"UNSCRAMBLING THE EGGS": HOW TO UNWIND HARMFUL MERGERS AFTER THEY HAVE CLOSED

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ABSTRACT

Modern merger enforcement is forward-looking and tries to predict whether a proposed transaction will harm competition. But for all the evidence and economic tools that it can marshal, merger enforcement is, at its core, a prediction—and a complex and fallible one at that.

What happens in antitrust when predictions are wrong? The Sherman Act is unavailing—Section 1's scope narrowly proscribes commitments to coordinate, and courts have heightened Section 2's burdens to the point that the government brings few cases, and private parties succeed only 2% of the time.

The Clayton Act—drafted with mergers in mind—offers the glimmer of a solution. It would allow enforcers to unwind transactions after companies have already combined. But here, the government's authority is hamstrung by practical challenges. Unwinding a merger is a herculean task akin to "unscrambling the eggs," so difficult that the government has called it "impossible."

The difficulty of crafting effective remedies stems from two sources: the government lacks the information needed to prescribe how a company should be broken up, and it lacks the ability to commit companies to assist in their own disassembly. To address these pitfalls, this Article proposes the concept of "break-up plans," which enforcers can require in the years after a merger has closed. If ordered to produce a plan, companies would have to provide information necessary to craft a meaningful divestiture. By obligating companies to assist in devising remedies and developing a structure of penalties to promote compliance, "break-up plans" would help preserve the viability of post-closing relief and in so doing,

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breathe life into post-closing reviews. They can already be implemented in the consent agreements that the Department of Justice and Federal Trade Commission negotiate with merging parties, though they would require statutory authorization to live up to their full potential.

Standard-bearers Phillip Areeda and Herbert Hovenkamp have long recognized that the most effective merger policy includes a system of post-closing reviews. But antitrust so far has yet to figure out how to meaningfully preserve that capability for large mergers. This Article points out that the current norm of leaving large mergers alone is not an inexorable tenet of antitrust enforcement. Rather, this custom stems from deficiencies in the legal architecture around merger enforcement, which can—and should be—fortified. In today's age of increased economic concentration, preserving meaningful post-closing relief is critical so that enforcers can correct past errors that have created and ossified market power.

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INTRODUCTION

2018 was not Facebook's year.

It started with George Soros excoriating the company at the World Economic Forum. At the annual Davos summit, he called Facebook a "near monopoly distributor[]" rising to the level of a public utility, which he thought should subject the company to "more stringent regulations, aimed at preserving competition, innovation, and fair and open universal access."[1]

Then in April, Facebook CEO Mark Zuckerberg was summoned to Congress after fallout from the Cambridge Analytica scandal unleashed public fury.[2] During congressional hearings, Senator Lindsey Graham asked Zuckerberg if Facebook was a monopoly. Although the CEO said no, he could not name a single direct competitor and mustered only that Google, Apple, Amazon, and Microsoft "overlap with Facebook in different ways."[3]

This mounting public scrutiny meant that the prospect of regulation loomed large. Even Zuckerberg admitted it was "inevitable that there will need to be some

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[1] George Soros, Remarks Delivered at the World Economic Forum (Jan. 25, 2018), https://www.georgesoros.com/2018/01/25/remarks-delivered-at-the-world-economic-forum [https://perma.cc/WG3U-66QD].

[2] In the Cambridge Analytica scandal, a data-analytics firm working with the Trump and Brexit campaigns used Facebook profiles to target individual voters with personalized political ads. The Guardian and New York Times' stories published on March 17, 2018 exposed the unprecedented scale of the operation, which implicated tens of millions of Facebook profiles and led lawmakers to call for greater scrutiny of the company. Matthew Rosenberg & Sheera Frenkel, *Facebook's Role in Data Misuse Sets Off Storms on Two Continents*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/us/cambridge-analytica-facebook-privacy-data.html [https://perma.cc/ZF5U-STCQ]. For the articles that broke the story, *see* Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/7Z5J-5GST]; *see also* Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 EDT), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election [https://perma.cc/6CLL-EW99].

[3] *Transcript of Mark Zuckerberg's Senate Hearing*, WASH. POST (Apr. 10, 2018, 10:25 PM EDT), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?noredirect=on [https://perma.cc/2ZXN-XBFR].

regulation."[4] Among the calls for government intervention was the idea to break up Facebook: Tim Wu, Robert Reich, and progressive groups all called for Facebook to be splintered into separate companies.[5] A breakup could effectively unwind Facebook's acquisitions of Instagram and WhatsApp, which Facebook's critics argued should never have been approved.[6]

As calls for its dismemberment escalated, Facebook announced that it would integrate messaging services across Instagram, WhatsApp, and Facebook Messenger.[7] Its announcement lacked a clearly articulated rationale; WhatsApp employees reported that Zuckerberg gave vague and meandering answers when asked why he was so invested in integrating the services.[8]

Facebook's weak justification indicates its move was motivated not by a desire to compete on the merits, but rather by an aim to fend off calls to break up the company. Though Facebook has never admitted this, the circumstantial evidence is substantial. First, integrating the services marked an abrupt about-face for Facebook. When it bought Instagram and WhatsApp, Facebook promised autonomy for each company.[9] For years, Facebook, Instagram, and WhatsApp employees worked in separate buildings and had discrete reporting lines.[10] But the move

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[4] Cecilia Kang & Kevin Roose, *Zuckerberg Faces Hostile Congress as Calls for Regulation Mount*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/business/zuckerberg-facebook-congress.html [https://perma.cc/R3UK-5M6Z].

[5] Aaron Mak, *Progressive Groups Launch Ad Campaign to Break Up Facebook*, SLATE (May 21, 2018, 2:22 PM), https://slate.com/technology/2018/05/break-up-facebook-progressive-groups-launch-ad-campaign.html; [https://perma.cc/9AH7-B85F]; Nilay Patel, *It's Time to Break up Facebook: "Start by Breaking off WhatsApp and Instagram,"* VERGE (Sept. 4, 2018, 1:00 PM EDT), https://www.theverge.com/2018/9/4/17816572/tim-wu-facebook-regulation-interview-curse-of-bigness-antitrust [https://perma.cc/8FDC-F5M8] (quoting Tim Wu); Robert Reich, *Break up Facebook (and While We're at It, Google, Apple and Amazon)*, GUARDIAN (Nov. 20, 2018), https://www.theguardian.com/commentisfree/2018/nov/20/facebook-google-antitrust-laws-gilded-age [https://perma.cc/D5HK-HCWE].

[6] *See* Patel, *supra* note 5.

[7] Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html [https://perma.cc/P9MK-HJQ8].

[8] *Id.*

[9] *Id.*; *see also* Emil Protalinski, *WhatsApp Reiterates Facebook Purchase Will Not Affect User Privacy; Company 'Values and Beliefs Will Not Change,'* NEXT WEB (Mar. 17, 2014), https://thenextweb.com/facebook/2014/03/17/whatsapp-promises-facebook-purchase-will-affect-user-privacy-company-values-beliefs-will-change [https://perma.cc/LPF8-3KA4] (quoting WhatsApp founder Jan Koum saying, "[W]e are forming a partnership that would allow us to continue operating independently and autonomously").

[10] Mike Isaac, *How Facebook Is Changing to Deal with Scrutiny of Its Power*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/technology/facebook-antitrust.html [https://perma.cc/9DH3-NZD5]; Kurt Wagner & Sarah Frier, *Facebook Wants to Integrate Instagram Direct Messages With Messenger*, BLOOMBERG (Aug. 7, 2019, 3:12 PM EDT), https://www.bloomberg.com/news/articles/2019-08-07/instagram-s-chat-product-to-be-rebuilt-on-facebook-technology [https://perma.cc/3VTD-MHEX].

to integrate Facebook's apps upended that independence: Instagram's direct-messaging team now reports to the Facebook Messenger group,[11] and employees across the services are being pushed to share more internal resources.[12]

Second, fusing together these services' technical infrastructures entails substantial costs. The services have different functionalities, which makes integration particularly expensive. For instance, WhatsApp does not store messages or require anything beyond a phone number for a user to create an account, unlike both Facebook Messenger and Instagram. WhatsApp also uses end-to-end encryption by default, whereas the other services do not.[13] Further, joining the services creates a mammoth codebase with webs of dependencies that makes it easier to introduce errors and harder to correct them.[14] Sure, Facebook could rationalize these costs with dazzling business justifications, but an internal analysis showed that integration would add only a meager number of new users in the United States.[15]

Many thus suspect that Facebook integrated its services to guard against a potential breakup of the company.[16] Representative David Cicilline, chairman of the House antitrust subcommittee, has criticized Facebook's move along these lines. "The combination of Facebook, Instagram and WhatsApp into the single largest communications platform in history is a clear attempt to evade effective antitrust enforcement by making it harder for the company to be broken up," he said. "We need to hit the pause button."[17]

Facebook cofounder Chris Hughes echoed these concerns, urging that "time is of the essence" to mandate a breakup because "Facebook is working quickly to integrate the three, which would make it harder for the F.T.C. to split them up."[18] The Federal Trade Commission (FTC) itself appears to share this

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[11] Wagner & Frier, *supra* note 10.

[12] Isaac, *How Facebook Is Changing to Deal with Scrutiny of Its Power*, *supra* note 10.

[13] *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, *supra* 7. End- to-end encryption protects user privacy by ensuring that only users can view the messages they send. *Id.*

[14] *See* J. David Morgenthaler et al., *Searching for Build Debt: Experiences Managing Technical Debt at Google*, 2012 PROC. OF THE THIRD INT'L WORKSHOP ON MANAGING TECHNICAL DEBT 1 (2012).

[15] *See* Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger, supra* note 7.

[16] Isaac, *How Facebook Is Changing to Deal with Scrutiny of Its Power*, *supra* note 10.

[17] *Id.*

[18] Chris Hughes, *It's Time to Break up Facebook*, Opinion, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html [https://perma.cc/68ZC-5UHT].

worry. In December 2019, the Commission considered whether to seek an injunction against Facebook integrating its apps.[19] FTC officials reasoned that an injunction holding the businesses separate would better preserve the remedies available if the Commission later sought to break up Facebook.[20]

This past October, Facebook has used its integration to argue that a breakup would be too expensive. Breaking up the company would be "a complete nonstarter,"[21] its lawyers contend, in significant part because Facebook would have "to spend billions of dollars maintaining separate systems, weakening security and harming users' experience."[22] But Facebook was the one that decided to expend resources to merge the systems together in the first place and did so after years of keeping them separate.

Facebook's strategy raises questions about antitrust law. Why did Facebook think it would be advantageous to scramble its operations when it found itself under scrutiny? Why was the FTC concerned about its future ability to break up the company if Facebook integrated Instagram and WhatsApp with Facebook Messenger?

The answer is that antitrust enforcers cannot currently exercise the full scope of their statutory authority. Section 7 of the Clayton Act—the merger-enforcement statute—gives enforcers broad authority to break up harmful mergers after they close. But the FTC and DOJ, collectively "the agencies," typically still seek to prevent harmful mergers from closing because once the parties have closed, reversing the merger is a herculean task akin to "unscrambling the eggs."[23] This challenge shapes the practical contours of merger litigation: the agencies focus on

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[19] John D. McKinnon & Emily Glazer, *FTC Weighs Seeking Injunction Against Facebook over How Its Apps Interact*, WALL. ST. J. (Dec. 12, 2019, 2:14 PM ET), https://www.wsj.com/articles/ftc-weighs-seeking-injunction-against-facebook-over-how-its-apps-interact-11576178055 [https://perma.cc/Y9ZA-2X5N].

[20] *Id.*

[21] Jeff Horwitz, *Facebook Says Government Breakup of Instagram, WhatsApp Would Be 'Complete Nonstarter,'* WALL ST. J. (Oct. 4, 2020, 2:04 PM EST), https://www.wsj.com/articles/facebook-says-government-breakup-of-instagram-whatsapp-would-be-complete-nonstarter-11601803800 [https://perma.cc/8TJX-N8ET] (quoting "a paper company lawyers have prepared in the wake of rising antitrust legal threats").

[22] *Id.*

[23] *E.g.*, ANTITRUST DIV., INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE FINAL REPORT, ch. 3, at 89 (2000) ("Advance notice . . . avoid[s] the widely acknowledged difficulties that accompany attempts to restore competition by 'unscrambling the eggs' after allegedly anticompetitive transactions have been completed. The experience of the U.S. antitrust enforcement agencies before 1976 illustrates that imposing structural relief after a transaction has been consummated is often difficult, if not impossible."); *see also* Memorandum of Law in Support of Plaintiffs' Motion for Injunction Pending Appeal at 9, FTC v. Penn State Hershey Medical Center, 185 F. Supp. 3d 552 (M.D. Pa. 2016) (No. 1:15-cv-02362) (pleading that allowing the parties to close "would require the FTC to take onerous measures to 'unscramble the eggs' at a later date").

preventing mergers from closing in the first place because post-closing challenges would be feckless.

Though prospective merger review evades the difficulty of devising a post-closing remedy, it has its own drawbacks. Chiefly, it cannot correct past enforcement mistakes. This limitation is particularly concerning in merger review because mistakes are inherent in its predictive nature. As Alan Devlin and Michael Jacobs have characterized prospective merger analysis, "[t]he propensity of such analysis to result in erroneous determinations is axiomatic."[24]

If we believe merger enforcement has been too aggressive, enforcers can be more permissive when reviewing future transactions. They have ample opportunities; each year, companies propose thousands of mergers. In 2019, deal volume totaled nearly two trillion dollars.[25]

But if we believe merger enforcement has been too lax, as many do today,[26] then the old answer of changing future enforcement policy is no longer sufficient because concentrated market structures can ossify past the point of self-correction. Indeed, evidence indicates that they may have already: incumbent firms today are more likely to continue being profitable than they were decades ago.[27] Startup rates have declined over the past forty years, "with accelerated slowdowns in high-growth young firm activity since 2000."[28] The startups that are forming employ a decreasing share of the workforce.[29] This evidence of decreased dynamism coincides with evidence of rising market power in the U.S. economy. Studies find that

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[24] Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 105 (2010).

[25] *US M&A News and Trends*, FACTSET: FLASHWIRE US MONTHLY (Oct. 2020), https://www.factset.com/hubfs/mergerstat_em/monthly/US-Flashwire-Monthly.pdf [https://perma.cc/JJ23-EPZ5].

[26] *See, e.g.*, Fiona Scott Morton, *Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects*, WASH. CTR. FOR ECON. GROWTH (May 19, 2019), https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects [https://perma.cc/B6YT-N62T] ("The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence. . . . The bulk of the research . . . finds evidence of significant problems of underenforcement of antitrust law.").

[27] *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing [https://perma.cc/9KBG-QRZZ] ("An American firm that was very profitable in 2003 (one with post-tax returns on capital of 15-25%, excluding goodwill) had an 83% chance of still being very profitable in 2013; the same was true for firms with returns of over 25%, according to McKinsey, a consulting firm. In the previous decade the odds were about 50%. The obvious conclusion is that the American economy is too co[z]y for incumbents.").

[28] Ryan A. Decker et al., *Entrepreneurship, Firm Dynamics, and Growth: Declining Dynamism, Allocative Efficiency, and the Productivity Slowdown*, 107 AM. ECON. REV.: PAPERS & PROCEEDINGS 322, 322 (2017).

[29] John Haltiwanger, HOOVER INST. 4, *Changing Patterns of Productivity and Business Dynamism: Is There a Connection?*, HOOVER INST. 4 (Feb. 2017).

average markups tripled since 1980 even when they remained stable in past decades.[30] Mergers, of course, are part of this story; researchers have found that tie-ups on average result in price increases.[31] Mounting evidence indicates that past waves of consolidation have contributed to the increasingly imperturbable dominance that large firms enjoy.

Antitrust's existing tools to tackle durable dominance are grossly inadequate. In theory, the government and private plaintiffs could bring monopolization cases under Section 2 of the Sherman Act to prevent dominant firms from using their market power to strengthen their monopoly.[32] But in practice, monopolization cases require high market share as a threshold matter, and courts are skeptical of theories of harm under Section 2—so much so that the government brings few monopolization cases, and while private plaintiffs do, they rarely succeed.

In effect, the agencies have two ways to correct errors: conducting post-closing reviews and bringing monopolization cases. Both are currently unavailing. Post-closing reviews are practically limited, while monopolization cases are doctrinally constrained. Though many scholars have focused on galvanizing monopolization law,[33] making post-closing reviews more practicable has received considerably less scholarly attention. Such neglect is unfortunate because post-closing reviews are more far-reaching than simply expanding monopolization claims: whereas Section 2 claims always require a preliminary showing of monopoly power—typically at least 70% market share,[34] Section 7 has no requirement. Post-

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[30] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, QUARTERLY J. ECON. (forthcoming 2020) (manuscript at 1).

[31] JOHN KWOKA, MERGER, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 154-55 (2015) [hereinafter KWOKA, MMR].

[32] 15 U.S.C. § 2 (2018).

