Office of the Chairman

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Prepared Remarks of Chairman Andrew N. Ferguson*

U.S. Federal Trade Commission

Eleventh-Hour Antitrust Remedy Proposals and Litigating the Fix

Washington, D.C.
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Greetings to all of you participating in today's workshop, which is sponsored and organized by the FTC's Bureau of Competition. The Federal Trade Commission regularly hosts workshops such as these to gain a better understanding of emerging challenges in antitrust and consumer protection.[1] By learning from policymakers, advocates, experts, and industry leaders, these workshops help us to identify the proper scope and application of our traditional enforcement power to address those challenges.

"Litigating the Fix"

Today's workshop is entitled, "Eleventh-Hour Antitrust Remedy Proposals and Litigating the Fix." As the title suggests, I am of the view that, generally speaking, litigating the fix is not good for the Commission, for courts, or for our system of antitrust enforcement. Let me explain why.

The "litigate the fix" problem arises under the following conditions. First, the original transaction must raise serious competitive problems. The government under President Donald Trump would not move toward enforcement litigation without first concluding that a merger, if consummated, would violate the antitrust laws. And parties to a merger would not undertake the expense of proposing and negotiating a potential remedy unless the underlying problem presented competitive concerns of sufficient weight that the government had a decent likelihood of succeeding in litigation to enjoin the merger.

Second, the parties must have proposed some form of remedy to the competitive problems underlying the merger. This proposal most often takes the form of a structural remedy—for

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

[1] Press Release, FTC, FTC Hosts Workshop on Noncompete Agreements (Jan. 26, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/01/ftc-hosts-workshop-noncompete-agreements; Press Release, FTC, FTC Releases Agenda for Workshop on Unfair or Deceptive Trade Practices in "Gender-Affirming Care" for Minors (Jun. 25, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/06/ftc-releases-agenda-workshop-unfair-or-deceptive-trade-practices-gender-affirming-care-minors; Press Release, FTC, FTC Releases Tentative Agenda for Attention Economy Workshop on June 4 (May 19, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-releases-tentative-agenda-attention-economy-workshop-june-4.

example, a divestiture of assets to eliminate the competitive problems posed by the merger.[2] It may also sometimes include behavioral remedies alongside a structural remedy[3] or, less frequently, standalone behavioral remedies.[4]

Third, the government and the parties disagree on whether that proposed remedy will resolve the government's concerns about the anticompetitive effects of the merger. If the government and parties agree that a proposed remedy would resolve the original transaction's competitive problems, then they can avoid litigation by allowing the parties to execute the remedy.[5] The problem with which we are dealing today arises when parties to a merger have proposed, or executed, a remedy after filing their premerger notification but before litigation has commenced fully.

Once this disagreement has reached full froth, the government confronts a difficult conundrum. The government believes that the original transaction raises competitive problems and believes that the remedy does not resolve them. But the remedy has *some* effect on the competitive problems, even if it does not completely eliminate them. The question in litigation then becomes not merely whether the underlying transaction violates the antitrust laws; the government must now also litigate difficult questions about the proposed remedy—for example, whether the divested assets are sufficient to eliminate the competitive problem; whether they are sufficient to give a divestiture buyer a meaningful chance to maintain them as competitively viable; whether that particular divestiture buyer is well positioned to compete going forward; whether a proposed behavioral remedy is readily administrable; and, where the divestiture is contemplated but not yet accomplished, whether the divestiture is likely to happen at all.[6]

A district court is therefore confronted not merely with one complex prediction—the likely effect of the original transaction[7]—but also with a host of additional predictive questions about the

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[2] See, e.g., *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024) (proposed remedy involved divestiture of 579 grocery stores); Transcript, *FTC v. GTCR, LLC*, 1:25-cv-02391, Dkt. 451, at 9 (Nov. 10, 2025) (proposed remedy consisted of GTCR divesting components of its subsidiary Biocoat's hydrophilic coating business).

[3] See, e.g., *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 128 (D.D.C. 2022), dismissed, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (UnitedHealth Group committed to divest acquisition target's ClaimsXten claims editing product and institute a "firewall policy" to prevent sharing of competitively sensitive customer information after the transaction); *FTC v. Tempur Sealy Int'l, Inc.*, 768 F. Supp. 3d 787, 857–60 (S.D. Tex. 2025) (acquiring firm Tempur Sealy committed to a divestiture of stores and a five-year commitment to reserve a percentage of slots of the target company's showroom for rival products).

