Federal Trade Commission

GCR Live 9th Annual Antitrust Law Leaders Forum
Miami Beach, Florida

Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition
(as prepared for delivery)

Remarks of Ian Conner
Director, Bureau of Competition
February 8, 2020

I want to thank GCR for the invitation to speak today. This is a great event with a fantastic line up of speakers. This year's topics are at the forefront of discussion in antitrust. Let me start by noting that the views I express today do not necessarily represent the views of the Commission or any individual Commissioner.

I want to start by giving a brief overview of recent Commission enforcement efforts, before discussing the role that remedies play in our enforcement efforts.

First, over the past several months, the Commission has moved aggressively against anticompetitive conduct in a range of industries and under varied, and often novel, theories. The cases authorized by the Commission were crafted by the exceptionally hard working and brilliant staff of the Bureau of Competition, who continue to be at the vanguard of pushing antitrust law forward. Relevant for the topic of this conference, two of these recent cases targeted acquisitions of nascent competitors,[1] another action in the pharmaceutical space targeted an anticompetitive scheme to prevent entry by a nascent or any other competitor,[2] another transaction was abandoned after FTC staff raised labor and downstream service concerns,[3] while other cases

[1] *In re Illumina Inc.,* Dkt. 9387 (complaint Dec. 17, 2019; dismissed Jan. 6, 2020), https://www.ftc.gov/enforcement/cases-proceedings/1910035/matter-illumina-incpacific-biosciences-california-inc; and *In re Edgewell Pers. Care*, Dkt. 9390 (complaint Feb. 3, 2020), https://www.ftc.gov/enforcement/cases-proceedings/191-0147/edgewell-personal-care-company-harrys-inc.
[2] *FTC and State of New York v. Vyera Pharmaceuticals, LLC et al*, No. 20-cv-00706 (S.D. N.Y. Jan. 21, 2020), https://www.ftc.gov/enforcement/cases-proceedings/161-0001/vyera-pharmaceuticals-llc.
[3] *Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services have Terminated Their Acquisition Agreement* (Jan. 30, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/statement-ftc-chairman-regarding-announcement-aveanna-healthcare.

focused on more familiar antitrust theories.[4] Even as we push forward with innovative theories, we still bring bread-and-butter cases to stop significant competitors in an industry from merging.

I can't remember a time when the Bureau has been so active on so many fronts, and I want to take this opportunity to thank the staff who work tirelessly on behalf of all consumers to get to the right resolution. I also want to do something we don't always do, and thank those who work on the cases that we end up closing. It's in the nature of our work that most attention is paid to the cases where we take public action, but a tremendous amount of staff time and expertise is invested in cases where the right thing to do turns out, after a careful investigation, to be not taking action.[5] I want to recognize that crucial work as well.

Turning now to the FTC's remedy toolkit. While finding and stopping anticompetitive conduct and mergers is the primary goal of the Commission's antitrust enforcement actions, just as important is how we fix those antitrust violations. Remedies are crucial because they are where the abstract theoretical and analytical work of antitrust meets the real world. There is a current perception in some corners that antitrust is, or should become, a cure-all. At the same time, others argue that antitrust is moribund and should be overhauled. I think the truth is that antitrust law is neither a blunt instrument nor a relic from a bygone era: rather it is far more like a chisel, useful to target a specific set of illegal conduct that distorts the competitive marketplace. And, just as important, is the remedial effort, seeking to restore the competitive dynamics – the vigor, the innovation, and the market opportunity – that the anticompetitive conduct stifled. Antitrust *is* a great set of tools for solving real competitive problems that harm real consumers in real markets. When antitrust succeeds in making the world a more competitive and innovative place, it does so with remedies.

Today I want to address some misperceptions about the Commission's remedial powers in competition cases. My main message is that the Commission relies on a variety of different tools to design a remedy that fixes the competitive problems in each case. The Commission has honed these tools over 100 years of practice, and we use them every day as part of our enforcement work. In fact, our expertise in constructing custom-made remedies for complex cases is one of the Commission's flagship advantages as an antitrust enforcer. And we are not deterred by the potential difficulty in crafting a remedy; and we will bring a case when it's the right thing to do even though restoring competition may be difficult. This is true for both conduct matters and for acquisitions, whether they affect small segments of the economy or significant industries. Our two guiding principles in enforcement are stop the conduct and restore competition. Sometimes we cannot fully un-ring the bell, but we will do our best.

