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"The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts"

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I am pleased to be here today to speak at GCR's inaugural New York conference. I understand that later today, a panel will discuss whether antitrust enforcement is occurring at the "right" level. While I am not going to wade into that debate, I will offer my initial impression from my perspective as Director of the Bureau of Competition for a mere 10 weeks: the Federal Trade Commission employs a rigorous case-by-case approach to law enforcement decisions. I will leave it to others to judge whether this results in the "right" amount of enforcement. Of course, I look forward to that discussion because I am always happy to hear views on how the FTC can marshal its resources to address anticompetitive mergers and conduct more effectively.

But I want to emphasize that to fairly judge the Commission's enforcement efforts, one must look at *all* enforcement decisions. Too often the only competition enforcement activities that gain attention are the handful of lawsuits the agencies bring to block a merger or halt anticompetitive conduct. Of course, those lawsuits are important and the FTC does not hesitate to litigate when necessary. In fact, by that measure, the FTC has been particularly active, with a significant pending litigation portfolio. For instance, we recently filed a preliminary injunction action to block Ardagh Group's proposed acquisition of Saint-Gobain Containers, alleging that the transaction would reduce the number of competitors from three to two in the supply of glass bottles to brewers and distillers.[2] The PI hearing is scheduled for mid-October, and the administrative trial is set to begin on December 2, 2013.

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[1] The views stated here are my own and do not necessarily reflect the views of the Commission or of any Commissioner.

[2] *See* Fed. Trade Comm'n, Press Release, *FTC Challenges Ardagh Group, S.A.'s Proposed Acquisition of Rival Glass-Container Manufacturer Saint-Gobain Containers, Inc.*, (July 1, 2013), *available at* http://www.ftc.gov/opa/2013/07/ardagn.shtm.

Next week in federal court in Boise, Idaho, the FTC and the Idaho Attorney General will prosecute a complaint challenging the merger between the state's dominant hospital system and Idaho's largest independent, multi-specialty physician practice group.[3] The complaint alleges that St. Luke's acquisition of Saltzer Medical Group would give St. Luke's a dominant share in the markets for adult primary care physician services and general pediatric services in the Nampa, Idaho area.

And finally, I would be remiss if I didn't mention that after the momentous win in the Supreme Court in *FTC v. Actavis*,[4] we are now actively pursuing two federal court cases involving anticompetitive reverse payment patent settlements, *FTC v. Actavis* and *FTC v. Cephalon*.[5] We look forward to proving that the pay-for-delay agreements at issue in each case violate the antitrust laws under the rule of reason.

Moreover, a full appreciation for the Commission's approach to addressing competitive harm must take account of the circumstances in which the Commission determines *not* to act. In some cases, the Commission or the Bureau will issue a closing statement outlining the factors that conclude a law violation has not taken place.[6] I recommend these to you, and commit that during my time as Bureau Director, I will identify appropriate cases in which to provide additional guidance in the form of public closing statements or other documents that enhance the transparency of the Bureau's competitive analysis.

While our litigated challenges grab headlines, most agency antitrust enforcement occurs through challenges settled by a consent order. Today, I want to discuss the importance of consent orders in the FTC's enforcement arsenal. In my view, FTC consent orders are every bit as important in preserving competition and protecting consumers as are our successful litigation efforts. And they provide significant guidance about how the Commission analyzes mergers and non-merger conduct matters. So I would like to talk a bit about what motivates us to settle and what we require in settlements – both in merger and conduct matters. I should note at the outset that while the examples I give throughout are from FTC matters, I could just as easily point to DOJ consents in making many of these points as we see remedies the same way.

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[3] *See* Fed. Trade Comm'n, Press Release, *FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive*, (March 12, 2013), *available at* http://www.ftc.gov/opa/2013/03/stluke.shtm.

[4] *Federal Trade Commission v. Actavis, Inc.*, No. 12-416, 570 U.S. __ (2013).

[5] *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008).

[6] *See, e.g.*, Fed. Trade Comm'n, Press Release, *FTC Closes Investigation into Tesoro's Acquisition of BP Refinery*, (May 17, 2013), *available at* http://www.ftc.gov/opa/2013/05/tesorobp.shtm; Fed. Trade Comm'n, Press Release, *FTC Closes Eight-Month Investigation of Express Scripts, Inc.'s Proposed Acquisition of Pharmacy Benefits Manager Medco Health Solutions, Inc.*, (April 2, 2012), *available at* http://www.ftc.gov/opa/2012/04/medco.shtm. *See also* Fed. Trade Comm'n, Press Release, *FTC Bureau of Competition Director Issues Statement on Providence Health & Services' Abandonment of its Plan to Acquire Spokane Cardiology and Heart Clinics Northwest*, (April 8, 2011), *available at* http://www.ftc.gov/opa/2011/04/providence.shtm.

The Benefits of Addressing Antitrust Violations through Consent Orders

I would like to start by discussing generally why the Commission settles rather than litigates in certain matters.

Above all, although they are often lower profile, in appropriate cases, consent orders are as effective in maintaining or restoring competition as going to court. A well-crafted consent order can achieve divestitures necessary to preserve existing levels of competition, stop anticompetitive conduct, cause firms to take additional steps to restore competition, or clear away impediments to future competition. Where a consent order can address the harm the Commission alleges has occurred or is likely to occur without the need for litigation, there are enormous benefits to resolving matters through consent orders.

First, resolving a matter through a consent order can lead to a quicker resolution of a matter. Litigation takes considerable time, and may prolong the anticompetitive effects of the illegal conduct and delay implementation of the remedy. The most obvious examples involve ongoing anticompetitive conduct or a consummated merger. Even where a merger is not consummated, obtaining relief quickly is important. Competition can be affected during the pendency of a merger. For example, customers and employees may go elsewhere because of the uncertainty related to the transaction. Plans of the parties may get put on hold while they consider what they might do jointly if the transaction proceeds. And, although unlawful, there is always the potential for gun-jumping which can also harm competition.

Second, in addition to being time-consuming, litigation is resource intensive. In this regard, the Commission seeks to be a good steward of public resources. Resolving a matter through a consent order frees up resources to be spent on investigating, and if necessary challenging other anticompetitive mergers or conduct. And it is not only Commission resources that are at stake. While decisions on fully litigated records may provide greater guidance on the state of the law, it is generally not good public policy to impose substantial costs on respondents and third parties to bring to trial matters that can be settled based on the sound application of law to the substantial record the Commission has developed during an investigation.

Third, litigation is uncertain. And it is important, especially in unconsummated mergers, to achieve a remedy before the eggs are scrambled and a remedy becomes unavailable or less effective. Sometimes, even when we ultimately win, it can be a bittersweet victory. This was the outcome recently when the Commission settled its case challenging the acquisition of Palmyra Park Hospital by its only hospital competitor in Albany Georgia.[7] The complaint also alleged that Phoebe Putney intentionally structured the deal in a way that involved the Hospital Authority as a "straw man" to immunize the anticompetitive acquisition from federal antitrust scrutiny under the state action doctrine.

