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STRUCTURAL MERGER REMEDIES

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* 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.

I. Introduction

Mergers and acquisitions play a critical role in economic growth and the promotion of innovation.[1] And, of course, the Biden antitrust enforcers' merger hostility based upon a view that organic or greenfield growth is always the preferred method of progress, is deeply flawed and counterproductive to growth and innovation. Equally problematic is the Biden-era enforcers' blanket hostility toward divestitures as a method to solve the anticompetitive components of proposed mergers.[2]

Last week, however, the Trump FTC announced a consent requiring divestitures to resolve allegations of anticompetitive effects in the proposed acquisition of Ansys by Synopsys. This is the FTC's first consent divestiture of tangible assets, outside of litigation, to be announced since October 2022.[3] So for the first time in three and a half years, merging parties have been able to solve competitive effects via divestiture of a product in an overlap market.

In Chairman Ferguson's statement last week, in which I joined along with Commissioner Meador, he explained several reasons why a universal rejection of divestitures has some serious pitfalls.[4] First, a divestiture or other settlement can "temper the potentially over-inclusive effects of an injunction blocking an entire merger."[5] Second, settlement maximizes the Commission's finite resources.[6] Third, refusing divestitures complicates subsequent litigation as parties engage in a "fix-it-first" divestiture or later present a divestiture as part of the litigation and the Commission is forced to "litigate the fix."[7] Though to be abundantly clear, the Commission will not hesitate to litigate against the fix when the proposal is inadequate.

All of these concerns flow from a blanket hostility toward divestitures, and this is why the Trump FTC is reversing course and will engage with merging parties when they present serious

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[1] *See, e.g.*, Statement of Chairman Andrew N. Ferguson, joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador, In re Synopsys, Inc. / Ansys, Inc., No. 2410059 (May 28, 2025) [hereinafter Synopsys/Ansys Statement].

[2] *See* Jonathan Kanter, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022) (explaining that divestitures should be "the exception, not the rule"); Margaret Harding McGill, *FTC's new stance: Litigate, don't negotiate*, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-newstance-litigate-dont-negotiate-lina-khan.

[3] *See* Fed. Trade Comm'n, Press Release, *FTC Approves Consent Order Addressing Concerns Over Tractor Supply's Acquisition of Orscheln Farm and Home* (Oct. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-approves-consent-order-addressing-concerns-over-tractor-supplys-acquisition-orscheln-farm-home.

[4] Synopsys/Ansys Statement, *supra* note 1, at 3, 5-7.

[5] Synopsys/Ansys Statement, *supra* note 1, at 3.

[6] Synopsys/Ansys Statement, *supra* note 1, at 6-7.

[7] Synopsys/Ansys Statement, *supra* note 1, at 5-6. I want to elaborate on concerns with the posture where the merging parties are proposing a fix-it-first remedy without the Commission's involvement. The Commission's goal, which is explained below based upon legal precedent, is to prevent a lessening of competition from the merger. The merging parties, however, have a different goal and different incentives. They, rightfully so, want to divest as little as possible and to as weak a buyer as possible, while increasing the litigation risk for the Commission enough that the Commission will not sue to block the merger. These dramatically different incentives result in a fix-it-first remedy that may fail to protect competition but still tie the Commission's hands when it comes to enforcement decisions. The Commission will, however, aggressively litigate against the fix when the proposed remedy fails to protect competition. Kroger/Albertsons provides one such example.

divestitures that will preserve competition, and if the divestitures are inadequate, we will go to court to protect competition.

As the Commission announced last week in the Synopsys/Ansys statement, we will publish a policy statement on remedies in due course.[8] For the rest of my remarks, I'm going to share my views on this topic, and I look forward to working with the Chairman and Commissioner Meador as we create this important guidance document.

II. Legal Standards

Investigations under the HSR Act operate in the shadow of merger litigation. Divestiture analysis and negotiations are not an exception and also must be thought of in the broader context of litigation.

As the Supreme Court has explained, a divestiture can be "a start toward restoring the pre-acquisition situation."[9] And litigating a merger where a divestiture or other remedies have been proposed—has become increasingly common in recent years. Such litigation has commonly been called "litigating the fix."[10] The Supreme Court has explained that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'"[11] But beyond that, the Supreme Court has not provided guidance on litigating the fix, nor much other guidance on merger challenges in the last 40 years.