I know we have limited time so there are a couple of things I'm not going to talk about: the ongoing litigation surrounding the FTC's Section 13(b) authority; remedies for order violations; and the relative virtues of structural versus behavioral remedies. All are important

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[4] *In re Post Holdings, Inc.,* Dkt. 9388 (complaint Dec. 2019; dismissed Jan. 16, 2020), https://www.ftc.gov/enforcement/cases-proceedings/191-0128/post-holdings-inc-matter; *In re Axon Enterprise, Inc*., Dkt. 9389 (complaint Jan. 3, 2020), https://www.ftc.gov/enforcement/cases-proceedings/1810162/axonvievu-matter;
[5] FTC Press Release, *Federal Trade Commission Closes Investigation of Roche Holding AG's Proposed Acquisition of Spark Therapeutics, Inc*., (Dec. 16, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/federal-trade-commission-closes-investigation-roche-holding-ags.

topics, but they are not the focus of today's discussion. Today's discussion is focused on remedies crafted by the Commission in a voluntary consent or following administrative litigation pursuant to Part 3 of our Rules of Practice.

Let's start with a couple of fundamentals. The Commission's authority to write its own orders derives from Section 5(b) of the FTC Act,[6] which gives the Commission a pretty expansive remedial toolbox. Section 5(b) talks on its face about orders to "cease and desist" from unlawful practices, but our remedies frequently do more than simply bring specific ongoing conduct to an end (or command that past conduct not be repeated). Commission orders are not limited to simply stopping past violations. In the words of the Supreme Court: "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."[7]

There are limits, of course. The remedial provisions must bear a reasonable relation to the violation charged – that is, the need for the remedial provision must be supported by the record and bear a nexus to the illegal conduct.[8] Commission orders also must avoid unreasonable overbreadth and impermissible vagueness: needless to say, respondents should be able to understand and comply with their obligations.[9] Respondents in contested Part 3 matters routinely seek federal court review of Commission orders, as is their right under the FTC Act.[10] So respondents enjoy both substantive and procedural protections, which they routinely exercise.

The Supreme Court has recognized that the FTC is an expert body with wide latitude to design remedies.[11] The Commission's remedial flexibility is critical if the Commission is going to be able to solve complex real-world problems in complex real-world markets. Courts remind us that the means of monopolization are myriad,[12] and we have learned over more than a hundred years that there are often countless ways for companies to impose the same harm by different means. So a remedy that can be easily evaded or subverted is really no remedy at all.

Often, delay in achieving justice accrues to the benefit of the offender. Respondents often continue to reap the benefits of their harmful merger or conduct until it is affirmatively stopped through entry of a final order. Delay also may undermine the remedial options available to the Commission. So we aim to act swiftly, as well as accurately, when we seek a remedy for anticompetitive problems.

Consummated Mergers: Options for Resurrecting a Lost Competitor

My first category of special cases is consummated mergers. It's important to remember that until Congress required premerger notification for some transactions in the late 1970's,

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[6] 15 U.S.C. § 45(b).
[7] *FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952).
[8] *FTC v. Nat'l Lead Co*., 352 U.S. 419, 428 (1957).
[9] *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 371 (5th Cir. 2008) (order provision requiring physicians' group to both deal and refuse to deal struck down as overly broad and inconsistent).
[10] 15 U.S.C. § 45(c).
[11] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946); *FTC v. Nat'l Lead Co.,* 352 U.S. at 428.
[12] *United States v. Microsoft Corp.,* 253 F.3d 34, 58 (D.C. Cir. 2001).

nearly all merger enforcement actions involved consummated mergers.[13] To put it another way, between 1890 and 1978, merger review was primarily structured as a consummated merger review. Section 7 in both its 1914 and 1950 versions had consummated transactions primarily in mind. This made merger review a tricky affair for all the familiar reasons: assets were scrambled, effective structural relief was hard to come by, and competitive harm continued during what was often lengthy litigation.

All this made merger control a weak constraint on anticompetitive deals until Congress introduced the Hart-Scott-Rodino premerger notification system in 1976, which greatly improved the agencies' ability to prevent competitive harm from mergers.[14] But not all acquisitions are subject to premerger notification, and sometimes acquisitions are challenged after they have been notified and cleared by the agencies. When the Commission challenges transactions that are anticompetitive but consummated, it must frame a remedy that reflects that reality and the challenges that come with it.

