	DOJ	10/30/2016	6/12/2017	225	7.4	Consent Decree	Up-front	N/A	

(continued)

Table A3. (continued)

Matter	Agency	Date transaction announced	Date of consent decree	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Sherwin Williams/Valspar	FTC	3/20/2016	5/26/2017	432	14.2	Consent Decree	Up-front	N/A	
Emerson/Pentair	FTC	8/18/2016	4/28/2017	253	8.3	Consent Decree	Up-front	N/A	
ChemChina/Syngenta	FTC	2/3/2016	4/4/2017	426	14.0	Consent Decree	Up-front	N/A	
Danone/White Wave	DOJ	7/6/2016	4/3/2017	271	8.9	Consent Decree	Postorder	N/A	
Smiths Group/Morpho Detection	DOJ	4/20/2016	3/30/2017	344	11.3	Consent Decree	Postorder	N/A	
DaVita/Renal Ventures	FTC	8/24/2015	3/28/2017	582	19.1	Consent Decree	Up-front	N/A	
C.H. Boehringer Sohn AG	FTC	6/27/2016	12/28/2016	184	6.0	Consent Decree	Up-front	N/A	
Abbott Labs/St. Jude Medical	FTC	4/28/2016	12/27/2016	243	8.0	Consent Decree	Up-front	N/A	
Clear Channel/Fairway Media	DOJ	3/3/2016	12/22/2016	294	9.7	Consent Decree	Up-front	N/A	
AMC/Carmike Cinemas	DOJ	3/3/2016	12/20/2016	292	9.6	Consent Decree	Postorder	N/A	
Wabtec/Faiveley	DOJ	7/27/2015	10/26/2016	457	15.0	Consent Decree	Up-front	N/A	
Nexstar Broadcasting/Media General	DOJ	1/27/2016	9/2/2016	219	7.2	Consent Decree	Up-front	N/A	
ON Semiconductor Corp.	FTC	11/18/2015	8/25/2016	281	9.2	Consent Decree	Up-front	N/A	
Teva/Allergan	FTC	7/27/2015	7/27/2016	366	12.0	Consent Decree	Up-front	N/A	
Mylan/Meda	FTC	2/10/2016	7/27/2016	168	5.5	Consent Decree	Up-front	N/A	
Koninklijke Ahold/Delhaize Group	FTC	6/23/2015	7/22/2016	395	13.0	Consent Decree	Up-front	N/A	
Anheuser-Busch/SAB Miller	DOJ	11/11/2015	7/20/2016	252	8.3	Consent Decree	Up-front	N/A	
Ball/Rexam	FTC	2/19/2015	6/28/2016	495	16.3	Consent Decree	Up-front	N/A	
Heidelberg Cement/Italcementi	FTC	7/28/2015	6/17/2016	325	10.7	Consent Decree	Mixed	N/A	
GTCR Fund/PRN (Cision/Agility)	DOJ	12/14/2015	6/10/2016	179	5.9	Consent Decree	Up-front	N/A	
Energy Transfer Equity/The Williams Companies	FTC	9/28/2015	6/9/2016	255	8.4	Consent Decree	Postorder	N/A	
Air Liquide/Airgas	FTC	11/17/2015	5/13/2016	178	5.9	Consent Decree	Postorder	N/A	
Iron Mountain/Recall	DOJ	6/8/2015	3/31/2016	297	9.8	Consent Decree	Mixed	N/A	
Hikma Pharmaceuticals, PLC	FTC	7/28/2015	2/26/2016	213	7.0	Consent Decree	Up-front	N/A	
Bedford Labs/Hikma	FTC	5/28/2014	2/19/2016	632	20.8	Consent Decree	Up-front	N/A	
Lupin Ltd., and others	FTC	7/23/2015	2/19/2016	211	6.9	Consent Decree	Up-front	N/A	
BBA Aviation/Landmark Aviation	DOJ	9/23/2015	2/3/2016	133	4.4	Consent Decree	Postorder	N/A	
U.S. Renal/DSI Renal	FTC	8/22/2015	12/30/2015	130	4.3	Consent Decree	Up-front	N/A	
ArcLight Energy Partners	FTC	5/15/2015	12/28/2015	227	7.5	Consent Decree	Up-front	N/A	
Gray Television/Schurz Communications	DOJ	9/14/2015	12/22/2015	99	3.3	Consent Decree	Up-front	N/A	
AMC/Starplex Cinemas	DOJ	7/13/2015	12/15/2015	155	5.1	Consent Decree	Postorder	N/A	
NXP Semiconductors N.V.	FTC	3/1/2015	11/25/2015	269	8.8	Consent Decree	Up-front	N/A	
Springleaf/OneMain Financial	DOJ	3/2/2015	11/13/2015	256	8.4	Consent Decree	Up-front	N/A	

