

TOWARD GUIDELINES FOR MERGER REMEDIES

Albert A. Foer[†]

INTRODUCTION

The remedial aspects of merger enforcement activity have been the subject of close scrutiny and fresh thinking over the past few years. In August 1999, the Federal Trade Commission (“FTC”) released its staff *Study of the Commission’s Divestiture Process* with its analysis of factors that may explain why some orders have been more successful than others in addressing competitive concerns. The Study also suggested “best practices” for future consideration, such as requiring upfront designation of an acceptable buyer in appropriate cases and reviewing the buyer’s business plan with respect to the assets being divested.¹ Several months later, in two speeches receiving widespread coverage, Chairman Robert Pitofsky offered his views on (1) why there is “no more important set of policy questions facing the antitrust community than defining the nature and limits of appropriate restructuring in merger review,”² and (2) “what factors the FTC should rely upon in deciding whether and to what extent restructuring can save an otherwise anti-competitive transaction.”³ In May 2000, Richard Parker and David Balto deepened the dialogue with their thoughtful article on *The Evolving Approach to Merger Remedies*,⁴ which concluded with several “going forward” suggestions, such as a strong preference for divestiture of an ongoing business rather than more limited or “mix-and-match” arrangements

[†] Mr. Foer is President of the American Antitrust Institute (“AAI”), Washington, D.C. The author gratefully acknowledges input from Gail Conlon, Kenneth Davidson, Daniel Ducore, John Kwoka, Robert Lande, Mary Lou Steptoe, Spencer Waller, and especially Robert Skitol.

¹ BUREAU OF COMPETITION, FED. TRADE COMM’N, A STUDY OF THE COMMISSION’S DIVESTITURE PROCESS (1999), available at <http://www.ftc.gov/os/1999/9908/divestiture.pdf> (last visited Oct. 15, 2001).

² Jaret Sieberg, *FTC Chief Wants Divestiture Guidelines*, THE DAILY DEAL, Dec. 16, 1999, at 1.

³ Robert Pitofsky, *The Nature and Limits of Restructuring in Merger Review*, Remarks at the Cutting Edge Antitrust Conference Law Seminars International, at <http://www.ftc.gov/speeches/pitofsky/restruct.htm> (Feb. 17, 2000).

⁴ Richard Parker & David Balto, *The Evolving Approach to Merger Remedies*, ANTITRUST REP., May 2000, at 2.

and more frequent use of interim trustees.⁵ In August 2001, Chairman Timothy Muris expressed his view that “[a]n effective remedy is a fundamental part of merger enforcement”⁶ and his commitment to “a divestiture that will likely create a viable *business entity* (rather than a creation of lawyers) to resolve the competitive problems posed” by any merger under review.⁷

The attention devoted to this subject has thrown a spotlight upon a central reality of merger enforcement activity at both of the federal antitrust agencies that the Bush administration’s appointees have inherited. The Hart-Scott-Rodino Antitrust Improvements Act of 1976⁸ (“HSR”) has had the largely unanticipated effect of moving the merger law development and enforcement policy process from a regime of post hoc adjudication to ad hoc regulation and pre hoc administrative negotiation. Today, relatively few merger cases are litigated, and a new body of administrative law has consequently evolved outside of the judiciary’s sight.⁹ To a large extent, the antitrust treatment of mergers is driven by a step-by-step application of the principles in the *Horizontal Merger Guidelines*.¹⁰ This is not to say there is anything like strict adherence to the Guidelines’ prescriptions, for it is apparent that substantial discretion is exercised in their application. In vast areas unaddressed by the Guidelines, however, largely unreviewed administrative discretion is exercised on a day-to-day basis without formal structure. Nowhere is this more substantively important than in the handling of deal restructuring, because the standard is to fix anticompetitive components rather than litigate. Negotiations over fixes take place under the powerful lever

⁵ *Id.* at 24.

⁶ Timothy Muris, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity, Remarks at the ABA Antitrust Section Annual Meeting (emphasis in original), at <http://www.ftc.gov/speeches/muris/murisaba.htm> (Aug. 7, 2001).