For many reasons, it may be hard to resurrect a competitor or form a new player that is able to exert the same competitive intensity that the target would have provided, but for the merger in question. The recent Remedy Study noted that the Commission may face significant challenges in crafting a remedy for a consummated merger, especially if the acquired business has been merged and its assets combined with those of the acquiring firm.[15]

But the challenges here can come not only from "scrambled" assets, but also from lost business relationships: customers may have chosen new suppliers, employees may have left or taken different positions, suppliers may no longer be available for needed inputs. And degraded assets cause other challenges: machinery may have been actively destroyed or intellectual property may not have been properly upgraded. The companies may have shared confidential business information, knowhow, trade secrets, or proprietary data that were key to the competitive significance of the acquired firm. Additionally, the passage of time may have resulted in the loss of brand or reputational cachet. In order to restore competition, the Commission will have to consider all of the factors that determine competitive success in the affected market, all the ways in which competition has declined since the transaction; and so on. Nevertheless, even when it is hard and may require assets and services beyond those acquired, breakup of the merged company to reestablish competition is still the most likely remedy for a consummated merger.

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[13] Congress enacted the Clayton Act in 1914 in part because the Sherman Act was considered to be wholly ineffective at preventing harmful mergers.

[14] Antitrust Modernization Commission, Report at 158 (April 2007) ("the existing premerger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects."), http://govinfo.library.unt.edu/amc/; *see also* "Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act," remarks of Bill Baer before The Conference Board, Washington, D.C. Oct. 29, 1996, https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

[15] The FTC's Merger Remedies 2006-2012 (Jan. 2017) at 19, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf

Parties can mitigate these problems and sometimes avoid them altogether if they refrain from integrating or diminishing the value of acquired assets during the Commission's investigation. For example, a hold separate agreement, or a letter commitment to refrain from integration, may help to preserve divestiture options, and retain relationships with key employees and trading partners that are important for the competitive viability of the target. The scope of the necessary hold separate (or similar measure) may be relatively modest: depending on the nature of the transaction and any competitive concerns, the relevant assets for this kind of exercise may be only a few business units or product lines, leaving the rest of the integration to proceed unaffected.[16] Parties should recognize that it may be in their interests to agree to this kind of arrangement early on in an investigation; without this agreement and with continued integration, the remedy may become more far-reaching to address the loss of competition.

The Commission will seek to unwind a merger when it's the best way to restore competition, as it did recently in *In re Otto Bock*.[17] After an administrative trial, the Commission found that Otto Bock's 2017 acquisition of Freedom removed from the market a firm that had directly competed against Otto Bock and other suppliers of microprocessor prosthetic knees by offering low prices and attractive promotions to prosthetic clinic customers to win sales. The Commission found that anticompetitive effects from the acquisition have already occurred, and that the acquisition is likely to cause future anticompetitive effects through higher prices and less innovation for amputee patients and prosthetic clinic customers. The Commission ordered a complete divestiture of the Freedom business; the Order has been stayed pending appeal.

In some cases, particularly where parties don't operate the acquired assets as a separate and ongoing business, simply unwinding the deal may not be enough to restore the competition that would have existed but for the challenged transaction. For example, this might be the case when an acquired firm was on a trajectory of growth; when the acquired assets have not been vigorously developed in the way that an independent firm would have developed them; when the acquired assets have become dependent on the acquirer. In cases like these, the Commission may order divestiture of assets beyond those acquired, for instance by requiring additional assets from the *acquiring* firm, or acquired assets that are used in other markets. In both *Chicago Bridge*[18] and *Polypore*[19] – two consummated mergers in which appellate courts upheld the Commission's remedial approach – the Commission's orders included assets outside the relevant market of competitive concern because those assets were necessary to ensure competitive viability in the relevant market and ensure that the buyer could effectively compete against the strong incumbent in the market. Where the acquired assets or business units would be viable

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[16] Just as with proposed mergers, it is possible that only certain of the acquired firm's business lines overlap with the acquiring firm's such that targeted divestitures would be sufficient, leaving the merged firm with some acquired assets that do not create competitive concerns. *See, e.g., In re Airgas, Inc.,* C-4029 (final order Dec. 18, 2001) (divestiture of two nitrous oxide plants and related assets acquired as part of a larger acquisition), https://www.ftc.gov/enforcement/cases-proceedings/0010040/airgas-inc-matter; *In re Service Corp. Internat'*l, C-3959 (final order June 30, 2000)(divested one of two acquired funeral homes to restore competition in Roswell, New Mexico), https://www.ftc.gov/enforcement/cases-proceedings/981-0108/service-corporation-international-matter.