Following rulings by the district court and the Eleventh Circuit U.S. Court of Appeals that the acquisition was shielded from federal antitrust scrutiny under the state action doctrine,

[7] Fed. Trade Comm'n, Press Release, *Hospital Authority and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws*, (Aug. 22, 2013), *available at* http://www.ftc.gov/opa/2013/08/phoebe.shtm.

Phoebe and Palmyra consummated the acquisition on December 15, 2011. The FTC appealed to the Supreme Court, which granted certiorari and issued a unanimous ruling in the FTC's favor on February 9, 2013, finding that the actions of the Hospital Authority were not entitled to state action immunity.[8] The Supreme Court's ruling is a significant win for consumers overall, because it reined in the lower court's overbroad application of state action immunity. Unfortunately, it was not able to fully benefit residents in Georgia.

The Commission ordered a new date for the administrative trial on the merits, but after several months of discovery, it became clear that divestiture would be unavailable as a remedy because of Georgia's strict certificate of need (CON) law. In 2012, Phoebe applied to the Georgia Department of Community Health for a new, single license for the two hospitals. As a result, the two hospitals became, for regulatory purposes, a single-licensed hospital with two campuses. Redivision of the license or divestiture/transfer of either hospital would have required issuance of a new CON under Georgia law, upon a showing of 1) unmet need for additional hospital beds and 2) no adverse impact on the patient volume/revenues of other hospitals in the area.

Yet it is all but certain that the state would not grant a CON to an acquirer, based on Georgia's assessment of bed capacity in the market. As a result, even if the Commission determined on a full trial record that the merger violated Section 7, divestiture would have been impossible because the divested facility could not obtain a new CON license. It is unlikely that a potential buyer would be willing to undertake the risk and upfront cost associated with CON litigation and appeals. In light of these unique circumstances, the Commission accepted a proposed settlement that does not include divestitures, but nonetheless represents the most effective and efficient resolution available. Importantly, it includes a stipulation that the effect of the consummated transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Complaint.

Let me make another point on litigation versus settlement. The Commission goes to court to protect competition and consumers when it has reason to believe there is an antitrust wrong to be righted and when such action would be in the public interest. Where there is a workable settlement offer that resolves and remedies the antitrust violation, then the Commission may determine that accepting the settlement in lieu of litigation is in the public interest.

Fourth, litigation can be a blunt instrument– especially federal court injunction cases where a merger is either blocked or allowed to proceed in its entirety. In some cases, the decision to litigate is the result of rejecting a settlement proposal and accepting that the litigation outcome will be all or nothing. In contrast, a consent order allows us to be surgical in our approach – to eliminate the anticompetitive aspects of a transaction or conduct with the detailed information needed to do so while not adversely affecting procompetitive aspects of an arrangement.

Finally, as I noted at the outset, in addition to maintaining or restoring competition, consents can provide significant guidance as to how the Commission views the competitive issues raised by a particular transaction or conduct. The Commission seeks to draft complaints that clearly lay out the key facts underpinning an action. This precision benefits not only those

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[8] *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003 (2013).

under order, but also those not involved in the matter as means of understanding the Commission's competitive concern, and its remedial approach. This provides valuable guidance to the bar and business community. While it is true that the briefs and opinions in a litigated challenge may more fully discuss the information and evidence underlying an action, a consent order has the advantage of describing in detail why the Commission required the particular remedy for the alleged law violation.

In addition to the complaint and order, the Analysis to Aid Public Comment, a document that I think often gets overlooked, also contains important details about the salient facts of a case. The Analysis is designed to explain precisely why we believe the proposed consent remedies the concern in the complaint and often has additional information beyond the other documents. Moreover, it is written in a way to encourage public comment, and is often the most easily understood summary of the key facts, the law violation, and the corrective action. Note that typically, the Commission accepts a proposed order and invites public comment before issuing a final order. This provides an opportunity for members of the antitrust bar and others to raise concerns about the Commission's approach, and I encourage you to do so.

The Commission is able to achieve significant law enforcement through consent orders in large part because over time, outcomes in antitrust investigations have become more predictable. Through substantive guidance on key areas of antitrust law, transparency in decision making via public documents, and outreach to the business community in events like this one, antitrust enforcers "fill the gaps" over time. The Commission will continue to litigate when necessary, but over time, one would expect less litigation in well-established areas, not more.

Myths Concerning Consent Orders

Having explained the significant benefits of addressing antitrust violations through negotiated remedies, let me address some persistent myths about Commission consent orders.

First, although the settlement process invariably entails a fair amount of back-and-forth, settlement negotiations can yield a remedy that is as good as or better than what could be achieved from litigation, because it allows all sides to fine-tune the specifics to maintain as much of the legitimate efficiencies as possible. In my experience, business executives often think that they can trade certain outcomes during settlement discussions, much like in a typical corporate negotiation. So, for instance, if the Commission staff indicates that x plants must be divested to resolve their concerns, business executives may believe we have artificially inflated our ask so as to compromise in the middle. That is simply not an accurate description of the Commission's process.

Rather, the benefit of the consent process is that it allows us to fashion an effective remedy through the back-and-forth of settlement discussions—sometimes extensive discussions. For instance, while we may have an initial view of a particular divestiture package that would resolve the competitive concerns, if the parties bring us an up-front buyer that can credibly explain and document why it prefers a different package, we are always ready to listen. Similarly, in conduct cases, if broad proscriptions for specific prohibited conduct sweep in conduct that is procompetitive or efficient, more narrowly tailored language may allow the beneficial conduct to continue. In that sense, settlement negotiations need not be a zero-sum game.

Here's an example involving a remedy to counteract exclusionary exclusive dealing contracts. Exclusive dealing contracts can be beneficial if they promote interbrand competition, say by encouraging marketing support for the manufacturer's brand. But when used by a manufacturer with market power, these types of vertical arrangements may work to prevent smaller competitors from succeeding in the marketplace, harming competition and ultimately consumers. For instance, exclusive contracts may be used to deny a competitor access to retailers or distributors without which the competitor cannot make sufficient sales to be viable. Such concerns were the basis for the Commission's 2010 consent order against Transitions Optical, Inc.[9] At that time, Transitions was the nation's leading manufacturer of photochromic lens treatment, a position it maintained for many years through the use of exclusive contracts at every level of the distribution chain. To undo the effects of its exclusionary conduct and to lower barriers to new entry, the Commission's order prohibits Transitions from using exclusive contracts with its direct customers (i.e., lens casters), but permits Transitions to continue to use exclusive contracts with retailers and wholesale labs under certain conditions.[10] The ability to fine tune the proscriptive provisions in a consent order in this way ensures that competition in the future will occur on the merits, by ending the illegal conduct without hobbling the firm under order.

Second, there is sometimes a belief that if our case were strong, we would not settle. Again, that is simply not the case. In fact, the stronger the evidence of likely competitive harm or the more predictable the needed remedy, the more likely parties are willing to discuss options to resolve our concerns.