[33] A group of academics has called for specific antitrust reforms in the *Utah Statement*. These include overruling the *Brooke Group* test for predatory pricing and *Weyerhaeuser* test for predatory bidding, and reviving the essential-facilities doctrine and the *Berkey Photo* standard for monopoly leveraging. Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech: A New Framework for Holding Private Power to Account*, ONEZERO BY MEDIUM (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7 [https://perma.cc/FUV3-VTHM]; *see also* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 791 (2017) (arguing for a presumption against dominant platforms in predatory-pricing cases).

[34] *See* Exxon Corp. v. Berwick Bay Real Estate Partners, 748 F.2d 937, 940 (5th Cir. 1984) ("[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%."). Relying only on monopolization would mean a market needs to be ultra-concentrated before enforcers can act. An industry with a dominant 70 percent market-share firm has a Herfindahl-Hirschman Index (HHI) of more than 4,900. The agencies' Horizontal Merger Guidelines deem that an HHI of 2,500 indicates a "highly concentrated market," where an increase of even a hundred points "potentially raise[s] significant competitive concerns and often warrant[s] scrutiny." *Horizontal Merger Guidelines*, U.S. DEP'T JUST. & FED. TRADE COMM'N 19 (Aug. 19, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/24D6-S82S].

closing reviews allow enforcers to balance a merger's pro and anticompetitive effects without requiring extremely high market share as a threshold condition.[35] Further, Section 7's substantive standard may present a lower bar.[36] As the Court said in *Brown Shoe*, "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."[37]

What scant attention post-closing reviews have received has focused only on the need for more of them.[38] This point is well appreciated by the FTC, which has shown greater interest in retrospective reviews.[39]

But scholars and the Commission alike have not addressed the central problem hampering post-closing reviews—the difficulty of devising relief. This quandary results from two primary limitations: first, the government lacks the granular information needed to prescribe how a company should be broken up, and second, it cannot commit companies to assist in their own disassembly.

This Article aims to empower more wide-ranging use of the agencies' post-closing enforcement authority by obligating companies to contribute their expertise

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[35] *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 982–86 (D.C. Cir. 1990) (describing horizontal-merger analysis under Section 7).

[36] *Cf.* Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, COMPETITION POL'Y INT'L (May 25, 2020), https://www.competitionpolicyinternational.com/challenging-consummated-mergers-under-section-2-2 [https://perma.cc/7RAN-J9BL] (refuting the idea that Section 2 presents a "lower bar" than Section 7).

[37] Brown Shoe Co. v. United States, 370 U.S. 294, 328-29 (1962).

[38] Menesh S. Patel, *Merger Breakups*, WIS. L. REV. (forthcoming 2020); *see also* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. (forthcoming 2020) (arguing for a greater willingness to use breakups as a remedy).

[39] Last February, the Commission created a technology task force charged with reviewing consummated tech mergers. *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, FED. TRADE COMM'N (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology [https://perma.cc/W7QV-JPW6].

Two months later, the FTC held hearings on merger retrospectives, during which Commissioner Slaughter emphasized the FTC's responsibility "to correct erroneous decisions that resulted in competitive harm" and noted a need for more formal review of consummated transactions. *Competition and Consumer Protection in the 21st Century: Merger Retrospectives*, FED. TRADE COMM'N 152 (Apr. 12, 2019), https://www.ftc.gov/system/files/documents/public_events/1466002/ftc_hearings_session_13_transcript_4-12-19_1.pdf [https://perma.cc/6Y3B-QXE9] (statement of Commissioner Slaughter); *see also id.* at 153 (statement of Commissioner Slaughter) ("Importantly, retrospectives may also be able to help us determine not only how to handle new cases in the future but whether, in a specific case, further enforcement action, such as unwinding a consummated merger or challenging anticompetitive conduct, is necessary to protect and restore competition.").

And this September, it announced it would expand and formalize its merger retrospective program to refine its analytic tools and enforcement thresholds. *FTC's Bureau of Economics to Expand Merger Retrospective Program*, FED. TRADE COMM'N (Sept. 17, 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program [https://perma.cc/6XY8-JLH3].

in devising breakups and developing a regime for companies' compliance. It proposes the idea of "break-up plans." The idea is that enforcers, upon finding harm from a merger in the years after it has closed, would be able to require companies to produce a plan for how they would divide their operations. Break-up plans would require companies to describe in detail how they would split up their resources to restore competition, and companies would be subject to meaningful penalties if they failed to develop credible plans. Having the ability to require break-up plans would allow agencies to craft meaningful remedies even after a merger has closed. This ability to obtain adequate relief then empowers enforcers to more fully exercise their post-closing authority, which is sorely needed to correct errors that inevitably arise in a process as predictive as merger review.

Agencies can already employ break-up plans by providing for them in consent agreements. Currently, agencies negotiate with merging parties during the clearance process: the parties will often agree to divestitures and behavioral remedies to secure the agencies' approval. These terms are finalized in a consent agreement, which upon court approval—or in the FTC's case, agency approval—becomes a binding, enforceable order. The agencies can use consent agreements to begin implementing break-up plans, and doing so would accord with recent DOJ moves to use consent decrees to contract around legal standards that it finds inadequate.[40]

Realizing the full potential of break-up plans—that is, their ability to remedy harm in already closed mergers—would require statutory authorization. There may yet be hope. Antitrust has attracted bipartisan interest in recent years and has featured significantly in the 2020 Democratic presidential primary.[41] In just the most recent session of Congress, Senator Amy Klobuchar alone has introduced six bills aimed at redressing various deficiencies of the current enforcement framework.[42]

[40] *Division Update Spring 2018, Punching Things up: The Antitrust Division Takes Steps to Make Consent Decrees More Enforceable, Less Regulatory*, U.S. DEP'T JUST. (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-takes-steps-make-consent-decrees-more-enforceable-less-regulatory [https://perma.cc/LZ46-D7B6].

[41] Makena Kelly, *Where Do the Top Presidential Candidates Stand on Breaking up Big Tech?*, VERGE (Mar. 14, 2019, 9:03AM EDT), https://www.theverge.com/2019/3/14/18264252/presidential-candidates-breaking-up-big-tech-stance-warren-sanders-booker-klobuchar [https://perma.cc/3B7Y-2528]; Tim Wu, Opinion, *Antitrust Returns to American Politics*, N.Y. TIMES (Mar. 13, 2019), https://www.nytimes.com/2019/03/13/opinion/antitrust-2020-campaign.html [https://perma.cc/F538-R9UR]; *Tech Competition & Antitrust*, POLITICO (Feb. 19, 2020), https://www.politico.com/2020-election/candidates-views-on-the-issues/technology/tech-competition-antitrust [https://perma.cc/K7S8-AL6K].

[42] S. 64, 116th Cong. (2019); S. 306, 116th Cong. (2019); S. 307, 116th Cong. (2019); S. 1224, 116th Cong. (2019); S. 1937, 116th Cong. (2019); S. 3426, 116th Cong. (2019).

This Article proceeds by making the case for post-closing merger review in Part I, which argues that errors are inevitable in merger review and neither changing future enforcement policy nor relying on non-merger antitrust law is sufficient. Part II describes the agencies' existing authority to pursue reviews of consummated mergers and explains the practical challenges that hamper enforcement. From there, Part III introduces the idea of break-up plans and explains how they would empower post-closing reviews. It then sets forth how break-up plans would work—describing who should enforce break-up plans, when they should be invoked, how they should be structured, what they should contain, and what penalties merging parties would face for subverting the requirement. Part III also concretely illustrates what a break-up plan could look like with the real-world example of the T-Mobile/Sprint merger. Part IV follows by presenting options for implementation, both immediate and statutory. Finally, Part V addresses general concerns with post-closing reviews and specific complications that break-up plans may present.

I. NEED FOR POST-CLOSING REVIEWS

A. Enforcement mistakes are inevitable

The FTC and DOJ's enforcement activity is overwhelmingly directed at proposed mergers,[43] and the agencies' forward-looking orientation necessarily traffics in predictions. As the agencies' Horizontal Merger Guidelines state, "Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."[44]

This policy of prospective enforcement is consistent with Section 7 of the Clayton Act, which forbids acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[45] Section 7 has been interpreted by courts to forbid "[m]ergers with *probable* anticompetitive effect," as "Congress used the words '*may be* to substantially lessen competition' . . . to indicate that its concern was with probabilities, not certainties."[46]

Carrying out this statutory mandate requires the difficult task of divining a transaction's future effects. To determine a merger's future impact on competition,

[43] *See, e.g.*, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2018, at 9-18 (reporting that the agencies challenged two consummated transactions out of the 39 enforcement actions they brought in 2018).
[44] *Horizontal Merger Guidelines*, *supra* note 34, at 1.
[45] 15 U.S.C. § 18 (2018).
[46] *E.g.* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (emphasis added); *see also* S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950) (declaring that the Clayton Act requires a "reasonable probability" but not certainty of injury to competition).

the agencies must analyze how the combined firm will act, how the firm's competitors will respond, and how market conditions may change.[47] Each of these questions entails a multi-faceted, fact-intensive inquiry. When examining unilateral effects, for instance, the agencies consider factors like demand elasticity, diversion ratios, margins, market share, rivals' supply responses, and potential efficiencies—which itself requires analyzing whether the touted efficiencies are merger-specific, verifiable, and substantial enough to counteract any anticompetitive harms detected.[48] To ascertain these factors, the agencies pour over troves of documents and data—emails, models, presentations, reports, spreadsheets, surveys, and contracts—produced by the merging parties, their competitors, and other industry sources.[49] The agencies must then analyze the competitive effects of the merger and synthesize their multi-pronged analysis into a unitary conclusion of whether the proposed merger will harm competition.

Merger review requires developing complex predictions premised on extensive factual foundations and layers of analysis. Predictions are imperfect under ordinary conditions, and the complicated and contingent forecasts demanded by merger review are even more fallible. Assessments of prospective harm can be wrong because the factual inputs were incorrect, the analysis of a particular aspect was flawed, the synthesis of competitive factors was mistaken, or the shifting conditions of a dynamic marketplace led to effects not considered in the agencies' analysis.[50] To be sure, proposed mergers can be clearly anticompetitive.[51] But in general, having to rely on predictions means that enforcers will inevitably err. As FTC Commissioner Becca Slaughter admitted, "[E]ven though we use our best economic and legal tools to make the most accurate predictions we can, we know that sometimes we may make mistakes."[52]

These critiques apply only when the agencies analyze a merger's prospective effects. But in most cases there is no agency analysis. In fact, the overwhelming majority of proposed mergers are not examined at all.

This is in part because the agencies can investigate only the proposed mergers that they know about, and those mergers are generally limited to the transactions that parties must report in advance. Under the pre-notification scheme created by the Hart-Scott-Rodino Act ("HSR Act"), only transactions worth more than $94

[47] *Horizontal Merger Guidelines*, *supra* note 34 at 1-3 (discussing the need to account for unilateral effects, coordinated effects, and entry).
[48] *Id.* at 29.
[49] *See id.* at 4-6.
[50] *See* Devlin & Jacobs, *supra* note 24, at 105-06.
[51] *See, e.g.*, *Competition and Consumer Protection in the 21st Century: Merger Retrospectives*, *supra* note 39, at 151 (statement of Commissioner Slaughter) (discussing the Tronox/Cristal merger).
[52] *Id.*

million must be reported.[53] Transactions that fall below the HSR threshold are thus unlikely to attract any agency scrutiny. These lower-value combinations do not deserve categorical immunity, however, as local mergers in supermarkets, pharmacies, funeral homes, and healthcare markets can have intense anticompetitive effects.[54] In *Evanston*, for instance, the merger of two rival hospitals in the Chicago suburbs led to price increases as high as 190%.[55]

But more importantly, even of the higher-value mergers that are disclosed to the agencies, few are thoroughly investigated: in 2018, the FTC and DOJ requested additional information in just 45 of the 2,028 reported transactions.[56] Enforcement errors are bound to occur where there is scant or nonexistent analysis of whether to enforce in the first place.

B. Typical correctives are inadequate

1. Evidence from recent studies

From the 1980s to 2000s, Chicago School orthodoxies "helped discredit . . . dubious past [enforcement] pursuits" and allowed large companies to merge.[57] Courts, agencies, and academics urged for the law "to err on the side of underenforcement," believing that "procompetitive behavior erroneously condemned will result in a permanent loss."[58] But today, Chicago-era ideas have increasingly come under attack. Jonathan Baker, among the Chicago School's many critics, has concluded:

> *[T]he Chicagoans lost their bet. Since the implementation of antitrust deregulation, market power has widened, without accompanying long-term gains in consumer welfare. Instead, economic dynamism and the rate of productivity growth have been declining. The harms from the exercise of market power have extended beyond the buyers and suppliers directly affected to include slowed economic growth and a skewed distribution of wealth. Whatever*

[53] Premerger Notification Office Staff, *HSR Threshold Adjustments and Reportability for 2020*, FED. TRADE COMM'N (Jan. 31, 2020 2:34 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020 [https://perma.cc/3XZ7-G2Q9].
[54] *Cf. Markets*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/markets [https://perma.cc/7ERK-BSA5] (describing the FTC's scrutiny of local markets).
[55] Complaint at 3-4, 6, In the Matter of Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Feb. 10, 2004).
[56] HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2018, *supra* note 43, at 1, 5.
[57] JOHN E. KWOKA, JR. & LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 3 (6th ed. 2014).
[58] *See* Devlin & Jacobs, *supra* note 24, at 79.

> *efficiency gains the Chicago-inspired changes may have achieved have not compensated for the market-power effects of the antitrust deregulation they sought.*[59]

Evidence for this view—that antitrust enforcers have been too permissive—is mounting. Retrospective studies suggest that recently approved mergers have generally harmed consumers. John Kwoka's meta-analysis of almost fifty merger retrospectives concluded that mergers resulted in an average 4.3% price increase at the product level.[60] Kwoka also found that in the 60% of cases where mergers increased product-level prices, the average price increase was 9%.[61] Kwoka's results corroborate those of other scholars. Similar to Kwoka's analysis, Matthew Weinberg's study of horizontal mergers concluded that "the bulk of consummated mergers that have been studied had price increases."[62] Likewise, Orley Ashenfelter et al.'s survey found in 36 out of 49 studies that mergers induced price increases.[63] Further, Bruce Blonigen and Justin Pierce have shown that mergers are associated with higher average markups without corresponding increases in productivity.[64] These results indicate that antitrust enforcers have been too permissive and have allowed many harmful mergers to close.

The agencies should be more aggressive in policing future mergers. But solely strengthening prospective enforcement may be insufficient to counteract underenforcement's harms because the effects of anticompetitive mergers can be lasting. To this point, there is at least evidence of entrenched market power in the United States. Studies show decreasing dynamism in our economy. According to a McKinsey study, the average profitable firm in 1990 had a 50% chance of remaining profitable in 2000. Fast forward one decade, and those odds are now 83%.[65]

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[59] JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 2 (2019).

[60] KWOKA, MMR, *supra* note 24, at 154-55. Kwoka is not without critics. *See* Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies: *A Critical Review*, 82 ANTITRUST L.J. 361, 363-64 (2018) (criticizing his methodology and expansive conclusions).

[61] KWOKA, MMR, *supra* 31, at 155.

[62] Matthew Weinberg, *The Price Effects of Horizontal Mergers*, 4 J. COMPETITION L. & ECON. 433, 434 (2007).

[63] Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J. L. & ECON. S67, S78 (2014). Ashenfelter et al. do find differences across industries, with all airline merger studies resulting in price increases, but only four out of nine petroleum industry studies resulting in price increases.

[64] Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency*, Board of Governors of the Federal Reserve System, Finance and Economics Discussion Series 2016-082, 2 (2016).

[65] *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing [https://perma.cc/9KBG-QRZZ].

Another indicator of dynamism is new business formation. On this aspect, startup rates have declined since the 1980s, "with accelerated slowdowns in high-growth young firm activity since 2000."[66] Correspondingly, there have been fewer initial public offerings (IPOs),[67] and startups have come to employ a decreasing share of the workforce.[68] Further, job reallocation rates—yet another measure of dynamism—have continuously declined since the 1980s.[69] The quarterly churn rate has decreased over 20% since just the 1990s.[70]

Evidence of decreased dynamism is part of an ongoing debate about the causes of rising concentration in the U.S. economy. Some argue that increased concentration is due to firms having greater market power—that increasingly dominant firms are growing more profitable by increasing prices, depressing wages, discouraging entry, and exerting power over political processes.[71] But others—namely David Autor and his co-authors—urge a more benign explanation. In their view, competition has taken on a "winner-takes-most" nature, leading to a contest where the most efficient firms naturally dominate; this effect is perhaps caused by greater prevalence of network effects and larger firms taking greater advantage of technological advances.[72]

Overall trends of decreasing dynamism weigh in favor of the market-power explanation because Autor et al.'s model would predict greater dynamism, not less. Taking the measure of job reallocation, for example, there should be greater churn in the economy both from supercharged firms expanding and from weaker competitors exiting the market.[73] But these overall trends of dynamism are not dispositive to the debate. Decreased startup rates may be due to increased regulation, and lower IPO rates specifically may be caused by reforms like Sarbanes-Oxley that impose greater compliance obligations and make going public less attractive.[74] Lower labor-market churn may be due to frictions like greater skills gaps at a re-

[66] Decker et al., *supra* note 29, at 322.