⁷ Speech by Timothy Muris, *supra* note 6, at <http://www.ftc.gov/speeches/muris/murisaba.htm>. As we go to press, Assistant Attorney General Charles James has announced a new “Merger Review Process Initiative” to focus on “early identification of issues” and “negotiation of investigation plans,” aimed at streamlining the entire merger review exercise and thereby reducing burdens confronting all parties involved. See Press Release, Antitrust Division Releases Details of Merger Review Process Initiative, at http://www.usdoj.gov/atr/public/press_releases/2001/9305.htm (Oct. 12, 2001). For a copy of the Initiative, see DEP’T OF JUSTICE, MERGER REVIEW PROCESS INITIATIVE, at <http://www.usdoj.gov/atr/public/9300.htm> (Oct. 12, 2001).

⁸ Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. § 18(a) (1994 & Supp. V 1999)).

⁹ See Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1399 (1998) (“Under this system only a tiny handful of transactions are ever challenged in court by either agency.”). See generally William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825 (1997) (noting that more merger litigation, particularly at the appellate level, would be helpful for the continued evolution of merger guidelines).

¹⁰ DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (rev. ed. 1997) reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (1998).

of the threat of litigation and delay but without any meaningful public input.

More specifically on that last point, neither published FTC “analyses” of proposed consent orders nor Department of Justice (“DOJ”) “competitive impact statements” filed with proposed consent decrees offer insight into trade-offs accepted during negotiations or reasons for accepting settlements that may differ in important respects from settlements in other apparently similar cases. The FTC occasionally receives comments on its proposed orders but does not publish its responses to them; DOJ publishes responses to comments received on its proposed decrees as required by the Antitrust Practice and Procedure Act of 1974 (“Tunney Act”),¹¹ but its responses rarely address the comments in an informative fashion. Indeed, DOJ outcomes are often revealed in only the most cursory terms in press releases that are unaccompanied by consent decrees, thereby circumventing the public scrutiny intended by the Tunney Act.

I believe the time has come to consider a more structured and transparent approach to the remedial phase of the merger review process. The vehicle I suggest is the promulgation of *Horizontal Merger Remedy Guidelines*. Part I of this paper explains my thinking in this regard. Part II highlights the main elements of the attached set of draft guidelines for this purpose.

I. CHANNELING ADMINISTRATIVE DISCRETION: THE TASK AHEAD

Broad administrative discretion can be a good thing, especially early in a governmental program when the best patterns of practice have not yet become manifest. But, sooner or later, it becomes prudent to narrow administrative discretion in the interests of assuring “discretionary justice” (in the words of administrative law expert Kenneth Culp Davis) through a structured framework. In the case of merger enforcement, this should take the form of (1) studying enforcement patterns, (2) deriving best practices, (3) formalizing rules, (4) providing transparency so that the public can understand and evaluate decisions being made, and (5) conducting regular post hoc evaluations to determine how well the program is working.

As already noted, the FTC Divestiture Study followed by the Pitofsky speeches and the Parker-Balto article had the effect of inviting the antitrust community to begin the process of structuring the enforcement agencies’ discretion. A next step was actual application of core recommendations from those initiatives, a process Chairman Muris appeared to endorse in his August 2001 address to

¹¹ Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-258, § 2, 88 Stat. 1706 (1974) (codified at 15 U.S.C. § 16).

the ABA. This may in part be a matter of self-protection. As agency resources become increasingly stretched and as restructuring proposals become more complicated, the need grows for streamlining the negotiating process and even declaring that certain restructurings are too taxing for the agencies to consider. Sometimes the agencies should just say no. I now outline my thoughts on further steps down this same path.

First, there is a need for more and better analysis of past restructurings. The FTC Divestiture Study was a commendable start in this direction but it insufficiently framed the core question under review: "whether the buyer of the divested assets was able to enter the market and maintain operations." The broader and more critical questions for future study are how well the divested assets performed over time compared to how they were performing prior to divestiture, and whether the buyer supplied real competition or merely cooperated in coordinated interaction or sat under the price-setting umbrella of the merged firm. Did the divested enterprise earn operating profits? Did it gain or lose market share? Did it constrain the merged firm's pricing, and did it contribute to innovation activity in the market generally? What is the realistic prognosis for its sales and earnings in the years ahead?

In the proposed acquisition of Pathmark by Royal Ahold, the American Antitrust Institute provided the FTC data based on a study by economist Ronald W. Cotterill in which he examined the effectiveness of Royal Ahold's divestitures in prior mergers.¹² His data showed that in some markets the divested supermarkets were performing twenty-five percent below stores that were not divested.¹³ This would not seem to reflect a successful restructuring, even though divested supermarkets were maintaining operations. Thus, additional empirical work would be useful for shaping future restructurings.