Consequently, litigation typically occurs in the merger context where the only viable remedy involves all or nearly all of what the buyer hoped to obtain through the deal or in a conduct case where the only remedy is for the business at issue to cease conduct it wishes to continue. By way of example, in September 2008, the Commission issued a complaint challenging the consummated acquisition by Polypore International, Inc., a North Carolina-based maker of battery components of Microporous Products, L.P., a rival component manufacturer.[11] There was no viable remedy that would address the Commission's concerns other than a complete divestiture of the acquired company. After an administrative trial and appeal, the Commission found that the consummated transaction led to decreased competition and higher

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[9] Fed. Trade Comm'n, Press Release, *FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses*, (Mar. 3, 2010), *available at* http://www.ftc.gov/opa/2010/03/optical.shtm.

[10] *See* Decision and Order, *In re Transitions Optical*, Docket No. C-4289 (Apr. 22, 2010) (Paragraph II.B: exclusive agreements with Indirect Customers must: i) be terminable without cause, and without penalty, on 30 days written notice; ii) be available on a partially exclusive basis, if requested by the customer; and iii) not offer flat payments of monies in exchange for exclusivity), *available at* http://www.ftc.gov/os/caselist/0910062/100427transopticaldo.pdf.

[11] Fed. Trade Comm'n, Press Release, *FTC Issues Administrative Challenge to Polypore International, Inc.'s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct,* (Sept. 10, 2008), *available at* http://www.ftc.gov/opa/2008/09/polypore.shtm.

prices in deep-cycle separators for batteries used primarily in golf carts; motive separators for batteries used primarily in forklifts; and automotive separators used in car batteries.[12] Polypore was required to divest Microporous to an FTC-approved buyer within six months after the divestiture provisions of the Order became final.

Polypore contested the Commission's ruling before the Eleventh Circuit, both on Section 7 standards of liability and also regarding the Commission' ability to require divestiture of a Microporous plant located in Austria, in addition to a Polypore plant in Tennessee. The Circuit upheld the required divestitures, ruling that the Commission did not abuse its discretion in requiring the divestiture of both plants to restore the competition eliminated by the acquisition.[13] In June, the Supreme Court denied review, and Polypore must complete the divestitures later this year.

Third, consent orders are not boilerplate, one-size-fits-all documents. While there are significant similarities in how the Commission resolves merger matters on the one hand and conduct matters on the other (and even some similarities across actions), each transaction or proscribed conduct is different, the harm being addressed is different, and consequently the specific order provisions needed to address that harm will be different. The Commission uses the flexibility it has to craft each remedy to the specific situation before it in a given matter.

There are standard provisions that are included in consent orders, such as compliance reports and access to records. And the similarity of many of our consents is no accident. We have learned what works best from years of monitoring our remedies. Nevertheless, because each situation is unique, parties under investigation will not get far by insisting that a particular provision was or was not in a past consent order involving a different transaction, especially one in a different industry. We will of course consider arguments that we should adhere to what we did in a prior case, but at the end of the day, the facts in the specific situation – and not a simple consideration of a previous matter – will determine the provisions in the consent. Equally, parties should not hesitate to suggest that we take an approach not previously taken if there is good reason to do so given the specifics of their case. Moreover, as the Commission continues to learn what remedies work better than others, especially in a particular industry, there will be adjustments. This learning may result in different, and perhaps more restrictive, requirements than those contained in previous consent orders—maybe even different from the one you saw in your last transaction in the same industry. Over time, we gain experience with remedies that work to preserve or restore competition.

Here's an example. In 1995, the Commission ordered Schnuck Markets, Inc. to divest 24 supermarkets in order to proceed with its acquisition of National Holdings, Inc.[14] The consent order did not require an up-front buyer, and divestiture was required within twelve months, a fairly standard time period for divestiture in those days. However, after the merger was consummated, Schnucks failed to maintain the 24 stores properly, for example by foregoing routine practices such as cleaning and stocking the shelves, and going so far as removing key

[12] Opinion of the Commission, *In re Polypore Int'l, Inc.*, Docket No. 9327, (Dec. 13, 2010) *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf
[13] *Polypore Int'l Inc. v. FTC* , 686 F.3d 1208 (11th Cir. 2012).
[14] *In re Schnuck Markets, Inc.*, 119 F.T.C. 798 (June 9, 1995).

equipment and delisting the phone numbers for the stores. As a result, what was delivered to the buyer 12 months later was a relatively unattractive set of assets with significantly diminished sales. The Commission filed a federal court action to obtain civil penalties, and in settlement, Schnucks agreed to pay $3 million and divest two additional stores.[15]

This was an unfortunate case in which the party under order was able to effectively thwart the Commission's remedial goal of preserving competition that would otherwise be lost as a result of the illegal acquisition. Although the Commission was able to secure a substantial penalty, we cannot rely on the threat of civil penalty actions alone to ensure that respondents take steps on their own to maintain the competitive status quo. In this case, the prospect of substantial civil penalties did not deter Schnucks from engaging in strategic behavior. More importantly, by the time the Commission would bring a civil penalty action, the damage to the market will have already been done, and possibly in a way that prevents any effective remedy. As a result, the Commission now requires, almost without exception, an up-front buyer in supermarket mergers and in other markets in which the consumer "franchise" might be diminished or destroyed pending post-order divestiture.

Process and Timing of Settlements

Finally, before discussing specifics of what the Commission looks for in designing effective remedies in various matters, let me talk a little about the process and timing of settlement discussions that occur during the course of our investigations.

First, a party may decide to raise the topic of settlement at any time during a pending investigation. In fact, lawyers representing the merging parties can and do initiate contact with Bureau staff after an agreement is signed but before they file notice under the Hart-Scott-Rodino Act to begin the process of identifying issues and proposing divestitures that will resolve them. We welcome such an approach and have sometimes found a way to obtain the information we need without full compliance with a second request. Nevertheless, staff still needs the time and information to do a thorough investigation to determine the scope and extent of the competitive concerns and to ensure that any remedy, if needed, is appropriate to address the potential harm.

For a matter where the issues are fairly clear-cut, and experience suggests a particular remedial approach, this approach may shorten the timetable for resolution. An example where this approach has worked well is with pharmaceutical mergers. Key information, such as whether entry is occurring or likely, is readily available. And we have sufficient experience with remedies in this area that we can likely determine relatively quickly what will satisfy our concerns. Similarly, in straightforward conduct cases, parties may seek to resolve the matter through consent almost immediately upon becoming aware of the staff's concerns. This may be possible in a situation where we understand the condemned conduct sufficiently to craft an appropriate and thorough remedy.

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[15] Fed. Trade Comm'n, Press Release, *Schnucks To Pay $3 Million, Divest Two Additional Stores To Settle FTC Charges Of Running Down Supermarkets Before Divesting*, (July 30, 1997), *available at* http://www.ftc.gov/opa/1997/07/schnuc~1.shtm.

For more complicated investigations—such as those involving multiple product or geographic markets, new industries or novel legal issues—quick settlement is less likely. For those cases, there may be no short-cuts for the type of analysis that needs to take place to achieve an acceptable settlement. In general, the staff will do as much investigation as needed to determine that a competitive concern exists and that the proposed remedy resolves any concerns.

Second, throughout the investigation, Bureau staff will try to be transparent about their concerns so that parties can anticipate the contours of what might be an acceptable settlement. Not surprisingly, parties often ask what it would take to resolve a competitive concern. When possible, staff will provide a response. Sometimes, the parties supply a basic framework of what they have in mind for a settlement. At that point, staff may provide feedback – often quite detailed – in order to narrow the issues and provide the basis for an effective remedy. To the extent possible, this dialogue should reduce surprises or last-minute impasses.

