set value. The divestiture periods were shortened from twelve months to typically three or four months; (3) Increased use of full or structural relief. The closer the divestiture package is to an ongoing business—better yet, if it is an ongoing business—the greater the likelihood that competition will in fact be restored; (4) The use of interim trustees, especially where technology transfers are involved.[33]

The value of up-front buyers and short divestiture periods is illustrated by the consent order in the Schnuck supermarket case,[34] which did not require an up-front buyer. Schnuck Markets acquired its chief competitor in St. Louis, Missouri, and the Commission required the divestiture of twenty-four stores within twelve months. Before the stores could be acquired, however, Schnuck failed to maintain them properly, resulting in a relatively unattractive set of assets.[35] The Commission filed a civil penalty action, and Schnuck agreed to pay a $3 million civil penalty and divest two additional stores.[36] While that was a substantial penalty, the FTC cannot rely on civil penalty actions alone to ensure that respondents will respond appropriately. Obviously, the prospect of substantial civil penalties did not deter Schnuck from engaging in strategic behavior, and it may simply have been an investment or cost of doing business to preserve market power. Moreover, by the time the agency can bring a civil penalty action, the damage to the market will have already been done. Accordingly, the agencies must assure up front that the remedy really will work for the parties to the transaction and the market.

Up-front buyers are probably the most vital tool in assuring a successful divestiture. Such buyers enable the FTC to better determine: (1) whether a proposed package of assets that is not a stand-alone business is viable in the real world; (2) whether there is a buyer for the proposed divestiture assets; and (3) the likelihood that the proposed buyer will restore the competition that otherwise would be lost through the merger. The likelihood of restoring competition should continue to receive careful scrutiny. The FTC seeks to assure not only that the buyer will successfully enter, but also that it can restore competition fully.

The FTC during the Clinton administration used up-front buyers in over sixty percent of the cases in which there was some form of nonbehavioral relief. There might have been an impression that the up-front buyer policy is

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33 *See* Parker & Balto, *supra* note 24, at 10.

34 FTC v. Schnuck Markets, Inc., Civ. No. 01830 (E.D. Mo. Sept. 5, 1997).

35 *Id.* Schnuck was required to divest twenty-four supermarkets in the St. Louis area as a result of its 1995 acquisition of National Food Markets and was subject to an asset maintenance agreement pending divestiture. *In re* Schnuck Markets, Inc., No. 941-0131, 1995 LEXIS 51 (FTC 1995). As soon as it closed on the National Foods acquisition, it began treating the divested stores as second-class citizens. It closed departments, failed to keep others adequately stocked and staffed, unlisted store phone numbers, and referred customers to Schnuck stores that were not being divested. During the year it had to sell the stores, the sales for those stores declined approximately thirty-five percent. *See* Staff of the Bureau of Competition, *supra* note 25. For further discussion of the Schnuck case and other supermarket mergers, see David A. Balto, *Supermarket Merger Enforcement*, 8-1999 Antitrust Rep. 2.

36 *Schnuck Markets, Inc.*, Civ. No. 01830.

reserved for cases where assets may waste quickly, such as supermarkets.[37] That is not the case. The Commission has used up-front buyers in pharmaceutical cases, in other health care products, industrial products such as refractories, acrylic polymers, lead smelters, industrial power sources, and consumer products. In many cases where the parties have identified an up-front buyer at the beginning of the investigation, the Commission has been able to resolve its concerns and enter a proposed consent order in less than sixty days after the investigation began. The message is straightforward: parties must consider and be able to identify an up-front buyer as part of the merger planning process.

III. Application of Remedy Reforms

The application of remedy reforms over the past few years, especially the greater focus on effective structural relief, has led to claims that the FTC has raised the bar for resolving merger concerns. Yet, such a characterization of the FTC is not entirely accurate. The agency has always insisted on the kind and quantum of relief necessary to protect competition based on its experience and the evidence. It evaluates what it takes to preserve or restore competition. As experience with divestitures grows, the FTC's understanding of what it takes to successfully remedy the potential anticompetitive effects of a proposed merger also grows. The FTC has been more willing today to consider nonlitigated resolutions to merger concerns, but that is no more a lowering of the bar than the recent reconsideration of merger remedies has been a raising of the bar.

In reality, the vast number of mergers raising competitive problems are resolved through consent orders that include a wide variety of approaches to relief. In most cases, structural relief involving divestiture of an ongoing business is required. In many cases, a partial divestiture is appropriate, often because it is clear that the acquiring firm has sufficient assets to replicate the efficiencies of the acquired firm and fully restore competition. In other cases, even more refined relief such as behavioral relief or licensing arrangements may be used, particularly in high-tech markets involving research and development or bundled products. Again, cases of more limited relief require a careful assessment of whether the relief can fully restore competition.

One illustration of the Commission's flexible approach is its evaluation of the merger between Ciba and Sandoz. Although divestiture is the preferred remedy, that does not mean it will be invariably used, especially where it may diminish procompetitive aspects of a merger. This can be a tough issue, particularly in high-technology markets where research and development rights and scientists work together on a number of projects. In the Ciba/Sandoz merger, the Commission chose licensing over divestiture because of the problems of separating ongoing R&D projects.[38] Commissioner Azcuenaga dissented as to the licensing aspect of this order, noting that divestiture would cure the anticompetitive problem in a "simple, complete, and

37 Balto, *supra* note 35.

38 *In re* CIBA-GEIGY Ltd., 123 F.T.C. 842, 898-99 (1997) (Azcuenaga, Comm'r, concurring in part and dissenting in part).