[67] *Increased Corporate Concentration and the Influence of Market Power*, BARCLAYS 15 (2019), https://www.investmentbank.barclays.com/content/dam/barclaysmicrosites/ibpublic/documents/our-insights/MarketPower/Barclays-ImpactSeries5-MarketPower_final_2.4MB.pdf [https://perma.cc/8E8Z-99B7].

[68] Haltiwanger, *supra* note 29, at 4.

[69] *Id.* at 3.

[70] *Increased Corporate Concentration and the Influence of Market Power*, *supra* note 67, at 15.

[71] Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 20, 2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today [https://perma.cc/H37G-WLMT] (summarizing the evidence).

[72] David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 QUARTERLY J. ECON. 645, 645, 650-51 (2020).

[73] Autor et al. study the effect of concentration on proxies for dynamism. But they examine labor productivity, not churn, and use the narrow metric of patent intensity. *Id.* at 690-92.

[74] Francesco Bova et al., *The Sarbanes-Oxley Act and Exit Strategies of Private Firms*, 31 CONTEMP. ACCT. RES. 818 (2014).

gional level and increased occupational licensing requirements. But to support Autor and his compatriots' exoneration of market power, all of these factors would have to be true concurrently.

The debate around what has caused the increase in concentration has not yet been settled, but there is strong evidence supporting the market-power hypothesis. If the symptom of decreasing dynamism is primarily caused by entrenched market power, harm must be undone—not merely prevented—in order to restore our economy to a competitive state.

2. Current enforcement tools

In theory, the agencies could bring monopolization cases under Section 2 of the Sherman Act to undo competitive harm.[75] But monopolization doctrine has become quite hostile to plaintiffs. Today, courts require a very high market share to entertain a monopolization claim and struggle to differentiate between illegal exclusionary conduct and permitted business practices.[76]

Monopolization cases require the plaintiff to prove that the defendant has monopoly power in a relevant market and has acquired, enhanced, or maintained that power through exclusionary conduct.[77] "Monopoly power" is defined as "the power to control prices or exclude competition,"[78] and plaintiffs typically use market share to prove monopoly power.[79] To do so, plaintiffs must define an antitrust market. This in and of itself can be a serious challenge: government merger litigation frequently fails on market definition.[80] And if the plaintiffs do successfully define a market, they must then show a high share. Typically, courts find monopoly power when a firm has a market share higher than 70% in a market with substantial

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[75] *See* 15 U.S.C. § 2 (2018).

[76] *Transcript of Monopolization Law Conference Call with Chris Sagers*, CAPITOL FORUM 1 (June 20, 2018) ("Monopolization has gotten extremely difficult to prove."). Notably, the recent Utah statement calls for ten major doctrinal reforms—with five of them relating to monopolization claims. Wu, *supra* note 33.

[77] *See* Verizon Commc'ns v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004). Exclusionary conduct refers to activity distinguishable "from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

[78] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

[79] *See* United States v. Grinnell Corp. 384 U.S. 563, 571 (1966) ("The existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market."); *see also* Eastman Kodak Co. v. Image Technical Serv., 504 U.S. 481 (1992) (holding that a court could infer monopoly power from an 80–95% market share); *cf.* AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS (EIGHTH) § 2B (2017) [hereinafter *ANTITRUST LAW DEVELOPMENTS*] (noting that plaintiffs can use market share to proxy for monopoly power).

[80] *See, e.g.*, Federal Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032 (D.C. Cir. 2008) ("[T]he district court committed legal error in assuming market definition must depend on marginal consumers.").

entry barriers and where competitors are unable to expand output.[81] This requirement of monopoly power means "that in most cases, Section 2 isn't available," in the words of FTC Bureau of Competition Director Bruce Hoffman.[82]

Further, federal courts since the 1980s "have become increasingly skeptical of theories of exclusionary harm."[83] The Chicago School's ascendance in the late 1970s contributed to this skepticism,[84] and in 1984 the Supreme Court held in *Copperweld* that a company could not be liable for conspiring with a subsidiary, evincing a belief that unilateral conduct is inherently less likely to be anticompetitive:

> *Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision-making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit . . . [In contrast] [t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition.*[85]

The Court's later decisions in *Brooke Group* and *Trinko* mirrored this wariness to punish unilateral conduct. In both cases, the Court narrowed its earlier, more expansive constructions of exclusionary conduct and instead "imposed significant burdens on plaintiffs . . . seeking to challenge dominant firm

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[81] *See* United States v. Microsoft Corp., 253 F.3d 34, 51, 55 (D.C. Cir. 2001) (holding monopoly power existed where Microsoft's market share was at least 80 percent and the "applications barrier to entry" blocked new entrants); Tops Mkts. v. Quality Mkts., 142 F.3d 90, 98-99 (2d Cir. 1998) (finding no monopoly power because of low barriers to entry, even though market share exceeded 70%); Exxon Corp. v. Berwick Bay Real Estate Partners, 748 F.2d 937, 940 (5th Cir. 1984) ("[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%.").

[82] D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues*, FED. TRADE COMM'N 9 (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf [https://perma.cc/47TP-MADA].

[83] *Transcript of Monopolization Law Conference Call with Chris Sagers*, *supra* note 76, at 2.

[84] *See* William F. Adkinson, Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, FTC 10-11 (Nov. 3, 2008), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf [https://perma.cc/36JE-Q647].

[85] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768-69 (1984).

conduct."[86] *Brooke Group* added a requirement for plaintiffs to show recoupment in predatory pricing cases and has attracted criticism for considering direct profit maximization as the sole goal of predatory-pricing initiatives.[87] *Trinko* declared that *Aspen Skiing*'s liability for refusal to deal with competitors and withholding an essential facility were "at or near the outer boundary of § 2."[88]

Given this doctrinal skepticism, monopolization cases rarely succeed. To begin with, the government brings few monopolization cases: in 2019, DOJ brought no monopolization actions,[89] and the FTC brought only two.[90] And although private plaintiffs bring the overwhelming majority of monopolization cases,[91] they almost always lose. An FTC study examining these private actions found that plaintiffs "won a favorable judicial ruling on at least one Section 2 claim in just 2% of all cases."[92] Defendants in contrast received a favorable ruling in over 60% of these cases.[93]

In addition to bringing monopolization cases, the agencies theoretically could use Section 1 of the Sherman Act to police merged firms' conduct. Section 1 targets collusion; specifically, it prohibits all contracts and agreements "in restraint of trade."[94] But Section 1 reaches only a limited range of harmful conduct. It does not forbid anticompetitive practices pursued unilaterally, as such practices

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[86] William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 19-20.

[87] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993); Khan, *supra* note 33, at 730.

[88] Verizon Comm'cns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (narrowing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

[89] *Antitrust Case Filings*, U.S. DEP'T JUST. (Dec. 20, 2019), https://www.justice.gov/atr/antitrust-case-filings [https://perma.cc/ZKA3-JT6L]. This mirrors historical patterns: "The Bush administration . . . brought no monopolization cases . . . . [T]he Obama Justice Department has brought just one monopoly case . . . ." Brent Kendall, *Justice Department Doesn't Deliver on Promise to Attack Monopolies*, WALL ST. J. (Nov. 7, 2015, 5:24 PM EST), https://www.wsj.com/articles/justice-department-doesnt-deliver-on-promise-to-attack-monopolies-1446892202 [https://perma.cc/U2UF-UCT7].

[90] Complaint, Fed. Trade Comm'n v. Reckitt Benckiser Grp. PLC, No. 1:19CV00028 (W.D. Va. July 11, 2019); Complaint, Fed. Trade Comm'n v. Surescripts, LLC, No. 1:19-cv-01080 (D.D.C. Apr. 17, 2019). In 2019, the district court did rule for the FTC in *Qualcomm* in 2019, but the Commission filed that action in 2017. Complaint, Fed. Trade Comm'n v. Qualcomm Inc., No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

[91] Adkinson Jr. et al., *supra* note 85, at 14 (citing Sherman Act Section 2 Joint Hearing: Section 2 Policy Issues Hr'g Tr. 45, May 1, 2007) ("Hearing panelists emphasized that in the monopolization context it is private treble damage suits, rather than government enforcement actions, that are the focal point of business attention.").

[92] *Id.* at 15.

[93] *Id.* The remaining 38% of cases were not judicially resolved. *Id.* at 15-16.

[94] 15 U.S.C. § 1 (2018).

do not entail an agreement among firms.[95] Further, Section 1 does not prohibit "tacit collusion"—where firms are able to essentially collude without communicating[96]—because it imposes liability only when companies have demonstrated a "conscious commitment to a common scheme."[97]

II. CURRENT LANDSCAPE

In the current enforcement regime, Section 1 and 2 claims cannot adequately rein in anticompetitive harm after mergers have closed. The agencies, however, can still enforce against consummated mergers under Section 7 of the Clayton Act. But though the agencies have occasionally challenged closed mergers, their enforcement is largely limited to small, recently completed transactions. Many of these small deals escaped initial review because the merging parties had no obligation to report transactions that fell below the HSR threshold.

In 2018, for instance, just two of the 39 mergers that the agencies challenged were consummated transactions.[98] One of those was the FTC's enforcement against Otto Bock's 2017 acquisition of Freedom Innovations. The merger combined two manufacturers of microprocessor prosthetic knees and was worth less than the then $81 million HSR threshold.[99] This meant that the FTC could not have prospectively enjoined the merger because the Commission did not even know of the deal until the merger had closed.[100] The Commission managed to learn of the transactions shortly after the parties merged: Otto Bock acquired Freedom Innovations on September 22, 2017, and that same month, the FTC began its investigation.[101] The challenge eventually went before the FTC's administrative law judge (ALJ), who found the merger illegal and ordered Otto Bock to divest Freedom's entire business.[102]

The second consummated merger challenge in 2018 was DOJ's move to block the TransDigm/SCHROTH merger. There, the Division contested the $90 million combination of two companies that made restraint systems for commercial aircraft. Though the transaction was technically above the HSR threshold, it was

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[95] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).
[96] *See, e.g.*, Nathan H. Miller & Matthew Weinberg, *Mergers Facilitate Tacit Collusion: An Empirical Investigation of the Miller/Coors Joint Venture* (Jan. 14, 2015), https://site.stanford.edu/sites/g/files/sbiybj8706/f/miller-weinberg-15.01.14.pdf [https://perma.cc/W5NF-4FZY].
[97] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).
[98] HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2018, *supra* note 43, at 2-3.
[99] Opinion of the Commission, In the Matter of Otto Bock HealthCare North America, F.T.C. No. 9378 at 3, n.3 (Nov. 1, 2019).
[100] *Id.*
[101] *Id.* at 3.
[102] *Id.* at 4.

structured in a way that allowed the parties to avoid prenotification.[103] DOJ filed its complaint ten months after the companies closed the transaction,[104] and the agency's challenge ultimately led to TransDigm agreeing to divest all SCHROTH assets.[105]

These examples of consummated merger challenges are representative of the agencies' extremely limited use of their authority to challenge mergers after they have closed. Since 2001, the FTC and DOJ have challenged 47 closed transactions out of a total 666 merger enforcement actions.[106] The vast majority of these were small mergers that had closed recently, mirroring the pattern of the Otto Bock/Freedom Innovations and TransDigm/SCHROTH mergers.[107]

A. Expansive legal authority

Though the agencies generally limit their enforcement against consummated mergers to small and recently closed transactions, their enforcement is not so circumscribed by the law. Quite the opposite—Section 7 grants capacious authority to the FTC and DOJ to challenge mergers after they have closed.

The government's power under Section 7 is not bounded by temporal restrictions. The agencies can challenge a merger whenever they discern a threat of

[103] Complaint at 3, United States v. Transdigm Group Inc. (No. 17-cv-02735), 2018 WL 2382602 (D.D.C. Apr. 4, 2018). TransDigm did not need to report the transaction because the foreign assets it acquired were exempted from HSR deal value. The foreign-assets exemption brought the transaction below the $81 million threshold.

[104] Competitive Impact Statement at 1, *Transdigm* (No. 17-cv-02735), 2018 WL 2382602.

[105] Final Judgment, *Transdigm* (No. 17-cv-02735), 2018 WL 2382602.

[106] *Consummated Mergers Enforcement Chart*, Westlaw: Practical Law Antitrust (2018); *Division Operations*, U.S. DEP'T OF JUST., ANTITRUST DIV. (July 1, 2019), https://www.justice.gov/atr/division-operations [https://perma.cc/3RV5-9WXK]; *Competition Enforcement Database*, FED. TRADE COMM'N, https://www.ftc.gov/competition-enforcement-database [https://perma.cc/3MPC-MTWL].

[107] *E.g.*, Complaint, In the Matter of Valeant Pharmaceuticals International, Inc., F.T.C. No. C-4602 (Feb. 8, 2017); Complaint, In the Matter of Keystone Orthopaedic Specialists, LLC, F.T.C. No. C-4562 (Dec. 18, 2015); Complaint, United States v. Heraeus Electro-Nite Co., LLC (No. 14-cv-00005) (D.D.C. 2014); Complaint, In the Matter of Solera Holdings, Inc., F.T.C. No. C-4415 (Oct. 24, 2013); Complaint for Permanent Injunction, Fed. Trade Comm'n v. St. Luke's Healthy Sys., Ltd. (No. 12-cv-00560) (D. Idaho 2013); Complaint, In the Matter of Renown Health, F.T.C. C-4366 (Aug. 6, 2012); Complaint for Temporary Restraining Order and Preliminary Injunction, Fed. Trade Comm'n v. ProMedica Health Sys. (No. 11-cv-00047) (N.D. Ohio 2011); Complaint, United States v. George's Foods, LLC (No. 11-cv-00043) (W.D. Va. 2011); Complaint, In the Matter of Laboratory Corporation of America, F.T.C. No. 9345 (Dec. 1, 2010); Complaint, In the Matter of Tops Markets LLC, F.T.C. No. C-4295 (Aug. 4, 2010); Complaint, United States v. Election Sys. & Software, Inc. (No. 10-cv-00380) (D.D.C. 2010); Complaint, United States v. Dean Foods Co. (No. 10-C-0059) (E.D. Wis. 2010); Complaint, In the Matter of Polypore International, F.T.C. No. 9327 (Sept. 10, 2008); Verified Complaint, United States v. Microsemi Corp. (No. 08-cv-1311) (E.D. Va. 2008); Complaint, In the Matter of Hologic, Inc., F.T.C. No. C-4165 (Aug. 9, 2006); Complaint, In the Matter of Chicago Bridge & Iron Co. N.V., F.T.C. No. 9300 (Oct. 25, 2001).

competitive harm, which includes any time after a merger has already closed. Courts have endorsed this broad authority.[108] In *United States v. E. I. du Pont de Nemours*, Justice Brennan declared that there was nothing to "even suggest[] that the Government is foreclosed from bringing the action *at any time* when a threat of the prohibited effects is evident."[109] Brennan supported his conclusion with legislative history, quoting a Senate report that said the Clayton Act was meant "to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil," which "may be at or *any time after* the acquisition."[110]

On rare occasions, the agencies have challenged mergers many years after they have closed. In *du Pont*, DOJ sued on a vertical theory of harm thirty years after du Pont acquired 23% of General Motors' stock. The Division contended that du Pont entrenched itself in the market for automotive finishes and fabrics by using its stock ownership to become General Motors' primary supplier.[111]

More recently, DOJ challenged a tour-bus company joint venture in 2012, nearly four years after the joint venture had formed.[112] As another example, the agency sued refinery-desalter Cameron in 2009—four years after it had acquired rival desalter Howe Baker.[113] The FTC has also challenged mergers years after they have closed. In *Graco*, the Commission contested the company's acquisitions of Gusmer and GlasCraft, which respectively closed five years and eight years prior.[114] The FTC also sued Consolidated Foods six years after it acquired Gentry, a rival food-seasonings manufacturer.[115]

These examples are infrequent. Around 80% of consummated merger challenges since 2001 were brought three years or sooner after the parties closed, with the majority being brought two years or sooner. And nearly all these post-closing challenges involved small transactions—only four contested deals were greater than two-hundred million. In comparison, the mergers that the agencies prospectively challenge are colossal, and they generally exceed the HSR threshold. Among the mergers prophylactically challenged in 2018, for example, were AT&T's $85.4 billion acquisition of Time Warner, Bayer's $66 billion merger with Monsanto, and Disney's $52.4 billion bid for Twenty-First Century Fox.[116]

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[108] *E.g.*, United States v. E. I. du Pont de Nemours, 353 U.S. 586, 598 (1957).
[109] *Id.* (emphasis added).
[110] *Id.* at 597 (emphasis added) (citing S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914)).
[111] *Id.* at 588, 605-06.
[112] Complaint, United States v. Twin America, LLC (No.12-CV-8989) (S.D.N.Y. 2012).
[113] Complaint ¶ 5-7, United States v. Cameron Int'l Corp. (No. 1:09-cv-02165) (D.D.C. 2009).
[114] *Graco, Inc. Settles FTC Charges That Its Acquisitions Illegally Harmed Competition in the U.S. Market for Fast Set Equipment*, FED. TRADE COMM'N (Apr. 18, 2013), https://www.ftc.gov/news-events/press-releases/2013/04/graco-inc-settles-ftc-charges-its-acquisitions-illegally-harmed [https://perma.cc/YG4E-AHHK].
[115] Complaint, In the Matter of Consolidated Foods Corp., 62 F.T.C. 929, 929-30 (Dec. 18, 1957).
[116] HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2018, *supra* note 43, at 10-12.