District courts—especially the DDC—have, however, grappled with these issues several times in the last 10 years. In the *Aetna* opinion, the court set forth the typical standard assessing divestitures: "A divestiture must effectively preserve competition in the relevant market. In other words, the divestiture must replace the *competitive intensity* lost as a result of the merger."[12]

But that standard has been questioned in a few recent decisions. In the DOJ's challenge to UnitedHealth's Acquisition of Change Health, the DDC observed that this typical standard that it had relied upon in past merger decisions may not be correct based upon the text of Section 7 of the Clayton Act. The court explained:

> [T]he text of Section 7 is concerned only with mergers that "*substantially* lessen competition," and by requiring on rebuttal a showing that the merger will preserve exactly the same level of competition that existed before the merger, the

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[8] Synopsys/Ansys Statement, *supra* note 1, at 1.
[9] *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).
[10] *See, e.g.*, Synopsys/Ansys Statement, *supra* note 1, at 5; David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10 (2016).
[11] *Ford Motor Co.*, 405 U.S. at 573.
[12] *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (brackets, citations, and internal quotation marks omitted); *see also Fed. Trade Comm'n v. RAG-Stiftung*, 436 F. Supp. 3d 278, 304 (D.D.C. 2020) ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity. To evaluate whether a divestiture will do so, courts consider the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the independence of the divestiture buyer from the merging seller, and the purchase price." (citations and internal quotation marks omitted)).

> Government's proposed standard would effectively erase the word "substantially" from Section 7.[13]

Building upon the *UnitedHealth* opinion, the Fifth Circuit in *Illumina Grail*, analyzed an "Open Offer" to provide irrevocable contractual terms as a remedy to alleged vertical harm. The court concluded that the Commission committed legal error by effectively requiring that the merging parties present evidence that, with the remedy, the merger "would not lessen competition *at all*."[14] The court explained that "to rebut [the] prima facie case, [defendant] was only required to show that the Open Offer sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition."[15] Though *Illumina Grail* was not a divestiture remedy, in at least the Fifth Circuit, it is possible that other courts may apply this standard in the future.[16]

In addition to the appropriate standard for analyzing divestitures, courts have also grappled with who bears the *burden* of proving the effect of divestitures when analyzing a merger under Section 7 of the Clayton Act.

Under the *Baker Hughes* burden-shifting framework, defendants litigating against both the FTC and the DOJ have argued that as part of its prima facie burden, the government must account for the effects of any proposed divestiture.[17] The government has argued, on the other hand, that the effects of a divestiture should not be part of the liability phase of the trial, but rather should only be considered during the remedy phase.[18] Courts, however, have typically taken another approach, requiring the defendants to prove the effect of the divesture in rebuttal.

Again in *Illumina Grail*, this was an issue on appeal from the Commission Decision. The court adopted the FTC's concurring view proposed by my friend, then Commissioner Christine Wilson, that the burden of proving the effect of the remedy should be placed upon the merging parties in rebuttal.[19] The court distinguished between cases like *Ford Motor Co*. and *du Pont* which involved court-ordered divestitures *after* a finding of Section 7 liability and cases like *Aetna* and *Sysco* where the proposed divestitures were conditioned upon a court's liability determination,

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[13] *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 134 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (ellipses and citations omitted); But note that the court ultimately said that the outcome was the same regardless of the standard applied.
[14] *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1058 (5th Cir. 2023) (emphasis in original).
[15] *Id.* at 1059.
[16] *See Fed. Trade Comm'n v. Tempur Sealy Int'l, Inc.*, No. 4:24-CV-02508, 2025 WL 617735, at *50 (S.D. Tex. Feb. 26, 2025) ("These are properly considered as rebuttal to the FTC's *prima facie* case, had it been established. And in that context, the burden would shift to Defendants to demonstrate that their remedial commitments would sufficiently mitigate the merger's effect such that it is no longer likely that the merger would substantially lessen competition. To be effective, such commitments needn't restore the premerger *status quo* or eliminate *any and all* anticompetitive harm; they need only prevent *substantial* harm to competition." (citations, brackets, and internal quotation marks omitted)); *But see Fed. Trade Comm'n v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *24 (D. Or. Dec. 10, 2024) ("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 mitigates the merger's effect such that it is no longer likely to substantially lessen competition. Phrased differently, the divestiture must replace the competitive intensity lost as a result of the merger." (citations, brackets, and internal quotation marks omitted)).
[17] *See, e.g.*, *Illumina, Inc.* 88 F.4th at 1055; *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 132-33.
[18] *See Illumina, Inc.*, 88 F.4th at 1055.
[19] *Id.* at 1057.

with cases like *AT&T* and *Microsoft*, which involved *binding* offers by the companies that were not contingent on a finding of liability.[20]

III. Effective Divestitures

Within the confines of the legal standard and burden shifting framework that I've just discussed, both the courts and the agencies focus on a variety of factors when analyzing a proposed divestiture "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."[21] I'll now provide my perspectives on what the FTC should consider when analyzing a proposed divesture, and, what merging parties should consider when proposing divestitures to the Commission.