[17] *In re Otto Bock HealthCare N.A*., Dkt. 9378 (opinion and final order issued Nov. 6, 2019), https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations.

[18] *Chicago Bridge & Iron Company v. Federal Trade Commission*, 534 F.3d 410 (5th Cir. 2008).

[19] *Polypore Internat'l v. Federal Trade Commission*, 686 F. 3d 1208 (11th Cir. 2012).

with some improvement, the Commission may require the Respondent to update or restore the assets before divesting them.[20] In some cases, and particularly when dealing with data, it may be possible to both retain and divest an asset: databases, for example, can be copied, with one copy divested and one retained.[21]

Regardless of which assets are divested, I want to emphasize how important it is that we find a strong buyer for divested assets. This is true in every merger divestiture, but it is especially true with consummated mergers where we may very well not have a standalone business to divest, and much may turn on how the buyer plans to support and use the divested assets. This was a key finding from the Remedy Study,[22] and it's hard to overstate the importance of finding the type of buyer that can compete with vigor in the post-merger market. Our Compliance Division has world-leading expertise in assessing potential divestiture buyers, and we take that exercise very seriously.

Behavioral relief may also have some role to play in reestablishing competition, particularly when the acquired assets are not viable. At a minimum, agreements that enable a merged firm to *further* restrain competition – in ways that go beyond the effects of the merger – are likely to be an obvious casualty of our remedy. For example, in 2013, the Commission charged Charlotte Pipe with acquiring its only U.S. competitor three years earlier for $19 million and destroying that firm's production equipment. As part of their merger deal, the companies had also executed a confidentiality and non-compete agreement that prevented the seller of the assets and its employees from competing against Charlotte Pipe for six years. Without the option of divesting assets, the Commission prohibited Charlotte Pipe from enforcing the confidentiality and non-compete provisions of the merger agreement so as to allow the seller and its employees to enter the market to compete against Charlotte Pipe.[23]

However, behavioral relief required to stand up a new competitor may go beyond – and perhaps far beyond – simply requiring that the merged firm give up the power to enforce anticompetitive agreements. In addition, we may require the merged firm to affirmatively engage in behaviors, or enter into agreements to license assets and provide other competitive resources to new entrants. These obligations are not unique to consummated mergers and are often included in non-consummated merger remedies as well in the scope of a transfer services agreement, third party consents, and sharing of certain assets or support functions for a period of time. The breadth of additional relief that may be considered include obligations to provide inputs, distribution, access or other rights, data, or supply of products and services to one or more entrants on specified terms or a non-discriminatory basis for some period of time. It could also impose obligations to change existing trading relationships (such as those with customers or

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[20] *In re Dun & Bradstreet Corp.,* Dkt. 9342 (final order Sept. 10, 2010), https://www.ftc.gov/enforcement/cases-proceedings/091-0081/dun-bradstreet-corporation-matter.

[21] *In re Solera Holdings, Inc.,* C-4415 (final order Oct. 24, 2013), https://www.ftc.gov/enforcement/cases-proceedings/121-0165/solera-holdings-inc.

[22] Remedy Study at 24 (in most cases, "respondents proposed buyers that were familiar with the market, dealt with many of the same customers and suppliers, had developed thoughtful business plans with realistic financial expectations and sufficient backing, and were well received by market participants.").

[23] *In re Charlotte Pipe and Foundry*, C-4403 (final order May 15, 2013), https://www.ftc.gov/enforcement/cases-proceedings/1110034/charlotte-pipe-foundry-company-et-al.

employees) in order to facilitate switching to competitors and entrants.[24] What matters here is ensuring the viability of new entry sufficient to restore the lost competition, and what that will require will vary significantly from one case to another.