Third, it is important to recognize that offers to settle are not the end of the inquiry, but the beginning of a new inquiry. Often business people are surprised that there is more work to be done and more information requested after settlement discussions have begun. Bureau staff, and ultimately the Commission, will need additional information to ensure that a proferred remedy is workable. This may involve the production of additional documents and data. If a third party is involved in making the remedy work, such as a divestiture buyer, we will spend considerable time with that party discussing the remedy. And we will obtain the reactions of others in the industry, particularly customers, to test our views as to whether the remedy solves their concerns. While not dispositive, this customer feedback can help the Commission determine if the proposed remedy is in the public interest.[16]

Personnel from our Compliance Division work with the investigative team to help craft the consent order and any additional agreements necessary to effectuate a settlement. They have extensive experience both with drafting – and as importantly – monitoring compliance with Commission orders. This experience promotes a consistent approach, and ensures that the Commission's and consumers' interests are protected. They are also quite creative in figuring out how to address competitive concerns without undermining efficiencies the parties seek to maintain. Indeed they often join the investigative team as soon as a settlement seems possible, to avoid any unnecessary delay.

When the Commission accepts a proposed settlement and publishes a proposed consent package, it is for the purpose of obtaining public comment. The Commission reviews all public comments. Issues raised by commenters may result in modifications to the final order.[17] Two

[16] Effective divestitures require strong viable *businesses*, not just a collection of assets, and analysis of what a robust *business* requires may go beyond the straight-up market definition exercise. Businesses should be aware of that and be prepared to assist staff as they grapple with those issues. *See* Fed. Trade Comm'n, Bureau of Competition, *Statement on Negotiating Merger Remedies*, (Jan. 2012) p. 5, *available at* http://www.ftc.gov/bc/bestpractices/merger-remediesstmt.pdf.

[17] Under the Commission's Rules of Practice, the Commission cannot unilaterally modify a proposed order; however, it may withdraw its acceptance of the initial agreement and file a complaint, or seek to negotiate modifications with the respondents. *See* 16 C.F.R. §2.34(e). If the respondents agree to the modifications, the Commission will issue the modified final order with an explanation of which

recent consent orders illustrate that public comments can lead to consent order modifications. In April 2012, the Commission accepted a proposed consent order to settle charges that CoStar Group, Inc.'s $860 million acquisition of Loopnet would have been anticompetitive in the market for commercial real estate information services in the United States.[18] However, many commenters raised concerns that one provision of the order would supersede existing contractual provisions between CoStar and its customers.[19] This interpretation would effectively foreclose competitors from access to these important customers due to these customers' dependence on CoStar extracts and internal usage rights. The Commission removed the provision from its final order.[20]

The Commission also approved a modified final order settling charges that some of Google Inc.'s business practices could stifle competition among manufacturers of electronic devices.[21] In its administrative complaint, the Commission charged that Google engaged in unfair methods of competition in violation of Section 5 by seeking injunctions on standard-essential patents (SEPs) held by Google's subsidiary, Motorola Mobility LLC and reneging on promises to provide licenses on fair, reasonable, and non-discriminatory or FRAND terms. The Commission has long been concerned that this type of patent hold-up threatens to harm the standard-setting process, impairs competition in the markets for products using those patents, and ultimately, raises prices to consumers.[22]

To settle those charges, Google agreed not to seek a new injunction for infringement of its SEPs without first following the process outlined in the Commission's proposed order. This process encourages negotiation with potential licensees over disputed terms or obtaining a ruling by a neutral third party. After considering the 25 public comments, the Commission and Google agreed to make modifications to several provisions in the order, including those pertaining to the arbitration process established to resolve disputes over FRAND terms.[23] The revisions contained

provisions have been modified and why. If the respondents do not agree to the proposed modifications, the Commission may issue an administrative complaint and proceed to trial.

[18] Fed. Trade Comm'n, Press Release, *FTC Places Conditions on CoStar's $860 Million Acquisition of LoopNet*, (Apr. 26, 2012), *available at* http://www.ftc.gov/opa/2012/04/costar.shtm.

[19] Decision and Order, *In re CoStar*, Docket No. C-4368 (Aug. 29, 2012) *available at* http://www.ftc.gov/os/caselist/1110172/120426costardo.pdf (Paragraph III.H.2.c. of the proposed order: "Provided, however, Respondents may decline to offer CoStar Database extracts to, or allow the creation of internal databases incorporating portions of the CoStar Database by, Customers who purchase, license, or subscribe to CRE Product Offerings from CoStar Competitors.")

[20] Fed. Trade Comm'n, Press Release, *FTC Approves Modified Final Order Settling Charges that CoStar's $860 Million Acquisition of LoopNet was Anticompetitive*, (Aug. 30, 2012), *available at* http://www.ftc.gov/opa/2012/08/costar.shtm.

[21] Fed. Trade Comm'n, Press Release, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search*, (Jan. 3, 2013), *available at* http://ftc.gov/opa/2013/01/google.shtm.

[22] *See* Prepared Statement of the Fed. Trade Comm'n Before the U.S. Comm. on the Judiciary, Subcomm. On Antitrust, Competition Policy and Consumer Rights Concerning "Standard Essential Patent Disputes and Antitrust Law," (July 30, 2013), *available at* http://www.ftc.gov/os/testimony/113hearings/130730standardessentialpatents.pdf.

[23] For example, in the final order, the description of the procedure to initiate arbitration under the order was revised, such that in its offer to arbitrate, Google must commit to abide by the outcome of the

in the final order help prevent Google from engaging in patent hold-up by establishing a workable alternative to seeking an injunction for resolving FRAND disputes.

Let me now turn to what we look for in merger and non-merger remedies.

Merger Remedies—The Key Components

In thinking about merger remedies, we start with the premise, as our Guidelines note, that "the agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively benign or neutral."[24] Merger review is a winnowing process, as the numbers bear out. Looking at fiscal year 2012, the agencies received HSR filings for 1429 transactions, issued a combined 49 second requests, and took 44 enforcement actions.[25] Clearly, the vast majority of mergers do not present competitive problems, and do not require any form of remediation.

In keeping with the goal of Section 7, the key in devising an effective merger remedy is to preserve or replace the competition that would likely be lost due to the acquisition.[26] The Commission and the Department of Justice take the same approach to remedies. The Bureau of Competition's Statement on Merger Remedies provides a roadmap for the Commission's approach to designing merger remedies that work.[27] In general, a merger remedy should (i) address the competitive harm from the merger; (ii) fit the facts of the case and characteristics of the relevant market by having a close and logical nexus between the theory of harm and the remedy; (iii) focus on preferred and time-tested approaches, such as divestiture of an on-going business to an up-front buyer, but retain flexibility when necessary; and (iv) preserve the procompetitive benefits of the merger consistent with obtaining effective relief.