(continued)

Table A3. (continued)

Matter	Agency	Date transaction announced	Date of consent decree	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Mylan/Perrigo	FTC	4/8/2015	11/3/2015	209	6.9	Consent Decree	Up-front	N/A	
Wright Medical Group/Tornier N.V.	FTC	10/27/2014	9/30/2015	338	11.1	Consent Decree	Up-front	N/A	
Cox Automotive/Dealertrack	DOJ	6/12/2015	9/29/2015	109	3.6	Consent Decree	Up-front	N/A	
Endo International	FTC	3/18/2015	9/25/2015	191	6.3	Consent Decree	Up-front	N/A	
GE/Power Systems Mfg. (Alstom)	DOJ	11/4/2014	9/8/2015	308	10.1	Consent Decree	Up-front	N/A	
Pfizer/Hospira	FTC	2/5/2015	8/24/2015	200	6.6	Consent Decree	Up-front	N/A	
Entercom/Lincoln Financial	DOJ	12/7/2014	7/14/2015	219	7.2	Consent Decree	Up-front	N/A	
Dollar Tree/Family Dollar	FTC	7/28/2014	7/2/2015	339	11.1	Consent Decree	Up-front	N/A	
Zimmer/Biomet	FTC	4/24/2014	6/24/2015	426	14.0	Consent Decree	Up-front	N/A	
Reynolds American/Lorillard	FTC	7/15/2014	5/26/2015	315	10.4	Consent Decree	Up-front	N/A	
ZF Friedrichshafen/TRW	FTC	9/15/2014	5/5/2015	232	7.6	Consent Decree	Postorder	N/A	
Holcim/Lafarge	FTC	4/7/2014	5/4/2015	392	12.9	Consent Decree	Mixed	N/A	
Waste Management/Deffenbaugh Disposal	DOJ	9/17/2014	3/13/2015	177	5.8	Consent Decree	Postorder	N/A	
Impax Laboratories, et. al.	FTC	10/9/2014	3/6/2015	148	4.9	Consent Decree	Up-front	N/A	
Novartis, AG (GlaxoSmithKline)	FTC	4/22/2014	2/23/2015	307	10.1	Consent Decree	Up-front	N/A	
Sun Pharmaceutical	FTC	4/7/2014	1/30/2015	298	9.8	Consent Decree	Up-front	N/A	
Albertsons/Safeway	FTC	3/6/2014	1/27/2015	327	10.8	Consent Decree	Up-front	N/A	
CDK Global/Auto/Mate	FTC	5/24/2017	3/20/2018	300	9.9	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed complaint
JM Smucker/Conagra	FTC	5/30/2017	3/5/2018	279	9.2	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed complaint
Wilhelmsen/Drew Marine	FTC	4/26/2017	2/23/2018	303	10.0	Litigation	N/A	Court blocked deal	Parties abandoned deal after court granted PI
Tronox/Cristal	FTC	2/21/2017	12/5/2017	287	9.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
AT&T/Time Warner	DOJ	10/22/2016	11/20/2017	394	13.0	Litigation	N/A	Court allowed deal	
Sanford Health/Mid Dakota Clinic	FTC	8/22/2016	6/22/2017	304	10.0	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
DraftKings/FanDuel	FTC	11/18/2016	6/19/2017	213	7.0	Litigation	N/A	Abandoned pretrial	Parties abandoned after FTC filed federal court complaint
Energy Solutions/Waste Control Specialists	DOJ	11/18/2015	11/16/2016	364	12.0	Litigation	N/A	Court blocked deal	
Deere/Monsanto	DOJ	11/3/2015	8/31/2016	302	9.9	Litigation	N/A	Abandoned pre-trial	
Aetna/Humana	DOJ	7/2/2015	7/21/2016	385	12.7	Litigation	N/A	Court blocked deal	

(continued)

Table A3. (continued)