Second, as noted, I believe the time has come for focused consideration of Horizontal Merger Remedy Guidelines as an addendum to the Horizontal Merger Guidelines. In this paper and its attachment, I propose a working draft for them. The logical next step would be for the agencies to initiate one or more workshops for the public to comment on this draft or some similar document, and to consider whether it is in the public interest to go in this direction.

Here are twelve questions raised by the remedy dialogue over the course of the past three years and now warranting more deliberate

¹² Press Release, American Antitrust Institute, American Antitrust Institute Warns FTC of Dangers in Supermarket Mergers, Urges Careful Scrutiny of Ahold Acquisitions in Northeast, at <http://www.antitrustinstitute.org/recent/32.cfm> (June 18, 1999).

¹³ See Letter from Albert A. Foer, American Antitrust Institute, to Robert Pitofsky, FTC Chairman, at <http://www.antitrustinstitute.org/recent/32.cfm> (June 18, 1999).

attention: (1) Is it the agencies' obligation to assure that a merger will not result in any reduction of competition? (2) Who should bear the risk of a failed divestiture, the parties seeking to merge or consumers? (3) Should the standard be to approve any reasonably acceptable buyer or to select one likely to restore competition? (4) When should an upfront buyer be required? (5) Should there be a presumption in favor of spinning off an entire business unit with all required intellectual property, manufacturing capabilities, marketing network, other infrastructure (e.g., warehousing facilities), and minimum efficient scale for advertising, purchasing and other purposes, rather than partial divestments? (6) When should the agencies accept some form of behavioral relief? (7) When should the agencies permit entangling arrangements between the merged firm and the acquirer of the divested assets and, if so, should there be time limits on them? (8) When should the agencies accept informal relief unaccompanied by a binding consent decree or order? (9) At what point does a deal that plainly requires massive and disruptive divestitures to address antitrust concerns warrant a presumption that the purpose is to acquire market power by taking apart a rival? (10) What modifications of agency processes are needed to ensure that remedy issues receive both early and adequate attention? (11) When should regulatory remedies (including the use of trustees) be employed? And (12) How can the public get the information needed to evaluate and provide input on agency enforcement judgments in this area?

I have not attempted to answer all of these questions, but they form a backdrop for the proposals that follow.

II. PROPOSED GUIDELINES

The attached draft presents my proposal for horizontal merger remedy guidelines. It addresses only market power risks associated with a merger's elimination of actual or potential competition between the merging parties. Market power risks associated with a merger's vertical dimensions may plainly warrant kinds of relief other than those described in the draft. Vertical dimensions present legal, policy, and economic analysis issues of growing importance, particularly in (but by no means limited to) high-technology markets that exhibit complex network effects. In my view, however, the antitrust community needs more experience with these kinds of vertical issues before formal remedy guidelines for them can be proposed.

Section I of the draft highlights the general principles underlying the more specific provisions set forth in Sections II and III. Section II establishes "presumptions" regarding elements of an acceptable consent order or decree permitting a merger to proceed without further challenge; Section III establishes conditions under which merging parties may obtain early consideration of remedy proposals, and provides incentives for merging parties to invoke the procedures set forth therein, in the interests of avoiding prolonged investigations and expediting consummation of the parties' transactions. Let me briefly explain the thinking behind each of the latter substantive sections.

A. *Remedy Presumptions*

The FTC Divestiture Study identified several aspects of past settlements that materially contributed either to the success or to the failure of a required divestiture in terms of the overriding objectives of eliminating market power risks and ensuring a post-merger competitive environment.¹⁴ Section II of my proposed guidelines represents my effort to crystallize the learning from that report into presumptions about necessary elements of an effective horizontal merger remedy.

¹⁴ See BUREAU OF COMPETITION, FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 15-29 (1999) (identifying obstacles and successes gleaned from divestiture case studies), available at <http://www.ftc.gov/os/1999/9908/divestiture.pdf>.

The objective is to clarify what the agencies will need in most cases to ensure effective relief and thereby expedite the resolution of enforcement concerns that may otherwise stand in the way of completing a proposed merger. To the extent these clarifications are faithful to established and now widely accepted core tenets of U.S. merger law, the business community should embrace them as removing or at least reducing obstacles to desirable efficiency-enhancing merger transactions.