Here's a good example. In 2013, Graco, Inc. bought its two closest competitors and reduced competition in the North American market for fast set equipment. Not only had it fully integrated the assets, it had also raised barriers to entry by taking steps to ensure that its distributors would distribute only Graco's products. As part of its remedy, the Commission required Graco to provide a license to certain competitively significant technology to a company run by former employees of the acquired firm. In addition, the Order required Graco to affirmatively change a number of its business practices, including prohibiting it from requiring exclusivity for distributors or their customers.[25]

The bottom line is that we can, and do, go beyond divestitures when that's what is needed to solve the competitive problem. We have often done so in the past, and you can expect us to continue to do so in future.

Dealing with IP

We have learned over many years that remedies can present special concerns or complexities when the acquired assets include intellectual property rights. Generally, the Commission treats IP rights like anything else: if they're part of a business unit, they will be treated for remedy purposes like any other competitively important asset. However, intellectual property also has value because it contains the right to exclude and can be monetized through licensing. When divesting intellectual property rights, the Commission seeks to provide a divestiture buyer with the full value of that intellectual property, including value from rights to exclude and rights to license. In consummated transactions, however, the merged company may have diminished the value of these rights by incorporating acquired patented technology into its own products. The Commission recognizes that in this type of situation, permitting a firm to retain a limited license to the technology it is divesting may be appropriate to avoid disruption to competition and consumers.[26]

Merger remedies involving IP rights sometimes call for creative solutions involving complementary remedial provisions. A good example is the 2002 order entered in our *MSC*

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[24] *In re TALX Corp.,* C-4228 (final order Aug. 8, 2008), https://www.ftc.gov/enforcement/cases-proceedings/061-0209/talx-corporation-matter. *See also In re Renown Health,* C-4366 (final order Dec. 4, 2012)(order lifted non-compete clauses for certain cardiologists, allowing them to realign with other health care groups), https://www.ftc.gov/enforcement/cases-proceedings/1110101/renown-health-matter; *In re CentraCare Health System*, C-4594 (final order Jan. 9, 2017), https://www.ftc.gov/enforcement/cases-proceedings/161-0096/centracare-health-system.

[25] *In re Graco, Inc.*, C-4399 (final order Apr. 18, 2013), Analysis to Aid Public Comment, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/graco-inc.analysis-agreement-containing-consent-order-aid-public-comment-proposed-consent-agreement/130424gracofrn.pdf.

[26] *See Aspen Tech, Inc*., Dkt. 9310 (final order issued Dec. 21, 2004; modified Aug. 25, 2009)(Respondent used the acquired IP in its product so the license to buyer was non-exclusive as to IP used in Respondent's products.), https://www.ftc.gov/enforcement/cases-proceedings/021-0153/aspen-technology-inc-matter.

Software Corporation matter.[27] In that case, MSC had made two unreported acquisitions that gave it a monopoly in the market for advanced versions of the "Nastran" engineering simulation software. The acquisitions eliminated two smaller competitors – Universal Analytics, Inc. and Computerized Structural Analysis and Research – that sold competing advanced versions of Nastran. All three versions were derived from a single, more basic, public domain software product. Because of the close family relationship between the three products, customers could switch more readily among their respective products, making them particularly close competitors and giving MSC reason to target its two smaller rivals for acquisition.

Our remedy required MSC not only to divest the IP it had acquired from UAI and CSAR, but *also* to give the divestiture buyer a clone copy of its current advanced Nastran software, including the source code with a perpetual, worldwide, royalty-free, and non-exclusive license to the most up-to-date version of its own Nastran software. This reflected the reality that MSC had improved its own product, including by taking features from the UAI and CSAR versions, but it had not improved the other two products in the way that an independent competitor would have done. The Commission concluded that "[d]ivestiture of the acquired assets alone would not restore the competitive conditions that existed before the acquisitions (the *status quo ante*), because the 3-year old UAI and CSAR codes are no longer as commercially viable as they were when MSC acquired them."[28]

The Commission's order also required MSC to provide affirmative assistance to the new competitor for a transitional period. The Commission ordered MSC to provide, for example, customer files and support logs; access to its personnel, information, and training; and the opportunity to hire key MSC personnel, especially programmers and customer support engineers. MSC was also required to maintain interoperability with the buyer's software for three years, including maintaining its file formats so that customers could switch to the software supplied by the divestiture buyer.