Matter	Agency	Date transaction announced	Date of consent decree	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Anthem/Cigna	DOJ	7/23/2015	7/21/2016	364	12.0	Litigation	N/A	Court blocked deal	
Superior/Canexus	FTC	10/6/2015	6/27/2016	265	8.7	Litigation	N/A	Abandoned pre-trial	Parties abandoned after FTC filed administrative complaint
Halliburton/Baker Hughes	DOJ	11/16/2014	4/6/2016	507	16.7	Litigation	N/A	Abandoned pre-trial	
Advocate/Northshore	FTC	9/12/2014	12/18/2015	462	15.2	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Penn State Hershey/Pinnacle Health	FTC	6/26/2014	12/8/2015	530	17.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Staples/Office Depot	FTC	2/4/2015	12/7/2015	306	10.1	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
Cabell Huntington Hospital/St. Mary's Medical Center	FTC	11/11/2014	11/6/2015	360	11.8	Litigation	N/A	Litigation withdrawn	FTC withdrew litigation following passage of new state legislation
Electrolux/GE	DOJ	9/7/2014	7/1/2015	297	9.8	Litigation	N/A	Abandoned mid-trial	
Steris/Synergy Health	FTC	10/13/2014	5/29/2015	228	7.5	Litigation	N/A	Court allowed deal	FTC withdrew litigation after court denied motion for PI
Sysco/U.S. Foods	FTC	12/9/2013	2/19/2015	437	14.4	Litigation	N/A	Court blocked deal	PI granted pending outcome of administrative adjudication
			Average for Consent Decree	285.0	9.4	Up-Front Buyer	61	75.3%	
			Average for Litigation	344.4	11.3	Postorder Buyer	15	18.5%	
			Overall Average	297	9.8	Mixed	5	6.2%	
			Median for Consent Decree	256	8.4				
			Median for Litigation	305	10.0				
			Overall Median	287	9.4				

Note. FTC = Federal Trade Commission; DOJ = Department of Justice.
[a]Excludes postconsummation challenges.

Table A4. Duration of DOJ Merger Reviews Resulting in Litigation or Divestitures (2006–2012).[a]

Matter	Date transaction announced	Date of Complaint and/or Proposed Final Judgment	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Star Atlantic/Veolia	7/18/2012	11/15/2012	120	3.9	Consent Decree	Postorder	N/A	
Standard Parking/Central Parking	2/28/2012	9/26/2012	211	6.9	Consent Decree	Postorder	N/A	
UTC/Goodrich	9/21/2011	7/26/2012	309	10.2	Consent Decree	Mixed	N/A	
Humana/Arcadian	8/24/2011	3/27/2012	216	7.1	Consent Decree	Postorder	N/A	
International Paper/Temple Inland	9/6/2011	2/10/2012	157	5.2	Consent Decree	Postorder	N/A	
Deutsche Borse/NYSE Euronext	2/15/2011	12/22/2011	310	10.2	Consent Decree	Postorder	N/A	Divestiture of equity; buyer approval only required if private sale/placement rather than sale on open market
Exelon/Constellation	4/28/2011	12/21/2011	237	7.8	Consent Decree	Postorder	N/A	
Blue Cross/New West Health Services	8/1/2011	11/8/2011	99	3.3	Consent Decree	Postorder	N/A	
Grupo Bimbo/Sara Lee	11/9/2010	10/21/2011	346	11.4	Consent Decree	Postorder	N/A	
Cumulus Media/Citadel Broadcasting	3/10/2011	9/8/2011	182	6.0	Consent Decree	Postorder	N/A	Divestiture by trustee (from the outset), not parties
GE/Converteam	3/28/2011	8/29/2011	154	5.1	Consent Decree	Postorder	N/A	
Regal Beloit/A.O. Smith	12/12/2010	8/17/2011	248	8.2	Consent Decree	Up-front	N/A	
Unilever/Alberto-Culver	9/27/2010	5/6/2011	221	7.3	Consent Decree	Postorder	N/A	
Stericycle/Health care Waste Services	9/24/2010	4/8/2011	196	6.4	Consent Decree	Postorder	N/A	
L.B. Foster/Portec Rail	2/16/2010	12/14/2010	301	9.9	Consent Decree	Up-front	N/A	
Amcor/Rio Tinto	12/21/2009	6/10/2010	171	5.6	Consent Decree	Postorder	N/A	
AMC/Kerasotes Showplace Theaters	1/19/2010	5/21/2010	122	4.0	Consent Decree	Postorder	N/A	
Baker Hughes/BJ Services	8/31/2009	4/27/2010	239	7.9	Consent Decree	Postorder	N/A	
ES&S/Premiere Voting Equipment	9/2/2009	3/8/2010	187	6.1	Consent Decree	Postorder	N/A	
Bemis/Alcan	7/5/2009	2/24/2010	234	7.7	Consent Decree	Postorder	N/A	
Ticketmaster/Live Nation	2/10/2009	1/25/2010	349	11.5	Consent Decree	Up-front	N/A	Divestiture via licensing of Ticketmaster host platform
Stericycle/MedServe	5/9/2009	11/30/2009	205	6.7	Consent Decree	Postorder	N/A	
Cameron Int'l/NATCO	6/1/2009	11/17/2009	169	5.6	Consent Decree	Postorder	N/A	
AT&T/Centennial	11/7/2008	10/13/2009	340	11.2	Consent Decree	Postorder	N/A	

(continued)

Table A4. (continued)