Presumptions include the need for (1) divestiture of all material tangible and intangible assets used by one of the merging parties to compete in each overlap area of concern with an eye on ensuring competitive viability; (2) an acceptable divestiture contract with an acceptable buyer in hand prior to consummation of the parties' proposed merger when the assets to be divested are less than an ongoing business; (3) contract provisions inducing employees of the divested enterprise to become employees of the buyer, restricting the divesting company's reemployment of those employees, prohibiting the divesting company's reacquisition of any divested assets, and providing for the continuation of all necessary third-party relationships; (4) buyer's possession of sufficient expertise, resources and incentives to become a vigorous competitor, evidenced by a meaningful business plan; (5) commitments by both the divesting party and the buyer of the assets to be divested to submission of reports on the effectiveness of the remedy two years after the effective date of the applicable order or decree; and (6) conditions for appointment of interim and monitor trustees.

My draft recognizes the need for flexibility and, in particular, circumstances when an agency might appropriately depart from the presumptions in Section II. I propose, however, that whenever an agency does so—accepting a remedy that omits any of the elements generally presumed to be necessary—there will be “a public explanation of the reasons for its determination that” the omission “is in the public interest”; and that the explanation “will provide details sufficient to enable and facilitate informed public comment during the required public comment period.” This obligation would, over time, generate a body of publicly known policy judgments that would promote (1) greater consistency from matter to matter; (2) greater understanding on the part of the business community and their counselors about required elements of acceptable merger remedies; (3) greater acceptance of those elements at early stages of remedy discussions; (4) more public scrutiny and dialogue about trade-offs underlying agency decision-making; and, as a result of all of those benefits, more effective remedy policies generally.

“Confidentiality” is an overused excuse for past agency resistance to explanations of the suggested kind. Agency desires to retain maximum discretion, to minimize creation of “precedents” that can be invoked by merging parties in subsequent cases, and to avoid acknowledgment of weaknesses in investigative conclusions are parts of the mix. An overriding reality is that many of the mergers that become conditioned on acceptance of a settlement are neither unqualifiedly anticompetitive nor unqualifiedly good for the world, either prior to or after restructuring to meet agency concerns. Complaint allegations on market definitions, entry barriers, and competitive effects often appear clear and simple while masking ambiguity and conflicting facts emerging from the underlying investigation; conversely, the parties’ efficiency claims often appear clear and simple while masking considerable doubt as to whether they will materialize. Predictions about both (1) the likely effects of the merger without any remedy and (2) the effectiveness of the remedy are almost always less secure and more debatable than press releases suggest. There should be more openness about these uncertainties, which will continue to be inevitable in a market economy as volatile and complex as I now confront.

B. Early Consideration of Remedy Proposals

Section III rests on the proposition that it is desirable for the agencies to encourage parties to proposed mergers presenting significant market power risks to submit remedy proposals during the initial HSR waiting period. To that end, the section sets forth procedures under which (1) parties opting for early remedy discussions can accompany their initial HSR filings with specified documents and other information not ordinarily included with those filings, along with specified undertakings related to remedy issues and (2) the reviewing agency thereupon becomes committed to a specified inquiry, dialogue, and schedule for meaningful early exploration of an acceptable remedial solution. There is also in Section III the prospect of some relaxation of the generally applicable presumptions set forth in Section II and thus a greater degree of flexibility in the negotiation of settlement terms. The agencies will need to demonstrate meaningful openness to the use of this option and meaningful receptiveness to relaxation of the Section II presumptions in a significant number of cases if the business community is to have confidence in it. Additional inducements to merging parties’ election of the Section III procedures include (1) the agencies’ commitment not to use any statements or proposals submitted by the parties in these procedures as admissions of any kind in any subsequent

litigation and (2) the agencies' agreement not to object if the parties in any such litigation wish to present for court consideration the adequacy of their proposed divestiture plan as part of their defense of the proposed transaction. (Another factor militating in favor of parties' use of these procedures in particular cases may be that the parties are simultaneously involving similar procedures before the European Commission, as discussed below.)

Section III seeks to overcome what, in many albeit not all circumstances, can be undesirable obstacles to early remedy discussions. Specifically, even when a merger may raise fairly obvious antitrust issues at the outset of the review process, agency reviewers may be reticent about and resistant to early, open, and meaningful dialogue with merging parties' counsel about potential concerns and how they might be addressed, preferring to retain all prerogatives for future action; and merging parties' counsel may be equally reticent about and resistant to early, open, and meaningful dialogue with agency reviewers about these matters, preferring to appear sure of the absence of any basis for enforcement concern and to preserve the possibility that the deal will escape close agency attention.