Divestiture remains the preferred remedy for violations of Section 7.[28] Remedies such as commitments not to increase prices do not create an independent competitor to replace the lost competition. The Commission cannot determine what the competitive price would have been absent the merger, and does not seek to regulate prices. Further, other dimensions of competition

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arbitration and the Potential Licensee must also make such a commitment. Decision and Order, *In re Google,* Docket No. C-4410 (July 23, 2013), Paragraph IV, *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf. The revised order also clarifies some aspects of timing to prevent a premature start of the six-month waiting period. *See* Paragraphs V and IV.B(1).

[24] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.0 (2010), *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

[25] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N., Hart-Scott Rodino Annual Report FY 2012, Appendix A, *available at* http://ftc.gov/os/2013/04/130430hsrreport.pdf. *See* pp. 9 – 20 for a description of each merger enforcement action taken by DOJ and the FTC during FY 2012.

[26] *United States v. E.I. du Pont de Nemours & Co*., 366 U.S. 316, 326 (1961).

[27] *Statement on Negotiating Merger Remedies*, *supra n. 16,* p. 5. DOJ takes a similar approach. *See* U.S. DEP'T OF JUSTICE, *Antitrust Division Policy Guide to Merger Remedies,* (June 17, 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf

[28] "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind when a violation of § 7 has been found." 366 U.S. at 330-31.

– such as quality and innovation – cannot be addressed by such measures as price caps. And a static commitment such as price caps may impede the ability of the merged firm to address dynamic marketplace conditions.

Many consent orders involve a fairly straight-forward divestiture of the assets of either the buyer or the seller in the market of concern. For instance, the Commission recently charged that Tesoro Corporation's acquisition of certain pipeline and terminal assets from Chevron Corporation would have given Tesoro ownership of two of the three full service light petroleum terminals in Boise, significantly reducing competition for local terminal services. The proposed order requires Tesoro to sell the light petroleum products terminal it currently owns in Boise to an FTC-approved buyer. Tesoro was also subject to a separate order to maintain assets to preserve the Tesoro's Boise terminal as a viable, competitive, and ongoing business pending its divestiture.

The Commission gave Tesoro six months to divest the Boise terminal because it considered those assets to be a relatively autonomous business. In other cases, the Commission may require divestiture to a buyer specifically named in the order, i.e., an up-front buyer.[29] The Commission is particularly likely to require an up-front buyer if the proposed set of assets is not a separate business unit that has operated as such in the past,[30] or if the to-be-divested assets are susceptible to deterioration pending divestiture.[31] Although finding an acceptable up-front buyer may streamline the process and avoid the time and effort needed to negotiate other terms such as a hold-separate, the Commission will need time to determine that the buyer has what it needs to be an effective competitor. In some cases, that inquiry may reveal the buyer needs additional assets or interim assistance to adequately replace the competition that would otherwise be lost. From experience, maintaining or restoring competition is as much a function of who the buyer is and the circumstances under which it is acquiring the assets as it is a function of what assets are divested. This is why, even in the case of an upfront buyer, the Commission must approve both the buyer and the manner of divestiture.

In some situations, the divestiture buyer may be the original seller. That is, the parties may decide to modify the original acquisition to exclude, or carve out, the business unit or units that operate in the relevant markets under investigation. In such cases, we will still need to understand the competitive consequences of doing so since the original seller will now have a different set of assets, and potentially different incentives, post-divestiture. For instance, when AmeriGas sought to acquire the Heritage Propane business of Energy Transfer Partners (ETP),

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[29] *See*, *e.g.*, *In re Robert Bosch GmbH*, Docket No. C-4377 (Apr. 24, 2013), *available at* http://www.ftc.gov/os/caselist/1210081/index.shtm; *In re Hertz Global Holdings, Inc.*, Docket No. C-4376 July 11, 2013), *available at* http://www.ftc.gov/os/caselist/1010137/index.shtm; *In re Watson Pharm. Inc.*, Docket No. C-4373 (Dec. 14, 2012), *available at* http://www.ftc.gov/os/caselist/1210132/index.shtm; *In re Johnson & Johnson*, Docket No. C-4363 (Aug. 7, 2012), *available at* http://ftc.gov/os/caselist/1110160/index.shtm.

[30] *See, e.g., In re Laboratory Corp.*, Docket No. C-4341 (Feb. 1, 2012), *available at* http://www.ftc.gov/os/caselist/1110155/index.shtm; *In re Corning, Inc.*, Docket No. C-4380 (Dec. 21, 2012), *available at* http://www.ftc.gov/os/caselist/1210133/index.shtm.

[31] *In re Koninklijke Ahold N.V./Safeway Inc.*, Docket No. C-4367 (Aug. 17, 2012), *available at* http://www.ftc.gov/os/caselist/1210055/index.shtm.

Commission staff raised concerns that the deal would have reduced competition in the market for propane exchange cylinders that consumers use to fuel barbeque grills and patio heaters. The parties subsequently proposed a modified transaction that excluded those assets and agreed to the terms of the consent order issued by the FTC.[32] ETP indicated that it still intended to sell its propane business, and the Commission's order required Commission approval if that future sale took place, which in fact occurred about six months after the order was issued for public comment.[33]

Parties often ask whether precision in replicating the "but-for" world is required, that is, whether the asset package must consist of a set of assets equal to or greater than the smaller of the merging parties' assets in the area of overlap. Many Commission orders contain divestiture packages that include all of A's or B's assets in the areas of competitive overlap. Yet some contain a smaller package of assets, especially where an up-front buyer already has assets that can be used to compete in the relevant market. Sometimes, parties propose to divest a set of assets that would equal the smallest competitor currently in the market, arguing those assets will be sufficient for a competitor to be viable. Restoring the lost competition is the standard remedy for a violation of Section 7. That means creating a competitor that has the ability and incentive to compete in a way that replaces the competition that would otherwise be lost through the merger. In fact, the Commission may reject a proposed buyer who, though viable, would not restore the necessary degree of competition to the market.[34]

Nonetheless, in a recent case, the Commission determined that the typical approach of requiring divestiture of all of either the buyer's or seller's assets in the area of competitive overlap was not the best alternative for preserving competition. In Pinnacle/Ameristar, the proposed consent order requires the divestiture of one of Pinnacle's casinos in St. Louis -- Lumière – but not its River City casino.[35] Based on quantitative and qualitative evidence gathered during the investigation, the Commission determined that the divestiture of Lumière alone likely will result in a St. Louis casino services market that is even more competitive than it is today. This results because Lumière is closer both to Ameristar St. Charles and River City than those casinos are to each other. As a result, an independent owner of Lumière will be well positioned to compete against both Ameristar St. Charles and River City.[36]

Consummated mergers can present a remedial challenge, especially where some integration of operations has taken place. In the worst case scenario, the acquired assets have

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[32] Fed. Trade Comm'n, Press Release, *FTC Puts Conditions on AmeriGas's Proposed Acquisition of Rival Propane Distributor Heritage Propane*, (Jan. 11, 2012), *available at* http://www.ftc.gov/opa/2012/01/amerigas.shtm.

[33] Fed. Trade Comm'n, Press Release, *FTC Approves Energy Transfer Partners' Application to Sell Heritage Propane Express to JP Energy Partners, LP*, (June 1, 2012), *available at* http://www.ftc.gov/opa/2012/06/amerigas.shtm.