The MSC remedy also provides a helpful illustration of a point I made earlier: when acquired assets have not been competitively maintained or developed by the merged firm – effectively left to rot or back-burnered while the acquirer's original product is kept competitive – then simply pulling the half-rotten assets out again will likely not solve the problem. That can be a particular concern in software markets, where products develop rapidly and frequent updates may be necessary, and back-burnering in this context can lead to the rapid devaluation of acquired IP. When this happens, the Commission may require the merged firm to update the relevant software before divesting it, and to provide updates post-divestiture for a short time.[29]

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[27] *In re MSC Software Corp.*, Dkt. 9299 (final order Nov. 1, 2002), https://www.ftc.gov/enforcement/cases-proceedings/0010077/mscsoftware-corporation.
[28] *MSC Analysis to Aid Public Comment*, https://www.ftc.gov/sites/default/files/documents/cases/2002/08/mscsoftwareanalysis.htm.
[29] *See In re Automatic Data Processing*, Dkt. 9282 (final order Oct. 24, 1997)(Para. IV requires ADP to update software for 3 years no later than when it pushes updates to its own customers), https://www.ftc.gov/sites/default/files/documents/cases/1997/10/autoinfo_0.htm. *See also FTC v. The Hearst Trust*, No. 1:01-cv-00734 (D.D.C. Stipulated Order Nov. 9, 2001)(merged firm did not maintain acquired database; Respondent required to divest acquired business, and provide access to its own information database for 3 years.), https://www.ftc.gov/sites/default/files/documents/cases/2001/11/hearststip.pdf

IP rights may be center-stage in cases dealing with nascent or potential competition. As the Commission explained in testimony before the Senate Antitrust Subcommittee last fall,[30] the acquisition of the assets – including IP rights – of an emerging or nascent competitor may harm competition, violating Section 7 of the Clayton Act and/or Section 2 of the Sherman Act (via Section 5 of the FTC Act). In such cases, IP rights may play a key role in the competitive story, and may form an important part of any divestiture or other remedy.

For example, in 2017, the FTC charged that Questcor had illegally maintained its monopoly in the United States for a drug called Acthar that treated infantile spasms and other conditions.[31] Outside of the United States, another drug, Synacthen, was sold in direct competition with Acthar. Questcor (later acquired by Mallinckrodt) bought the U.S. rights to Synacthen, outbidding several other companies for those development rights. The anticompetitive effects of this conduct were substantial because it eliminated the possibility that a competitor to an extraordinarily expensive lifesaving drug would emerge but for the acquisition, and, according to the complaint, Questcor had no legitimate business purpose for buying Synacthen other than elimination of a nascent competitor. In a Stipulated Injunction, the Commission ordered the defendants to grant to a divestiture buyer a royalty-free license to develop Synacthen.

I mentioned earlier that remedies may need to go beyond divestiture and impose affirmative obligations to ensure that competition is fully restored. This can be a heightened concern in cases where the remedy involves a transfer of IP rights and other technology: in particular, the transitional period may need to be carefully managed in order to protect the divestiture buyer from interference by the merged firm. Appropriate provisions might include licensing requirements, covenants not to sue the divestiture buyer for IP infringement, or whatever else is necessary to create a safety net to ensure that the effectiveness of the divestiture is not undermined by sharp practice after the fact.[32] These types of provisions are not unique to consummated mergers, but are often employed in non-consummated transactions or other remedies involving the transfer or spin-off of assets.

Conduct Remedies: Cease, Desist, and A Lot More

My final topic is remedies for anticompetitive conduct, and particularly remedial provisions beyond mere cease-and-desist provisions. Because anticompetitive conduct comes in many forms, conduct orders are necessarily varied in what they prohibit. For instance, the order

[30] Prepared Statement of the Commission before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf.

[31] FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/pressreleases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[32] *See, e.g., In re Kyphon, Inc.,* C-4201 (final order Dec. 7, 2007), https://www.ftc.gov/enforcement/cases-proceedings/071-0101/kyphon-inc-disc-o-tech-medical-technologies-ltd-et-al-matter.

in a monopolization case (such as McWane[33]) will contain different prohibitions than an order that addresses an illegal agreement among competitors, like the one the Commission recently issued in the Benco case.[34] As I said at the beginning, antitrust remedies are designed to fix antitrust problems and restore the market to health. In appropriate cases, remedies may also aim to compensate those injured, obtain equitable monetary relief, improve the defendant's compliance system, and so on.