Post-closing Section 7 authority, however, still extends to the larger transactions that have been reported to the agencies under the HSR Act.[117] Wilson Sonsini partner Scott Sher has argued that the HSR regime should limit post-closing review because the agencies know of and can challenge reported transactions before they close.[118] But this is only a policy argument. The HSR Act was meant to be—and has been interpreted as—a procedural statute. The Act's sponsors wanted to give enforcers more time to prepare their case and bolster the agencies' ability to seek injunctive relief.[119] They did not aim to narrow enforcers' post-closing review authority.

Regarding the substance of that authority, Section 7 provides for broad relief at the remedy stage. *Du Pont II* established the general point that "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."[120] In the few consummated merger challenges that have been brought, the agencies have been able to obtain full divestiture of the acquired assets. For example, in *St. Luke's Health System*, the district court in 2014 ordered St. Luke's to divest itself fully of the physicians and assets it had acquired from Saltzer, a rival medical group.[121] The order additionally required St. Luke's to "take any further action needed to unwind the Acquisition."[122] Similar requirements have been upheld in earlier post-closing merger challenges. In *Ekco Products*, the company was required to divest assets acquired in its McClintock acquisition and "all other assets as may be necessary to reconstitute McClintock Manufacturing Company as a going concern and effective competitor."[123] Orders in *Fruehauf Trailer*[124] and *Crown Zellerbach*[125] likewise required divestiture of all assets necessary to restore the target company as an effective competitor in the relevant product markets.

Despite Section 7 permitting expansive relief, the agencies' authority to demand post-closing divestiture has limits. In *Reynolds*, the D.C. Circuit held that

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[117] 15 U.S.C. § 18a (2018); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 990c (4th ed. 2019).

[118] *See* Scott Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 43-44 (2004).

[119] H.R. REP. NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2640 ("[W]ithout advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare a case, the government often [had] no meaningful chance to . . . win a preliminary injunction against a merger."); 122 CONG. REC. 2505125,051 (1976) (statement of Rep. Rodino).

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

[121] Memorandum Decision and Order at 4, Fed. Trade Comm'n v. St. Luke's Health Sys. (No. 13-cv-001116) (D. Idaho 2014).

[122] *Id.*

[123] 65 F.T.C. 1163, 1228-29 (1964), *aff'd,* 347 F.2d 745 (7th Cir. 1965).

[124] 67 F.T.C. 878, 939 (1965).

[125] 54 F.T.C. 769, 808 (1957).

the defendant was not required to divest a plant that it had acquired after its contested Arrow acquisition.[126] The court required a tight nexus for the government to order divestiture of property not acquired in the illegal merger; such assets needed to “represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property.”[127] The court also emphasized that divestitures generally needed to be *necessary* to restore lost competition, and “even greater necessity” must be shown “[i]f ever after-acquired property may be subject to a government order to sell.”[128] Thus, the government must show how the divestiture it seeks is related to the challenged merger and needed to restore lost competition.

But so long as the government can demonstrate these connections, *Reynolds* does not categorically bar divestiture of assets acquired after the merger. In fact, the Supreme Court implied as much in *Cascade Natural Gas*. The Court in *Cascade* had previously found El Paso’s acquisition of Pacific Northwest Pipeline illegal and was reviewing whether Cascade, the new company created under the divestiture plan, had a right to intervene in the district court’s hearings on what divestiture was proper in the case.[129] After finding a right to intervene and ordering new hearings, the Court contemplated how the gas reserves developed after the merger closed should be divided between El Paso Natural Gas and the new company:

> *[T]he new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. We are told by the intervenors that El Paso gets the new reserves in the San Juan Basin But the merged company, which discovered them, represented the interests both of El Paso and of Pacific Northwest.*[130]

Though the Court ultimately deflected on how the assets should be divided,[131] its dicta indicates that the government likely can obtain divestiture of assets acquired after the merger, *Reynolds* notwithstanding.

[126] Reynolds Metals Co. v. Fed. Trade Comm’n, 309 F.2d 223, 230-31 (D.C. Cir. 1962).
[127] *Id.* at 231.
[128] *Id.* (emphasis added).
[129] Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 131 (1967) (citing United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964)).
[130] *Id.* at 137.
[131] *Id.*

B. Constrained by practical difficulties

Despite the agencies' broad authority to pursue retrospective challenges, crafting effective post-closing relief remains unwieldy. Indeed, this challenge ranked among the reasons that spurred lawmakers to pass the HSR Act. As Representative Peter Rodino, one of the bill's three principal sponsors, said, "[I]f the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet."[132] Representative Rodino's focus on divestitures reflects the long-standing tenet that divestiture is the "most effective" antitrust remedy.[133]

Ordering that a merged firm be split up entails real costs to firms, as the parties have already spent resources integrating their operations. After a transaction has closed, the combined company believes it is entitled to merger-related rewards and likely fights harder to keep them than it would pre-closing.[134] Commissioner Rosch speculated that this factored into Evanston Northwestern Healthcare's bitter opposition to the FTC's post-closing challenge.[135] In comparison, pre-closing merger challenges sacrifice only the prospect of the merger's touted benefits.

In some cases, mandating post-closing review may also compromise efficiencies that the parties have achieved. For example, in *Evanston*, two merged hospitals had functioned as one for seven years before the FTC's ALJ ordered that the merger be undone.[136] The Commissioners reversed the ALJ's remedy because they feared losing the efficiencies that Evanston had achieved. "The development and implementation of a cardiac surgery program" was a "critical improvement," the Commissioners noted, and it would take "a long time for [the target] to recreate [these] on its own after a divestiture." [137] Instead of a divestiture, the FTC imposed a comparatively weak conduct remedy, which required Evanston to establish independent negotiating teams.

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[132] 122 CONG. REC. 25,051 (1976).

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

[134] The merged party has an "endowment effect" that makes it more resistant to surrendering the fruits from its merger.

[135] J. Thomas Rosch, *Consummated Merger Challenges—The Past Is Never Dead*, FED. TRADE COMM'N 3 (Mar. 29, 2012) (citing Opinion of the Commission, Evanston Northwestern Healthcare Corp., Docket No. 9315, at 88-91 (Aug. 6, 2007)) ("In the meantime, the merging hospitals had functioned together, including the merging of their heart surgery programs. That is arguably why the acquiring hospital fought so hard to save the transaction.").

[136] Initial Decision, In the Matter of Evanston Northwestern Healthcare Corporation, F.T.C. No. 9315, at 202-06 (Oct. 20, 2005).

[137] Opinion of the Commission on Remedy, In the Matter of Evanston Northwestern Healthcare Corporation, No. 9315, at 11, https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopiniononremedy.pdf [https://perma.cc/TF8T-3SGZ]; *Id*. at 16.

Divestitures can also be difficult to implement successfully. In particular, a new business created under a divestiture order is less likely to succeed compared to spinning off an established enterprise.[138] Understanding how to craft a divestiture that successfully unwinds a merger requires careful study, and the agencies may not be up to the task. For instance, in *Diamond Alkali*, the FTC charged Diamond Alkali with violating Section 7 for its nearly two-years-old acquisition of Bessemer, a cement-maker rival. Bessemer was "the last remaining independent firm" in the northeastern Ohio and northwestern Pennsylvania area, and the FTC believed that the acquisition had "destroyed" actual competition.[139] When crafting the remedy, the Commission worried that splintering cement processor Diamond Alkali "would necessarily cast the Commission in the role of arbiter and impose upon the Commission a compliance surveillance task whose dimensions would be badly out of proportion to any benefit realized."[140] The Commission essentially found itself potentially taking on "a compliance undertaking for which it is not equipped."[141]

In these cases, concerns about the agencies' competence are particularly acute because the law does not require the parties to help devise a remedy that restores competition. Again in *Diamond Alkali*, the FTC noted the company's refusal to cooperate: not only did Diamond Alkali refuse to offer meaningful remedies, it threatened to leave the cement industry if the FTC required it to divest the Bessemer plant.[142] Facing a recalcitrant counterpart, the FTC realized it could either "throw[] up [its] hands and surrender[] all chance that this Section 7 violation will be remedied" or could order a divestiture and "preserve whatever promise of enhancement of competition is implicit in Diamond Alkali as a potential competitor."[143] It chose the latter imperfect remedy—imperfect because only the Bessemer plant's buyer would be in the market if Diamond Alkali exited. The Commission hoped that Diamond Alkali was bluffing and would reenter the market.[144] *Diamond Alkali* provides a real-world illustration of Areeda and Hovenkamp's observation that "merg[ed] firms have every incentive to make the divestiture work poorly, particularly if it calls for the creation of a competitive firm."[145]

These reasons collectively help explain why post-closing remedies are so difficult to develop and implement. As a result, the agencies—aware of these challenges—tend to avoid having to "unscramble the eggs." In the few cases where the

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[138] AREEDA & HOVENKAMP, *supra* note 117, ¶ 990c.
[139] Complaint, In the Matter of Diamond Alkali Co., 72 F.T.C. 700, 703 (May 16, 1963).
[140] *Id.* at 745.
[141] *Id.* at 744.
[142] *Id.* at 744-47.
[143] *Id.* at 751; *see also In re* Ecko Prod. Co., 65 F.T.C 1204, 1221-23 (1964) (mandating remedy that similarly removed the acquirer from the market).
[144] Complaint at 749, In the Matter of Diamond Alkali Co., 72 F.T.C. 700 (May 16, 1963).
[145] AREEDA & HOVENKAMP, *supra* note 117, ¶ 990c.

government enforces against consummated mergers, enforcement is generally limited to small, recently closed mergers. But in overwhelmingly embracing ex ante enforcement, the agencies have encountered a different set of pitfalls. Namely, prospective enforcement relies on complex and sensitive predictions, which inevitably will be wrong in some cases.[146] When they are, these errors very often cannot be corrected with current enforcement tools under Sections 1 and 2 of the Sherman Act. And at this point, changing future enforcement policy may not be sufficient to correct past errors: where dominance has already been entrenched through mergers, only an effective system of post-closing review can restore lost competition.

III. Break-up plans

A. Empowering post-closing review

Antitrust enforcement would benefit from a mechanism that preserves the viability of divestitures post-closing. Break-up plans offer that solution. They provide enforcers with the information necessary to craft a meaningful divestiture after the parties have merged and thereby empower enforcers to unwind mergers.

Divestitures have been called the "natural remedy" for illegal mergers because they can create independent entities that compete with each other.[147] Today, fashioning a post-closing divestiture is often a herculean task: the government must delicately disentangle a merged firm's operations without any help from the firm. Break-up plans would change this by obligating firms to aid the government and thereby give the agencies a workable way towards dividing a company's operations to create separate, independent competitors. This ability would breathe vitality into post-closing enforcement and transform an often futile enforcement power into a viable means to restore competition when harmful mergers have already closed.

Post-closing challenges allow the agencies to base enforcement decisions on realized harms and demonstrated efficiencies. Currently, litigated merger challenges center on models of competitive harms and offsetting efficiencies.[148] But these predictive models are necessarily founded on assumptions of future behavior, which can and do diverge from the actual conditions that manifest post-merger.

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[146] Today, for instance, Facebook and Google's respective acquisitions of Instagram and DoubleClick are much maligned. *See* Steven Overly & Margaret Harding McGill, *Google's Onetime Hired Gun Could Now Be Its Antitrust Nightmare*, POLITICO (July 6, 2019, 7:53 AM EDT), https://www.politico.com/story/2019/07/06/googles-onetime-hired-gun-could-now-be-its-antitrust-nightmare-1559740 [https://perma.cc/H7Y9-9JTM] (quoting Sally Hubbard, director of enforcement strategy at Open Markets Institute, saying "The DoubleClick merger is one of those deals you look back on and say, 'That was a mistake'"); Elizabeth Warren, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/MM2D-V9GA].

[147] *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329 (1961).

[148] *See, e.g.*, United States v. AT&T Inc., No. 17-2511, at 131, 149 (D.D.C. 2018).

Post-closing enforcement affords the agencies a chance to meaningfully restore competition when they realize a merger is anticompetitive only after it has already closed.

Empowering post-closing reviews also allows the agencies to evaluate efficiencies more rigorously. Parties may claim spectacular consumer benefits when promoting a proposed merger. For instance, merging airlines "routinely assert substantial dollar benefits—in the hundreds of millions of dollars—to consumers from creating more single-carrier routes and more frequent service on any single route."[149] But as the agencies recognize, "[E]fficiencies projected reasonably and in good faith by the merging firms may not be realized."[150] In fact, emerging evidence shows efficiencies are particularly elusive in some sectors, namely in manufacturing and hospitals.[151] The upshot here is that break-up plans would allow the agencies to retract their approval if the touted efficiencies are later shown not to be timely or sufficient to offset a merger's harmful effects.[152] Under a break-up plan regime, companies would also be required to demonstrate—not just model—their efficiencies to avoid their merger being undone. This ability for the agencies to rescind approval and unwind the merger may even further spur firms to achieve their efficiencies and, taking a step back, could prompt them not to undertake mergers unless they are confident they can achieve significant efficiencies.

Further, post-closing reviews can deemphasize—if not obviate—market definition and its associated challenges. Market definition is a fraught inquiry in litigated mergers, and the agencies' challenges have regularly collapsed because courts find that they have failed to properly define the market.[153] The market-definition inquiry is so delicate partly because it "risks getting bogged down in esoteric fights over critical loss analysis or the SSNIP test."[154] But not all merger challenges

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[149] John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice*, AM. ANTITRUST INST. 32 (Oct. 9, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf [https://perma.cc/N3JD-W9M3]. *See generally id.* at 29 ("[A]rguments over efficiencies have shifted from being exceptional to becoming the norm.").

[150] *Horizontal Merger Guidelines*, *supra* note 34.

[151] Kwoka, *supra* note 149, at 30 (footnotes omitted) ("Previously cited work by Blonigen and Pierce searched for statistical evidence of efficiency gains in manufacturing plants that were involved in mergers between 1997 and 2007. They found none. A summary of evidence from retrospective studies that examine the effects of mergers on cost savings reports savings averaging less than one percent. A recent study of numerous hospital mergers confirms marginal cost reductions of only about 1.5 percent.").

[152] *Horizontal Merger Guidelines*, *supra* note 34

[153] *See, e.g.*, Federal Trade Comm'n v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032 (D.C. Cir. 2008) ("[T]he district court committed legal error in assuming market definition must depend on marginal consumers.").

[154] Opinion of the Commission on Remedy, *supra* note 137, at 11. The SSNIP test refers to the hypothetical-monopolist test used to define markets; the test finds a relevant antitrust market where

need to define a market. As the Supreme Court held in *FTC v. Indiana Federation of Dentists*, market definition is not necessary when the agencies can show actual anticompetitive effects.[155] There, the Court wrote:

> *Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." In this case, we conclude that the finding of actual, sustained adverse effects on competition is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.*[156]

Some courts have still required the plaintiff to define a market in post-closing challenges,[157] but being able to show actual anticompetitive effects at least de-emphasizes market definition. By shifting the focus to realized effects, post-closing reviews can lessen reliance on complex tests and tools that, after all, only proxy for actual market conditions.

Post-closing reviews may also help protect the integrity of the merger-review process. As a practical matter, large mergers that are approved are left undisturbed. Parties can clamor to merge and try their luck before different administrations, knowing that they need only one administration to approve in order to cement their anticompetitive deal.[158] Allowing future administrations to revisit past non-

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a hypothetical single firm owning the entire market could profitably enact a "small but significant and non-transitory increase in price."

[155] Though *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), is a Section 1 case, its point about market definition applies broadly.

[156] *Id.* at 460-61 (citing 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)).

[157] *See* FTC v. Lundbeck, Inc., Civil Nos. 08-6379, 08-6381, 2010 WL 3810015 (D. Minn. Aug. 31, 2010). But many other courts have recognized that evidence of actual competitive effects can displace the need for market definition. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) (writing that evidence of an "actual adverse effect on competition . . . arguably is more direct evidence of market power than calculations of elusive market share figures"); Fed. Trade Comm'n v. Libbey, Inc. 211 F. Supp. 2d 34, 48-49 (D.D.C. 2002) (noting that direct evidence of "actual detrimental effect" could substitute for market share and market definition analysis).