The result is too often exceptionally expensive and prolonged Second Request investigations going all the way to their bitter end before remedy discussions even begin. This is sometimes rationalized on the ground that "responsible" remedy discussions cannot begin until "all the facts are in" and both sides know everything there is to know about both sides' strengths and weaknesses. It brings to mind the old story about the perfect being the enemy of the good, disserving the interests of both the merging parties and the public at large.¹⁵

The Europeans have a better approach built into their system. European Commission ("EC") procedures provide incentives for the merging parties to proffer "undertakings" in the third week of the phase-one review process; if that option is pursued, serious remedy discussions ensue and, even if the phase-two period goes forward, the expectation is that it will be short-lived and will evolve into a reasonably quick resolution of the matter. If the undertakings option is not pursued and the phase-two notice is then issued, a full phase-

¹⁵ The above comments should not be construed as implying that early fast-track settlement negotiations never occur. I know there have been instances when agency staff and merging parties' counsel have cooperated in producing mutually acceptable and effective remedies at very early stages of the review process. My concern is that instances of this kind are too rare, and the proposed guidelines are designed to encourage more frequent efforts in this direction.

two investigation becomes virtually unavoidable, and there is no procedural device that allows it to be abbreviated in a material way.

I don't suggest that that is a perfect approach to this problem (or that EC remedies are always ideal or better than their counterparts in the U.S.). What is nonetheless quite appealing is the idea of procedural incentives that bring both sides to remedy discussions at an early point in the merger review process. Conversely, there should be adverse consequences from tactical judgments by counsel and their clients to "play out strings" and thereby force agencies as well as the clients themselves to waste resources on unnecessarily extended investigations.

On our side of the Atlantic, one of the reasons why there can be more confidence in an early settlement than in one fashioned ten or more months after a deal is announced is because of the harm done to the overlap business of the company to be acquired during the prolonged investigation period. The business will inevitably deteriorate as a result of customer uncertainty, employee defections, and managerial inability to undertake capital investments and otherwise pursue long-term strategies (often due to strictures on their actions routinely built into merger agreements). In short, a meaningful divestiture to a suitable buyer announced within a few months after the merger itself is announced is far more likely to be successful in preserving competition within the affected market than the same or similar divestiture announced many months later.

To the extent my proposal promotes early completion of merger investigations with less burden to all parties involved, it advances an objective that both Chairman Muris and Department of Justice Antitrust Chief Charles James have vowed to pursue. As Chairman Muris has observed: "we need to find ways to do our jobs more efficiently"; merger investigations "take longer than necessary" and "[w]e will try to expedite the process"; "[i]mproved communication is part of the answer"; and both sides need "to join issue on the critical aspects" of merger inquiries at earlier stages.¹⁶ As Chief James observed in his preview of the October, 2001 DOJ Merger Review Process Initiative: "the agencies and the private bar could do a much better job in the merger enforcement process if we acknowledge our contributions to the problem and work to minimize the tactical maneuvering and gamesmanship"; "[b]oth sides would benefit from an orderly review period that has greater procedural certainty"; and, to that end, he has announced a program under which the agency may commit to "specific procedural agreements" that expedite the

¹⁶ Speech by Timothy Muris, *supra* note 6, at <http://www.ftc.gov/speeches/muris/murisaba.htm>.

completion of merger reviews.¹⁷ Commitments to early remedy discussions under conditions outlined in the proposed guidelines could be a meaningful part of that program. AAI welcomes comments and suggestions on all aspects of the proposed guidelines attached to this paper.

PROPOSED HORIZONTAL MERGER REMEDY GUIDELINES

I. INTRODUCTION

- A. As set forth in the Horizontal Merger Guidelines, the mandate of the Antitrust Division of the U.S. Department of Justice and of the Federal Trade Commission (hereafter “Agency” or “Agencies”) in the exercise of their horizontal merger enforcement responsibilities is to prevent the consummation of proposed mergers that may create, increase, or facilitate the exercise of significant market power in any relevant product or geographic market. At the same time, however, the Agencies recognize that proposed mergers presenting risks of significant market power effects may also present prospects for significant procompetitive efficiencies. This fact underlines the reviewing Agency’s responsibility to work with parties to a proposed merger that presents market power risks to fashion a consent order or decree that eliminates the risks, then allows the merger to go forward, and thereby ensures a post-merger environment at least as competitive as evident in the pre-merger environment.
- B. Section II of these Guidelines establishes presumptions regarding necessary elements of an acceptable consent order or decree permitting such a merger to proceed without further challenge. As indicated therein, the Agencies accept the obligation of public explanation whenever they accept a consent