I prefer a proposed divestiture that includes a standalone business or a complete business unit.[22] What I mean by this is that divestiture assets that include a preexisting complete business line that includes not only assets, but also the personnel, customer and supplier contracts, intellectual property, distribution centers, back-office support, management teams, and other assets that would allow the business unit to operate independently.

This also means that the divestiture assets are free of entanglements with the seller of the assets. If the divested assets were previously acquired by the seller and it has been continuing to operate the assets as a standalone business, then that serves as a good indicator that the assets, if divested, would be able to successfully operate without the prior firm's support, and therefore would be able to effectively restore lost competition.

At times, however, a proposed divestiture will include something less than a complete business unit. While it is not my preference, the divestiture of assets that amount to less than a full business unit may still be acceptable in limited circumstances. At a minimum, such a divestiture should anticipate additional scrutiny. But the standard remains the same—the question is whether the divestiture will replace lost competition. And given the additional risks that the divestiture will be successful, the likelihood that it will preserve competition also goes down.[23]

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[20] *Id.* at 1056-57.

[21] *UnitedHealth Grp. Inc.*, 630 F. Supp. 3d at 135 (brackets and internal quotation marks omitted).

[22] *Aetna Inc.*, 240 F. Supp. 3d at 60 ("Divestiture of an existing business entity might be more likely to effectively preserve the competition that would have been lost through the merger, because it would have the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary to competition, but divestiture of some lesser set of assets might be appropriate when the purchaser already has, or could easily attain, the other capabilities needed to compete effectively." (brackets and internal quotation marks omitted)).

[23] The success of such a divestiture will depend heavily upon the capabilities of the divestiture buyer, including its past experiences and whether it has the assets necessary to make the divestiture successful without a full business unit. For example, if a divestiture excludes sales personnel or distribution centers, the buyer may not have sufficient personnel and a distribution center to ensure that the assets will be operated successfully. Related to the issue of divesting a partial business unit, if merging parties proposing mixing and matching assets from across the two merging parties, I'll be even more skeptical given that the assets were not operated in that fashion before the divestiture.

I also find it critical that the divestiture assets have limited ongoing entanglements with the seller of the divestiture assets.[24] At a basic level, if the seller continues to supply inputs for the divested business, then the seller could find ways to undermine the divested business's access to inputs and hamper its ability to compete. Other entanglements, like leases or licenses, could still be problematic, and as a result, they are disfavored. At the same time, especially when a divestiture is not a complete business unit, certain short-term entanglements and transition services may be critical in order to allow the divested business to quickly begin competing after the close of the transaction. In that circumstance, it is important to me that the transition services be minimized both in scope and duration so that any ability of the divestiture seller to hinder the buyer's business is limited. Any such proposal will likely result in additional scrutiny and will likely be overseen by the agency via compliance reports or by a monitor appointed by the agency.[25]

The divestiture buyer is also critical to the success of the divestiture. First and foremost, the divestiture buyer cannot—by acquiring the divestiture assets—create new anticompetitive concerns. And if the buyer is in over its head, financially unstable, or otherwise lacks the capabilities to effectively operate the divested assets, then the divestiture will not be successful.

Some of the documents cited by the court in *Aetna* give an entertaining example of what qualifies as evidence that a divestiture buyer may not be able to meaningfully operate the divestiture assets. There, executives of the divestiture buyer—Molina—expressed concerns in internal communications that Molina "lack[s] management with the requisite Medicare skills and the handful of people we have won't cut it."[26] And that "the sales and marketing of MA is a really different process for us."[27] And as a final striking example, one executive said: "The image that comes to my mind here is the dog chasing the car and we are the dog. What happens if we catch it?" To which the CEO responded, "I guess it depends on if it is a [sic] mini Cooper or a suburban."[28]

I also note that absent extraordinary circumstances, I would not likely consider divestiture without an upfront buyer. Such arrangements have many more risks, not least of which is the situation where no suitable buyer can be identified after the consent has been finalized and the transaction has been closed. This is not the kind of risk that I favor.