Conduct orders typically contain a broad cease-and-desist provision, which lists various prohibitions against certain conduct. However, the Order also contains exemptions from these prohibitions – that is, things the company can do by way of derogation from the order's general prohibitions.[35] Antitrust practitioners will recognize what this line-drawing is intended to do: to create a workable and clear definition of prohibited conduct while carving out space for behavior that we can be confident poses little or no risk of anticompetitive harm. In defining prohibitions and exceptions, we pay careful attention to the state of the law, the likely practical and economic consequences of various forms of conduct, and the full range of evidence collected during the investigation or submitted by the parties.

Importantly, our remedial orders can (and do) do more than just repeat the antitrust laws by prohibiting conduct that is already unlawful and otherwise leaving the respondent free to go about its business. Commission remedial orders commonly include prohibitions that go beyond the complained of behavior and seek to, in the words of the Supreme Court, "effectively to close all roads to the prohibited goal."[36] This is obviously both necessary and appropriate because "those caught violating the [antitrust laws] must expect some fencing in."[37]

Fencing-in relief is exemplified by our 2016 order in Victrex. In that case, the Commission alleged that Victrex, Inc., monopolized sales of a high-performance polymer by committing medical device companies to deal exclusively with Victrex.[38] The Commission's order not only banned explicitly exclusive contracts, but also banned contract terms that would have an equivalent effect, such as market-share discounts or retroactive volume discounts that could result in *de facto* exclusivity. Even though Victrex had not used such pricing policies in the past, and even though such agreements are not automatically unlawful under the Sherman Act, the Commission's order simply took them off the table, to ensure that Victrex would stay away from conduct that would have an equivalent effect to its original violation of the law.

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[33] Opinion of the Commission, *In re McWane, Inc.,* Dkt. 9351 (final order Feb. 6, 2014), https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf, *aff'd,* 783 F.3d 814 (11th Cir. 2015).

[34] *In re Benco Dental Supply Co., et al*, Dkt. 9379 (final order Nov. 8, 2019), https://www.ftc.gov/enforcement/cases-proceedings/151-0190/bencoscheinpatterson-matter.

[35] *See, e.g.,* Paragraph II of the McWane Order: "PROVIDED, HOWEVER, that nothing in Paragraphs II A-D of this Order prohibits Respondent from providing discounts, rebates, or other Price or non-Price incentives to purchase Domestic DIPF that are (i) volume-based, above average variable cost, and not Retroactive Incentives as defined herein; or (ii) designed to meet competition, if Respondent determines in good faith that one or more Competitors are offering terms of sale for their Domestic DIPF that Respondent needs to match in order to win contested business.", https://www.ftc.gov/system/files/documents/cases/140206mcwaneorder.pdf.

[36] *FTC v. Ruberoid Co*., 343 U.S. at 473.

[37] *FTC v. National Lead Co.*, 352 U.S. at 431.

[38] *In re Victrex plc*, C-4586 (final order Jul. 14, 2016), https://www.ftc.gov/public-statements/2016/07/statement-federal-trade-commission-matter-victrex-plc.

Sometimes fencing-in relief takes the form of, or is supplemented by, a notice or reporting obligation. This is a requirement to make the Commission aware of future potentially problematic actions. Prior notice provisions may, for example, impose a company-specific merger notification system where there is reason to think that a company may harm competition through transactions that would not meet HSR reporting thresholds.[39] Imposing a reporting obligation in a remedial order may be an efficient way to ensure that further acquisitions will not escape the attention of the Commission.