¹⁷ Charles A. James, U.S. Department of Justice, *Be Careful What You Wish For: Some Thoughts on the Merger Review Process*, Address Before ABA Antitrust Section Annual Meeting, at <http://www.usdoj.gov/atr/public/speeches/8764.htm> (Aug. 7, 2001). *See also* Sieberg, *supra* note 2. While the DOJ Initiative deals with some of the issues and ideas raised in this article, many others are ignored, leaving open to further experience the question of whether the Initiative goes far enough. Note that the DOJ Initiative was not jointly produced with the FTC, which raises the possibility of inconsistent procedures at the two enforcement agencies.

order or decree in such a case that omits one or more of these elements. Section III of these Guidelines establishes conditions under which merging parties may obtain early consideration of remedy proposals, and provides incentives for merging parties to invoke the procedures set forth therein, in the interests of avoiding prolonged investigations and expediting consummation of the parties' transactions. Both sections address only risks associated with horizontal overlaps, entailing elimination of actual or potential competition between the merging parties. Market power risks associated with vertical dimensions of a transaction may require other kinds of relief that are not addressed in these Guidelines.

II. NECESSARY ELEMENTS OF AN EFFECTIVE REMEDY

- A. A proposed merger presenting significant market power risks should not be permitted to proceed absent pre-consummation Agency acceptance of a consent order or decree ensuring elimination of the identified risks. An acceptable consent order or decree for this purpose must address each horizontal overlap between the merging parties that presents significant market power risks. The reviewing Agency will presume that the risks presented by any such overlap area are not eliminated unless the relief includes divestiture of all material tangible and intangible assets used by one of the merging parties to compete in that overlap area. The relief should prevent any diminution of competition in each affected product and geographic market with due regard for all relevant dimensions of competition—price, service, quality, innovation, and variety.
- B. The reviewing Agency will not presume that a proposed divestiture encompassing less than an ongoing business suffices to eliminate identified risks absent execution of an acceptable contract with an acceptable buyer prior to consummation of the proposed merger. More specifically:
 1. For the contract to be acceptable, it must provide adequate due diligence with respect

to the assets in question, adequate incentives for employees of the divested enterprise to become employees of the buyer, restrictions on the divesting company's reemployment of those employees, prohibitions on the divesting company's reacquisition of any divested assets, and provisions for the continuation of necessary supply, distribution, and other outside relationships.

2. For the buyer to be acceptable, it must possess demonstrable expertise, resources and incentives sufficient to maintain the competitive viability of the divested enterprise, enjoying both scale and scope economies comparable to those enjoyed by the existing owner and thereby ensuring preservation of effective competition in the relevant market or markets of concern. The buyer should be encouraged to submit a proposed business plan for the Agency's review in connection with the Agency's consideration of the buyer's acceptability. The plan should reflect a realistic strategy to become a vigorous and successful competitor in the relevant market or markets of concern on a long-term basis.
3. In appropriate cases, the Agency may require retention of an independent investment banker or other outside advisor at the parties' expense to assist in assessing the acceptability of both the contract terms and the proposed buyer, in evaluating the merits of the proposed business plan, and otherwise in determining whether the proposed divestiture can be expected to result in an independent enterprise with realistic prospects for long-term financial and competitive viability.
4. The Agency will be sensitive to risks of deterioration in assets and goodwill of the

entity to be divested during the period between announcement of the proposed transaction under investigation and completion of the contemplated divestiture. If any such material deterioration has occurred, the Agency may require that it be addressed and cured in an effective manner in the divestiture plan.

