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Fixing "Litigating the Fix"

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I. Introduction

Merging firms have been increasingly asking trial courts to adjudicate their merger “as remedied” by a voluntary “fix” and ignoring the merger agreement in the original HSR submission. These fixes typically involve remedy proposals that have been rejected by the agency. This procedure has been termed “Litigating-the-Fix” ("LTF"). LTF remedies may involve the buyer divesting some of the assets to a third party, the seller retaining the competing business, the buyer committing to certain conduct duties or constraints, or some combination of

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

these options. These remedies may be unilateral promises, commitments placed into an amended merger agreement, or formal agreements with a divestee, customers, or others.

This trend will increase if the agencies demand stronger consent decrees or if the agencies adopt a “just say no” policy of refusing to negotiate consent decrees. Either way, the merging parties have the incentive to demand judicial oversight to combat what they see as agency over-reach. Courts generally have denied agency motions in limine to exclude consideration of these remedies, at least where the merging parties have offered a definite remedy with sufficient time for the reviewing agency to investigate.

This article proposes a judicial procedure for managing cases in which the merging parties attempt to LTF. Our recommendations flow from our analysis of relevant LTF case law, the merger enforcement record, the language and goals of Section 7, and economic analysis of the incentives of the parties and agencies created by LTF. Our recommended procedure allows LTF in most instances but mitigates the likelihood of adverse competitive effects. We build upon the analysis and proposals of other scholars and commentators. Our proposed procedure has some features that are similar to the recent Kwoka-Weber Waller proposal, but ours is more defendant-friendly.

In general, district courts have required merging firms to propose definite remedies with sufficient time for the agencies to investigate. They have not, however, consistently allocated the parties’ respective evidentiary burdens. When the defendants propose a behavioral remedy

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

7 See, e.g., Arch Coal, 329 F. Supp. 2d 109; Aetna, 240 F. Supp. 3d 1; Sysco, 113 F. Supp. 3d 1; Libbey, 211 F. Supp. 2d 34; CCC Holdings, 605 F. Supp. 2d 26. The most notable exception is Ardagh: the court excluded consideration of an “11th hour suggestion” of a divestiture proposed after discovery, expert reports, and briefing, and the proposal did not involve a signed agreement, a price, or a plan for how the divested assets would be employed to preserve competition. See Transcript of Pre-Hearing Conference, FTC v. Ardagh, No. 13-1021 (D.D.C. 2013) at Tr. 13:19-25.


and the structural presumption would apply to the unremedied merger, they have generally (sometimes implicitly) placed the burden on the defendants to rebut the presumption.\(^{10}\)

But they have been inconsistent in their approach when the proposed remedy includes divestiture. In *FTC v. Sysco Corp.*\(^{11}\) and *United States v. Aetna Inc.*,\(^{12}\) the courts applied the structural presumption to the merger as notified in the HSR filing and assigned defendants the rebuttal burden of establishing that the divestiture was sufficient to maintain competition. In both cases, the courts rejected the “fix,” concluding the divestees would face impediments that would prevent them from replacing the competitive intensity of the acquired firms.

In *FTC v. Arch Coal*, the court evaluated the merger as modified by the divestiture, stating that “Section 7 of the Clayton Act requires the Court to review the *entire* transaction in question.”\(^{13}\) The court based its HHI calculation on the post-divestiture market and assumed that the divestee’s production was equal to the share possessed by the assets under the seller’s ownership, pre-divestiture.\(^{14}\) While concluding that the FTC satisfied the structural presumption,\(^{15}\) it further concluded that the divestee would provide more competition than did the acquired competitor.\(^{16}\)

In *FTC v. Libbey, Inc.*, the remedy provided that Libbey would no longer acquire Anchor’s food service business, and would instead only acquire Anchor’s plants and retail and specialty-glassware businesses. The surviving business would use a contract manufacturer to supply products. The court focused on the amended merger agreement. It found that the surviving business would face higher costs and other competitive impediments, implying that competition likely would be decreased.\(^{17}\)

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

\(^{11}\) See *Sysco*, 113 F. Supp. 3d 1 at 57 (placing “PFG Divestiture” as the first section under Defendants ’ Rebuttal Arguments).

\(^{12}\) *Aetna*, 240 F. Supp. 3d 1 at 59. The defendants ’ divestiture offer was made *conditional*—*i.e.*, only if the court believed that it was necessary to counteract the merger’s anticompetitive effect. *Id.* at 17.


\(^{14}\) *Arch Coal*, 329 F. Supp. 2d 109 at 115 n.2 (D.D.C. 2004) (“On July 7, 2004, the Court issued a decision concluding that Arch's sale of the Buckskin mine to Kiewit would be considered as part of the challenged transactions along with Arch's acquisition of Triton.”).

\(^{15}\) *Id.* at 129.

\(^{16}\) *Id.* at 147-149.

\(^{17}\) *Libbey*, 211 F. Supp. 2d 34 at 47-50.
In developing our procedure, we have been guided by Section 7 of the Clayton Act, which is concerned with preventing competitive harm in its “incipiency.” As the Supreme Court stated in American Stores, “Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect 'may be substantially to lessen competition.'” The “incipiency standard” has been interpreted in terms of probabilities. The Brown Shoe v. United States Court stated the standard as requiring a showing of only a “reasonable probability” of anticompetitive harm—a showing that is less than that which a plaintiff must make to establish a violation of Section 1 of the Sherman Act. Section 7 requires a “prediction of its impact upon competitive conditions in the future.” And, as articulated by Judge Richard Posner in FTC v. Elders Grain, Inc., “doubts are to be resolved against the transaction” in making this prediction.

In decision theoretic terms, this incipiency standard amounts to placing greater value on the avoidance of harmful mergers (“false negatives”) over prevention of beneficial mergers (“false positives”)—i.e., it is better to err on the side of over-deterrence rather than under-deterrence. This is not to say that false positives do not matter, only that false negatives matter more.

There are several economic reasons for placing greater emphasis on avoiding false negatives. First, the cost of false negatives is the long-term competitive harm. In contrast, the cost of false positives is the loss of efficiencies and synergies which can often be mitigated or eliminated by internal growth by the buyer or the acquisition of the target by a less concerning acquirer. Second, merging firms anticipating increased profits from market power have...
incentives to dramatically outspend the agency in litigation, which skews litigations outcomes in their favor and makes false negatives more likely. 26 Third, it is harder for the agencies to prevent harm with consent decrees because the merging firms have informational advantages in those negotiations.

This analysis of incipiency and false negatives also is relevant for LTF. In United States v. E.I. du Pont de Nemours & Co., the Court opined that “all doubts as to the remedy are to be resolved in [the government’s] favor.”27 While that case involved a remedy after liability had been found, the point remains relevant here when the structure of existing pre-merger competition is eliminated with certainty and the claim that the divestiture or conduct remedy will prevent harms from that lost competition is hypothetical.

False negative concerns likely are increased by a more permissive (i.e., defendant friendly) LTF procedure. The historical evidence suggests that negotiated consent decrees have often been insufficient.28 An FTC self-study found a worrisome number of consents to be failures or achieved success only after substantial delays.29 If LTF leads courts to ratify LTF proposals that have been rejected by the agency, then these deficiencies will be exacerbated.

Analogous concerns with false negatives led to passage of the HSR Act. The Act represents a procedural solution to an under-enforcement problem that stemmed from the enforcement agencies lacking sufficient notice and time to evaluate and attempt to block anticompetitive mergers before they were consummated, leading to what Kenneth Elzinga called “pyrrhic” victories.30 The HSR Act eliminated the twin problems of “midnight mergers” and “unscrambling the eggs” by requiring pre-merger notification, second requests, and waiting periods.31

A LTF procedure that provides the agencies with inadequate notice or excessive evidentiary burden would lead to similar underenforcement concerns. In addition to the risk of losses at trial, a more permissive LTF procedure would also cause the agency to have less

26 Supra, Section III.
28 Infra, Section III.
relative bargaining leverage in negotiating consent decrees, which would tend to lead to weaker consent decrees and under-deterrence of anticompetitive merger proposals.