[34] Fed. Trade Comm'n, Press Release, *FTC Rejects B.A.T. Proposal To Divest Cigarette Brands To Lorillard*, (Apr. 10, 1996), *available at* http://www.ftc.gov/opa/1996/04/bat6.shtm.

[35] Fed. Trade Comm'n, Press Release, *FTC Requires Pinnacle to Sell Two Casino Properties as Condition for Acquiring Rival Ameristar*, (Aug. 12, 2013), *available at* http://www.ftc.gov/opa/2013/08/pinnacle.shtm.

[36] Analysis to Aid Public Comment, *In re Pinnacle Entertainment, Inc.*, Docket No. 9355 (Aug. 12, 2013), *available at* http://www.ftc.gov/os/adjpro/d9355/130812pinnacleanalysis.pdf.

been redeployed outside the relevant market[37] or destroyed,[38] leaving few remedial options. Nonetheless, the Commission has the discretion to order an effective remedy to counteract the effects of an illegal acquisition even for consummated mergers, including the reconstitution of a divestible entity.[39]

As an example, in 2005, the Commission ruled that Chicago Bridge & Iron Company (CB&I) illegally acquired certain Pitt-Des Moines, Inc. (PDM) assets, which significantly reduced competition in four separate markets involving the design and construction of various types of field-erected specialty and industrial storage tanks in the United States.[40] CB&I completed the acquisition of PDM assets in February 2001, during a pending Commission investigation. To restore competition as it existed prior to the merger, the Commission ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, under the eye of a monitor, and then to divest (with the Commission's approval) one of those businesses. CB&I petitioned the Fifth Circuit to review the Commission's decision, and on January 25, 2008, the appellate court upheld the Commission's decision, finding that the scope of the divestitures, which included assets capable of making products other than those involved in the violation, was "consistent with and relevant to creating a viable competitor."[41] Moreover, the court cited with approval the flexibility given to CB&I and the monitor to determine how the assets must be divided in order to create a new separate entity to compete with CB&I in the relevant markets on an equal footing.[42] In November 2008, the Commission approved CB&I's application to divest PDM assets, along with knowledgeable employees, contracts, and technical support, to an established tank engineering and construction business.[43]

[37] *In re Magnesium Elektron*, Docket No. C-4381 (Dec. 26, 2012) (divestiture of intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications, as well as a supply agreement for magnesium plates until the buyer is able to produce and sell products on its own), *available at* http://www.ftc.gov/os/caselist/0910094/index.shtm.
[38] *See In re Charlotte Pipe and Foundry Co.*, Docket No. C-4403 (May 15, 2013) (acquired assets were destroyed; final order requires prior notice of future acquisition involving cast iron soil pipe, as well as elimination of non-compete and confidentiality provisions), *available at* http://www.ftc.gov/os/caselist/1110034/index.shtm.
[39] *In re Cardinal Health*, Docket No. C-4339 (Oct. 21, 2011) (final order requires buyer to reconstitute and sell nuclear pharmacies in three cities), *available at* http://www.ftc.gov/os/caselist/0910136/index.shtm.
[40] Opinion of the Commission, *In re Chicago Bridge & Iron Co.*, Docket No. 9300 (Jan. 6, 2005), at 32, *available at* http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.
[41] *Chicago Bridge & Iron Co. v. FTC*, 515 F.3d 447, 476-77 (5th Cir. 2008).
[42] *Id*. at 478. "[I]nstead of a hearing, the Commission devolved authority to decide what assets will be involved in the divestiture to CB&I and the monitor trustee. Permitting the respondent and a trustee to decide, instead of holding another court hearing, is within the Commission's broad authority to fashion relief. The Commission's remedy in this case is also possibly a superior and more efficient method to resolve the issue."
[43] Fed. Trade Comm'n, Press Release, *Commission Approves Divestiture by Chicago Bridge & Iron Company, Extends Monitor Trustee's Term of Service for Six Months*,(Nov. 28, 2008), *available at* http://www.ftc.gov/opa/2008/11/chicagobridge.shtm.

In some instances, a straight-forward divestiture is not available or would otherwise not be in the public interest.[44] For instance, after the largest provider of acute care hospital services in Reno, Nevada acquired the two largest cardiology practices, the FTC charged that the acquisitions eliminated effective competition for adult cardiology services in violation of Section 7.[45] In particular, the contracts between the hospital, Renown Health, and the newly hired cardiologists included "non-compete" provisions, which effectively prevented them from joining medical practices that competed with Renown Health. As a result of the acquisitions and non-compete clauses, the FTC claimed that Renown Health employed 88 percent of the cardiologists in the Reno area. However, because the "assets" controlled by Renown could be described as the doctor-employees, divestiture in this case was not appropriate. The Commission's order provided that Renown Health would temporarily suspend the non-compete provisions with its cardiologists, allowing them to seek other employment, including positions with other hospitals in the Reno area. Many of them did just that. This case demonstrates the Commission's flexibility in devising non-structural remedies that restore competition when an outright divestiture is not feasible.

While divestitures are the preferred remedy, there are times when licensing can be an appropriate remedy on the facts. For example, licensing requirements may resolve concerns about an otherwise harmful merger in markets where other aspects of establishing a business can easily be duplicated.[46] Just last week, the Commission issued a proposed consent order settling charges that Honeywell International Inc.'s proposed $600 million acquisition of Intermec, Inc. would substantially reduce competition for 2D scan engines which are used in retail scanners and other devices to capture an image (such as a barcode) through a digital photograph.[47] According to the complaint, 2D scan engine suppliers who want to sell their scan engines to customers who intend to incorporate them into products sold into the United States must own or have a license to U.S. patents covering 2D scan engine technology and be able to indemnify their customers against the threat of a patent suit. The proposed order requires Honeywell to license Honeywell's and Intermec's U.S. patents covering technology used in 2D scan engines to Datamec, a company who marketed 2D scan engines outside the U.S. but lacked the necessary IP to sell into the U.S. The license allows Datamec to enter the U.S. market immediately.

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[44] Fed. Trade Comm'n, Press Release, *FTC Closes its Investigation into GenCorp's Proposed Purchase of Pratt & Whitney*, (June 10, 2013), *available at* http://www.ftc.gov/opa/2013/06/gencorp.shtm (Department of Defense raised concerns about national security).

[45] Fed. Trade Comm'n, Press Release, *FTC Order Will Restore Competition for Adult Cardiology Services in Reno, Nevada*, (Aug. 6, 2012), *available at* http://www.ftc.gov/opa/2012/08/renownhealth.shtm.

[46] Fed. Trade Comm'n, Press Release, *FTC Challenges Flow International's Proposed Acquisition of Rival OMAX Corp.*, (July 10, 2008), *available at* http://www.ftc.gov/opa/2008/07/flowomax.shtm (buyer agreed to provide royalty-free licenses to seller's patents to complete merger).

[47] Fed. Trade Comm'n, Press Release, *FTC Puts Conditions on Honeywell's Acquisition of Scan Engine Manufacturer Intermec,* (Sept. 13, 2013) *available at* http://www.ftc.gov/opa/2013/09/honeywell.shtm.