[158] Some might say that T-Mobile and Sprint's recent merger provides an example of the merger review process perhaps not working as it should. The parties previously tried to merge in 2014. At the time, AAG Bill Baer voiced his disapproval, saying, "It's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers." Diane Bartz & Alina Selyukh, *Sprint, T-Mobile Deal to Face*

prosecution decisions has the benefit of checking parties' incentives to opportunistically supplicate themselves before political leaders in the hopes of getting their merger approved.

For all their potential benefits, post-closing reviews should never be the only mode of enforcement. They are second best because they require that consumers first be harmed. But as Areeda and Hovenkamp recognize:

> *[T]he most effective merger policy should, and does, include two equity enforcement mechanisms. First is a system of advance reporting and government pre-acquisition challenges to mergers that are predicted to have the anticompetitive consequences that the statute forbids and thus can be remedied at a time when costly divestitures are unnecessary. Second, however, is a system of post-*

Fierce U.S. Antitrust Headwinds, REUTERS (June 5, 2014, 4:40 PM), https://www.reuters.com/article/tmobile-sprint-corp-antitrust/sprint-t-mobile-deal-to-face-fierce-u-s-antitrust-headwinds-idUSL1N0OM1R420140605 [https://perma.cc/5NPA-ZXV5].

The parties then tried again after Trump was elected, and T-Mobile spent $195,000 at the Trump International Hotel in D.C. while it lobbied the government to approve its deal. David A. Fahrenthold & Jonathan O'Connell, *T-Mobile Acknowledges Its Patronage of Trump's Washington Hotel Increased Sharply After Announcement of Merger with Sprint*, WASH. POST (Mar. 5, 2019, 8:00 AM EST), https://www.washingtonpost.com/politics/t-mobile-acknowledges-its-patronage-of-trumps-washington-hotel-increased-sharply-after-announcement-of-merger-with sprint/2019/03/05/d123be66-3ecb-11e9-922c-64d6b7840b82_story.html [https://perma.cc/XXM2-EEV3]. For context, only two top T-Mobile executives had ever stayed at Trump's hotel before the parties announced their merger. *Id.*

The T-Mobile/Sprint merger also featured AAG Makan Delrahim aggressively supporting the merger's approval and its associated divestiture arrangement. In texts revealed at trial, the AAG reported on his discussions with FCC Chairman Ajit Pai to Charlie Ergen, CEO of Dish. Dish ultimately bought the deal's divestiture assets and was Delrahim's client when he was formerly a lobbyist. *See* Tony Romm, *Lobbying a Bust in AT&T Bid*, POLITICO (Dec. 20, 2011, 1:40 PM EST), https://www.politico.com/story/2011/12/at-ts-lobbying-turned-back-in-t-mobile-bid-070701 [https://perma.cc/BN4Y-7VFF].

The AAG told Ergen that he had "a generally good chat with the chairman." Katie Benner & Cecilia Kang, *How a Top Antitrust Official Helped T-Mobile and Sprint Merge*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html [https://perma.cc/V7CJ-2WKB]. The next day, the AAG advised Ergen to call Senators Cory Gardner and Mitch McConnell to pressure Chairman Pai to approve deal terms that many saw as favorable to Dish. *Id.* "Today would be a good day to have your Senator friends contact the chairman," he messaged. Erik Larson, *Texts Show DOJ Effort to Enlist Senators in T-Mobile Deal*, BLOOMBERG (Dec. 18, 2019, 11:43 AM EST), https://www.bloomberg.com/news/articles/2019-12-18/doj-antitrust-head-told-dish-to-enlist-senators-in-t-mobile-deal [https://perma.cc/W6TM-ZFUH]. T-Mobile used the AAG's support for the arrangement to pressure Dish to play ball; then-CEO Legere told Ergen, "I have told Makan I don't believe you are serious about doing a deal." Benner & Kang, *supra* note 157.

In this case, T-Mobile and Sprint seemed to have found a receptive agency head who willing to play dealmaker. One favorable audience was all they needed to merge and remain merged to this day.

> *acquisition challenges that are typically evaluated on the basis of actual, rather than predicted, anticompetitive effects.*[159]

Practically speaking, this second prong is missing from our current antitrust enforcement framework. Break-up plans would help construct a feasible and robust system of post-closing review and would work in tandem with current prospective enforcement efforts. In such a system, enforcers would continue seeking to enjoin mergers that are likely to be harmful. But in cases where harm is far from clear—or where enforcers never had the chance to review the combination in the first place—break-up plans can act as a backstop to protect competition. By preserving the agencies' ability to seek effective divestitures even when a merger has closed, these plans would empower post-closing challenges and bring us closer towards achieving the optimal merger-enforcement policy.

B. Mechanics of break-up plans

To enable post-closing reviews, break-up plans must address the two central difficulties that make devising divestitures in consummated merger cases so difficult. First, they must help the government undertake the intricate and information-intensive task of splitting up the merged company. Without overcoming this hurdle, the agencies' ability to unwind mergers will remain limited to occasional enforcement against small, recently closed transactions. The evident solution to this information problem is to enlist the merged company in devising its own mitosis.[160] But that creates a second challenge. Companies have every incentive to defy the government and undermine enforcers' attempts to unwind the merger. How can the agencies both recruit merged firms to give thoughtful input on how to break up a harmful merger and ensure that they comply?

Asking companies to plan against their self-interest is not an impossible task. As the experience of living wills in the banking context has shown, companies can be expected to produce credible plans for how they would file for bankruptcy and dissolve their operations in a crisis.[161] A significant reason for compliance is that the living-will requirement exists in an ecosystem of close, ongoing contact

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[159] AREEDA & HOVENKAMP, *supra* note 117, ¶ 990c (emphasis added).

[160] Rory Van Loo suggests that enforcers should not rely on the firms but should hire reorganization experts. Van Loo, *supra* note 38. While reorganization experts would be skilled at implementing divestitures, they do not have experience in setting up independent firms that can compete with each other, which is the central objective of breakups in the difficult horizontal merger context.

[161] *See, e.g.*, Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation Joint Press Release: *Agencies Provide Feedback on Second Round Resolution Plans of "First-Wave" Filers*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Aug. 5, 2014), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20140805a.htm [https://perma.cc/F59Z-B882].

with regulators, who are empowered with broad discretion and the ability to levy harsh penalties.[162] This Section sets out to answer this compliance challenge in the antitrust setting and, more broadly, to lay out the general framework for break-up plans: it discusses who should enforce break-up plans, under what circumstances they should be used, what they should include, and what the penalties for failing to produce a credible plan should be.

In discussing the content of break-up plans, this Section focuses on cases where horizontal mergers have caused unilateral harm to demonstrate that break-up plans would be feasible. Disentangling operations is far harder in horizontal mergers than in vertical transactions.[163] Further, horizontal mergers are more salient because the agencies enforce against them more frequently. To date, the agencies have overwhelmingly focused on horizontal mergers—so much so that DOJ litigating the AT&T/Time Warner transaction on a vertical theory of harm was newsworthy because it marked the first time in forty years that the agencies had done so.[164] And in the horizontal challenges that the agencies bring, unilateral harms are always at the forefront, with coordinated effects generally serving as ancillary grounds for the challenge.[165]

1. Enforcing authorities

Only one authority should supervise a particular break-up plan. Break-up plans require enforcers to judge whether to require a plan—and if required, whether

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[162] *See, e.g.*, Reg QQ, 12 C.F.R. § 243.9 (2019).

[163] *Compare* Order at *2, Fed. Trade Comm'n v. Heinz, H.J. Co., 2000 WL 1741320 (No. 00-5362) ("[I]f the merger were allowed to proceed, subsequent administrative proceedings on the merits 'will not matter' because Beech-Nut's manufacturing facility 'will be closed, the Beech-Nut distribution channels will be closed, the new label and recipes will be in place, and it will be impossible as a practical matter to undo the transaction.'"), *and* Emergency Motion of the Federal Trade Commission for an Injunction Pending Appeal at 19, Fed. Trade Comm'n v. Whole Foods, 548 F.3d 1028 (D.C. Cir. 2008) (No. 07-5276) ("Whole Foods proposes to close . . . Wild Oats stores and dismantle all of those stores' employment and supply relationships. It strains credulity to suppose that the Commission will be in a position to fashion 'adequate ultimate relief' under these circumstances."), *with AT&T/Time Warner: In Event of DOJ District Court Loss, Uncertainty Around Path to Injunction Pending Appeal*, CAPITOL FORUM (May 29, 2018), https://library.thecapitol-forum.com/docs/26rvbye9qx8t [https://perma.cc/6URW-VVCH] ("[T]he 'scrambling of the eggs' flowing from a short-term AT&T/Time Warner combination is probably less significant than in the typical horizontal merger context, and divesting Turner or DirecTV could remain viable options to restore competition even after the parties have closed.").

[164] Karen Hoffman Lent & Kenneth Schwartz, *AT&T-Time Warner and Beyond: The State of Vertical Merger Enforcement in the U.S.*, N.Y. L.J. (Mar. 11, 2019, 2:45 PM), https://www.law.com/newyorklawjournal/2019/03/11/att-time-warner-and-beyond-the-state-of-vertical-merger-enforcement-in-the-u-s [https://perma.cc/H62L-22HP].

[165] *See* Janusz A. Ordover, *Coordinated Effects*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1361 (2008) ("Over the past several years, unilateral effects were in the forefront of . . . complex litigation[].").

the plan would satisfactorily restore competition. Having multiple enforcers make these decisions risks creating an unmanageable framework where firms are required to produce multiple sets of plans to satisfy the disparate and perhaps irreconcilable directives from enforcers.

To avoid potential coordination problems among enforcers, the federal agencies should lead the break-up plan process. In modern practice, the FTC and DOJ have directed merger review, and the states have taken supporting roles.[166] This dynamic—the federal agencies leading and remaining free to enlist the states' assistance—remains apt in the break-up plan setting, as mergers often have implications beyond a single state. Federal leadership is further justified because both DOJ and the FTC have deep reserves of antitrust expertise. Each has dedicated teams of lawyers and economists that focus on competition issues. In contrast, while some states have highly developed antitrust capabilities, they are outliers among their peers.[167] Moreover, where break-up plans involve re-examining mergers, the federal agencies will generally have the full record of their past review of the transaction and previous consolidation in the industry, which provides valuable institutional knowledge. Finally, overlap between the FTC and DOJ will be minimal. In normal course, the federal agencies split industry coverage to prevent redundant investigations.[168]

2. Invocation

With break-up plans, the agencies can more effectively re-examine mergers that have closed, no matter if they never examined these mergers in the first place or allowed the HSR period to terminate early or run out. Under this structure, merging parties would file their HSR, and if allowed to, would close their transaction and integrate their operations. The agencies would then review the merger's effects on competition in the years after the parties have closed.

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[166] The state's challenge of the T-Mobile/Sprint merger was so notable because it contravenes this norm. *See* Third Amended Complaint ¶ 76-79, New York v. Deutsche Telekom AG, No. 1:19-cv-5434 (S.D.N.Y. Sept. 18, 2019).

[167] *See* Thurman Arnold Project at Yale, *State Antitrust Employment*, YALE SCH. MGMT., https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/state-antitrust-employment [https://perma.cc/R2HS-YQQ7].

[168] *Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations*, U.S. DEP'T JUST. at app'x A (July 17, 2007), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf [https://perma.cc/3C48-5H5X]. In the pre-merger clearance context, the FTC and DOJ will sometimes contest the other's authority to review a particular transaction. This concern is less salient in the post-closing context because one of the agencies will have already claimed authority for an HSR-reported transaction. But there may still be jurisdictional conflicts over transactions that neither reviewed. The agencies would have to resolve these through negotiation, as they do today. In the post-closing context, this negotiation has lower stakes because it is not subject to the pre-merger statutory deadlines that are triggered when an HSR is filed.

A flexible time frame for review is necessary because a merger's impact may take years to manifest[169] and because parties would be able to circumvent time-limited review. If re-examination were limited to a year after the transaction had closed, the merged company could discipline itself in the first year and behave anticompetitively immediately after the agencies' review period had passed. This is not a theoretical concern—already, merged companies receive legal advice to "avoid rapid and sudden price increases *in the first year* after closing" to evade post-closing scrutiny.[170]

Once the agency revisits the merger, it should determine whether the transaction has caused competitive harm. In making this determination, the agencies should have broad discretion on what kind of evidence they use. In some cases, an agency may be able to discern harm directly from the merged party's conduct. As an example, pharmaceutical company Lundbeck owned Indocin IV, the only FDA-approved drug for patent ductus arteriosus, a fetal congenital heart defect. In 2006, Lundbeck bought the U.S. rights to NeoProfen, the only other drug used to treat patent ductus arteriosus. Two days after acquiring the rights to NeoProfen, Lundbeck raised Indocin IV prices by 1,300%.[171] The FTC saw this anticompetitive result and challenged Lundbeck's acquisition.

In other cases, an agency may need to supplement its observations with insights from the party's business documents. This was the case in *Evanston*, where the Commission found that the merged hospital raised prices to managed-care organizations shortly after it closed the deal.[172] The Commission's review of Evanston's post-merger business documents showed that the hospital "exhibited little concern about the reactions of the managed care plans with which it contracted."[173]

An agency may also study a merger's effects by interviewing market participants. As FTC economists have said, "[t]he simplest, and sometimes least costly, empirical approach is to ask knowledgeable industry participants (especially customers) after the fact if the merger affected prices or outputs."[174] Though

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[169] *Cf.* Joseph Farrell, Paul A. Paulter & Michael G. Vita, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. IND. ORG. 369, 371 (2009) ("[T]he study might have to extend several years before and after the deal to allow sufficient time for any merger effects to appear.").

[170] *Below-Threshold Transactions: Enforcement and Exposure*, WHITE & CASE: PUBLICATIONS & EVENTS (Nov. 11, 2015), https://www.whitecase.com/publications/insight/below-threshold-transactions-enforcement-and-exposure [https://perma.cc/U78E-23RQ] (emphasis added).

[171] Fed. Trade Comm'n v. Lundbeck, Inc., 2010 WL 3810015 (D. Minn. Aug. 31, 2010).

[172] Complaint at 1, In the Matter of Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Feb. 10, 2004).

[173] Complaint Counsel's Revised Pretrial Brief at 22, In the Matter of Evanston Nw. Healthcare Corp., Fed. Trade Comm'n, No. 9315 (Jan. 27, 2005); *see also* Opinion of the Commission, *supra* note 135, at 11 ("Th[e] [Commission's] finding was consistent with post-merger business documents from Evanston.").

[174] Farrell et al., *supra* note 169, at 372.

the value of this approach depends on how forthcoming and reliable the interviewed participants are, the agencies can factor in these drawbacks when deciding how heavily to weigh survey evidence.

Finally, the agencies can conduct a quantitative retrospective. Such studies evaluate a merger's effects on prices, product variety, innovation, and quality by comparing data from before and after the merger.[175] Though these retrospectives may seem to provide the most robust evidence of a merger's effects, they have drawbacks: retrospectives require accurate data[176] and appropriate control groups,[177] and they need to be done at the right time.[178] Given these limitations, quantitative retrospectives—and more generally, any particular approach—may not be feasible or apt in a specific case.

The agencies therefore should have the discretion to determine what evidence they use to assess harm. No matter what type of evidence they choose, the agencies should require a break-up plan once they find significant signs that the merger has harmed competition.

3. Structure

An agency requiring a break-up plan is exploring whether to take enforcement action against a closed merger. To that end, break-up plans must include two distinct elements. First, break-up plans should include evidence of the merger's efficiencies. Because sizeable efficiencies can offset and even overcome harm to competition, this evidence would inform whether the agencies challenge a particular merger. Second, the break-up plan must dictate how the firm should be divided to restore lost competition. To direct companies' responses, the agencies should provide guidance on the specific areas of concern that the company's break-up plan must address. Together, these elements inform whether an agency should challenge a closed merger and if it chooses to challenge, how it can go about devising adequate relief.

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[175] Jonathan B. Baker and Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST 29, 29 (2008).

[176] *See* Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Generating Evidence to Guide Merger Enforcement*, 5 COMPETITION POL'Y INT'L 57, 66 (2009).

[177] Defining control groups differently can meaningfully change a retrospective's results. For instance, a study of the Northwest/Delta merger found average fare increases between 0-6% when using several different control groups. But when researchers identified the single best-match control group for each route affected by the merger, they found a 1% fare increase. *See* Aditi Mehta & Nathan Miller, *Choosing the Appropriate Control Group in Merger Evaluations*, *in* KONKURRENSVERKET, MORE PROS AND CONS OF MERGER CONTROL 189 (2012), http://www.konkurrensverket.se/globalassets/english/research/more-pros-and-cons-of-merger-control.pdf [https://perma.cc/ZUE5-DBQX].

[178] Farrell et al., *supra* note 169, at 371 ("[T]he study might have to extend several years before and after the deal to allow sufficient time for any merger effects to appear, but not so long that the merger effects become confounded with other market shocks.").