5. The reviewing Agency will not presume that a proposed divestiture suffices to eliminate identified risks absent commitments by both the divesting party and the buyer of the assets to be divested to submission of reports, in a manner specified by the reviewing Agency, on the effectiveness of the remedy, particularly on whether it succeeded in preserving competition in the relevant market or markets of concern, two years after the effective date of the applicable order or decree.
 6. See the Appendix to these Guidelines for additional criteria relevant to the acceptability of a proposed divestiture plan.
- C. If the parties seek to consummate their merger prior to consummation of the proposed divestiture, the consent order or decree must include an acceptable interim arrangement under which the enterprise to be divested is held and operated separately from the merged firm. To be acceptable, the arrangement must include appointment of a suitable interim trustee whose responsibility is to ensure that the assets to be divested are appropriately maintained, that the enterprise continues to compete independently during the interim period, and that the divestiture occurs in a manner consistent with the objectives of the consent order or decree.
- D. Any consent order or decree that omits any of the elements set forth in paragraphs A, B and C above must include provisions for appointment of an

acceptable monitor trustee whose function will be (a) to supervise compliance with all of the terms of the order or decree, (b) report to the Agency on any deficiencies in the compliance process, and (c) report to the Agency on the effectiveness of the remedy, particularly on whether it succeeded in preserving competition in the relevant market or markets of concern, one year after the effective date of the applicable order or decree. Any such order or decree must also include provisions enabling the Agency to institute proceedings under which it may seek additional relief, including the divestiture of specified additional assets, in the event the Agency accepts the monitor's findings of either deficiencies in the compliance process or lack of effectiveness of the remedy generally.

- E. The Agency must select or approve the interim trustee under paragraph C and the monitor trustee under paragraph D, the terms of a trust agreement ensuring the trustee's fiduciary obligation to the Agency, and terms under which the merging parties commit to the trustee's compensation.
- F. In the event the Agency accepts a consent order or decree that omits any of the elements set forth in paragraphs A through E, the Agency will provide a public explanation of the reasons for its determination that omission of any such element or elements is in the public interest. The explanation will provide details sufficient to enable and facilitate informed public comment during the required public comment period.

III. OPTION TO SUBMIT REMEDY PROPOSAL DURING OR
SHORTLY AFTER EXPIRATION OF INITIAL HSR WAITING
PERIOD

- A. The Agencies encourage parties to proposed transactions presenting or likely to present significant market power risks to submit remedy proposals during or shortly after expiration of the initial HSR waiting period. To that end, and provided that the parties comply with the conditions set forth in paragraph B below, the Agencies will (a) commit to the procedures set forth in paragraph C below and (b) abide by the terms of paragraphs D and E below.
- B. Parties that want to take advantage of the procedures set forth below should accompany their initial HSR filings with all of the following:
1. Memorandum providing the parties' perspectives on horizontal overlaps and other aspects of the transaction that may raise antitrust issues, the parties' positions on appropriate definitions of the relevant market or markets for purposes of analysis of the identified overlaps, and the parties' positions on market conditions and other considerations pertinent to assessment of the proposed transaction's likely competitive effects.¹⁸
 2. Statement of commitment to full cooperation with the reviewing Agency in an investigation of the identified overlaps, other identified aspects of the transaction that may raise antitrust concerns, and of any other issues that the reviewing Agency may wish to pursue during the initial waiting period.
 3. Names and contact information on each party's (a) ten largest customers and

¹⁸ The parties may also, at their option in that memorandum, identify remedies that may be entertained in the event the reviewing Agency believes the proposed transaction does present or is likely to present significant market power concerns. Alternatively, the parties may opt to defer specific remedy proposals to later stages described in this section.

(b) significant competitors in each identified overlap area within the United States during the most recent 12-month period.

4. Each party's documents relating to competitive effects of the transaction, including business plans relating to each identified overlap area and prepared during the twenty-four months prior to the HSR filings.
5. Third-party market research reports or analyses relating to each identified overlap area, in either party's possession or control, and prepared during the twenty-four months prior to the HSR filings.

Each party will thereafter and throughout the initial HSR waiting period promptly comply with any requests from the reviewing Agency for (a) additional documents and information, whether relating to the identified overlap areas or relating to other issues of potential Agency interest and (b) interviews or depositions of company officers or other personnel.

- C. With regard to proposed transactions as to which the parties comply with all of the provisions set forth in paragraph B above, the Agencies commit to the following procedures:
 1. Determination of which Agency will be the reviewing Agency within five working days of the commencement of the initial HSR waiting period.
 2. Within the ensuing five working days after that determination, a meeting between the assigned staff of the reviewing Agency and the parties' counsel to share initial reactions to the filings and the proposed transaction

generally, and to propose an investigation plan as described in subparagraph 3 below.