Other provisions in aid of effective divestiture

In addition to divestiture provisions, Commission merger consent orders may include non-structural, or conduct, relief to ensure the buyer can be competitive as soon as possible.[48] In some cases, the acquirer of divested assets may need temporary assistance to fill in gaps until the acquirer is fully up and running (such as IT or billing services) or may need training in using newly-acquired assets; the Commission will require that the respondent provide such assistance or training.[49] In other cases, the buyer may need a guaranteed supply of finished product to sell immediately until the buyer can produce product on its own;[50] it might also need a supply of inputs until it can secure its own supply.[51]

In many cases, experienced employees are critical to the success of the acquirer. The Commission cannot require employees to accept employment with the acquirer. Yet it often requires that respondents aid acquirers in their efforts to hire employees, particularly with respect to key employees, by providing access to employees and removing impediments to employees accepting employment with the acquirer.[52] In some cases, the Commission may also require respondents to offer incentives to employees to remain with the assets until divested and/or accept employment offers from the acquirer.[53]

Where the merging parties have had access to confidential information related to assets ordered to be divested, use or disclosure of that confidential information might harm the buyer of

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[48] Non-structural remedies are often used to address concerns raised in a vertical merger about the ability or incentive of the integrated firm to reduce competition. Conduct relief in a vertical merger may include a requirement to erect firewalls to protect confidential information, or a requirement not to favor certain entities. *See, e.g.*, Fed. Trade Comm'n, Press Release, *FTC Puts Conditions on PepsiCo's $7.8 Billion Acquisition of Two Largest Bottlers and Distributors*," (Feb. 26, 2010), *available at* http://www.ftc.gov/opa/2010/02/pepsi.shtm; *and* Fed. Trade Comm'n, Press Release, *FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo*, (Sept. 15, 2008), *available at* http://www.ftc.gov/opa/2008/09/fresenius.shtm.

[49] *See, e.g.*, Decision and Order, *In re Kinder Morgan, Inc.*, Docket No. C-4355 (June 14, 2012), *available at* http://www.ftc.gov/os/caselist/1210014/index.shtm; Decision and Order, *In re AEA Investors 2006 Fund L.P.*, Docket No. C-4297 (Aug. 31, 2010), *available at* http://www.ftc.gov/os/caselist/0810245/index.shtm; Decision and Order, *In re Carpenter Tech. Corp.*, Docket No. C-4349 (Apr. 1, 2012), *available at* http://ftc.gov/os/caselist/1110207/120413carpentertechdo.pdf.

[50] *See, e.g.*, Decision and Order, *In re Valeant Pharm. Int'l, Inc.*, Docket No. C-4342 (Feb. 22, 2012), *available at* http://www.ftc.gov/os/caselist/1110215/index.shtm; Decision and Order, *In re Teva Pharm. Ind. Ltd*, Docket No. C-4335 (July 3, 2012), *available at* http://www.ftc.gov/os/caselist/1110166/index.shtm; Decision and Order, *In re Corning Inc.*, Docket No. C-4380 (Dec. 21, 2012), *available at* http://ftc.gov/os/caselist/1210133/index.shtm.

[51] *See, e.g.*, Decision and Order, *In re Magnesium Elektron*, Docket No. C-4381 (Dec. 26, 2012), *available at* http://www.ftc.gov/os/caselist/0910094/index.shtm.

[52] *See, e.g.*, Decision and Order, *In re Robert Bosch GmbH*, Docket No. C-4377 (Apr. 24, 2013); Decision and Order, *In re Tesoro Corp.*, Docket No. C-4405 (Aug. 7, 2013), *available at* http://www.ftc.gov/os/caselist/1310052/index.shtm.

[53] *See, e.g.*, Decision and Order, *In re Kinder Morgan, Inc.*, Docket No. C-4355 (June 14, 2012), *available at* http://www.ftc.gov/os/caselist/1210014/index.shtm.

those assets. To prevent that harm, many cases require firewalls to limit the use and disclosure of that confidential information.[54]

In orders with no upfront buyer, the Commission is likely to require other protections, such as a separate order to hold separate or maintain assets. The Commission may also designate different or additional assets that could be made available to a potential buyer if the respondent fails to divest the original assets as required. These are known as "crown jewel" provisions. For example, the Commission required hospital management company Universal Health Services, Inc., to sell an acute inpatient psychiatric facility in the El Paso, Texas/Santa Teresa, New Mexico area to settle charges that its proposed acquisition of Ascend Health Corporation would be anticompetitive.[55] At the time of the acquisition, UHS owned or operated 25 general acute care hospitals and 198 behavioral health facilities, while Ascend operated nine behavioral health facilities. The only competitive overlap, however, was in the El Paso/Santa Teresa area. The Commission required UHS to sell its Peak Behavioral Health Services. In addition, to ensure that the Peak assets were able to attract a buyer that can effectively compete with UHS after the sale, the order allowed the Commission to require a second UHS hospital, Mesilla Valley Hospital in Las Cruces, New Mexico, to be sold together with Peak if Peak alone was not divested to an approved buyer within six months. UHS also was required to keep the Peak assets separate and apart from its other operations and to maintain both Peak and Mesilla Valley as viable operations pending a sale.[56] In May, the Commission approved the sale of Peak to Strategic Behavioral Health.

The Commission often requires appointment of an independent third party to perform carefully described functions. A monitor may be appointed in cases in which there are possible complications or technical complexities associated with the transfer of assets or with the performance of other functions, such as transferring intellectual property, ensuring performance of supply agreements, providing assistance, or maintaining assets pending divestiture). A good monitor can be extremely useful to the parties in helping identify issues early, resolve disputes before they become significant and ensure that the merged firm does not run into compliance issues.

Similarly, a hold separate trustee (sometimes referred to as a hold separate monitor) is appointed when the Commission requires that certain assets be held separate pending their divestiture. Typically, the Commission will also require appointment of a hold separate manager who will be responsible for the operation of the assets on a day-to-day basis and who will report directly to the hold separate trustee.[57] Finally, virtually every order authorizes the Commission to

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[54] *See, e.g.*, Decision and Order, *In re Tesoro Corp*., Docket No. C-4405 (Aug. 7, 2013), available at http://www.ftc.gov/os/caselist/1310052/index.shtm; Decision and Order, *In re Kinder Morgan, Inc*., Docket No. C-4355 (June 14, 2012), available at http://www.ftc.gov/os/caselist/1210014/index.shtm.
[55] Fed. Trade Comm'n, Press Release, *FTC Puts Conditions on UHS's Proposed Acquisition of Ascend Health Corporation*, (Oct. 5, 2012), *available at* http://www.ftc.gov/opa/2012/10/uhs.shtm.
[56] Decision and Order, *In re Alan B. Miller, and Universal Health Services, Inc*., C-4372 (Dec. 12, 2012), *available at* http://www.ftc.gov/os/caselist/1210157/121130uhsdo.pdf.
[57] *See, e.g.*, Proposed Order to Hold Separate and Maintain Assets, *In re Pinnacle Entertainment Inc.*, Docket No. 9355 (Aug. 12, 2013), *available at* http://www.ftc.gov/os/adjpro/d9355/130812pinnacleorder.pdf.

appoint a divestiture trustee who will take over the divestiture process if the respondent fails to divest the required assets in the required time frame.

