A. Transparency

Much of the controversy raised in the articles in this symposium arise because the parties, the merging parties, acquirers of divested assets, and consumers, know relatively little about the agencies' policies on merger remedy issues. There are no guidelines in this area and very little guidance except some speeches by FTC officials (and none by Antitrust Division officials). Speeches are necessarily incomplete and cannot provide a thorough discussion of remedy issues. Moreover, since the divestiture study began, neither the FTC nor the Antitrust Division have ever articulated what remedies were considered and rejected, why those remedies were rejected, and the basis for rejecting those remedies.

Moreover, the agencies have not articulated what the standards are for a variety of issues, including when a divestiture of an entire business is necessary, what is meant by this divestiture of an ongoing business, when a mix-and-match approach is appropriate, and how the time period for divestiture is determined. The agencies should endeavor to articulate each of these issues in their merger enforcement actions.

As discussed below, the agencies should issue guidelines that articulate the standards on each of these issues, along with other issues. When the agencies take action inconsistent with the guidelines in an individual case, they should articulate the reasons for these actions. Moreover, as was done in this article, in individual cases they should discuss rejected remedies and the basis for rejecting those proposed remedies.

B. Further Studies

The Divestiture Report performed a valuable service in assessing the success of a set of divestitures leading to important reforms of the divestiture process. But it suffered from two shortcomings. First, the time period was relatively short (1990-1994). In addition, the definition of "success" was a relatively limited one. The FTC defined success as whether the acquirer of the divested assets was able to make some sales into the market, whereas a more appropriate definition of success would be whether the acquirer was able to restore competition to the market.

The agencies should conduct a new divestiture study examining the divestitures of the last part of the 1990s. This study should follow the format of the earlier study, but also examine whether the divestiture was effective in restoring competition to the market. The study should include the active input and review by academics, economists, and members of the private bar.

C. Workshops and Guidelines

There is currently an incredible paucity of information on divestitures. As the articles in this symposium have noted, all of the caselaw on the divestitures is basically from the 1960s. There are almost no cases decided on divestitures, including the appropriate scope and requirements of divestiture, over the past three decades.

To facilitate the understanding of the business community and the private bar on divestitures, the antitrust agencies should hold a series of work-

shops on the issue, bringing together business people, academicians, investment bankers, lawyers, and economists. These workshops should attempt to facilitate a dialogue between the government and the private bar on how divestitures should be approached and structured.

Based on the workshops, the agencies should endeavor to issue guidelines on divestitures. These guidelines should address the issues noted above on subjects such as upfront buyers, the scope and scale of remedies, and the other issues identified above.

D. A Report on the Use of Trustees

Trustees are increasingly used, especially in cases in which some form of regulatory relief is utilized. The FTC has used trustees in about twenty cases over the past three years. The agencies should review the use of the trustee process and issue a report on the effectiveness of trustees in these types of cases.

E. Consistency Between the Antitrust Agencies

One of the striking aspects of this entire discussion is that the innovations to merger remedies have been almost exclusively adopted by the FTC. The Antitrust Division of the Justice Department has not used a similar approach to issues such as up-front buyers or the preference for a clean sweep divestiture. There is no reason why the two agencies should take different approaches to these issues, and they should work to develop a consistent approach.

F. Recognition of the Costs of Delay

Although the FTC's stronger approach to remedies is generally laudatory, there is a hidden cost that is often overlooked: tougher remedies and especially the requirement of up-front buyers significantly delay the resolution of merger investigations. Merger investigations now take significantly longer than in the past and often take up to nine to twelve months. During the course of an investigation the to be acquired assets deteriorate, as employees leave to other companies and customers defect. It is unlikely the acquired firm will continue to invest in new products or plant improvements. Uncertainty undermines the ability of firms to effectively compete. Moreover, the efficiencies from a merger are lost during the delays of the investigation.

This means that the agencies should be more flexible towards remedies especially where the overlap is only a small part of the acquisition. For example, if the overlap consists of less than five percent of the acquired assets and the acquisition offers significant efficiencies, delays may actually harm competition and consumers. In this type of setting the agencies should be more willing to moderate their approach to divestitures.

G. Alternative Options in the Divestiture Process

The antitrust agencies should consider new alternatives for grappling with divestiture. I present two suggestions:

First, the agencies should consider using stepped relief in some cases. Under this approach the agency can use a more limited form of relief initially and then if unsuccessful, use more extensive relief. For example, an agency could use some form of behavioral relief and then reexamine whether or not that behavior relief has been successful. If that relief is unsuccessful based on some type of independent review, the agencies could secure more significant relief such as structural relief.

A second approach might be to use auctions for divestiture. There is an inherent problem in the divestiture process that the merging firms choose a buyer, and it is in their interests to choose a weak acquirer. One approach to this concern would be to sell the assets through an independent auction. In that way, the marketplace can ensure that assets are put to their optimal use.

Ultimately, the question of whether the FTC's approach to merger divestitures is successful will be left to history and other scholars. Although the articles in this symposium raise many controversies, there can be little dispute that the FTC's efforts have improved the merger divestiture process. In addition, there is little doubt that these efforts to ensure that consumers are fully protected are vital. Ensuring that merger remedies are more than pyrrhic victories is one of the most critical responsibilities of the antitrust enforcement agencies. As the new Bush administration FTC Chairman Timothy Muris has observed: "An effective remedy is a fundamental part of merger enforcement. . . . [W]e must protect consumers, not help you get your deal through at consumers' expense."[74]

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74 Timothy Muris, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity (Aug. 7, 2001), http:/www.ftc.gov/speeches/muris/murisaba.htm.