[4] See *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *50–51 (D.D.C. Nov. 15, 2022) (Penguin Random House CEO proposed a purely behavioral remedy involving the implementation of an internal bidding process that the court viewed as an "unenforceable promise" that "can be broken at will.").

[5] See, e.g., Decision & Order, *In the Matter of Garage Topco LP and Cantaloupe, Inc.*, Matter No. 2513161 (May 1, 2026); Decision & Order, *In the Matter of Synopsys, Inc. and ANSYS, Inc.*, Matter No. 2410059 (May 27, 2025); Decision & Order, *In the Matter of Omnicom Group and The Interpublic Group of Cos.*, Matter No. 2510049 (Sept. 26, 2025).

[6] See Statement of Chairman Andrew N. Ferguson, Joined by Comm'rs Melissa Holyoak and Mark R. Meador at 7, *In the Matter of Synopsys, Inc. and ANSYS, Inc.*, Matter No. 2410059 (May 28, 2025) ("Ferguson Synopsys/Ansys Statement").

[7] See 15 U.S.C § 18 (prohibiting mergers "the effect of [which] *may be* substantially to lessen competition, or to tend to create a monopoly" (emphasis added)); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963)

effect of an additional transaction.[8] Proposing a remedy in the middle of the Commission's investigation, or near its conclusion, or even after the Commission has filed suit but before the parties are on the courthouse steps, can be an attractive strategy for merging parties. For some, this is a good-faith effort to resolve the government's real concerns short of expensive and risky litigation. For others, it is a chance to muddy the water and complicate future enforcement litigation. Either way, proposing to amend the terms of a merger to address the government's anticompetitive concerns will make the government's case under Section 7 of the Clayton Act more difficult to prove because, at the very least, it will complicate the government's case by adding a second layer of predictions on top of the underlying prediction that Section 7's language requires. Even when a remedy is woefully inadequate, the government will still have to litigate it.

By that, I mean that any dispute over a remedy in litigation changes the case the government must present to the district court. Presumably, the government committed its scarce resources to litigate the *original* merger on the grounds that it would be likely to prevail in court. And indeed, during the investigation it committed those resources to evaluate the anticompetitive effects of the original merger and so prepare a robust argument that the merger is likely substantially to lessen competition in violation of Section 7. But now the government must litigate an entirely different case, and undoubtedly a more complicated one. In effect, the government expended its limited resources—remember, the Commission has only 1,100 employees and an appropriation of fewer than $400 million[9]—on a merger that no longer "exists." The world has shifted.[10]

The advantages of this arrangement to the merging parties, and the disadvantages to the government, are self-evident. The introduction of a proposed "fix" at the "eleventh hour," with little time for the government to evaluate whether the "fix" is sufficient to resolve anticompetitive concerns, amplifies both the advantages and disadvantages. This strategy has one major deleterious effect for antitrust enforcers: it shifts the bargaining power decidedly in favor of the merging parties. In the worst-case scenario, an "eleventh-hour" fix compels the government to choose between a proposed remedy that it may be unable to evaluate rigorously and litigation that is more challenging to prepare. And it often must do so in a matter of days.

One concern here is fairness. Antitrust enforcers, charged with vindicating the American people's collective interest in open and competitive marketplaces, and merging parties should operate on equal footing. The merger-review process—from the initial review of an HSR filing

("[Section 7] requires not merely an appraisal of the immediate impact of [a] merger upon competition, but a prediction of its impact upon competitive conditions in the future.").

[8] See, e.g., *Kroger*, 2024 WL 5053016 at *24–25 ("Defendants bear the burden of showing that any proposed remedy, including a divestiture, would negate any anticompetitive effects of the merger. … A divestiture is successful rebuttal evidence if it sufficiently mitigate[s] the merger's effect such that it [is] no longer likely to substantially lessen competition. … When considering whether a proposed divestiture will restore competition courts look at several factors, including 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.") (cleaned up).

[9] FTC, FTC Appropriation and Full-Time Equivalent (FTE) History (last visited May 29, 2026), https://www.ftc.gov/about-ftc/bureaus-offices/office-chief-financial-officer/ftc-appropriation.