Based on this history, Section 7, and our economic and decision theoretic analysis, we recommend that courts adjudicating such proposed remedies (including amended merger agreements) adopt case management procedures to safeguard against competitive harm. Our proposal addresses four important procedural features: (i) timing and notice of the parties’ remedy proposal, (ii) definitiveness of the proposal, (iii) evidentiary burdens placed on the parties, and (iv) certainty of execution and enforcement of the remedy. We also suggest several possible refinements to the procedure, including exclusion of certain remedy proposals. Since this procedure can be mandated by a district court, additional legislation is unnecessary.

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

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

We recommend that the court only entertain LTF proposals that are definite. If the proposed remedy involves a divestiture, the buyer and terms must be identified. If it involves behavioral restrictions or ongoing relations between the merged firm and the divestee, the filing must specify these provisions in detail. The filing should additionally include provisions for monitoring the compliance with the restrictions and setting penalties for violating them.

Our procedure focuses on the effect of the merger as modified by the proposed remedy. In the case of structural remedies, we nonetheless recommend that the government can satisfy its prima facie evidentiary burden by showing that the transaction would satisfy the structural presumption if the buyer hypothetically acquired all of the seller’s assets and there are no other restrictions. We make this recommendation because there are numerous reasons why the
divestee would not provide the same competitive intensity as did the seller. The defendant can then rebut this presumption, either by showing that concentration is improperly measured or with other evidence that competitive harm is unlikely. We also recommend that the court require defendants to produce substantial rebuttal evidence to ensure a high degree of confidence before accepting the defendant’s rebuttal claims.

We recommend that courts approach proposed divestitures of only select assets and behavioral remedies with a high degree of skepticism. Promises to operate divisions within a vertically integrated firm as though the businesses are separate entities conflict with economic incentives and so should only be accepted if they involve legal commitments and the firm’s compliance can be verified with confidence. Furthermore, we strongly recommend that similar promises to maintain competition among divisions of a corporation be excluded from consideration altogether. Such remedies are unenforceable and are wholly inconsistent with Copperweld Corp. v. Independence Tube Corp., United States v. Trenton Potteries, and National Society of Professional Engineers v. United States.

The remainder of this article is organized as follows. Part II reviews the LTF case law. Part III reviews merger enforcement statistics and merger retrospective studies, which provide evidence of under-enforcement. Part IV sets forth our economic analysis, which explains how permitting unconstrained LTF increases the likelihood of insufficient remedies, weakens agency bargaining leverage in negotiating consent decrees, and reduces deterrence. Section V presents our proposed LTF procedure. Section VI concludes.

II. “Litigating the Fix” Caselaw

Asking courts to allow LTF is not new. In general, courts have been willing to adjudicate defendants’ proposed remedies and have denied motions to exclude evidence relating to these proposals. Their willingness is understandable: If the circumstances surrounding a merger have changed, then those changed circumstances should be analyzed by the court, even if the remedial proposal took place after the complaint was filed. As the district court explained in Libbey,

33 273 U.S. 392 (1927).
Operating on what appears to be a clear slate, the Court concludes that parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government’s concerns. And when they do so under circumstances as occurred in this case, it becomes the new agreement that the Court must evaluate in deciding whether an injunction should be issued.\(^{37}\)

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

**A. Timing and Sufficient Notice**

District courts have been willing to consider evidence relating to defendant’s proffered remedy when the timing of the proposal provides the agency with sufficient time to consider it, even if the formal proposal is made after the complaint is issued. For example, in *Libbey*, the defendants amended their merger agreement about one month after the FTC filed its complaint. The agreement provided that Libbey would no longer purchase Anchor’s food service business. In response, the FTC voted out an amended complaint. The district court rejected the “evade FTC and judicial review,” concluding instead that the defendants were attempting to address the FTC’s concerns, and noting that the agency remained capable of, and indeed did, vet the merger as modified.\(^{38}\)

Similarly, in *United States v. United Healthgroup, Inc.* ("UHG/Change"), the defendants’ proposal provided the agency with sufficient time to evaluate the competitive effects. The defendants proposed a divestiture, a firewall, and other commitments before the complaint was filed and subsequently reached a somewhat revised, signed divestiture agreement after the agency filed its complaint, but with more than four months for the agency to conduct discovery before the hearing. The court rejected the DOJ’s motion *in limine* and ultimately found the remedy sufficient to avoid liability.\(^{39}\)

In *Arch Coal*, the defendants proposed a divestiture, which the FTC rejected and filed a complaint two months later seeking a preliminary injunction.\(^{40}\) The district court denied the

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\(^{38}\) *Libbey*, 211 F. Supp. 2d 34 at 46.


\(^{40}\) *Arch Coal*, 329 F. Supp. 2d 109 at 114. In May 2003, defendant Arch Coal entered into an agreement with defendant Triton to acquire Triton, including two of its mines. In July 2003, the parties complied with the HSR filing requirement, and, in August 2003, the FTC made a second request. In response to the FTC’s concerns, Arch signed an agreement to sell one of the Triton mines in January 2004. After further
FTC’s motion in limine, seeking to exclude evidence relating to the proffered divestiture, concluding that “the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement. . . . Thus, the FTC has assessed and is in reality challenging the merger agreement including [the deal remedying the initial merger].”

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

B. Definitiveness

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

analysis, the FTC filed a motion for preliminary injunction in April 2004 seeking to enjoin Arch from consummating the acquisition.

44 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000).
45 See Transcript of Pre-Hearing Conference, supra note 6, at Tr. 14:17-15:1 (Ardagh conceding it had not identified a buyer, the sale price of the assets, or whether the plants could be combined into a viable business); 21:12-17 (Ardagh’s counsel stating that there is not yet a binding contract but the plan is in the negotiation phase); 28:6-23 (Ardagh’s counsel stating again that the firm is negotiating with two or three buyers).
46 See id. at Tr. 29:10-22; see also id. 35:20-22 (“[W]e will not be discussing any divestiture of plants that one side sort of knows about and the other side doesn’t.”); cf. Chemetron Corp. v. Crane Co., No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. Sep. 8, 1977) (refusing to credit defendant’s divestiture offer in suit by target of hostile takeover against firm making the tender offer, explaining that the offer was made during a hearing without specificity, and that undefined proposals should not be considered in the midst of a preliminary injunction hearing). But see Arch Coal, Mem. Opinion (denying FTC’s motion in limine
C. Evidentiary Burdens

A decision that the parties are entitled to have the court adjudicate the modified transaction, rather than the one they notified under HSR, does not automatically determine how the court will allocate the litigants’ relative evidentiary burdens or how it should apply the HSR structural presumption. Must the agency as a part of its *prima facie* case establish that the defendants’ proposal does not resolve the anticompetitive issues the merger raises? Or is the burden, instead, on the defendants to establish that the proffered remedy resolves the potentially anticompetitive effects of the merger as initially proposed? With respect to the HSR structural presumption, where the proposed remedy includes a divestiture, should the court calculate the market concentration using the merging firms’ pre-merger market shares, such that the burden shifts to the defendant if the structural presumption is satisfied? Or should the court assume the divestee will successfully replace the seller’s competitive intensity with the divested assets and, consequently, calculate market concentration using the post-divestiture market shares? There is no consensus among the district courts on these issues.

