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FTC Releases Study Examining Merger Remedies Between 2006 and 2012

On February 3, 2017, the Federal Trade Commission ("FTC") released a report on an internal staff study examining the success of the Commission's merger remedies from 2006 to 2012.[1] The report, which also focuses on the remedy process more generally, is a follow up to the Commission's first remedy study, released in 1999.

The FTC has received some criticism in the recent past about the perceived lack of success of a few of its merger consent decree remedies. But the report found that the remedy process was generally effective and that most remedies proposed by the FTC succeeded in promoting competition. The report also highlighted several "best practices" that will be a particular focus areas going forward.

The 2017 study reviewed all 89 merger consent orders issued by the Commission related to mergers proposed from 2006 to 2012 and included information gathered in voluntary interviews with over 200 market participants. In reviewing the past orders, the staff utilized three different methods:

- The staff reviewed 50 of the orders using a "case study" method supplemented with interviews of other market participants. The FTC staff also required competitors to submit sales data for the three years prior to the merger and the three years after it was completed.
- FTC staff examined an additional 15 orders involving industries with which the commission was "well familiar," including supermarkets, drug stores, and health care facilities by using voluntary questionnaires sent to the buyers of divested assets.[2]
- Finally, the staff reviewed 24 orders involving the pharmaceutical industry using internal information and expertise and publicly available data.

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1 The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics, *available at* https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics.

2 *Id*. at 5.

Report Finds Majority of FTC Remedies Are Successful

The report broke down the success rates into three categories:

- Of the 50 orders analyzed under the case study method, the staff found that 83% were successes or qualified successes, while 17% of the orders failed to maintain the level of pre-merger competition.
- Of the 15 orders analyzed under a focused questionnaire, the staff found that 39 of the 43 divested businesses remain in the market today.
- Of the 24 orders in the pharmaceutical industry examined in the study, which subjected 60 on-market pharmaceuticals to divestiture, staff found that 75% of the divested pharmaceuticals succeeded by remaining in the market, while 25% failed.

Results of Report Suggest Best Practices for Future Transactions

The FTC included in its report a series of best practices suggested by the results of the survey. The report states that the Commission does not believe the practices "reflect significant changes to the Commission's current practice, but rather further refine the Commission's approach to remedies and the remedy process."[3] The report states that divestitures, by far the most common remedy proposed by the FTC, are the most successful method for maintaining competition levels post-merger.

The report repeats the Commission's preference for divestitures of stand-alone ongoing businesses, as opposed to the divestiture of selected assets.

Additional best practices presented by the report for determining the likely success of a proposed remedy include:

- Extensive review of proposed buyers to ensure proper financing and strategy exist to make the divested asset a successful competitor.
- Ensuring the buyer conducts sufficient due diligence prior to the purchase and properly analyzes customer and other third-party relationships before agreeing to acquire the divested asset.
- Increased focus and attention on back-office functions, including making sure proposed buyers understand all functions needed and the complexities surrounding their transfer.

FTC staff also repeated a recommendation made in the 1999 report: buyers and other affected parties are encouraged to communicate with staff if any issues or concerns arise. Buyers of divested assets are

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3 *Id*. at 31.

specifically encouraged to maintain contact with staff during the transition of ownership of the divested asset and afterwards.

Key Takeaways

- The FTC is confident that the majority of its proposed remedies from 2006-2012 were successful, suggesting no major overhauls are likely to occur as a result of this study.
- Divestiture, specifically divestiture of ongoing businesses, will remain the FTC's most commonly proposed remedy.
- At the margins at least, expect the FTC staff to scrutinize more heavily the efficacy of proposed divestitures that do not represent stand-alone ongoing business, including more in-depth evaluations of the proposed buyer's financing, its due diligence review, and any back office functions being transferred.

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