[10] See, e.g., Transcript, *FTC v. GTCR, LLC*, No. 1:25-cv-02391, Dkt. 451, at 9 (noting that "The fully executed Divestiture Agreement will become effective upon the closing of the Original Transaction if the plaintiffs' motion for a preliminary injunction is not granted. In other words, there is no world in which the Original Transaction closes, but Biocoat does not go through with the divestiture to Integer.").

right through to litigation—ought to reflect and reinforce that norm. Not because doing so will help the government "win" more cases, but because parity between the two parties best ensures that mergers will generate gains deriving from increased efficiency, synergy, and innovation rather than gains derived solely from excess market power.[11] When antitrust enforcers and merging parties operate on equal footing, there is a greater possibility that good-faith negotiation over effective remedies can occur, which will lead to a more competitive, dynamic, and productive economy.[12] Late-breaking "fixes," whether intended to sideline the input and expertise of antitrust enforcers in the formulation of remedies, or whether merely having that effect, substantially undermine the very possibility of identifying and implementing such pro-competitive remedies. They also increase the likelihood of inadequate remedies that fail to protect competition and expose the public to the anticompetitive effects of an illegal merger.

I have outlined the problem. Now, what to do about it. That's why today's workshop is so important. By *highlighting* the procedural difficulties and potential prejudice to the American people stemming from strategically belated remedy proposals, *identifying* what agencies can do in response, and *discussing* how courts ought to treat these issues to promote pre-litigation discussions with the agencies, the Commission is attempting to recalibrate the merger review process so that it achieves its intended goal: to promote a more competitive, dynamic, and productive economy.

Constructive Approaches to Settlements and Litigation

Before I turn things over to our first panel, I want to offer a few points on why I think an openness to negotiate settlements can diminish the incentives of merging parties to "litigate the fix" and yield more pro-competitive outcomes in our merger review process.

As I mentioned at the outset, a "litigate the fix" scenario typically arises when the merging parties perceive that agreement with the government over an acceptable remedy is unlikely. So, for example, if the government *categorically rejects* negotiated settlements in merger cases, as was the case at the Department of Justice in the Biden Administration,[13] merging parties *know* that the only way to consummate the merger is by seeking judicial approval for a proposed remedy. Because the government won't negotiate and insists upon litigation, the merging parties have every incentive in the world to engage in an eleventh-hour "fix" that can hinder the government's case. Similarly, if merging parties know that government enforcers are hostile to a merger, not because of its unlawfulness, but because those enforcers have ideological objections to mergers as such, as

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[11] Ferguson Synopsys/Ansys Statement at 2.

[12] *Id.* at 3 ("Assuming the settlement would in fact prevent the merger's anticompetitive effects, the settlement would fully protect the competitive process while also promoting the innovation and growth that the remainder of the merger might foment.").

[13] Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york (stating that when the government "concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction" rather than agree to a remedy and "often … we cannot accept anything less than an injunction blocking the merger — full stop.").

was the case in the Biden FTC,[14] they have little reason to expect those enforcers will engage in good-faith negotiations over potential remedies. Here again, merging parties would much rather propose an eleventh-hour "fix" to a district judge, who is more guided by the law than the three Democrat Commissioners, than negotiate a remedy with those Commissioners. It is no surprise, then, that we saw a rise in "litigate the fix" cases under the Biden Administration.[15]

Ultimately, this is a question of how one understands the *purpose* of the Commission's merger-review process. Under the previous administration, the purpose was to disincentivize mergers by punishing merging parties with a convoluted, confusing, and endlessly time-consuming review process. But the purpose of the review process in this Administration is *not* to disincentivize mergers; it is to protect competition and the collective benefits—both economic and social—generated by competitive marketplaces.[16] And that means our engagement with merging parties should be *constructive,* not *punitive*. If the merging parties believe there are ways to remedy a potential merger in a manner that will eliminate its anticompetitive effects, we should, mindful of our duty to protect competition, entertain those proposals in good faith.[17]

A greater openness to negotiated settlements not only diminishes the incentive for merging parties to pursue a last-minute "fix;" it also can maintain the role our agency should play in the formulation of potential remedies. When merging parties perceive a greater opportunity for a negotiated settlement, they are more likely to engage with us on proposed remedies rather than bypass us entirely by employing a "fix it first"[18] or "litigate the fix" strategy. Those strategies involve remedies formulated without any input from the Commission. If the goal of our merger-review process is to protect competition, we want remedies to be informed by the expertise, experience, and pro-competitive purpose of the Commission. When the Commission signals unflinching hostility to negotiated settlements, however, it will, little by little, surrender judgment about what constitutes an acceptable remedy to merging parties and the judiciary. There is no doubt in my mind that this outcome would be detrimental to competition.