For conduct remedies, the courts generally have required defendants to rebut the agency’s evidence that the as-notified merger is sufficiently likely to be anticompetitive. For example, in *Franklin Electric*, the proposed remedy was a licensing arrangement.\(^{47}\) The court continued to rely on the HSR structural presumption and placed the burden on the defendant, explaining that “[t]he presumption the government starts with, which is that a merger of the only two competitors in the market is a violation of § 7, remains unrebutted.”\(^{48}\) Similarly, in *FTC v. CCC Holdings Inc.*, the proposed remedy involved revising a software license agreement between defendant and a smaller competitor with the objective of easing the smaller competitor’s barriers to entry. The court noted that defendant’s ease-of-entry evidence could serve as *rebuttal* evidence, thereby placing the burden on defendant.\(^{49}\)

But the courts’ treatment of divestiture remedies has been more complicated. When there is a proposed divestiture, the issue of the appropriate burden is intimately bound up with the applicability of the structural presumption based on pre-merger market concentration. This precise issue was raised by Judge Nichols in *UHG/Change*.\(^{50}\) The court’s preferred position was that the divestiture made the structural presumption inapplicable, so that the government would have the burden to prove its *prima facie* case with non-structural evidence rather than the presumption. In contrast, the government argued that the anticompetitive presumption, based on

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\(^{47}\) 130 F. Supp. 2d 1025 at 1026.

\(^{48}\) *Id.*


unremedied market shares, should apply. In adjudicating the merger, the court chose to use the government’s preferred approach and then found for the parties under this more intrusive standard. Treating the large increase in the “unremedied” HHI as satisfying the government’s *prima facie* case under the *United States v. Baker Hughes Inc.* burden-shifting approach, he then analyzed the evidence and concluded that the parties carried their burden.  

In general, courts have placed the burden on defendants to establish how their proffered remedies would address the mergers’ anticompetitive features. In *Sysco* and *Aetna*, the district courts applied the structural presumption to the merger as originally notified in the HSR filing and assigned defendants the rebuttal burden of establishing the divestiture was sufficient. In *Sysco*, the defendants’ proposed remedy was divestiture of 11 distribution centers, a commitment by the buyer of those assets to develop more distribution centers, and the business acumen and experience of the purchaser’s leadership. In *Aetna*, the court similarly considered Aetna’s divestiture of Medicare Advantage business in some areas as a rebuttal argument. And in both cases, the courts rejected the “fix,” concluding the divestees would face impediments that would prevent them from replacing the competitive intensity of the acquired firms. 

In *Libbey*, the district court also focused on the merger as modified. As noted above, the retained business unit lacked a factory and would have needed to procure its product from a contract manufacturer. The court analyzed the various deficiencies of this arrangement and concluded that the acquiring firm’s market power would be less constrained after the transaction than before. The court then strikingly calculated the increase in concentration flowing from the original transaction. The court explained,

> [T]he best evidence of its potential effect is the impact of the original agreement because the post-merger landscape could quite possibly be similar to the terrain that would have been created if Libbey had acquired all of

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51 908 F. 2d 981, 991 (D.C. Cir. 1990).

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

53 113 F. Supp. 3d 1 at 57.

54 240 F. Supp. 3d 1 at 59 (“Defendants’ next rebuttal argument is that the proposed divestiture of certain assets to Molina Healthcare would counteract any anticompetitive effects of the merger.”).

55 *Sysco*, 113 F. Supp. 3d 1 at 15.

56 *Aetna*, 240 F. Supp. 3d 1 at 70, 72-73. The court concluded that the planned acquirer Molina Healthcare would not have the internal capacity (including IT infrastructure, personnel who can manage star ratings, and management and staff with relevant expertise) to successfully operate the divestiture plans. The court was also concerned with the fact that Molina had previously tried to enter the Medicare Advantage space repeatedly but had not succeeded.
Anchor’s business, assuming, as the FTC argues, that RCP [the surviving competitor] may prove to be an ineffective competitor.57

III. The Merger Enforcement Record Indicates False Negative Concerns

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

A. Agency Budget Constraints and Under-Enforcement

The agencies today are severely budget constrained, which forces them to engage in triage.58 The agencies issue second requests only for the most problematical transactions, and, as a result, a high fraction of second requests lead to challenges. Because the agencies lack the resources to litigate many cases, most merger challenges settle with consent decrees. If consent decrees are rejected and not later renegotiated, most transactions are abandoned. Of the few that go to trial, the agencies usually win.

These results are reflected in historical data.59 Over the twenty-year period from 2001 to 2020, there were a total of 31,500 HSR filings that reached outcomes by the end of 2020. Of these filings that reached outcomes, only 969 cases—about 3.1%—led to second requests. Only 272 (28.1%) of these 969 cases were cleared as is. Another 254 (26.2%) were abandoned or restructured, and 367 (37.9%) were resolved by consent decrees entered simultaneously with a complaint. Only 77 (7.9%) of the 969 second requests were not resolved in these ways. Of the 77, 11 (14.3%) led to a negotiated settlement, 34 (44.2%) were abandoned or restructured, while 3 (3.9%) were withdrawn by the agency as mooted. Only 29 cases (37.7% of the 77) reached a litigated decision, and the government won 18 (62.1%) while losing 11 (37.9%).

57 Libbey, 211 F. Supp. 34 at 50.
59 For a more detailed description and analysis, see Logan Billman & Steven C. Salop, Merger Enforcement Statistics: 2001-2020 (unpublished manuscript, October 2022) (on file with the authors).
B. Insufficient Consent Decrees

A consent decree does not ensure that competition will be preserved. There have been some striking examples of failed divestitures. When Safeway and Albertsons merged, the FTC consent decree required divestiture of 168 stores. Haggens, a chain of 18 stores, acquired 146 of these stores. Later that year, Haggens declared bankruptcy, and the FTC subsequently approved Albertson’s re-acquisition of 29 of the stores.

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

The FTC’s 2017 self-study reports more systematic evidence of insufficient consent decrees. The study analyzed a significant number of (unidentified) mergers settled with consent decrees between 2006 and 2012. The study found that many orders were insufficient. Among all horizontal merger orders, 19% failed to restore or preserve competition. Another 15% were only “qualified successes” because they took longer than 2 to 3 years to restore competition. Together, these data indicate there was some significant competitive harm

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


64 FTC STUDY, supra note 29, at 7.

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

66 Id. at 18 (Table 3).

67 Id.
suffered in 34% of the consents. Even among non-consummated horizontal mergers, 19% were considered as “failures” and another 6% were only “qualified successes.” Divestitures of entire ongoing businesses were more successful than those that they concluded involved only the sale of “selected assets.” By the FTC’s definition, 100% of the orders involving divestitures of ongoing businesses were “successes.” But only 56% of the “selected asset” orders were “successes” and 33% were “failures.”

It is well accepted that behavioral remedies are generally less likely to succeed than divestitures because behavioral remedies invariably are unable to cover all the potential conduct of the merging firms and because they are difficult to enforce. Of the remedies the FTC examined in its study, there were four firewalls in the context of vertical mergers; the agency deemed all four successful, although the staff’s main measure of main measure of success was "whether respondents effectively monitored and enforced them." Relying on the fox to monitor and report whether it raided the henhouse is a poor way to enforce a remedy and an equally poor way to gauge success of the remedy. The FTC study apparently did not examine vertical mergers with non-discrimination or duty-to-deal remedial provisions, but there is other evidence that these remedies may not be effective.

The fact that only 66% of mergers that were reported as “successes” suggests that the agencies approve consent decrees that entail insufficient likelihood of preserving competition.

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

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

70 Another 11% were considered qualified successes. Id.

71 Merger Remedies Manual, Antitrust Division: U.S. Department of Justice at 4 (Sept. 2020), available at https://www.justice.gov/atr/page/file/1312416/download [https://perma.cc/48X6-SNS8] (“Conduct remedies . . . require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure. Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions.”).

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

73 E.g., Fernando Luco & Guillermo Marshall, The Competitive Impact of Vertical Integration by Multiproduct Firms, 110 AM. ECON. REV. 2041(2020).