On the contrary, I much prefer the scenario where our talented and dedicated staff in the merger shops and within the Compliance division have the opportunity to thoroughly vet any proposed divestiture proposal, including the divestiture buyer. As staff investigate, they will request documents and data, interview customers and suppliers, and review contracts to better understand the potential risks of any divestiture proposal. And then, as they work with the merging

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[24] Courts are skeptical of a divestiture that relies on a "continuing relationship between the seller and buyer of divested assets because that leaves the buyer susceptible to the seller's actions—which are not aligned with ensuring that the buyer is an effective competitor." *Aetna Inc.*, 240 F. Supp. 3d at 60 (brackets and internal quotation marks omitted).
[25] I do note that if entanglements are required in the long term, I consider that a strong indicator that the divestiture is inadequate to resolve competitive concerns.
[26] *Aetna Inc.*, 240 F. Supp. 3d at 69-70.
[27] *Id.* at 70.
[28] *Id.*

parties, the result is a consent—including compliance reporting and, at times, the appointment of monitors—that maximizes the likelihood that the divestiture will be successful.[29]

IV. Synopsys/Ansys

Last week's consent and divestiture in Synopsys/Ansys provides a good example of how these principles should be applied in real life.

In January of 2024, Synopsys entered an agreement to acquire Ansys for $35 billion. Synopsys develops and supplies software used to design semiconductors. The software it provides is called Electronic Design Automation software. Ansys provides Simulation & Analysis software that is used by engineers for testing products, especially semiconductors.

As alleged in the Complaint, the acquisition would result in anticompetitive effects and violate Section 7 of the Clayton Act in the markets for optical software tools, photonic software tools, and RTL power consumption analysis tools.[30]

The parties and the Commission agreed to the proposed consent that requires Synopsys and Ansys to divest optical software tools, photonic software tools, and the power consumption tools to Keysight Technologies. The proposed consent represents the principles that I described above:

- The assets divested to solve the concerns in the markets for optical software tools and photonic software tools represent a divestiture of a complete business unit.[31]
- The selected assets divested to solve the concerns in the power consumption tools market had not previously been operated as a separate business unit. Because of the inherent risk involved in divesting less than an ongoing business, the Commission took the time it needed to scrutinize aspects of the proposed remedy and ultimately insisted on additional order requirements as safeguards to ensure the effectiveness of the remedy.[32]
- Keysight represents a suitable, upfront divestiture buyer with experience acquiring and improving technological assets. It is financially sound and already has relationships with many of the customers of the divestiture products.[33] Plus, Keysight had a proven track record of successful acquisitions.

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[29] *See* Fed. Trade Comm'n, *A Guide for Respondents: What to Expect During the Divestiture Process*, Bureau of Competition (June 2019), https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_respondents.pdf; Fed. Trade Comm'n, *A Guide for Potential Buyers: What to Expect During the Divestiture Process*, Bureau of Competition (June 2019), https://www.ftc.gov/system/files/attachments/merger-review/a_guide_for_potential_buyers.pdf.

[30] Compl., *In re Synopsys, Inc.*, Matter No. 2410059, ¶¶ 10-17 (F.T.C. May 28, 2025).

[31] Proposed Decision & Order, *In re Synopsys, Inc.*, Matter No. 2410059, ¶ I.Y. (F.T.C. May 28, 2025)

[32] *Id.* at ¶¶ II.E-I and K.

[33] Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Synopsys, Inc.*, Matter No. 2410059, 3 (F.T.C. May 28, 2025).

- The consent also was designed to ensure that Keysight could compete immediately to the same extent as Synopsys and Ansys and to limit entanglements while providing the necessary transition services.[34]
- And, the consent also requires compliance reports and appointed a monitor to oversee compliance.[35]

In short, the divestiture and consent represent excellent work by the Commission's dedicated staff who conducted a thorough investigation of the underlying transaction and the proposed divestiture, resulting in a meticulous order that protects competition while allowing the broader merger to proceed.

As the Commission forges ahead with additional merger investigations and divestitures, we will continue to protect competition, but at the same time, where there are not problems, we will get out of the way. Where parties want to address problems with robust divestiture proposals, we look forward to engaging and identifying solutions when possible, and of course, litigating where divestiture proposals are inadequate.

[34] *Id.* at 3.
[35] *Id.* at 4.