But how can a firm be expected to develop a credible way for it to be broken up when it has every incentive to fend off enforcement? Further, why would a company develop a sound plan if it knows that the more effective of a plan it presents, the more likely the agencies will act on it and dismember the company? The answer lies in part on tying the weight given to the efficiencies arguments to the credibility of a company's plan for breaking itself up—in other words, the implausibility of one of the plan's central elements should diminish the credibility of the whole submission. This serves as a necessary punitive function.

Companies have a strong incentive to present the most robust efficiencies case possible because the agencies will not challenge a merger whose efficiencies "are of a character and magnitude such that the merger is not . . . anticompetitive."[179] Formally connecting the credibility of the break-up plan to the weight accorded to the company's efficiencies acts to countervail the company's incentives to produce a shoddy break-up plan. With this link, submitting a substandard plan will increase the risk of their merger being challenged in the first place, even if the agencies may have a harder time devising relief without the company's input. Firms that seek to dodge the requirement to produce a credible break-up blueprint will have to take on the cost of greater litigation risk. In the case that a company really cannot muster a colorable efficiencies case—and is thus not deterred by the risk of dampening the weight of potentially exculpatory evidence—additional penalties are necessary to spur it to produce a credible plan for breaking itself up.[180]

This discussion has centered on shaping companies' incentives to produce break-up plans because firms lack the will—not ability—to splinter their operations. As Rory Van Loo has written, sophisticated and successful companies routinely restructure their firms, including by splintering their operations.[181] Hewlett-Packard provides a sterling example. In 2015, the company "cleaved itself in half," with one division taking data centers, software, and services and the other taking printers and computers.[182] The split—completed in five months—divided a company with $65 billion of assets and 300,000 employees scattered over 600 locations.[183] Beyond the Hewlett-Packard example, firms regularly sell off their previous acquisitions that proved to be unsuccessful.[184] The ability of corporations to

[179] *Horizontal Merger Guidelines*, *supra* note 34, at 30.
[180] *See infra* Section IV.B.v.
[181] Van Loo, *supra* note 38, at 28.
[182] *Id.*; Brian Womack, *After One of Tech's Biggest Breakups, HP Inc. Comes Out on Top*, BLOOMBERG (Aug. 22, 2017, 6:00 AM EDT), https://www.bloomberg.com/news/articles/2017-08-22/after-one-of-tech-s-biggest-breakups-hp-inc-comes-out-on-top [https://perma.cc/JP3Q-6HBQ].
[183] Robert McMillan, *Hewlett-Packard Officially Files to Split*, WALL ST. J. (July 1, 2015, 7:06 PM ET), https://www.wsj.com/articles/hewlett-packard-officially-files-to-split-1435783640 [https://perma.cc/5FHX-6ZXZ].
[184] Van Loo, *supra* note 38, at 24 (citing Michael C. Jensen, *Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61 (1989)).

restructure in normal course shows that the challenge lies not in devising break-up plans but rather in structuring the right incentives for firms to do so.

4. Content

a. Principles

The plan's substance should first address the merger's efficiencies, which can manifest as "lower prices, improved quality, enhanced service, or new products."[185] Consistent with the Horizontal Merger Guidelines, the agencies should credit only efficiencies that are merger-specific and passed onto consumers.[186] Further, only realized efficiencies should be counted in the post-closing context, since the agencies are examining mergers years after they have closed. With these considerations in mind, the agencies would judge the magnitude of eligible efficiencies against the harms observed.

Second, the plan must lay out how the merged company would be split up to create well-positioned, independent competitors. To do so, plans must describe how the merged firm plans to divide its assets, employees, and customer contracts in detail. This meticulous undertaking has precedent in *Chicago Bridge & Iron*, where the FTC challenged the company's acquisition of Pitt-Des Moines's storage-tank business. Though *Chicago Bridge* offers a helpful template for break-up plans, the case itself is emblematic of the current limited reach of post-closing enforcement. As is typical of consummated merger challenges, *Chicago Bridge* was a small, $84 million transaction that the Commission was investigating even before the parties had closed.[187]

In *Chicago Bridge*, the Commission found that the merger would likely harm competition in four industrial-tank markets.[188] To restore competition, the FTC ordered the company to divide its business into two separate entities, "each having approximately equal shares of the market each fully capable of being divested, and each fully (and, to the extent practicable, equally) engaged" in the

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[185] *Horizontal Merger Guidelines*, *supra* note 34, at 29.
[186] *Id.* at 30-31.
[187] Complaint at 2, In the Matter of Chicago Bridge and Iron Co., Fed. Trade Comm'n, No. 9300 (Oct. 25, 2001); *see also* Chicago Bridge & Iron, 515 F.3d 447, 455 (5th Cir. 2008) ("Prior to the acquisition, the Commission notified CB&I that it had significant antitrust concerns about the acquisition and was conducting an investigation.").
[188] Chicago Bridge & Iron Co. v. Fed. Trade Comm'n, No. 05-60192, slip op. 1, 3 (5th Cir. Jan. 25, 2005). The Commission alleged harm in liquified natural gas, liquified petroleum gas, liquid atmospheric gas storage-tank markets, as well as the thermal vacuum chamber market. Brief of Respondent at 3 nn.2-5, Chicago Bridge & Iron Co. v. Fed. Trade Comm'n, No. 05-60192.

four markets.[189] The order required Chicago Bridge to allocate its assets, employees, and customer contracts between the two new companies.

The FTC defined "assets" broadly. It included "all assets of every description . . . engaged, directly or indirectly, in all aspects of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating, or selling" the storage tanks.[190] This list included real property, inventory, supply agreements, intellectual property, warranty rights, and books and records, as well as government authorizations that a firm would need to operate.[191] *Chicago Bridge* shows that assets must be defined expansively enough to include all the inputs a firm needs to compete effectively in the relevant market.

Break-up plans also need to allocate a firm's employees. In *Chicago Bridge*, the FTC first required the company to "use best efforts to retain its current workforce" and prevent deliberate internal transfers that would pluck out key employees and reassign them to other parts of the organization.[192] The company then had to allocate personnel so that each new firm could successfully complete customer contracts and bid for new contracts and do so in "substantially the same manner and quality" that Chicago Bridge had done.[193] This entailed deciding how many engineers, draftsmen, estimators, purchasers, and field personnel, as well as managers, salespersons, and marketing employees each entity would have.[194] Besides specialized employees directly engaged in the storage-tank business, the new firms would also need administrative personnel to manage services like accounting, purchasing, and warehousing. The *Chicago Bridge* order also provided for each division to have these employees.[195] Beyond identifying the types of employees each new firm would need, the order also required the company to give financial incentives to the employees selected to go to the divested division to encourage them to accept their new positions.[196] Once these employees left for the divested

[189] Final Order, In the Matter of Chicago Bridge & Iron Co., F.T.C. No. 9300 at 4, 7-8 (Dec. 21, 2004).
[190] *Id.* at 3-4.
[191] *Id.* at 3. On intellectual property, the Order included "(i) all trade names, registered and unregistered trademarks, service marks and applications, domain names, trade dress, copyrights, copyright registrations and applications, in both published works and unpublished works; (ii) all patents, patent applications, and inventions and discoveries that may be patentable; and (iii) all know-how, trade secrets, confidential information, customer lists, customer records and files, bidding and estimating documents, software, technical information, data, registrations, applications for governmental approvals, processes and inventions, practices, standards, formulae, recipes, methods, and product and packaging specifications." *Id.*
[192] *Id.* at 14.
[193] *Id.* at 7.
[194] *Id.* at 4.
[195] *Id.* at 2.
[196] *Id.* at 8-9. These financial incentives included but were not limited to "(i) vesting of all current and accrued pension benefits as of the date of transition of employment to the Acquirer; (ii) continuation of all employee benefits offered by CB&I until the date New PDM is divested; and (iii) no

division, Chicago Bridge could not interfere with their performance by attaching non-compete or confidentiality provisions to their employment contracts.[197] Neither could the company "directly or indirectly, solicit, induce, or attempt to solicit or induce" any key person employed at the divested division to rejoin Chicago Bridge.[198]

Beyond splitting up key inputs, the FTC's order also required Chicago Bridge to divide customer contracts between the two divisions. Not all businesses will have consumer contracts, but where applicable, these contracts should be divided equally. The FTC's order in *Chicago Bridge* required the company to assign each new division a set of contracts, "equitably apportioned among the types of products" in the four relevant storage-tank markets.[199] And if equally dividing the agreements was not possible, Chicago Bridge was to contract around that obstacle and "enter into such agreements, contracts, or licenses as are necessary to realize the same effect" as equal division.[200]

Apart from dividing a company's existing assets, employees, and customers, break-up plans should also allow the merged firm to seek out new assets and employees in setting up the two divisions to compete effectively. This ability to seek resources from outside the firm gives the merged company more flexibility to structure the split and thus improves the chances that the firm creates effective and similarly situated competitors, which is the remedial goal when a horizontal merger has had harmful unilateral effects. If a plan includes proposals to acquire new physical or human capital for the two divisions to be equally matched, the associated costs should be allocated equitably among the divisions instead of the benefiting division solely bearing the costs.

Finally, break-up plans can apply the principle of fair division to create two evenly matched competitors. Best analogized with the example of cutting a cake, this principle calls for one party to cut the cake and the other to choose the slice they receive.[201] This division of power helps ensure that the split is fair. Applied to break-up plans, the merged firm would structure the two new companies, and the government would choose which one it had to divest. Because it does not know which division it would keep, the merged firm is encouraged to divide its resources equitably in the first place.

later than thirty (30) days from the date CB&I divests New PDM, payment of a bonus to any Relevant Business Employee who accepts an offer of employment from the Acquirer." *Id.*

[197] *Id.* at 8.

[198] *Id.* at 8-9.

[199] *Id.* at 7.

[200] *Id.*

[201] STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION (1996).

b. Example

To demonstrate how a break-up plan would work, I use the example of T-Mobile and Sprint's recent merger. In my hypothetical, a subsequent administration reexamines the transaction and finds that the loss of Sprint has significantly reduced competition and harmed consumers of mobile-wireless services. The DOJ then requests New T-Mobile to submit a break-up plan.

New T-Mobile's break-up plan must address how it plans to divide its network assets, as it cannot create effective competitors to the dominant service providers without giving each company its own network infrastructure.[202] Owning the underlying infrastructure allows a carrier to control its network quality, a key dimension of competition in the mobile-wireless industry. Here, simply dividing all assets in half risks handicapping both companies because their network quality would immediately suffer and cannot be quickly improved.

Instead of splitting network assets strictly down the middle,[203] one plausible way to create two viable carriers would be to divide New T-Mobile's infrastructure by local markets. Using the FCC's Cellular Market Areas (CMAs),[204] New T-Mobile's break-up plan could allocate spectrum and cell sites—kept intact within CMAs—to each company. That way, each carrier would have its own network assets to develop and improve upon. To provide service in areas where neither carrier owns assets, the two new companies could negotiate roaming agreements with other carriers. To be sure, this split of network resources does not guarantee that two robust competitors will emerge from New T-Mobile. Building a network is extremely expensive and requires key inputs such as spectrum licenses, which can be hard to come by.[205] Even with the break-up plan, one or both companies may struggle to marshal the requisite resources for building a wireless network.

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[202] Customers buy mobile wireless services from Mobile Network Operators (MNOs) and Mobile Virtual Network Operators (MNVOs). MVNOs do not own their own networks but rather buy network access from MNOs and resell that capacity to retail consumers. "Because MVNOs must purchase access from an MNO, MVNOs depend on the MNOs for network quality. The prices a MVNO can charge are indirectly controlled by the prices MNOs set for network access to the MVNO. As such, MNOs have power to adjust terms and prices charged to MVNOs in a way that prevents MVNOs from creating significant new competition. Accordingly, MVNOs are not a significant competitive constraint on MNOs. Rather, MVNOs are considered as more of a marketing channel through which MNOs can reach additional consumers." Third Redacted Complaint ¶ 36, New York v. Deutsche Telekom AG, No. 1:19-cv-5434 (S.D.N.Y. Sept. 18, 2019).

[203] Splitting assets down the middle would mean giving each division half of New T-Mobile's network assets in every geographic market.

[204] The FCC uses CMAs as the geographic unit to license spectrum. *See* 47 C.F.R. § 22.909 (2019). The states' complaint additionally alleges that CMAs "approximate the areas within which customers have the same competitive choices." Third Amended Complaint ¶ 42, New York v. Deutsche Telekom AG, No. 1:19-cv-5434 (S.D.N.Y. Sept. 18, 2019).

[205] Defendants' Pretrial Memorandum at 7, New York v. Deutsche Telekom AG, No. 1:19-cv-5434 (S.D.N.Y. Nov. 26, 2019).

Still, break-up plans would significantly increase the likelihood of two successful carriers emerging from one because they require the merged entity to contribute its information and expertise toward setting up the new competitors.

Beyond network assets, New T-Mobile's break-up plan would need to split physical property, which includes retail stores, warehouses, and office space. Retail stores should be split relatively equally within localities to ensure that both companies can attract and service consumers with similar ease. Warehouses are even more straightforward, as both companies just need similar amounts of space, though geographic considerations may dictate which company receives which facilities. With offices, each company should be given an equal amount of space and settle between themselves any discrepancies in property value or leases. In addition, both companies should have necessary enterprise systems for communication, analyzing its network, and producing financials, among other tasks.

Besides physical assets, New T-Mobile would also need to split its intellectual property. The new companies should jointly hold New T-Mobile's patents, and trade secrets should similarly be available to both companies. Though these aspects are relatively straightforward, the break-up plan would need to carefully consider how New T-Mobile's trademarks would be divided. While some split is possible—such as assigning Metro, its prepaid brand, to one company and T-Mobile, its postpaid brand, to another—this division would be lopsided, as the T-Mobile brand is more valuable. Because it would be impossible to split any individual brand and both carriers must operate with different brands if they are to be independent competitors, the company receiving the brand of greater value—here, the company that gets T-Mobile—should pay the other the amount it thinks it would need to build a similarly recognizable brand. The principle of fair division is critical to curb the merged firm's opportunism: because New T-Mobile knows it will keep one of the companies but does not know which one, it has the incentives to structure a fair payment in case it ends up with the Boost brand, or alternatively, must pay the compensatory sum if it gets the T-Mobile brand.

New T-Mobile would also have to split up its consumers. On the retail side, it makes sense to divide consumers by CMA if network assets are also split that way. Such a CMA split should result in relatively equal shares of prepaid to postpaid customers. Because postpaid customers are more profitable,[206] giving one company a lopsided number of prepaid customers would disadvantage it. But if any imbalance exists, new T-Mobile can make some granular adjustments to ensure that both companies have similar shares of prepaid and postpaid customers. On the

[206] Sheila Dang & Akanksha Rana, T-*Mobile Exceeds Expectations for Phone Subscribers, Profit*, REUTERS (Oct. 30, 2018 4:25 PM), https://www.reuters.com/article/us-t-mobile-results/t-mobile-exceeds-expectations-for-phone-subscribers-profit-idUSKCN1N42OU [https://perma.cc/BPL6-A7RF] ("[P]ostpaid . . . users pay a recurring bill and are more valuable to the carriers.").

enterprise side, which includes the carrier's business and government customers,[207] New T-Mobile should divide up the contracts by value and allocate them equally. If the company cannot apportion its discrete number of contracts equally, it can instruct the company receiving more in contract value to pay the other to compensate for the lopsided allocation.

New T-Mobile must also address its abundance of third-party contracts. Wireless carriers contract with suppliers, tower companies, device manufacturers, and dealers to run their business. In the break-up plan context, New T-Mobile must ensure that suppliers who provide key inputs would service both companies. For most contracts, New T-Mobile can jointly renegotiate existing contracts and secure equal terms for both companies. The benefit of allowing New T-Mobile to negotiate is that the combined company has greater bargaining power than its divided halves, and the companies would begin their existence on equal footing with suppliers. In some cases, however, each company should independently negotiate. For example, the companies should negotiate their own roaming contracts because they could roam on each other's networks post-split.

Next, New T-Mobile must allocate its employees. It has to ensure both companies have comparable levels of expertise in engineering, marketing, sales, customer service, management, and other business areas. It also has to equally staff administrative services like accounting, IT, and compliance. This would require New T-Mobile to identify these employees, catalog their qualifications, experience, and perhaps also their performance evaluations.[208] New T-Mobile could then allocate employees between the companies, and if it found that either division lacked adequate personnel after the allocation, it could plan to hire additional staff and allocate that financial burden between the companies. New T-Mobile would have to commit to waiving non-compete and nondisclosure agreements, as well as to not soliciting the divested company's personnel after the split is complete.[209]

Another key element of the break-up plan is splitting up New T-Mobile's finances. The two companies should carry the company's debt burden evenly, meaning the amount of debt and maturities should be apportioned equitably. This may require renegotiating with lenders, which New T-Mobile could do jointly for the companies. On the equity side, New T-Mobile's stock would need to split. This would be simple because the companies should be equal. To ensure shareholders

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[207] Businesses and governments contract for mobile wireless plans for their employees. These enterprise customers are considered distinct from retail customers because carriers individually negotiate these contracts and give "rate plans and service offerings that are generally not available to retail consumers." Third Amended Complaint ¶ 32, New York v. Deutsche Telekom AG, No. 1:19-cv-5434 (S.D.N.Y. Sept. 18, 2019).