74 Compare Joe Sims & Michael McFalls, Negotiated Merger Remedies: How Well Do They Solve Competition Problems, 69 GEO. WASH. L. REV. 932, 937-940 (2001); Lawrence M. Frankel, The Flawed
If market outcomes are worsened in the other 34% (some for 2 to 3 years and some longer), these data raise the question of whether all the remedies together may have led on average to worse market outcomes than a counterfactual "no-merger world" would have, an issue the FTC study did not address.

Agencies may feel compelled to accept potentially insufficient consent decrees because constrained agency budgets limit the amount of litigation the agencies can undertake. Losing a trial is worse for competition than a somewhat insufficient settlement. The financial returns to completing an anticompetitive merger are very high; defendants therefore have an incentive to devote significant resources to litigation—more than can a budget-constrained agency. These asymmetric stakes and budgets tend to skew litigation outcomes away from the merits in favor of the merging firms and thus increase false negatives.75

This context explains how the parties approach litigation, in the first place. And as we explain below, LTF further influences these dynamics.

IV. Economic Analysis of LTF Impact on Trial Outcomes, Consent Decrees, and Merger Proposals

LTF raises additional concerns about false negatives. The merger record suggests that there is underenforcement from resource constraints and negotiated consent decrees often are not fully successful. Allowing parties to propose even weaker LTF proposals to the court (and have some probability of winning) will further reduce the agency’s bargaining leverage in consent decree negotiations, leading to even weaker negotiated consent decrees. Deterrence also will be reduced.

These false negative effects and the potentially exacerbating effects of LTF can be explained with analysis of the five stages of the HSR process. In stage 1, the firm decides how potentially anticompetitive of a merger to propose, as gauged by the probability and magnitude of the merger’s anticompetitive effects. For simplicity, we assume there is a second request. In stage 2, the agency either clears the merger as notified or proposes a consent decree that may be more or less restrictive.76 In stage 3, the firm either accepts or rejects a negotiated consent decree.77 In stage 4A, the firm may abandon (or restructure) the transaction, propose a LTF


76 We put aside the issue of the agency simply moving directly to trial.

77 At this point, the agency might withdraw its complaint, or the parties might renegotiate, but these possibilities can be usefully ignored here.
remedy to the court, or proceed to court with no LTF proposal. In stage 4B, the agency may file a motion *in limine* (we assume that it will), which the court either grants or denies. In stage 5, there is a trial and an outcome.

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

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

Assuming that an LTF remedy is proposed and the motion *in limine* is denied (stage 4B), then an imperfectly informed court (stage 5) may, at trial, end up accepting a firm’s LTF remedy that would lead to a more anticompetitive outcome than would occur absent the merger. This “false negative” outcome is more likely if the LTF procedure is more permissive. While “false positives” may be reduced somewhat, “false negatives” are of greater concern under the incipiency standard.

The effects of any agency’s increased risk of a loss at trial from a more permissive procedure that leads a court to be more willing to accept a firm’s LTF remedy can be traced back to earlier stages of the process. If the firm anticipates that the motion *in limine* will be denied by

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79 Suppose that the merger as-remedied is anticompetitive, but less anticompetitive than the merger as-proposed. Since the trial court faces imperfect information, it is reasonable to expect that it will more likely permit the remedied merger than it would the more anticompetitive merger as-proposed, despite that both are anticompetitive. To illustrate, consider a court with imperfect information evaluating whether the competitive effect of the merger is positive or negative. Suppose there are two possible effects, either -100 or -10. If the court relies on an imperfect “signal” of the effect, based on the evidence, it is more likely to estimate a positive competitive effect if the actual effect is -10 than if the effect is -100.

80 *Supra*, text accompanying nn.24-29.
the court (stage 4B), then it will be incentivized (and more likely) to reject the agency’s proposed consent decree (stage 3) and propose its own, weaker LTF remedy (stage 4A), and less likely to abandon the transaction (stage 4A).\textsuperscript{81} This analysis all stems from the fact that a more permissive LTF procedure (\textit{i.e.}, more defendant-friendly) makes it more likely that the court will accept the firm’s possibly weak remedy rather than enjoining the merger (stage 5).

Most importantly, such a permissive LTF procedure will also lead the agency to propose a weaker consent decree (stage 2) because of its greater perceived risk of losing at trial to an even weaker LTF remedy. The firm also can anticipate that its higher chance of winning at trial will lead the agency to demand a weaker consent decree (stages 2-3). LTF will also incentivize the firm to propose mergers that have higher competitive risks (stage 1).

A more permissive LTF procedure increases false negatives in a second way—by incentivizing merging firms to hide potential competitive problems rather than self-disclosing and voluntarily proposing effective remedies in the original HSR filing or shortly thereafter. As a result, the process may be lengthened. Allowing late-stage LTF proposals also incentivizes the firms to attempt to gain a litigation advantage by reducing the amount of time and information available to the agencies to investigate the proposed remedy.

In short, a more permissive LTF procedure weakens the agency’s relative litigation position and bargaining leverage while strengthening the firm’s.\textsuperscript{82} These changes lead to more false negatives, weaker consent decrees, and less deterrence of anticompetitive proposals.

\section*{V. Proposed Procedure}

Our proposal is designed to permit courts to consider LTF proposals and evidence while avoiding excessive false negatives. Our recommendations are driven by our economic analysis,

\begin{footnotesize}
\footnote{The firm has less to lose by rejecting the agency’s offer because now the firm has the LTF alternative. In decision theory jargon, the firm’s “best alternative to a negotiated solution” (BATNA) has improved. The firm’s BATNA similarly increases, and the agency’s BATNA decreases, at every decision stage.}
\footnote{For a sample of the technical literature, see John Nash, \textit{The Bargaining Problem}, 18 ECONOMETRICA 155 (1950); Ken Binmore et al., \textit{The Nash Bargaining Solution in Economic Modeling}, 17 RAND J. ECON. 176 (1986).}
\end{footnotesize}
the language and goals of Section 7, LTF case law, and the history of negotiated consent decrees.\textsuperscript{83}

We appreciate the rationale for prohibiting LTF proposals.\textsuperscript{84} Permitting LTF encourages the parties to hide competitive problems rather than self-disclosing and remedi ing problems in the original HSR filing increases costs and raises the risk of false negatives. LTF also reduces the agency’s bargaining leverage and allows the defendant to bet on the court erring in its favor, or even tailoring the LTF proposal according to the judge assigned to the case. However, outright prohibiting LTF would not make much difference. The parties can withdraw the old agreement and file a new HSR; they would therefore still have a practical opportunity for a second bite of the apple with similar delays. Thus, we do not recommend prohibiting LTF.

\textbf{A. Basic Proposal}

Our basic procedure has the following features: (i) it provides ample time for agency investigation; (ii) it ensures that the agency and court have sufficient information regarding a definitive remedy proposal; and (iii) it allocates the evidentiary burden to the merging parties to establish that the proposal is sufficient to eliminate anticompetitive effects, even in cases involving partial mergers or divestitures. It also includes provisions that a court can apply to post-judgment enforcement. In setting out this procedure, we assume that there is no amendment to the HSR Act or regulations.