We also want this process to be efficient. If each party takes a constructive, rather than adversarial, approach to the merger review process, we are more likely to find remedies that resolve competition concerns in a more timely and efficient manner rather than expending time and money—and judicial resources—in litigation.

But that isn't the only benefit to greater openness to negotiated settlements. As federal antitrust enforcers, our aim is not only to protect competition, but also to be a prudent steward of

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[14] FTC's new stance: Litigate, don't negotiate, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new stance-litigate-dont-negotiate-lina-khan; Remarks by Holly Vedova, Director, Bureau of Competition, FTC, at 12th Annual GCR Live: Law Leaders Global Conference, at 10–12 (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-globalconference.pdf.
[15] Parties are More Willing Than Ever to 'Litigate the Fix' in the United States, Glob. Competition Rev. (Oct. 25, 2023), https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/parties-are-more willing-ever-litigate-the-fix-in-the-united-states.
[16] See Ferguson Synopsys/Ansys Statement at 2.
[17] See *id.* at 3.
[18] See *id.* at 6; Fix-it-first: navigating a seismic shift in US antitrust agency approaches to merger remedies, Financier Worldwide (Aug. 2023), https://www.financierworldwide.com/fix-it-first-navigating-a-seismic-shift-in-us-antitrust-agency-approaches-to-merger-remedies.

the financial resources entrusted to us by Congress. Litigation is extraordinarily expensive.[19] It requires many months, man-hours, and millions of dollars to undertake. Because our resources are finite, every decision to litigate entails costly tradeoffs.[20] When the Commission decides to litigate a case, it forecloses other enforcement actions it might take against other unlawful mergers or anticompetitive conduct. For that reason, it would be imprudent, even irresponsible, for the FTC to not even consider the possibility that a negotiated settlement might restore and protect competition as fully as a successful, but costly, litigation would. The previous administration tried to avoid this tradeoff by weaponizing the merger review process to disincentivize mergers.[21] But that is not our job as antitrust enforcers. Congress charged us with preventing mergers likely to substantially lessen competition,[22] not preventing mergers *tout court*. Prudent stewardship of our agency's resources requires that we maximize the procompetitive effects of every tax dollar we spend. If the Commission is confident that a settlement will prevent a substantial lessening of competition as fully as would litigation, while sparing the Commission and the American people the expense and uncertainty of litigation, then it should accept that settlement.[23]

Ultimately, an openness to negotiated settlements is a byproduct of a commitment to a fair, efficient, and constructive merger-review process that gives weight to both agency and business concerns. To that end, the Commission recently requested public input on how we might revise the HSR form to ensure that it facilitates an efficient and timely review process.[24] Among other things, we solicited opinions on (1) whether a new or supplemental HSR filing should be required if parties propose a "fix" after certifying substantial compliance or during an enforcement action, (2) what additional costs might be incurred by a new or supplemental HSR filing, and (3) potential alternatives that would lead to more efficient or procompetitive divestitures.[25] By constructively engaging businesses on the merger review process itself, we hope to make it an even more efficient means of protecting competition while fostering business growth and development.

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[19] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020) ("Perhaps most remarkable about antitrust litigation is the blurry product that not infrequently emerges from the parties' huge expenditures and correspondingly exhaustive efforts."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) ("[P]roceeding to antitrust discovery can be expensive."); *FTC v. Dean Foods Co.*, 384 U.S. 597, 633 (1966) (Fortas, J., dissenting) ("[T]here is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation."); Kimberly L. King, An Antitrust Primer for Trade Association Counsel, 75 Fla. B.J. 26 (May 2001) ("No litigation is more complex, drawn out, or expensive than antitrust litigation."); Donald I. Baker & Mark R. Stabile, Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel, 48 Bus. Law 395, 396 (1993) ("Antitrust litigation is notoriously fact-intensive, time-consuming and expensive."); Assistant Attorney General Jonathan Kanter Delivers Farewell Address (Dec. 17, 2024), https://www.justice.gov/archives/opa/speech/assistant-attorney-generaljonathan-kanter-delivers-farewell-address (DOJ can "accrue expert fees of up to 30 million dollars—just for a single case.").