Matter	Date transaction announced	Date of Complaint and/or Proposed Final Judgment	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Sapa/Indalex	6/16/2009	7/30/2009	44	1.4	Consent Decree	Postorder	N/A	Main transaction was purchase pursuant to bankruptcy auction
Republic Services/Allied Waste	6/22/2008	12/3/2008	164	5.4	Consent Decree	Postorder	N/A	
InBev/Anheuser-Busch	7/13/2008	11/14/2008	124	4.1	Consent Decree	Postorder	N/A	
Verizon/Alltel	6/5/2008	10/30/2008	147	4.8	Consent Decree	Postorder	N/A	
Manitowoc/Enodis	6/30/2008	10/6/2008	98	3.2	Consent Decree	Postorder	N/A	
Raycom/Lincoln Financial Media	4/1/2008	8/28/2008	149	4.9	Consent Decree	Postorder	N/A	
Hawker Beechcraft/Signature Flight	2/21/2008	7/3/2008	133	4.4	Consent Decree	Postorder	N/A	
Verizon/Rural Cellular	7/29/2007	6/10/2008	317	10.4	Consent Decree	Postorder	N/A	
Cengage/Houghton Mifflin	11/30/2007	5/28/2008	180	5.9	Consent Decree	Postorder	N/A	
Regal Cinemas/Consolidated Theaters	1/14/2008	4/29/2008	106	3.5	Consent Decree	Postorder	N/A	
Altivity Packaging/Graphic Packaging	7/10/2007	3/5/2008	239	7.9	Consent Decree	Postorder	N/A	
Cookson/Foseco	10/11/2007	3/4/2008	145	4.8	Consent Decree	Postorder	N/A	
UnitedHealth/Sierra Health Services	3/11/2007	2/25/2008	351	11.5	Consent Decree	Postorder	N/A	Structured as postorder but with a preferred buyer (see Para. S)
Thomson/Reuters	5/15/2007	2/19/2008	280	9.2	Consent Decree	Postorder	N/A	
Bain/Clear Channel	11/16/2006	2/13/2008	454	14.9	Consent Decree	Postorder	N/A	
Pearson plc (Reed Elsevier/Harcourt)	5/4/2007	1/24/2008	265	8.7	Consent Decree	Post-order	N/A	
CommScope/Andrew	6/26/2007	12/6/2007	163	5.4	Consent Decree	Postorder	N/A	
Vulcan Materials/Florida Rock	2/19/2007	11/13/2007	267	8.8	Consent Decree	Postorder	N/A	
AT&T/Dobson Communications (Cellular One)	6/29/2007	10/30/2007	123	4.0	Consent Decree	Postorder	N/A	
Abitibi Consolidated/Bowater Inc.	1/29/2007	10/23/2007	267	8.8	Consent Decree	Postorder	N/A	
Monsanto/Delta Pine & Land	8/14/2006	5/31/2007	290	9.5	Consent Decree	Mixed	N/A	
Cemex/Rinker	10/27/2006	4/4/2007	159	5.2	Consent Decree	Postorder	N/A	Hostile takeover - announcement date is launch of hostile offer
Alltel/Midwest Wireless	11/17/2005	9/7/2006	294	9.7	Consent Decree	Postorder	N/A	

(continued)

Table A4. (continued)

Matter	Date transaction announced	Date of Complaint and/or Proposed Final Judgment	Days between	Months	Resolution	Buyer Type	Litigation Outcome	Notes
Mittal/Arcelor	5/19/2006	8/1/2006	74	2.4	Consent Decree	Up-front	N/A	Structured as up-front but gives parties the option to divest to an alternative buyer if approved by DOJ
McClatchy/Knight Ridder	3/12/2006	6/27/2006	107	3.5	Consent Decree	Postorder	N/A	
Inco/Falconbridge	10/10/2005	6/23/2006	256	8.4	Consent Decree	Up-front	N/A	
Exelon/Public Service Enterprise Group	12/20/2004	6/22/2006	549	18.0	Consent Decree	Postorder	N/A	
AT&T/T-Mobile	3/20/2011	8/31/2011	164	5.4	Litigation	N/A	Abandoned pre-trial	
H&R Block/TaxAct	10/13/2010	5/23/2011	222	7.3	Litigation	N/A	Court blocked deal	
Verifone/Hypercom	11/17/2010	5/12/2011	176	5.8	Litigation	Up-front	Divestiture settlement	Parties agreed to divestiture (on 8/4/2011) after DOJ sued to block
JBS/National Beef Packing	2/29/2008	10/20/2008	234	7.7	Litigation	N/A	Abandoned pretrial	
		Consent Decree Average	217.0	7.1	Up-front buyers	5	9.8%	
		Litigation Average	199.0	6.5	Postorder buyers	44	86.3%	
					Mixed	2	3.9%	

Note. DOJ = Department of Justice.
[a]Excludes postconsummation challenges.

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