\textbf{1. Timing and Sufficient Notice}

To ensure that the agency receives sufficient notice and time to evaluate the proposed remedy, we recommend that the court require the merging parties to submit a “remedy filing” that articulates the terms of the remedy as part of its case management order. We recommend a process analogous and very similar to the HSR process. If the proposed remedy is not included in the original HSR notification (which has been the norm in the past), the remedy filing would trigger a thirty-day waiting period (\textit{analogous to the HSR waiting period}) during which the agency would gain compulsory process and the power to issue a subpoena for further information (\textit{analogous to a second request}). Assuming the remedy filing occurs after the

\textsuperscript{83} Professor Horton argues that the federal courts’ jurisdictional grant under Section 15 of the Clayton Act does not extend to considering remedies proffered by defendants because the statute provides that the proceedings may be initiated “by way of petition setting for the case,” evidencing Congress’s intention to leave “the shaping of ‘the case’ under the Clayton Act to the executive branch.” \textit{See} Thomas Horton, \textit{supra} note 8 at 90. No court has ever construed Section 15 in such a limited way. And we do not believe such a construction is justified. Moreover, courts routinely accept jurisdiction and treat the LTF provisions as revised merger transactions. Antitrust courts also routinely analyze and order antitrust remedies. \textit{See}, e.g., \textit{Standard Oil Co. of New Jersey v. United States}, 221 U.S. 1, 77-83 (1911). The most contentious issue instead appears to be how to apply the structural presumption when the LTF remedy is a divestiture.

\textsuperscript{84} Kwoka & Weber Waller, \textit{supra} note 9; Salop, \textit{supra} note 8.
complaint is filed, the briefing and trial would then be delayed (and the parties would not be permitted to close the deal) for a sufficient period of time determined by the court (analogous to the HSR waiting period) after compliance with the subpoena. 85

This procedure could cause some delays if the proposal comes late in the process. But the merging parties can mitigate delays by beginning to collect the relevant information during the initial thirty-day period. 86 Moreover, the threat of delays has important benefits. First, this threat would prevent the parties from disadvantaging the agency by not affording it the time and information needed to investigate and litigate the remedy. Second, the potential for delays would encourage the parties to disclose voluntarily any potential competitive problems and their proposed remedies earlier in the process. Remedies proposed in the original HSR submission would avoid any delay. Third, earlier disclosure would result in the agency and the defendants possessing more common knowledge, thereby reducing the parties’ reliance on trial to resolve these uncertainties. 87

2. Definitiveness

To ensure the agencies have sufficient information to review the remedy, we recommend that the parties be required to specify the proposed remedy in detail. In the case of a divestiture, the filing should identify the divestee; the assets included in the divestiture package; the terms of the agreement; any post-divestiture dealings or other entanglements among these parties (e.g., input supplies, duties to deal, pricing terms, non-competition or no-poach agreements); and any contractual or behavioral restrictions or other promises. We also recommend that the filing specify how the remedy will be enforced, how its impact will be monitored, the sanctions that will be levied in the event of non-compliance, and any process for modifying the remedy if it fails. 88

3. Evidentiary Burdens

Entitling the parties to have the court adjudicate the modified transaction rather than the one they notified under HSR does not automatically determine how the court should allocate the litigants’ relative evidentiary burdens. In analyzing this issue, we focus on transactions where the structural presumption would apply if the buyer obtained all of the seller’s competing assets, given that is the condition where LTF typically arises. Under these conditions, we recommend that the court place the evidentiary burden on the defendant to show the sufficiency of the

85 For remedies proposed before compliance with the original second request, these waiting periods would supplement, rather than replace, the waiting period under the original HSR filing.

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

87 Differential information that leads to asymmetric expectations can make litigation more likely.

88 If the remedy is proposed as part of the initial HSR filing or before a court is involved, including all these disclosures would prevent further delays later in the process.
remedy, along with its other rebuttal arguments. The burden would be imposed on the defendant in cases that involve partial acquisitions, such as in *Libbey* (where the acquisition does not include all the competing assets of the acquired firm), as well as divestitures, such as in *Arch Coal* or *Sysco* (where the sellers’ competing assets are divided between the acquiring firm and a divestiture buyer). This burden also would apply to conduct remedies.

Our recommendation is based on our greater concern with avoiding false negatives over false positives for these sorts of transactions in light of the historical record of insufficient consent decrees, the Section 7 incipiency standard, and our economic analysis. Our recommendations also reflect the reality that the merging parties have proposed the remedy and it is therefore likely biased in their favor, and the fact that defendants have incentives to outspend the agencies in litigation, which skews litigation outcomes in their favor.

Behavioral remedies are necessarily part of the parties’ rebuttal case. A proposed behavioral remedy amounts to a claim that the remedial restrictions will prevent the merged firm from acting on the anticompetitive incentives possibly created by the merger. Thus, if the firms’ market shares trigger the structural presumption to satisfy its *prima facie* case of showing anticompetitive incentives, the burden shifts to the defendants to rebut the presumption; the remedy would be one way defendants can meet the burden.

If the parties propose a *conditional* divestiture, that is, conditional on the court finding that the transaction as initially proposed (without a divestiture) violated Section 7, it also seems clear that the burden appropriately should be placed on the parties. But when the merging parties propose an *unconditional* divestiture in an amended merger agreement, they may argue that the HSR structural presumption is not satisfied because the divestiture prevents the increase in concentration. Absent the presumption, the argument would go, the burden should be placed on the government to show likely anticompetitive harm with other evidence. This approach is the one preferred by Judge Nichols in *UHG/Change*—that the government should be allocated the burden as part of its *prima facie* case to show that the divestiture is insufficient to restore competition.

While we agree that the court should be adjudicating the merger as remedied, we do not recommend Judge Nichol’s preferred approach. The economic issue is whether the divestee will, in fact, have the ability and incentive to replace the competitive intensity of the acquired firm. There is no economic basis simply to *assume* that the divestee will replace the competitive intensity of the acquired firm and achieve the same market share as the acquired firm. Divestitures do not automatically or even necessarily create a new competitor that will provide

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89 *Aetna*, 240 F. Supp. 3d 1 at 17.


equal (or sufficiently close) competitive intensity to that of the pre-merger acquired firm. Moreover, the fact that the merging party chooses the divestee, and has an incentive to choose a weaker competitor reinforces the concern that the divestee will provide less competitive intensity than did the seller. Thus, automatically assuming that a proposed divestiture will replace the lost competition, and consequently exploding the structural presumption, suffers from a serious economic flaw.

The likely competitive intensity will depend on the facts. The divestee may be a weaker competitor for various economic reasons: higher costs, lower quality, less desirable product portfolio, or less experienced or proficient executives and employees. These economic conditions are even more concerning if there is a partial divestiture of a business. The conditions can be even worse if the divestee remains dependent on the merged firm or must purchase higher cost services or inputs from third parties. Even if the divestee can compete intensely in the short run, it may fall short in the long run because it may fail to produce innovations on par with its competitors. These problems will be more severe if the divestee needs to replace assets that were not included in the divestiture. But even if the divestee obtains an ongoing business, there may be significant adjustment costs that prevent it from rapidly restoring competition.

A divestee also may have less incentive to compete or innovate as vigorously—for example, if the divestee already sells substitutes or if it is a vertically integrated firm that provides inputs to rivals. In addition, the divestiture might replace a maverick or aggressive competitor with a divestee that lacks similar competitive incentives. The divestee’s business plan also may involve a less vigorous competitive approach, for example, as recently has been alleged with respect to private equity buyers. Furthermore, a divestee may face fewer reputational constraints.

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

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

“milking” the asset rather than growing it. Such a divestee similarly may place lower value on innovation. We recommend that the court request facts on all these issues rather than assume that divestee will have sufficiently equal incentives to compete as intensely.

Even if the divestee obtains an ongoing business, it may or may not exert the same competitive intensity as the seller. Again, the facts matter. In some cases, the district courts concluded that the divestee would fully replace or surpass the competition provided by the seller. For example, in UHG/Change, the court rejected the DOJ’s argument that the divestee would be disadvantaged by its failure to offer a portfolio of products. And in Arch Coal, the court found that the divestee would be an even stronger competitor. In other cases, however, the district courts concluded that the competition provided by the divestee would fail to provide competition on par with that of the seller. In the Libbey amended transaction, Anchor’s parent, Newell, maintained ownership of the ongoing food service business. But Newell no longer would have owned its own production facilities but instead was to rely on a foreign contract manufacturer, which the court found would lead it to face higher costs. In Sysco, the proposed divestee had fewer distribution centers and the divestee’s own market share projections fell short of the acquired firm’s pre-merger share, so that it would provide less of a competitive constraint on the

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

96 The FTC Study found that the effectiveness of divestitures depended on the breadth of assets divested. Only slightly more than half of the orders were considered successes when selected assets were divested, whereas all the orders involving divestitures of ongoing businesses were considered successes. Yet even here, the distinction between “selected assets” and “ongoing business” is not a bright line, as indicated by these examples.