If a monitor or trustee is to be appointed, the staff typically asks respondents to propose some candidates for staff to vet. It is important to do this early in the process. Often parties wait until the last minute to do this, which can hold up completion of the consent. For a monitor or a hold separate trustee, someone with industry expertise and no or limited ties to the respondents is preferred. In some cases, professional monitoring organizations or lawyers will be appropriate depending on the expertise of the proffered monitor and the role they will play. The Commission will require its approval of the party and of the agreement between the party and respondents. Agreements approved by the Commission in the past are available on the Commission's web site.[58]

Remedies in Conduct Cases

It is more difficult to provide general rules of thumb for appropriate remedies for anticompetitive conduct because the conduct is so varied. The provisions needed to put an end to a group boycott are quite different from those that will mitigate the effects of harmful exclusive dealing contracts. Nonetheless, Commission consent orders in conduct cases typically include three key features: a cease and desist order, fencing-in provisions to prevent a recurrence of the illegal conduct or similar conduct, and monitoring or reporting requirements.

Speaking generally about the Commission's approach to conduct remedies, the first priority is to put an end to any offending conduct – as quickly as possible. In addition, the cease and desist provisions should prevent a recurrence of the same or similar conduct. This may include conduct that facilitated or otherwise made the illegal conduct possible. [59] And where practicable, consent orders addressing anticompetitive conduct should minimize or eliminate the effects of the violation in an attempt to restore competition in the marketplace.

As an example, last year the Commission charged a cooperative of 300 pharmacy owners in Puerto Rico with negotiating agreements among its members to illegally fix prices on which the members would contract with insurers and pharmacy benefits managers.[60] The coop, known as Coopharma, agreed to settle the charges in an order that not only stops the offending conduct, but also prohibits Coopharma from facilitating information exchanges between its pharmacy members regarding pricing, as well as attempting to, or encouraging any person to, engage in the prohibited conduct. Finally, to undo the effects of the illegal conduct, Coopharma was required to notify payers and allow them to terminate their contracts without penalty.

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[58] *See, e.g.,* Interim Monitor Agreement, *In re Watson Pharmaceuticals, Inc.,* Docket No. C-4373 (Dec. 12, 2012), *available at* http://www.ftc.gov/os/caselist/1210132/121015watsonmonitoragree.pdf; Monitor Agreement, *In re Johnson & Johnson*, Docket No. C-4363 (Aug. 7, 2012), *available at* http://ftc.gov/os/caselist/1110160/120611jjexhc.pdf.

[59] *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957). *See also Toys "R" Us v. FTC*, 221 F.3d 928, 939-40 (7th Cir. 2000) (order provisions regulating future conduct within Commission's discretion to ensure that the violation stops and competition will be restored).

[60] Fed. Trade Comm'n, Press Release, *Puerto Rican Pharmacy Cooperative Settles Price-Fixing Charges*, (Aug. 21, 2012), *available at* http://www.ftc.gov/opa/2012/08/coopharma.shtm.

While consent orders in conduct cases should prevent the continuance and recurrence of the illegal conduct alleged in the complaint, the proscriptive provisions should not be unduly broad. They ordinarily should not prohibit conduct that is procompetitive, nor unnecessarily restrict the respondent's ability to compete in the marketplace. For instance, to resolve charges that two competing managers of medical/surgical hair transplantation practices had unreasonably exchanged specific competitively sensitive information for many years, the Commission required that the communications stop. However, the consent order was specifically worded so that it would not interfere with respondents' ability to compete or prevent participation in legitimate industry practices, such as ordinary trade association or medical society activity.[61]

Further, the Commission can apply antitrust principles in new situations and dynamic markets without unduly chilling a leading firm's incentives to compete aggressively. As an example, in 2010, the Commission settled charges that Intel Corporation engaged in unfair and deceptive conduct designed to maintain its monopoly in the markets for computer chips and to create a monopoly for Intel in the market for graphics processing units.[62] The complaint alleged that Intel's course of conduct was designed to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. The Commission's order aimed to prevent the recurrence of Intel's unreasonable exclusionary and deceptive conduct without stifling its ability to continue to innovate and compete fairly. Notably, the settlement did not strip Intel of its chip monopoly, which was in large measure gained through innovation and the development of associated intellectual property. Rather, it provided conduct relief designed to restore the competition lost as a result of Intel's past conduct, opening the door to fair and vigorous competition in chip markets in the future.

To return to an earlier assertion that consent orders can be as effective in maintaining or restoring competition as going to court, I would offer as an example the Commission's enforcement efforts involving exclusionary rules by real estate boards to thwart competition from brokers offering less than full service listings. In 2006, the Commission announced charges against seven real estate groups operating Multiple Listing Services (MLS) for rules that withheld valuable MLS benefits from consumers who chose to enter into non-traditional listing contracts with real estate brokers.[63] Five groups settled the charges when they were brought, another settled four months later, but Realcomp, a real estate group serving Southeastern

[61] Fed. Trade Comm'n, Press Release, *Bosley, Inc. Settles FTC Charges That It Illegally Exchanged Competitively Sensitive Business Information With Rival Firm, Hair Club, Inc.*, (Apr. 8, 2013), *available at* http://www.ftc.gov/opa/2013/04/bosley.shtm. Specifically, the proposed Order excludes from its prohibitions certain communications including: (1) where the information is reasonably necessary to achieve pro-competitive benefits related to a lawful joint venture or as part of legally supervised due diligence; (2) provision of rates to market research firms or Respondents' own vendors or independent contractors; (3) provision of rates or competitive offers to actual or prospective customers; and (4) receipt of information from competitors for the purpose of legitimate market research where the information is not knowingly conveyed to Respondents or their representatives (e.g., competitive intelligence).
[62] Fed. Trade Comm'n, Press Release, *FTC Settles Charges of Anticompetitive Conduct Against Intel*, (Aug. 4, 2010), *available at* http://www.ftc.gov/opa/2010/08/intel.shtm.
[63] Fed. Trade Comm'n, Press Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services*, (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.shtm.

Michigan, contested the charges in administrative litigation. After a full trial, the Commission determined that Realcomp had violated Section 5 by adopting anticompetitive policies that limited the public distribution and display of limited-service property listings based on the nature of the listing contract, and thereby unreasonably restrained competition in the market for the provision of residential real-estate-brokerage services.[64] The Sixth Circuit affirmed the Commission on appeal.

But more importantly, the order provisions contained in the settled matters are nearly identical to those imposed on Realcomp after a full trial. Certainly, businesses are entitled to test the law and the facts in any given matter, but if the Commission ultimately prevails, they should not be surprised to find themselves subject to the very proscriptions they sought to avoid by choosing to litigate. And this example should make clear that our consent orders enable us to obtain relief as effective as what we can obtain through litigation.

[64] Opinion of the Commission, *In re Realcomp II*, Docket No. 9320, (Nov. 2, 2009) *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf, *aff'd* Realcomp II, Ltd. v. FTC, 635 F.3d 815, 823 (6th Cir.), cert. denied, 132 S. Ct. 400 (2011).