Other provisions in an order may require the respondent to mitigate the impact of its previous unlawful conduct in some way. For instance, the Commission may require respondents to notify customers who might have been affected by the illegal conduct, for example by giving them the option to terminate an existing contract without facing an action for breach by the respondent. In the *Victrex* order, for example, the Commission required respondents to notify all customers with existing contracts that required exclusivity and give them the opportunity to change the terms of their contracts.[40] The Commission may also require notice to individuals who need to know that the Respondent's conduct will or may change in the future because of the order.[41] The Commission can also prohibit the inclusion of certain similar terms in future agreements.[42]

The Commission will also seek, in appropriate cases, to obtain equitable monetary relief and compensate those harmed due to a party's anticompetitive conduct. The most well-known example of such a remedy is the Cephalon matter.[43]

Last but not least is a set of what you might think of as compliance obligations. Many competition conduct orders require the respondent to implement an antitrust compliance program to reduce the chance that the same (or similar) illegal behavior will occur in the future. These programs, which are commonplace at many larger companies, are intended to help create a culture of competition and help employees throughout the firm understand the types of conduct that may violate the Commission's order or otherwise attract antitrust scrutiny. These programs can be comprehensive: for one trade association that ejected members who violated non-solicitation rules, the Commission required the association to designate an antitrust compliance monitor, mandated in-person training for the association's board and employees for five years,

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[39] *See, e.g., In re Charlotte Pipe and Foundry; supra* n. 24; *In re Graco, Inc., supra,* n. 26.
[40] *In re Victrex*, D&O, Paragraph III G, https://www.ftc.gov/system/files/documents/cases/160714victrexdo.pdf.
[41] *In re Professional Skaters Association, Inc.*, C-4509 (Dec. 23, 2014), https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter.
[42] *In re Concordia Healthcare/Par Pharmaceutical, Inc.*, C-4553 and C-4554 (final orders Oct. 30, 2015), https://www.ftc.gov/enforcement/cases-proceedings/151-0030/concordia-healthcare-par-pharmaceutical-matter.
[43] *See, e.g.,* FTC Press Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics* (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill. *See also* FTC Press Release, *Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics*, (Apr. 20, 2015), https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it.

and required the association to adopt non-retaliation protections for those who reported violations of the Order.[44]

Separate and apart from provisions regarding a company's own internal compliance program, every Commission order contains some requirement that the respondent file periodic reports with the FTC, explaining how they are complying with our order. These help Commission staff monitor the firm's compliance with the order, and provide a basis to follow up with the firm if there are issues that arise while the order is in effect. The nature of the report may vary with the nature of the violation: for example, where a company has been found to have participated in an illegal agreement with competitors, the Commission may require it to submit documentation of communications with competitors in its periodic reports.[45] As the Bureau explained in a blog post[46] last year, compliance reports are a critical means of ensuring that the Respondent's actions are consistent with the Commission's order. To reflect their importance, Commission orders now contain new model language requiring more detail in the periodic compliance reports.[47] The accuracy, timeliness, and comprehensiveness of compliance reports are critical dimensions of a company's overall order compliance, and the Bureau is willing to seek penalties if compliance reports are deficient or inaccurate.

Orders also typically require the respondent to provide FTC staff with access to information, documents, and employees (in the presence of counsel), including by allowing FTC staff access to do on-site compliance inspections, subject to advanced notice to the respondents.[48] The Commission designs these provisions to support and complement the primary operative provisions in the order.

I hope these three snapshots – consummated mergers, IP remedies, and conduct cases – have been enough to demonstrate the breadth and flexibility of our remedial powers, and the skill and creativity with which our staff apply them. That includes, but isn't limited to, the very talented team of our Compliance Division, under the supervision of my friend and former DOJ colleague Maribeth Petrizzi, and her superb Deputies Eric Rohlck and Susan Huber.

I'll end on that note of appreciation.[49]

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[44] *See, e.g., In re Professional Skaters Association, Inc., supra* n. 42. In a few cases, the Commission has appointed a Monitor to oversee compliance with the Order. *See Cardinal Health*, *supra* n. 44.

[45] *In re Benco Dental Supply Co. and Patterson Companies, Inc*., *supra* n. 35.

[46] "Compliance reports: Reinforcing a commitment to effective orders," *Competition Matters* blog (Mar. 11, 2019), https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/compliance-reports-reinforcing-commitment-effective.

[47] *See, e.g., In re Bristol-Myers Squibb Co.,* C-4690 (final order Jan. 13, 2020) Para. XI, https://www.ftc.gov/enforcement/cases-proceedings/191-0061/bristol-myers-squibb-company-celgene-corporation-matter.

[48] *See, e.g., In re Impax Laboratories*, Dkt. 9373 (final order Apr. 3, 2019), Para. VI, https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_final_order_0.pdf.

[49] I also want to thank Kelly Signs and Daniel Francis for their considerable work on this speech.