97 UHG/Change, supra note 39.

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

99 Libbey, 211 F. Supp. 2d 34 at 42-43 (“FTC questions whether the manufacturer identified by Newell, Peldar S.A. (‘Peldar’), will be a reliable resource for the glassware because it is located in Colombia, a country that currently and has been experiencing for many years civil unrest and internal instability. The FTC opines further that even if RCP can successfully outsource from Peldar, RCP's outsourcing costs will be 4.3 percent higher than Anchor's current manufacturing costs and RCP will have to pass this cost onto its customers, thus hindering its ability to compete with Libbey.”).
merged firm.\textsuperscript{100} In \textit{Aetna}, the court also found that the divestee would provide less of a constraint.\textsuperscript{101} A smaller product portfolio also may be a significant impediment.

The FTC study also indicated that many consent decrees involving divestitures fail to yield equally strong competitors.\textsuperscript{102} A significant number failed to restore competition, suggesting that consumers suffered long-run harms. Even the divestiture consent decrees deemed “successful” by the FTC may have taken two or three years to restore competition, a period during which there was competitive harm. Other consent decrees scored as “qualified successes” took even longer. And success of LTF divestiture remedies proposed by the parties, but rejected by the agencies, is even less likely because those remedies will be systematically weaker (which is why the agency would have rejected them in the first place).

The fact that the merged firm selects the divestee reinforces these concerns. The merged firm does not have the incentive to divest the assets to a strong competitor, even if that potential divestee would be willing to pay somewhat more for the divested asset. To the contrary, the merged firm has the incentive to divest to a third party that will be a weaker competitor. Thus, rewarding a divestiture by automatically exploding the structural presumption increases the likelihood of false negatives and insufficient consent decrees.

For all these reasons, we recommend that the court approach LTF with substantial skepticism and require a high degree of confidence before accepting those claims. This analysis and historical evidence suggest that an appropriate approach is to presume, as a starting point, that the divestee will be a weaker competitor and thereby place the burden of rebutting this presumption on the defendant. We specifically recommend that that the government be permitted to satisfy its \textit{prima facie} burden by showing that the transaction would satisfy the structural presumption if the buyer acquired the entire competing business (and all related assets) from the seller.\textsuperscript{103} By “related assets,” we mean to include not just the assets used directly in the competing business but also all other assets of the seller that contribute to the success of that competing business.

The parties can rebut this presumption by showing that the government’s measure of concentration is incorrect because it failed properly to account for the impact of the divestiture. This rebuttal would be analogous to the situation in \textit{United States v. General Dynamics Corp.},

\textsuperscript{100} \textit{Sysco}, F. Supp. 3d 1 at 73-76.

\textsuperscript{101} \textit{Aetna}, 240 F. Supp. 3d 1 at 72 (“Based on all the evidence concerning Molina's ability to successfully operate the divestiture Medicare Advantage plans, the Court finds that Molina is not likely to be able to replace fully the competition lost by the merger. Two other types of evidence—the low purchase price and Molina's history in Medicare Advantage—also support this conclusion.”).

\textsuperscript{102} \textit{Supra}, Section II.

\textsuperscript{103} Given the merging firms have the incentive to structure the divestiture to create a weaker competitor, it is appropriate to presume so.
where the Court held that the level and increase in concentration were improperly measured. The parties would argue that the harm to competition is much less than the situation where the buyer acquires all the assets and there is no divestiture. The government’s response would likely be that the harm is still substantial because the divestee is a weaker competitor than was the acquired seller. The parties can rebut the presumption by providing sufficient evidence that the residual owner of the non-acquired business (or assets) would not face significant competitive disadvantages or incentives relative to the pre-merger seller. Both sides can suggest relevant concentration estimates.

In cases where the structural presumption is weakened or even exploded, the agency would retain the opportunity to produce evidence to explain why the divestee will likely be weaker and compete with less competitive intensity than would the seller absent the merger. Along with evidence that the post-merger market will be concentrated, this non-structural evidence would be sufficient to shift the burden to the defendant under the rule of reason structure of Baker-Hughes.

Neither the timing of the divestiture (or retention of some assets) nor whether these provisions are contained in the initial HSR filing, should matter. The economic analysis is the same either way. This is because the issue is whether the new structure leads to a divestee (or owner of the residual assets) being a weaker competitor than would be the acquired firm if it remained independent. It is also because the merging firms have the incentive to choose a structure that reduces post-merger competition. While this approach may somewhat reduce incentives for early self-disclosure, it ensures that the structural presumption will remain in place and the burden will be placed on the merging firms to show that the agreement will not lead to a less competitive structure.

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

104 The argument in General Dynamics was that the increase in concentration was improperly measured using production instead of unsold reserves. See 415 U.S. 486, 510-11 (1974).
105 See infra for an example using HHIs.
106 In Sysco, the FTC’s expert estimated post-divestiture HHI increases under various assumptions. 113 F. Supp. 3d 1 at 53-54.
Consider next a middle case, where the evidence suggests that the divestee likely would be somewhat weaker (e.g., higher cost) competitor than was the seller firm and would obtain a hypothetical market share of only 15%, with the other 5% being obtained by the buyer firm. In this situation, the buyer and the divestee would contribute 3250 points (i.e., \((50+5)^2 + 15^2 = 3025 + 225\)) to the post-HHI. In comparison, the buyer and seller contributed 2900 points (i.e., \(50^2 + 20^2 = 2500 + 400\)) to the pre-merger HHI. Thus, the increase in the hypothetical HHI from the merger and divestiture would equal 350 points (i.e., \(3250 - 2900\)). While this 350-point increase is much less than the 2000-point HHI increase if there were no divestiture, it still exceeds the 200-point HHI increase identified in the *Horizontal Merger Guidelines* as creating a presumption of increased market power.\(^{107}\) Thus, it would be sufficient to satisfy the government’s *prima facie* case and shift the burden to the defendant.\(^{108}\)

*Arch Coal* provides an example of this approach. The court reported various HHI calculations based on different measures. It then explained that “although the FTC has satisfied its prima facie case burden, the FTC’s prima facie case is not strong. Certainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case.”\(^{109}\)

Alternatively, the court might look directly to likely cost increases or other significant disadvantages in its evaluation of the government’s *prima facie* case. For example, suppose the evidence indicates that the divestee’s costs would be 5% higher than the seller’s costs absent the transaction. This significant cost disadvantage could satisfy the government’s *prima facie* case that the divestee would be a weaker competitor and allow the defendant firm with a high market share firm to achieve or enhance market power, or possibly facilitate improved coordination.