[208] Proposed Final Judgment at 7-9, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019).

[209] *Id.* at 9.

are invested in the prospect of each company succeeding, shareholders should receive two shares of one of the companies—and not one share of each company. Otherwise, having New T-Mobile's shareholders owning both divisions could facilitate common-ownership harms.[210] Another benefit of this structure is that before the split, shareholders could have the incentive to pressure the company to structure its division equitably because they do not know in advance which company's shares they will come to own.

Of course, other permutations of a potential break-up plan for T-Mobile exist. The outline sketched above presents a plausible vision for New T-Mobile's break-up plan and serves to demonstrate that the exercise is feasible even for large, complex mergers.

5. Penalties

Ensuring companies' compliance is a central challenge to developing a successful break-up plan framework. Already, I have discussed implicit penalties to a company shirking its obligation to produce a credible plan. First, a substandard plan should result in the agencies giving less weight to the company's efficiencies and thus increase the chance that the government challenges the merger. Second, applying the principle of fair division means that merged firms which split assets lopsidedly between two divisions run the risk of being left with the weaker company.

Still, these detriments may be insufficient. A firm confident that its efficiencies can overcome its merger's competitive harm would likely take the break-up plan requirement seriously to stave off enforcement action. But a merged company with weak synergies would be less responsive to the agencies discounting its efficiencies, and these are the very mergers that agencies should be most concerned about. Additional penalties are thus necessary for these firms to comply.

Devising optimal penalties to deter noncompliance is a difficult task. As John Coffee has written, fines generally have to be mammoth to deter since the risk of apprehension is low. But such a fine risks being nullified by prosecutors and judges because of the potentially disastrous consequences it would have on innocent parties. After all, "a financial penalty imposed on the corporation falls ultimately on" shareholders, bondholders, low-level employees, and consumers, "who

[210] *See* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); Eric A. Posner, Fiona Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017); *see generally* C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392, 1401-03 (2020) (describing theories of anticompetitive effects from common ownership).

are seldom culpable."[211] Further, individual managers may have incentives that run counter to the interests of the corporation and may persist in violating the law even if there is an optimal deterrence penalty.[212] A rich literature has formed around the problem of optimal corporate deterrence, but scholars have yet to reach widespread consensus.[213]

My goal here is not to enter this broader debate but only to sketch out what practicable—not necessarily ideal—penalties would look like in the break-up plan context. First, penalties should persist until the firm has submitted a credible plan. In other words, the requirement to produce a break-up plan should not be an optional obligation, waivable by paying a fee. One way to implement ongoing penalties would be to impose daily fines on noncompliant companies that toll until they have submitted an acceptable plan. The agencies have provided for daily fines in consent decrees to urge companies to commit to speedy divestitures. For instance, in the General Electric/Baker Hughes merger, DOJ required GE to make daily incentive payments until it completed the divestiture of its water and process technologies business in each international jurisdiction.[214] But fines need not be daily so long as they persist until the company has submitted a credible plan. Another way of levying continuing penalties would be to require companies to resubmit plans and subject them to penalties every time their plans were deemed inadequate.

Second, penalties must be calibrated appropriately. The fine should allow the firm to "feel the impact" but not be "so high as to cause violators to go out of business, and not so onerous as to offend the society's sense of absolute equity."[215] With these concerns in mind, William Breit and Kenneth Elzinga have proposed a calibration of 25% of a company's annual profits for deterring antitrust violations.[216] While their 25% figure is admittedly only an educated guess, Breit and Elzinga's focus on using a percentage of the firm's profits is apt for two reasons. First, setting the same notional penalty for all firms would not account for the het-

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[211] *See* John C. Coffee, Jr., *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. ILL. U. L. REV. 3, 6 (1980).

[212] *Id.* at 9-10.

[213] *See, e.g.*, John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (arguing for equity fines, adverse publicity, and integrating public and private enforcement as punishments). *But see* Brent Fiss, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983) (critiquing equity fines).

[214] Press Release, Justice Department Requires General Electric Company to Make Incentive Payments to Encourage Completion of Divestitures Agreed to as a Condition of Baker Hughes Merger, U.S. DEP'T JUST. (Oct. 17, 2017), https://www.justice.gov/opa/pr/justice-department-requires-general-electric-company-make-incentive-payments-encourage [https://perma.cc/MJF6-8DZP].

[215] William Breit & Kenneth G. Elzinga, *Antitrust Remedies and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 711 (1973).

[216] *Id.*

erogeneity in size of mergers the agencies enforce against. Second, basing the penalty off of profits avoids the inequities of a revenue-based measure that punishes firms with low margins more harshly than firms with high margins.[217] I preliminarily propose imposing a penalty of 10% on annual profits for firms who fail to produce a credible break-up plan. This calibration poses less risk of driving companies to insolvency while still remaining significant enough for firms to take notice. Admittedly, 10% is as unscientific as Breit and Elzinga's 25%, and further analysis is needed to determine the precise percentage.

Besides being ongoing and calibrated appropriately, penalties should be certain. They should be clear to the parties in advance and should apply mandatorily once enforcers deem a plan inadequate. Having clear penalties that apply with certainty upon violation increases the fine's deterrence value. Studies have consistently shown that certainty of punishment deters more effectively than severity.[218] Requiring certainty of punishment again highlights the importance of calibration—if enforcers are required to impose a penalty they believe is overly harsh, they may relax their assessment of the break-up plan's adequacy. But requiring certainty can also facilitate a more sensible calibration. Typically, penalties meant to deter are discounted by the likelihood of being punished, so a $1000 violation with a 1% risk of apprehension yields an optimal penalty of $100,000. When actually imposed on a party, however, this penalty may be so devastating that enforcers cannot bring themselves to levy the fine. But this problem becomes less acute in the break-up plan context because the certainty of apprehension is high. Enforcers will be reviewing each plan and determining whether each submission is credible. This certainty of review—coupled with a mandatory punishment—means that fines would not need to be magnified to optimally deter.

To judge when penalties should apply, the agencies would assess whether the proposed plan would adequately restore competition. Far from being an abstruse inquiry, determining whether the plan remedies competitive harms is squarely within the agencies' competence. In current merger enforcement, the agencies regularly "litigate the fix"—that is they challenge the adequacy of the merging parties' offered remedy.[219] This happens in merger litigation when the defendants present rebuttal evidence that their proposed divesture will effectively preserve competition by replacing the "competitive intensity lost as a result of the merger."[220] In *United States v. Aetna*, for example, the merging parties argued that their negotiated divestiture of individual Medicare Advantage plans to Molina

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[217] *Id.* at 710-711.

[218] *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201-02 (2013).

[219] David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 ANTITRUST 10, 10 (2016)

[220] Fed. Trade Comm'n v. Sysco Corp., 113 F. Supp. 3d 1, 72 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972)).

would offset the loss of competition.[221] The court, however, found the government's concerns persuasive and held that Molina lacked the personnel, management, technology, and ability to manage star ratings needed for the divestiture to restore competition lost by the merger.[222] In another example, the court in *FTC v. Sysco Corp.* heard evidence about the merging broadline distributors' proposed divestiture of 11 distribution facilities to PFG, a regional broadliner.[223] As in *Aetna*, the court ultimately sided with the government. It concluded that the divestiture was inadequate because PFG would still lack the distribution centers necessary to compete nationally.[224]

Even though courts have evaluated litigated-fix arguments before, the agencies should have the sole discretion to determine whether a break-up plan is credible. Allowing agencies to be the sole judge would make the process more efficient and sensible, since evaluating the plans requires antitrust and industry expertise and would have been formulated under agency guidance.

To fend off fears that agencies would have runaway discretion, it is important to highlight that break-up plans only contemplate how a company can be divided. Actually breaking up the company still requires the agency to pursue a merger-enforcement challenge. In such a challenge, parties will have the opportunity for judicial determination and review.

6. Disclosure

Agencies should keep the details of break-up plans confidential. The plans will contain competitively sensitive information because they must explain the company's internal operations and business needs in detail. If public, competitors could use these plans to undermine the merged company's strategy. Merged parties, wary of this risk, would then hesitate to be forthcoming in their break-up plans. Plans should thus be kept private to encourage parties to submit helpful plans to the agencies.

Because break-up plans would not be publicly disclosed, they would not give rise to a third party's private right of action to challenge a merger. Foreclosing private actions is apt because only one actor should oversee a firm's production of a break-up plan, and the federal agencies are best suited for that role.[225] Private plaintiffs may have motives other than promoting the public interest,[226] and they

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[221] United States v. Aetna Inc., 240 F. Supp. 3d 1, 59-60 (D.D.C. 2017).
[222] *Id.* at 70-71.
[223] *Sysco*, 113 F. Supp. 3d at 16-17, 21.
[224] *Id.* at 73-76.
[225] *Supra* Section III.B.i.
[226] *See generally* R. Preston McAfee et al., *Private Antitrust Litigation: Procompetitive or Anticompetitive*, U.S. DEP'T JUST. (Dec. 1, 2005), https://www.justice.gov/atr/private-antitrust-litigation-procompetitive-or-anticompetitive [https://perma.cc/Y2CW-6ND7] (describing how private firms' interests "could easily diverge from the social interest").

lack the merger-review expertise that federal authorities have. Further, private plaintiffs face unique doctrinal barriers. Courts often apply the equitable doctrines of laches and unclean hands to reject private consummated merger challenges, even "when it would not be too late for the government to vindicate the public interest."[227] And even though private plaintiffs technically can obtain divestitures under Section 16 of the Clayton Act,[228] it is exceedingly rare for a court to order a merged party to divest assets in a private suit.[229]

IV. Implementation

A. By consent

Though break-up plans themselves require detailed mandates, the concept does not require congressional action to be implemented. The agencies can already incorporate the break-up plan framework through consent agreements. Currently, enforcers resolve the majority of their investigations by reaching a settlement with the merging parties. In 2018, for instance, the FTC and DOJ resolved twenty of the thirty-nine cases they challenged with a consensual settlement.[230]

Consent agreements are so popular because they offer benefits to the merging parties and the agencies. From the merging parties' perspective, consent agreements allow firms to avoid litigation and its attendant costs of extensive discovery, business disruptions, and negative publicity.[231] Settling through a consent agreement also allows merging parties to avoid the "treble damages consequences of

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[227] California v. Am. Stores Co., 495 U.S. 271, 296 (1990); Ginsburg v. InBev NV/SA, 623 F.3d 1229 (8th Cir. 2010) (affirming dismissal of beer consumers' suit to enjoin InBev's acquisition of Anheuser-Busch).

[228] *Am. Stores Co*., 495 U.S. at 282 (interpreting 15 U.S.C. § 26 (2018)).

[229] The ABA's Antitrust Law Developments states that "no court has ordered the divestiture of a completed transaction in a private suit", ANTITRUST LAW DEVELOPMENTS, § 9F. But in December 2018, a court upheld a jury verdict that ordered doorskin manufacturer JELD-WEN to divest a facility it had acquired from competitor Craftmaster International. Steve & Sons, Inc. v. Jeld-Wen, Inc., 345 F. Supp. 3d 614 (E.D. Va. 2018). The decision has been called the "first private antitrust divestiture suit" and is currently being reviewed by the Fourth Circuit. Alexandra A. Zeiger & Megan E. Harmon, *Steves and Sons vs. Jeld-Wen: The First Private Antitrust Divestiture Suit*, PHILA. BUS. J. (Dec. 11, 2018, 2:11 PM EST), https://www.bizjournals.com/philadelphia/news/2018/12/11/steves-and-sons-vs-jeld-wen-the-first-private.html [https://perma.cc/Y3L6-6SP8].

[230] HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2018, *supra* note 43, at 2-3; AREEDA & HOVENKAMP, *supra* note 111, at § 327a ("Most civil antitrust actions initiated by the United States terminate in a settlement that is filed with the court and incorporated into a judicial order known as a 'consent decree.'").

[231] AREEDA & HOVENKAMP, *supra* note 111, ¶ 327 ("Settlement can also benefit the defendant who prefers to avoid the expense, publicity, and business disruption of discovery procedures and trial as well as the treble damage consequences of adjudicated liability."); John J. Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 1 J. REPRINTS ANTITRUST L. & ECON. 247, 269-70 (1969).

adjudicated liability."[232] Under Section 5(a) of the Clayton Act, a judgment against a defendant in a government enforcement suit is prima facie evidence against the defendant in subsequent private suits for treble damages.[233]

For the government, consent agreements provide a "relatively inexpensive and rapid method of enforcement," which allows the agencies to take on a greater number of cases.[234] Further, because the agreements are flexible enough to provide for "broader and more radical relief" than courts may be willing to provide, they can serve as a nimble means to further policy goals.[235]

The current DOJ has used consent-decree provisions to contract around legal standards that it deemed insufficient. Starting in 2018, DOJ has incorporated three new provisions to make its settlements more enforceable.[236] The first lowered the evidentiary standard for proving the defendant violated the terms of the consent decree from "clear and convincing" to a preponderance of the evidence. Without this provision, the Division faced "a higher burden of proving a violation of that consent than it would of proving the original unlawful conduct which . . . triggered the consent."[237] Second, DOJ's consent decrees now require defendants to pay the agency's enforcement costs, which combated the problem of defendants dragging out proceedings. Third, DOJ's consent decrees allow it to extend the decree's terms upon notice to the court and defendant. The power to extend the decree's terms aims to "make the relief in decree enforcement proceedings more meaningful, and in so doing discourage violations."[238] The Division has stated it would insist on these provisions being included in future consent decrees.[239]

Given consent agreements are so flexible, the agencies can begin requiring break-up plans in their settlements with merging parties. The agencies can specify in the agreements what break-up plans must include and what penalties come with submitting an inadequate plan.[240] In their consent agreements, the agencies can also identify their competitive concerns and commit to giving companies' submissions

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[232] AREEDA & HOVENKAMP, *supra* note 117, ¶ 327.
[233] 15 U.S.C. § 16 (2018); Flynn, *supra* note 213, at 269.
[234] Flynn, *supra* note 213, at 269.
[235] *Id.*
[236] Makan Delrahim, Assistant Attorney Gen., U.S. Dep't Justice, Remarks Delivered at the New York State Bar Association: Improving the Antitrust Consensus (Jan. 25, 2018), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar [https://perma.cc/5FNC-VBW5].
[237] Jonathan M. Jacobson, *Issues in Antitrust Consent Decrees*, U.S. DEP'T JUST. 4 (Apr. 26, 2018), https://www.justice.gov/atr/page/file/1057131/download [https://perma.cc/6ZXJ-CN9V].
[238] Delrahim, *supra* note 213.
[239] *DOJ Toughens Antitrust Consent Decree Enforcement*, JONES DAY (Feb. 2018), https://www.jonesday.com/en/insights/2018/02/doj-toughens-antitrust-consent-decree-enforcement [https://perma.cc/4934-793A].
[240] The penalties developed in Part III are still necessary if the agencies implement break-up plans through consent agreements because "the consent order[] has a basic limitation: in practice, it seldom leads to any significant sanction if it is violated." Coffee, *supra* note 39, at 453.

confidential treatment. The only limitations are that the agencies must follow agency procedures for settlements, identify in advance which mergers they would like to later re-examine, and obtain the merging parties' consent.

The requirement to identify mergers in advance restricts break-up plans' application to the 2% of cases that the agencies even investigate. Still, these are likely the cases where break-up plans would have the greatest impact, both because mergers that the agencies investigate are typically large and because they present the most borderline theories of harm. When the agencies have uncertain competitive concerns, having the opportunity to revisit mergers and seek a meaningful divestiture to restore lost competition would minimize enforcement error. In particular, break-up plans may be especially useful in cases where non-price harms are central and in vertical mergers, where predictions about how the combination will impact competition "are often more complicated and may be less clear."[241]

Obtaining the merging parties' consent may be challenging but is certainly not impossible. The parties' willingness to assent to break-up plan provisions will depend on how confident they are in realizing their merger's efficiencies and their assessment of the strength of the government's case at the time of negotiation. In some cases, companies may refuse to agree to a break-up plan provision and instead goad the agencies into taking them to trial. The agencies may have to litigate some weaker cases at the outset, but if they demonstrate that they are willing to take merging parties to trial, they can credibly signal that parties must endure the vagaries of litigation if they refuse to accept break-up plan provisions.

The overarching point is that the idea of break-up plans can already be implemented if the agencies so choose, even if such implementation is not ideal. So long as the agencies follow their procedures for minting consent agreements, agreements providing for break-up plans can be enforced.

1. DOJ consent decrees

When entering into a consent decree, DOJ negotiates the terms with the merging parties and submits their agreement to a court. Upon court approval, their agreement becomes a judicial act enforceable by the court.[242] Courts enforce consent decrees like a contract. As D.C. Circuit in *Microsoft* explained when reviewing the district court's consent decree:

> *[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the*

[241] *Competition and Consumer Protection in the 21st Century: Merger Retrospectives*, *supra* note 117 at 152 (statement of Commissioner Slaughter).