3. Priority attention during the initial waiting period to an investigation plan that enables early determination of (a) whether horizontal overlaps may present sufficient concerns to warrant remedial conditions to the proposed transaction; and, if so, (b) whether appropriate remedial conditions can be fashioned and accepted without the need for a full Second Request investigation.¹⁹
4. Advice to the parties no later than two working days before expiration of the initial waiting period on the staff's findings to date and, if the findings indicate that horizontal overlaps may present sufficient concerns to warrant remedial conditions to the proposed transaction, whether the staff can entertain an early remedy proposal.²⁰
5. Based on the advice provided under subparagraph 4 above, the parties may either (a) withdraw and refile their HSR filings, thereby restarting the initial waiting period or (b) opt to continue cooperation with the previously adopted investigation plan in the event the reviewing Agency proceeds to issue a Second Request. The parties may also, within the ensuing ten working days, submit a remedy proposal. If the parties opt for either (a) or (b) above, the reviewing Agency will commit to continued priority attention to the investigation plan. If the parties submit a remedy proposal within the period indicated above, the reviewing Agency will promptly

¹⁹ The investigation plan would be devised in consultation with the merging parties and would include: (a) document and information requests to the parties and third parties and (b) depositions or interviews of the parties and third parties.

²⁰ The reviewing Agency must retain the discretion to determine that further, in-depth investigation is required before any remedy proposal may be entertained. This may, for example, be the case when there may be either horizontal or vertical issues beyond those previously identified by the parties that may warrant close scrutiny.

respond to it, advise as to whether it can be the basis for resolution of outstanding concerns and, if so, proceed with expedited negotiations with regard to it.

- D. The elements of an acceptable divestiture remedy set forth in Section II of these Guidelines will generally be required for an acceptable remedy under this Section III. Where other adequate safeguards are provided, however, the reviewing agency may not apply all of the presumptions set forth in Section II, i.e., it may not presume that all of those specified elements are required for a proposal to be acceptable under this Section III. In short, the reviewing Agency may be more receptive to less stringent provisions or alternative kinds of safeguards in remedies presented under this Section III in light of the benefits from earlier resolution of outstanding concerns and earlier implementation of any required divestiture relief.
- E. The Agencies recognize that, despite best efforts to resolve concerns presented by a proposed transaction under Section III of these Guidelines, a mutually acceptable resolution may not emerge and the parties may ultimately opt to defend their transaction in litigation. In that event, no party's statements, proposals or other actions taken in accordance with Section III of these Guidelines will be used as an admission or otherwise used against or to the prejudice of the parties' defense of their transaction in any such ensuing litigation. On the other hand, should the parties wish to litigate the defensibility of their proposed transaction as modified by their proposed divestiture plan, the Agency challenging the proposed transaction will not object to the court's consideration of the adequacy of the divestiture plan in its adjudication of the Agency's objections to the transaction at issue. Specifically, the Agencies will waive any objections to admissibility under the Federal Rules of Evidence should the parties opt to present their divestiture plan as part of their defense of the transaction at issue.

APPENDIX

Acceptable divestiture must result in preservation of the state of competition in all affected product and geographic markets and all relevant dimensions of competition prior to the announcement of the proposed merger, with due allowance for any changes in the state of competition that would predictably have occurred absent the announcement.

The state of competition resulting from the proposed divestiture may be determined by reference to characteristics affecting the competitive force of the proposed post-divestiture entity. The relevant characteristics include resources, incentives, and structure of the post-divestiture entity.

Resource characteristics may be divided into operations and finance criteria. Operations criteria include the adequacy of the entity's labor force, its wage levels and union contracts, materials costs, management expertise, access to related functions (e.g., distribution channels), and any necessary intangible assets. Finance criteria include its balance sheet strength, access to financial markets, and likely resilience over foreseeable contingencies.

Incentives characteristics include the full independence of the new entity from its predecessor, together with a business plan that makes clear the motivation of new management to act in the interests of its own shareholders. The business plan must have realistic prospects of success.

Structural characteristics include the entity's range of internal activities (e.g., manufacturing, research, marketing), its size or market share, and the scope or range of output offerings.

The proposed post-divestiture entity need not duplicate each individual characteristic of the pre-divestiture entity so long as the post-divestiture entity will as a whole replicate the competitive force of the pre-merger entity in all affected product and geographic markets and in all relevant dimensions of competition. In situations, however, where the pre-divestiture entity is recognized as a "maverick" in pricing, as a particularly significant source of innovation, or as a firm otherwise making a unique contribution to the competitive dynamics of the affected market or markets, there must be some confidence that the post-divestiture entity will possess and exhibit similar characteristics.