Applying these methodologies to *UHG/Change*, if the divestee’s product would have lower value to customers because of its narrower product portfolio, as alleged by the DOJ, its competitive intensity would be reduced, and competition would be lessened. This claim might be conceptualized as the divestee having significantly higher costs. But, applying the HHI methodology here paradoxically would lead to an *HHI decrease*, if the divestee would be a weaker competitor. This decrease would represent an erroneous signal that occurs because of the parties’ relative market shares (i.e., Change at 70% and UHG at 20%).\(^{110}\) For example, if the Change divestee’s share would be 65% and UHG’ share would be 25%, the hypothetical HHI

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\(^{108}\) As another example, suppose that evidence suggests market shares of 19% and 51% for the divestee and buyer. In that case, these two firms would contribute 2962 points (i.e., \(512 + 192 = 2601 + 361\)), an increase of only 62 points (i.e., \(2962 - 2900\)) over the pre-merger HHI contributions. This 62-point increase would be too small to satisfy the anticompetitive structural presumption in the *Merger Guidelines*, despite the highly concentrated market.


would fall, despite the fact the divestee’s product is assumed to have lower value, which is what leads its share to fall.\textsuperscript{111}

4. Enforcement and Oversight

If a court finds for the defendants, thereby enabling the merger to proceed, we recommend that the court should order the remedy to be implemented.\textsuperscript{112} This is necessary, given the firm’s promises might be reversed or evaded.\textsuperscript{113} To ensure that behavioral restrictions or other provisions of the remedy are not evaded, we also recommend that the order also include a court-enforced monitoring and enforcement mechanism and well-specified sanctions for failure to comply. Furthermore, we recommend that enforcement of the order include provisions and a process for modifying the remedy in the event of failure.\textsuperscript{114} These additions can ensure that the goal of the order —restoring competition— is not undone.

B. Refinements and Exclusions

In setting the evidentiary standards, we recommend that courts apply a higher degree of skepticism to various arguments. We also recommend the courts exclude consideration of certain remedial proposals.

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

We recommend that courts apply greater skepticism to remedies that involve divestitures of only select (as opposed to all overlapping) assets because they tend to be less successful.\textsuperscript{115} In Libbey, for example, the court found that the food service business retained by Anchor likely would have higher costs and face other impediments.\textsuperscript{116} The court therefore was justified in being more skeptical of the proposed remedy.

Greater skepticism also should apply to remedies that contain substantial behavioral provisions. Behavioral remedies demand that the merged firm engage in conduct that it would prefer to avoid, so it has inherent incentives to evade the requirements. In addition, the remedy

\textsuperscript{111} The HHI falls because $70^2 + 20^2 > 65^2 + 25^2$.

\textsuperscript{112} In UHG/Change, the court ordered the divestiture, despite finding that there was no Section 7 violation. Redacted Mem. Opinion at 58 (“The Court enters judgment for Defendants, denies the Government’s request for a permanent injunction, and orders that ClaimsXten be divested to TPG.”).

\textsuperscript{113} This concern was raised in United States v. Dairy Farmers of America, 426 F.3d 850, 862 (6th Cir. 2005).

\textsuperscript{114} Steven C. Salop, Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy, 31 ANTITRUST 15, 17 (Fall 2016).

\textsuperscript{115} FTC Study (2017) at 22 (Table 7).

\textsuperscript{116} Libbey, 211 F. Supp. 2d at 52; see also Sysco, 113 F. Supp. 3d at 73-5; Aetna, 240 F. Supp. 3d at 99.
often will be difficult, if not impossible, for the agency or court to monitor the conduct to effectively enforce.117

2. Remedies for Consummated Mergers

We also recommend greater skepticism in accepting LTF remedies in consummated mergers where the parties have already integrated their operations, rather than holding them separate pending outcome of the proceeding.118 The proposed remedies may involve divestitures of selected assets, provisions to support new entry, or promises of intra-corporate competition. The FTC study found that 22-33% of the consent decrees in such cases were failures and 44-52% were only qualified successes, while merely 22-26% were considered successful.119

3. Vertical Merger Promises of Vertical Separation

Vertically merging firms sometimes promise (or contractually obligate) that their separate divisions will act as if they are independent companies. These are promises to forgo favoritism towards one another and foreclosure of rivals, even if the firm has the ability and incentive to foreclose. Such promises were rejected by the agencies and led to merger abandonments in LAM/KLA,120 Nvidia/ARM,121 and Lockheed Martin/Aerojet Rocketdyne.122 But such promises

117 Merger Remedies Manual, supra note 71.

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

119 FTC Study (2017) at 19 (Table 4).


were accepted by the courts in *AT&T/Time Warner*\(^{123}\) and *UHG/Change*.\(^{124}\) Those courts were persuaded by testimony by the corporate executives that they would fulfill their promises in order to maintain the trust of customers that now would also be competitors. The idea was that violating the trust would harm the corporation’s reputation and long-term profits. In both cases, there was testimony that the firms had not engaged in foreclosure tactics in the past, though their previous vertical integration was substantially less than it would be after this transaction. The companies also created contractual obligations.\(^{125}\)

There are economic reasons to be highly skeptical of these promises when they require the merged firm to act in conflict with its fundamental economic incentives. History is not a reliable guide to future conduct in these circumstances. The fundamental economic analysis on which antitrust law is based recognizes that financial incentives change when benefits and costs change. When a corporation expands vertically and has market power sufficient to foreclose, its decision calculus regarding neutrality towards customers who are rivals also will be altered. Importantly, the firm’s withholding of access to critical inputs may not even be necessary to harm competition. The customers who are also competitors will understand that the merged firm has gained increased bargaining leverage and so will agree to pay higher prices.\(^{126}\) Reputational losses will not occur if breaches of the promises cannot be detected. And most importantly, the foreclosed customers must have good alternatives for the loss of trust to matter.\(^{127}\)

These impediments to detection are key issues for the court to investigate, even if the promises are made contractual. If the upstream division drives a harder bargain with competitors of the downstream division, a court or arbitrator often will be unable to distinguish between a foreclosure strategy versus normal bargaining that does not take the firm’s vertical integration

\(^{123}\) United States v. AT&T, Inc., 310 F. Supp. 3d 161, 164 (D.D.C. 2018) (discussing the landscape of how the parties claim the merger will increase not only innovation but competition).

\(^{124}\) Redacted Mem. Opinion, *UHG/Change*, 1:22CV00481 at 41-50 (discussing the structural provisions, firewalls, and customer contracts, which prevent sensitive information from being shared among divisions of the company).

\(^{125}\) In re *Illumina/Grail*, the defendants have persuaded the ALJ to accept their contractual provisions and promises and the matter is now under appeal to the Commission. Docket No. 9401.

\(^{126}\) U.S. Department of Justice, *Vertical Merger Guidelines* (June 2020). In this regard, foreclosure threats generally are made one day at a time, not on a one-time, permanent basis. *See e.g.*, Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. ANTITRUST ENFORCEMENT 459, 466 (2018) and the Amicus Briefs cited therein.

\(^{127}\) Skepticism also is warranted because the promises would reduce some of the alleged merger benefits, including the elimination of double marginalization. Nor could the two divisions gain the benefit of more intensive cooperation if they are being instructed to act as if they are not part of the same company.
into account.\textsuperscript{128} This problem is more severe if most or all customers of the upstream division are competitors of the downstream division because that means that there would be no good non-foreclosure price benchmark for comparison. Requiring non-discriminatory prices also can give the merged firm the incentive to raise the prices to all its customers instead of lowering prices to the rivals.\textsuperscript{129} Simple refusals to supply might be detectable, but little else. When products are unique, there also will be no benchmark for comparing the prices charged or the quality of products or services. This detection problem is even worse with respect to innovation activities. A court or compliance monitor would find it impossible to detect if the upstream division is (for example) assigning the A-Team to working with its own downstream division to innovate but assigning the B-Team to the rival.\textsuperscript{130} For all these reasons, we are very skeptical that effective detection would be possible.

In light of these severe detection problems, if the court chooses to accept such promises, we recommend that the court follow a “trust but verify” approach. Effective enforcement requires (i) making the promised remedy legally binding, (ii) mandating a reporting and monitoring mechanism to verify that the promised conduct is properly followed, and (iii) mandating well-specified (and large) sanctions for failure to comply, including discretion for modifications if the remedy fails, which the court would oversee. Unless the court has confidence that violations would be deterred by its detection and punishment procedure, it should not bless the fix.