[242] James C. Noonan, Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 HASTINGS L.J. 133, 133 (1983).

> *resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. The court's task, then, is to discern the bargain that the parties struck; this is the sense behind the proposition that consent decrees are to be interpreted as contracts.*[243]

The Division's consent decrees are subject to the Tunney Act, which stipulates the procedures that consent decrees must follow.[244] The critical instruction for courts is that the consent decree should be approved if it is in the public interest.[245]

When deciding whether a proposed consent decree is in the public interest, courts are mandated by statute to consider:

> *(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and*
> *(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.*[246]

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[243] United States v. Microsoft Corp., 147 F.3d 935, 946 (D.C. Cir. 1998) (citation omitted) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)).

[244] 15 U.S.C. § 16 (2018). Under the Act, the government must first file a complaint alleging a violation of the antitrust laws and then propose a final judgment that sets forth the terms of the parties' settlement. From there, DOJ must accept public comments for 60 days. The agency then publishes those comments in the Federal Register and files the comments with the district court. Further, to facilitate public and court understanding of the proposed consent decree, the government must provide a "competitive impact statement" (CIS) that explains the alleged violation, the remedy, and its anticipated effects on competition. The CIS must also describe what private remedies are available and what alternatives the government considered, as well as lay out the processes for public comment and modifying the decree.

[245] 15 U.S.C. § 16 (2018).

[246] 15 U.S.C. § 16(e)(1) (2018).

Though the court must consider the multitude of factors described above, they assess the proposed consent decree with deference. In *Massachusetts v. Microsoft*, the D.C. Circuit formally articulated the standard of withholding approval to be "only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a 'mockery of judicial power.'"[247] Judges, in practice, have almost always approved DOJ's proposed consent decrees.[248] As Areeda and Hovenkamp describe, judicial "approval has ordinarily been perfunctory."[249]

In recent years, Judge Leon has attracted attention for taking a more involved role in reviewing the consent decrees that have come before him. In the NBC/Universal merger, he added compliance and reporting obligations to the proposed order,[250] and more recently, in the CVS/Aetna merger, he required evidentiary hearings to determine whether the settlement was in the public interest—even though a 2004 revision to the Tunney Act clarified that courts are not required to hold evidentiary hearings or permit intervenors. Indeed, requiring an evidentiary hearing in a Tunney Act proceeding is "very unusual."[251] Still, Judge Leon ultimately approved both consent decrees, and even he concluded that DOJ's settlements deserve "great deference—if not a presumption of accuracy."[252] Judicial approval is therefore unlikely to impede DOJ efforts to include break-up plan provisions in consent decrees, so long as the provisions themselves are clear.

2. FTC consent orders

The FTC follows a different procedure for its consent orders. The Commission itself has statutory authority to make and enforce consent decrees.[253] Courts thus play no role in the FTC consent-order process—in fact, parties must explicitly waive their right to seek judicial review.[254]

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[247] Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236 (D.C. Cir. 2004).

[248] David Gelfand & Elaine Ewing, *"Be Careful What You Wish for": U.S. Government Enforcement of Merger Consent Decrees*, 58 ANTITRUST BULLETIN 225, 229 (2013) (noting that the rejection of proposed consent decrees is "very rare"); Michael Gleason et al., *It Ain't over Till It's Over: Review of DOJ M&A Settlements Under the Tunney Act*, 23 M&A LAWYER 1, 3 (2019).

[249] AREEDA & HOVENKAMP, *supra* note 231, ¶ 327e.

[250] United States v. Comcast Corp., No. 1:11–cv–00106, 2011 WL 5402137, at *16 (D.D.C. 2011); Diane Bartz & Jasmin Melvin, *U.S. Judge Signs off on Comcast NBC Universal Buy*, REUTERS (Sept. 1, 2011), https://www.reuters.com/article/nbcu-comcast/u-s-judge-signs-off-on-comcast-nbc-universal-buy-idUSN1E7801ZL20110901 [https://perma.cc/5SDN-YJBN].

[251] Pub. L. No. 108-237, 118 Stat. 661 (2004); United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. 2019); COMMITMENT DECISIONS IN ANTITRUST CASES, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ¶ 12 (June 2016), https://www.justice.gov/atr/file/873491/download [https://perma.cc/25SS-6KKS].

[252] *CVS Health*, 407 F. Supp. 3d at 54.

[253] 16 CFR § 2.32(c) (2020).

[254] 16 CFR § 2.32 (2020).

In the FTC process, the Commission's staff negotiates an Agreement Containing Consent Order ("ACCO") with the parties. The ACCO contains waivers and recitations that must be included in every consent agreement, including the waiver of any right to seek judicial review.[255] FTC staff then prepare a complaint, which explains the case and alleges specific violations of the antitrust laws.[256] The complaint can later be used to construe the terms of the consent order, and the parties acknowledge in the ACCO that they have read the complaint.[257]

Once the parties sign the ACCO, the Commissioners can approve the proposed order if they find a "reason to believe" that the parties have violated the antitrust laws and that the proposed settlement resolves the agency's competitive concerns. Once approved, proposed orders are publicized, and the FTC invites public comments for 30 days. The agency publishes an "Analysis to Aid Public Comment," which explains the case and proposed remedy. The FTC then examines comments, and if it deems no changes to the order are needed, it issues the consent order as a final FTC order. Only after this second vote of the Commissioners does the settlement become final.[258]

In the FTC realm, the authority to develop and approve the consent decree lies entirely with the Commission. In theory, the public can influence the content of the settlement through public comment, but the FTC has never withdrawn a consent order based on comments.[259] The agency itself states that "virtually every proposed Consent Order becomes final as originally negotiated, except for minor modifications to which the parties and staff may agree during the settlement process."[260]

B. By statute

Though the agencies could implement break-up plans through their ample discretion to strike consent agreements with merging parties, break-up plans could further benefit antitrust enforcement if they were implemented more widely.

If done through consent agreements, the requirement to produce a break-up plan could apply only prospectively to new mergers. Further, consent decrees require the agency to affirmatively require break-up plans, which they can do only for the cases that they investigate. Implementing break-up plans through consent decrees would thus limit their reach to the roughly 2% of pre-notified mergers that the agencies are able to probe further.

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[255] *Id.*
[256] COMMITMENT DECISIONS IN ANTITRUST CASES, *supra* note 251, ¶ 13.
[257] *Id.*
[258] *Id.* ¶ 14.
[259] J. Thomas Rosch, Consent Decrees: Is the Public Getting Its Money's Worth?, Address at XVIII S. Gallen International Competition Law Forum 2-3 (Apr. 7, 2011), https://www.ftc.gov/sites/default/files/documents/public_statements/consent-decrees-public-getting-its-moneys-worth/110407roschconsentdecrees.pdf [https://perma.cc/6H8S-QJ9Y].
[260] COMMITMENT DECISIONS IN ANTITRUST CASES, *supra* note 251, ¶ 14.

With a statute, the agencies could have the power to require break-up plans from mergers that have already closed and to require them even where the agencies did not identify harm before the merger closed. Given that prospective merger review is inherently prone to error, not restricting break-up plans to only the cases where the agencies have correctly detected harm allows these plans to live up to their full potential for correcting enforcement errors.

Statutory power to require break-up plans should be coextensive with the agencies' authority to challenge closed transactions. The agencies can undoubtedly contest closed transactions that they had not challenged before, even when those transactions were previously reported to them.[261] There is a vast universe of unchallenged mergers, including the 98% of HSR reported mergers where the agencies do not issue a second request, as well as smaller mergers below the HSR-threshold.

It is less clear whether the agencies can relitigate cases where they have previously tried to enjoin a merger or negotiated a consent agreement with the merging parties. *Du Pont*'s broad language that the government can bring a Section 7 suit "at any time when a threat of prohibited effects is evident" raised questions about how many times the same merger could be challenged.[262] Edward Levi mused, "The Court's emphasis suggests that conceivably a new cause of action might arise when the effect of the acquisition changes."[263] But he added, "[p]resumably a judgment under Section Seven will be res judicata for a later action directed at the same acquisition, even though there may be a likelihood of monopoly previously absent."[264] Despite this intuition, later-arising conditions may present new facts and circumstances sufficient to provide the government with a new basis for challenging the merger.[265] This question has yet to be settled because the government has not brought a second challenge against a merger that it previously contested.

But whatever the answer, the government has the power to review consummated mergers that it never challenged in the first place. This vast authority reaches Amazon's acquisition of Whole Foods and Zappos, Facebook's acquisitions of WhatsApp and Instagram, and Google's acquisition of Waze, to name a few examples.[266] Giving agencies the power to require break-up plans in cases like these would empower them to enforce against mergers that have proved to be harmful. Realizing that potential requires statutory intervention.

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[261] *See supra* Section II.A.
[262] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957).
[263] Edward Levi, *The duPont Case and Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 3, 5 (1958).
[264] *Id.*
[265] *See* 50 C.J.S. *Judgements* § 988 (2020).
[266] Warren, *supra* note 146.

V. CHALLENGES

Some have argued against re-examining mergers. Areeda and Hovenkamp have raised concerns about establishing the causality of a merger's effects long after the transaction has closed, punishing procompetitive conduct, and lessening enforcers' willingness to challenge harmful mergers prospectively.[267] But these objections do not militate against using break-up plans to empower post-closing reviews.

First, the causation difficulties in consummated merger challenges also attend to prospective challenges. In both cases, enforcers must isolate the effects of the transaction. Pre-closing, the dangers are ignoring relevant factors and making incorrect predictions. Post-closing, the challenge is to extricate the merger's effects from concomitant market developments. Both are hard tasks, and if we are comfortable with relying on predictions of market conditions as is done in all prospective suits, we should also be fine with attempts to tease out the merger's effect from realized market outcomes. Further, where causation is murky, the uncertainty should affect the weight of the evidence in a particular case and not impugn the entire practice of re-examining mergers.

Second, Areeda and Hovenkamp emphasize that there must be an exception for procompetitive activities like expansion and new entry.[268] In their view, "such exceptions seem too difficult to formulate precisely and to administer wisely." But accounting for efficiencies in post-closing reviews is possible. In fact, break-up plans would require the company to present its case for the merger's cognizable efficiencies, and enforcers would not challenge a merger whose efficiencies dwarfed its competitive harm. This requirement encourages merged firms to diligently achieve and document its synergies, as a compelling showing can stave off a post-closing challenge. Granted, break-up plans may chill mergers where firms' efficiencies are highly uncertain. Antitrust policy, however, does not credit these efficiencies. As the Horizontal Merger Guidelines state, efficiencies must be likely and reasonably verifiable.[269] They will not be credited where they are "vague" or "speculative."[270] Break-up plans reinforce this existing requirement.

Third, having a viable path to challenge mergers post-closing may temper enforcers' vigor to contest acquisitions prophylactically. This critique, however, paints merger challenges with a broad brush. Some cases present clear cases of harm and should be enjoined before closing,[271] but others are highly uncertain. Such uncertainty is especially prone where mergers implicate non-price factors like

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[267] AREEDA & HOVENKAMP, *supra* note 117, ¶ 1205.
[268] *Id.* ¶ 1205(c)(3).
[269] *Horizontal Merger Guidelines*, supra note 34, at 30.
[270] *Id.*
[271] *Competition and Consumer Protection in the 21st Century: Merger Retrospectives*, *supra* note 39, at 151 (statement of Commissioner Slaughter) (citing the Tronox/Cristal merger as an example).

quality and innovation, as well as vertical conduct.[272] For these less certain cases, taking a "wait and see" approach and making enforcement decisions based on realized conditions can yield better outcomes. Post-closing reviews enable the agencies to enforce based on actual competitive effects in cases where courts may deem a novel theory of harm too speculative to enjoin the merger prospectively.

Beyond these concerns, break-up plans themselves may pose challenges. By making the prospect of a break-up more likely, the potential requirement to submit a plan may encourage companies to knit together their operations and then plead that dividing up their operations would be impossible. For this reason, developing adequate penalties to prevent such moves is paramount. Linking the credibility of the plan to break up the company to the company's efficiencies evidence, mandatorily imposing a fine of 10% of profits, and continuing to levy penalties until the company submits a credible plan serve to promote compliance. Aside from break-up plans' penalty scheme, the agencies can halt parties' attempts to frustrate a break-up by seeking an injunction to preserve the status quo. Further, such actions could even provide evidence of anticompetitive intent during a merger challenge.

Additionally, break-up plans would also not guarantee that enforcers can create successful competitors from the merged company. Market dynamics could lead one company to falter while the other succeeds—or both could stumble into obsolescence. But this is not unique to companies that emerge from a break-up plan. Firms fail in the ordinary course of business. Break-up plans decrease this chance compared to a plan devised by enforcers alone because they leverage a company's own information and expertise.

Finally, break-up plans would give enforcers significant power, including the sole discretion to determine whether a company's submission is credible. But break-up plans serve only an informational function; they do not actually give enforcers new authority to order divestitures. Break-up plans only make devising relief more practicable when mergers have already closed. If the agencies were to challenge the consummated merger, companies would still have the right to judicial determination and review.

VI. CONCLUSION

Break-up plans are a needed addition to antitrust enforcement. Because merger review is inherently predictive, enforcers will sometimes permit harmful mergers to close. When they make such mistakes, they generally lack the ability to devise effective remedies after parties have closed and integrated their operations. In large part, this is because the merged company has no obligation to help—and in fact, has every incentive to cripple—efforts effecting its own disassembly. Break-up plans would force a company to contend with its anticompetitive effects

[272] *Id.* at 152.

by obligating it to craft a plan for dividing itself up when enforcers have judged its merger to be harmful. Enlisting merged parties in this endeavor would allow enforcers to use companies' valuable expertise to more nimbly design post-closing remedies. By easing the substantial burden of crafting an effective divestiture, break-up plans would allow the agencies to more aggressively pursue post-closing reviews and better use the full range of their Section 7 enforcement power to achieve a more effective merger policy.

In facilitating post-closing reviews, break-up plans would allow enforcers to rely more heavily on realized harms and efficiencies when challenging a merger. Such evidence may be less resource intensive to marshal than the prospective economic models that currently dominate merger challenges. Further, evidence of actual anticompetitive effects may also be more compelling to courts. The ability to use a merger's realized effects could even obviate the need for market definition, which has proved to be a highly fraught inquiry.

This Article has introduced the idea of break-up plans and described how they could function in a post-closing review of a horizontal merger where enforcers have found significant unilateral harm. Though the most straightforward use of break-up plans is for horizontal mergers resulting in unilateral harm, they can have more wide-ranging applications. For instance, break-up plans could be useful in vertical contexts. Taking the example of the AT&T/Time-Warner merger, break-up plans could dexterously disentangle areas where the company has integrated its programming and distribution arms. Further, break-up plans could even be useful when enforcers have found that a merger has resulted in coordinated harm. There, break-up plans could be required from several merged firms, and enforcers can select the best break-up option for disrupting the industry's collusive conduct. Finally, break-up plans could be extended to the monopolization context, where they could make divestitures less daunting and more effective. Of course, more work needs to be done to specify how break-up plans would work in each of these extensions.

But already, enforcers can require break-up plans through settlements negotiated with merging parties. So long as the agencies follow the necessary procedures, consent agreements providing for break-up plans can be enforced. Realizing the promise of break-up plans to rectify harm in already closed transactions, however, will require statutory intervention. Passing a statute is never easy. But in recent years, antitrust has increasingly become the subject of congressional focus. Bipartisan scrutiny has centered on tech platforms in particular, with Republicans expressing concerns about censorship and Democrats highlighting how platforms allow conspiracy theories to disseminate.[273] On the floor, Senator Klobuchar alone

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[273] *See, e.g.*, Steve Lohr, *New Google and Facebook Inquiries Show Big Tech Scrutiny Is Rare Bipartisan Act*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/technology/attorney-generals-tech-antitrust-investigation.html [https://perma.cc/L96C-ZWGD]; David McLaughlin

has introduced a string of bills that include proposals to increase pre-merger notification filing fees, shift the burden of proof in larger mergers, require companies to provide post-closing data to support agency retrospectives, give the FTC authority to study common ownership, and require the Government Accountability Office to study the effectiveness of merger remedies and the impact of consolidation on employment, innovation, and new business formation.[274] Further evidenced in Democratic primary discussions,[275] antitrust's heightened salience provides potentially fertile ground for congressional action.

Break-up plans should be part of any contemplated statutory reform, for they have the potential to spur more vigorous and effective antitrust enforcement.

& Ben Brody, *Big Tech Is Taking a Bipartisan Beating All Over Washington*, BLOOMBERG (July 17, 2019, 4:00 AM EDT), https://www.bloomberg.com/news/articles/2019-07-17/big-tech-is-taking-a-bipartisan-beating-all-over-washington [https://perma.cc/36UW-ZDRE].

[274] S. 306, 116th Cong. (2019); S. 307, 116th Cong. (2019); S. 1937, 116th Cong. (2019).

[275] *See supra* note 40, and accompanying text.