[20] See Ferguson Synopsys/Ansys Statement at 6.

[21] Andrew N. Ferguson, Remarks to the George Mason Law Review 29th Annual Antitrust Symposium at 40:40 (Feb. 20, 2026), https://www.c-span.org/program/public-affairs-event/ftc-chair-ferguson-on-competition-mergers/673704.

[22] See 15 U.S.C § 18.

[23] See Ferguson Synopsys/Ansys Statement at 2–3.

[24] Press Release, FTC, Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form (March 25, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/03/federal-trade-commission-department-justice-seek-public-comment-premerger-notification-report-form.

[25] See FTC and Dep't of Justice, Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form, Questions 14, 15 (March 25, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/2026.03.25-HSR-RFI.pdf.

In all this, I do not mean to downplay the importance of litigation. In this past year alone, we initiated four lawsuits challenging business combinations.[26] Constructive engagement is a *means* to a pro-competitive outcome, not an end in itself. If the merging parties propose a divestiture that is not sufficient to make the intended buyer an independent, viable, and competitive business rival, or if the intended buyer lacks the resources or experience to do the same, we should continue to proceed to litigation. Indeed, we did precisely that in *FTC v. GTCR*.[27] In other words, if we are not confident that a proposed remedy will protect competition in the relevant market as much as successful litigation would, we will take the parties to court. So my point is that the Commission must learn the lessons of unsuccessful past remedies and avoid returning to an era when it sometimes accepted weak remedies in lieu of the hard work of litigating to protect competition.[28] Learning from the past, the FTC under President Trump should err in favor of litigating to protect competition where it believes it can prevail, rather than accepting a remedy that we are not confident will prevent a substantial lessening of competition.[29]

Conclusion

To conclude, I'd like to emphasize that just as the proper response to an agency that has too often accepted questionable remedies is *not* to adopt a policy of rejecting settlements altogether, so too the proper response to an agency that has too often rejected settlements is not to adopt a policy of accepting questionable remedies. There is a middle ground here, which I laid out above.

In a similar vein, the proper response to hostile regulators that weaponized the merger review process is *not* to subvert the process itself through unfair or bad-faith eleventh-hour "fixes," but to remove those hostile enforcers, as our nation did just a few years ago. Congress adopted our merger review process so that antitrust enforcers could prevent anticompetitive mergers prior to their consummation, and to do so in a timely and efficient manner.[30] With that in mind, the proper response of businesses is to engage, and where necessary, work with the agencies to improve, this process so that it achieves the procompetitive and pro-business aims that Congress intended.

Thank you all once again for your participation in this workshop and I look forward to the day's conversations.

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[26] See Complaint, *In the Matter of Edwards Lifesciences Corp. and JenaValve Technology, Inc.*, Dkt. No. 9442 (Aug. 6, 2025); Complaint, *In the Matter of GTCR, LLC and Surmodics, Inc.*, Dkt. No. 9440 (Mar. 6, 2025); Complaint, *FTC v. Henkel AG et al.*, No. 1:25-cv-10371 (Dec. 11, 2025); Complaint, *FTC v. Zillow Group, Inc. et al.*, No. 1:25-cv-1638 (Sept. 30, 2025).

[27] Litigating the Fix in Merger Cases: Some Lessons and Continuing Questions Following FTC v. GTCR, JDSupra (Dec. 8, 2025), https://www.jdsupra.com/legalnews/litigating-the-fix-in-merger-cases-some-3829407/ (The judge in GTCR "ordered the parties to engage in settlement discussions and ultimately mediated discussions between the two sides. The parties were unable to reach an agreement" and proceeded to a preliminary injunction hearing.).

[28] See Ferguson Synopsys/Ansys Statement at 4.

[29] *Id*. at 7.

[30] See William J. Baer, Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act, Remarks Before the 35th Annual Corporate Counsel Institute (Oct. 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act; *United States v. EI du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (declaring that the objective of the Clayton Act was "to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation. . . .*" (quoting S. Rep. No. 698, 63d Cong., 2d Sess. 1) (emphasis added)).