\textbf{4. Horizontal Merger Promises of Intra-Corporate Competition}

A defendant sometimes may proffer as a remedy the promise that it will instruct its separate divisions to compete as if they were separate firms. The FTC adopted such a remedy in the “highly unusual” \textit{Evanston/Northwestern} merger, which had been consummated years

\textsuperscript{128} An arbitrator would need to know the prices charged to competing versus non-competing customers of the upstream division (and similarly for other competitive conduct). In the \textit{Comcast/NBCU} vertical merger, the DOJ and FCC mandated an arbitration process to ensure that NBCU would not charge higher content prices to Comcast’s two pay TV distribution rivals like Dish and DirecTV. This arbitrator could use as a benchmark the prices charged to non-competitors like Charter and Cox. In \textit{AT&T/Time Warner}, AT&T also made a similar promise that Time Warner would not charge higher prices to DirecTV’s competitors. But in that matter there was no good price benchmark because DirecTV’s satellite service competes with all the other distributors. For criticism of the AT&T/Time Warner arbitration remedy, see Gene Kimmelman & Steve Salop, \textit{AT&T’s Flawed Arbitration Proposal} (Apr. 10, 2018), available at https://publicknowledge.medium.com/at-ts-flawed-arbitration-proposal-d020e66b2985 [https://perma.cc/3G9S-7WUJ].

\textsuperscript{129} See, e.g., Steven C. Salop & Fiona Scott Morton, \textit{Developing an Administrable MFN Enforcement Policy}, 27 \textsc{Antitrust} 15 (Spring 2013).

\textsuperscript{130} And even if the teams were equally competent, the team assigned to the rival might realize that it was not in the interest of the corporation to put in as much effort to help the rival.
earlier. After that, courts rejected similar intra-corporate competition remedies in both the *In re Promedica Health System, Inc.* and *St. Alphonsus Med. Center Nampa Inc. v. St. Luke’s Health System* hospital transactions. However, a unilateral promise of continued intra-corporate competition was recently accepted in *United States v. Booz Allen Hamilton Co.* (“Booz Allen/EverWatch”). An intra-corporate competition promise also has been proposed by the parties in the pending *Penguin/Simon & Schuster* merger. In this latter case, the court denied the DOJ’s motion *in limine*, opining that the case law does not support a blanket exclusion of such unilateral promises and that “unenforceability of the bidding policy goes to weight and not admissibility.”

We recommend that such promises should be treated as inadmissible. They require the corporate divisions firm to act in direct conflict with the fundamental economic incentives of the unified corporation. If this approach were accepted, it would undermine the rule of *Copperweld* that intra-corporate conspiracies are not actionable. Overseeing such remedial promises would turn district courts into regulatory commissars that determine “reasonable” prices on an ongoing basis, a role rejected by antitrust law since *Trenton Potteries*.

Moreover, this remedy has no limits. Under the logic of the remedy, all the firms in a market could merge to monopoly, so long as the surviving corporation promises that the divisions will continue to compete against themselves, perhaps also offering compensation based on divisional rather than corporate profits. Indeed, if *Copperweld* and *Trenton Potteries* are superseded, then so must the blanket immunization for intra-corporate joint pricing and other conduct.

Furthermore, breaches of such promises to engage in intra-corporate competition would be practically unenforceable since breaches are highly unlikely to be detectable. For example,

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


133 778 F.3d 775 (9th Cir. 2015).

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


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

138 *Trenton Potteries*, 273 U.S. at 397-98 (“The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.”).
the corporation can informally provide higher rewards to those divisions that soften or eliminate their competition against other divisions but act instead to maximize total corporate profits. If the corporation awards lower differential bonuses, a customer or monitor could not determine whether this was the result of a violation of the rule as opposed to remuneration for legitimate performance. The same difficulty applies to differential promotions of executives. Moreover, corporations can provide incentives to act in the interest of the entire corporation (in conflict with the remedial goal) by providing stock options or other compensation based on corporate profits, not just divisional profits. Comparing the bidding behavior of the separate divisions would fail to uncover breaches because every division has the incentive to lighten up against each other. In short, unless some executive simply admits to violating the rule in emails, there would be no direct evidence. Again, *Trenton Potteries* counsels courts against such an oversight role and instead reject such remedies.

Merging firms might propose a backup arbitration process. However, customers and arbitrators would face the same inability to determine whether the firms’ conduct is the result of the divisions acting unlawfully in concert rather than independently in light of the complexity of market forces. Simply stated, a “trust but verify” procedure would be highly unlikely to deter violations of these promises.

Even aside from inconsistency with *Copperweld* and *Trenton Potteries*, relying on such promises (or mandating such remedies) represents a “frontal assault” on the policy of the Sherman Act, which *Engineers* made clear is premised on consumer sovereignty and competition. A customer certainly can choose to negotiate a sole source contract rather than rely on competitive bidding. However, in *Engineers*, the Court made it clear that it is not permissible for the *sellers themselves* to make the decision to prohibit the customer’s decision to use competitive bidding.\(^\text{139}\) Nor should a court, which is poorly suited to oversee the conduct on an ongoing basis.

The recent decision by the Maryland district court in *Booz Allen/EverWatch* is illustrative. The customer—i.e., the U.S. National Security Agency (NSA)—had chosen to rely on competitive bidding for a new contract to obtain the best offer, and only Booz Allen and EverWatch responded with “Letters of Intent to Bid.”\(^\text{140}\) The DOJ argued that the pending merger agreement between the two firms would eliminate the incentives of each to compete for the contract because competition would reduce the profits of the to-be-merged company.\(^\text{141}\)

\(^{139}\) *Nat l Soc. of Prof. Engineers*, 435 U.S. 679, 694 (1978).

\(^{140}\) Memorandum, United States v. Booz Allen Hamilton Co. et al., 1:22CV01603 at 4 (Oct. 17, 2022).

\(^{141}\) It follows that the relevant market was competition for this single procurement, a conclusion rejected by the court. *Id.* at 22-3.
DOJ thus alleged that the merger agreement itself would violate Section 1. The court rejected this claim, concluding that the two companies’ fear of losing future business from a tarnished reputation and the personal pride and reputations of the managers would be sufficient to ensure post-merger intra-corporate competition. Ignoring the fact that NSA has opted for competitive bidding, the court concluded that NSA would be protected by these reputational factors, despite the inherent change in the bidders’ economic incentives.

C. Implementation of the Procedure

New legislation is not necessary. District courts can incorporate this procedure into their case management. For example, the court can require the defendant to make the remedy filing, provide for the agency to have a time frame to issue one or more subpoenas, and require time after compliance with the discovery before commencing briefing and trial. The court also can decide how to apply the structural presumption and evidentiary burden. A body of law then can develop from appealed cases.

In anticipation of the court’s adoption of the procedure, the agency and the merging parties have incentives to negotiate agreements during the pre-complaint period that set disclosure, timing, and discovery provisions in the event of an LTF proposal, just as they commonly negotiate timing agreements today. If remedy proposals are included in the initial HSR submission, the agency can obtain relevant information by including relevant specifications to the second request.

VI. Conclusions

We hope that our proposed procedure can lead to uniform application of LTF adjudication. Our proposal highlights the three key, related dimensions of the procedure and explains why placing the burden on the defendant to justify remedial provisions with evidence is supported by the statute, the case law, merger enforcement experience, and economic analysis. Our analysis also explains why it would not make economic sense simply to assume that a divestee will be a perfect competitive replacement for the seller, rather than require the defendant

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

143 Memorandum at 13-15.

144 See id. at 13 ("Booz Allen has strong countervailing incentives to maintain a competitive bid. . . . Booz Allen needs a sterling reputation to have a shot at these opportunities.").
to provide that evidence and why promises by a company to mandate intra-corporate competition should not be considered as a credible merger remedy.