Dated: June 2, 2025.

Nancy Abrams,

Associate Director, Office of Federal Activities.

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FEDERAL TRADE COMMISSION

[File No. 241 0059; Docket No. C–4820]

Synopsys, Inc. and ANSYS, Inc.; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before July 7, 2025.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''Synopsys and ANSYS; File No. 241 0059'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex S), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kara Monahan (202–326–2018), Health Care Division, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

The public is invited to submit comments on this document. For the Commission to consider your comment, we must receive it on or before July 7, 2025. Write ''Synopsys and ANSYS; File No. 241 0059'' on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website. If you prefer to file your comment on paper, write ''Synopsys and Ansys; File No. 241 0059'' on your comment and on the envelope, and mail your comment by overnight service to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex S), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov*—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before July 7, 2025. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreement Containing Consent Orders To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Synopsys, Inc. (''Synopsys'') and ANSYS, Inc. (''Ansys'') (collectively, ''Respondents'') that is designed to remedy the anticompetitive effects that may result from Synopsys' acquisition of Ansys. Pursuant to an Agreement and Plan of Merger dated January 15, 2024, Synopsys proposes to acquire Ansys in a transaction valued at approximately $35 billion (the ''Proposed Acquisition''). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the following markets: (1) optical software tools; (2) photonic software tools for the design and simulation of photonic devices; and (3) Register Transfer Level (''RTL'') power consumption analysis tools. The Consent Agreement will remedy the alleged violations by preserving the

competition that otherwise would be eliminated by the Proposed Acquisition.

Under the terms of the proposed Decision and Order (''Order''), Respondents are required to divest (1) Synopsys' optics and photonics design products, which includes Synopsys' optical software products and photonic software products for the design and simulation of photonic devices, related assets, and facilities in California, New York, France, and Germany; and (2) Ansys' RTL power consumption analysis product, PowerArtist, along with all associated assets necessary to compete in the market. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain all divestiture assets in the normal course of business until the assets are ultimately divested. The Commission issued the Order to Maintain Assets as final.

The Commission has placed the Consent Agreement, along with the proposed Order and the Order to Maintain Assets, on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Order, along with the comments received, to make a final decision as to whether it should withdraw, modify, or make final the proposed Order. The Commission is issuing the Order to Maintain Assets when the Consent Agreement is placed on the public record.

I. The Respondents

Respondent Synopsys is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 675 Almanor Avenue, Sunnyvale, California 94085. Synopsys is a leading developer and supplier of Electronic Design Automation (''EDA'') software principally used to design semiconductors, including integrated circuits and systems-on-chips.

Respondent Ansys is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 2600 ANSYS Drive, Canonsburg, Pennsylvania 15317. Ansys is a leading provider of Simulation and Analysis (''S&A'') software tools, which model physical effects for an array of products, including semiconductors.

II. The Products and Structure of the Markets

The Proposed Acquisition raises competitive concerns in markets for optical software tools, photonic software tools for designing and simulating photonic devices, and RTL power consumption analysis tools.

Optical software tools are S&A software products that enable engineers to design and simulate optical devices. Optical devices generate, reflect, or refract light, and include LED screens, mirrors, and lenses. Photonic software tools for the design and simulation of photonic devices are S&A software products that enable engineers to design and simulate photonic devices. Photonic devices are those that use photons as a signal to transmit information. Relevant photonic applications include fiber optic cables, LiDAR technology, and solar panels. Synopsys competes in these markets with its optical software tools Code V, LightTools, LucidShape, and ImSym, and its photonic software tool RSoft. Ansys competes in these markets with its optical software tools Zemax and SPEOS and its photonic software tool Lumerical.

RTL power consumption analysis tools are EDA software products used to measure and optimize the power consumption of digital chips at an early stage of the design flow known as Register Transfer Level design. Chip designers value the ability to obtain early readings of a chip's power consumption through RTL power consumption analysis. Other EDA tools cannot perform RTL power consumption analysis. Ansys offers an RTL power consumption analysis tool called PowerArtist, while Synopsys competes with a tool called PrimePower-RTL.

The relevant geographic area in which the Proposed Acquisition may substantially lessen competition in all three markets is global. The major suppliers of optical software tools, photonic software tools for designing and simulating photonic devices, and RTL power consumption analysis tools license those tools in substantially the same form to customers worldwide. All three global markets are highly concentrated, with Respondents holding the largest and second-largest share in each market.

III. Competitive Effects

The Proposed Acquisition will eliminate substantial head-to-head competition between Synopsys and Ansys in each of the three relevant markets. In the market for optical software tools, customers view Respondents' tools as their only two options, and the Proposed Acquisition would leave a single firm with the ability to set prices in the market. In the market for photonics software tools used for design and simulation of photonic devices, Respondents closely monitor each other's tools and compete against each other to win customers. In the RTL power consumption analysis market, Respondents similarly recognize each other's tools as their closest competitors and have innovated in response to that competition. By removing the competitive constraint that Respondents face from direct competition in each of the relevant markets, the Proposed Acquisition is likely to result in higher prices and decreased innovation to the detriment of customers.

Entry into the three markets at issue would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Developing EDA and S&A software tools is capital-intensive, requiring significant time, technical expertise, and investment in research and development. In addition, customers face high switching costs and tend to keep the same tools in their design flows for long periods.

IV. The Proposed Order and the Order To Maintain Assets

The proposed Order and the Order to Maintain Assets (collectively, ''Orders'') effectively remedy the competitive concerns raised by the Proposed Acquisition in each of the three relevant product markets. Pursuant to the proposed Order, the parties are required to divest Synopsys' optical software products and assets and photonic software products and assets aiding the design and simulation of photonic devices, as well as Ansys' PowerArtist product and assets, including certain real property interests, intellectual property, contracts, business information, and intangible rights and property to Keysight Technologies, Inc. (''Keysight''). The parties must accomplish these divestitures no later than 10 days after Synopsys consummates the Proposed Acquisition. The proposed Order allows the Commission to appoint a monitor to oversee the implementation of the Orders and a divestiture trustee in the event the parties fail to divest the products.

Keysight appears to be a suitable purchaser with experience acquiring and improving technological assets. It is financially sound and well positioned to integrate the divestiture assets quickly

and effectively. Keysight already has existing relationships with many customers who purchase the divestiture products; it is a strong purchaser for these products. To aid in the transition to Keysight, the Respondents will provide a limited amount of technological support, enabling Keysight to compete immediately with the divestiture assets to the same extent as Respondents absent the Proposed Acquisition.

The proposed Order contains several provisions to help ensure that the divestitures are successful. The proposed Order requires Respondents Synopsys and Ansys to provide transition services to Keysight as it integrates the divestiture assets to enable Keysight to operate similarly to how the Respondents operated. The proposed Order requires Respondents to operate and maintain the divestiture assets in the ordinary course of business consistent with past practices until such assets are fully transferred to Keysight. For assets that cannot be fully divested, including certain intellectual property and a limited number of customer contracts, the proposed Order provides protections to ensure Keysight can operate the business independent of the Respondents. The proposed Order also protects the confidential information of the divestiture assets. These safeguards include limiting the purposes for which Respondents may use such confidential information and the employees to whom the information may be disclosed.

The proposed Order contains certain provisions to facilitate that the employees most familiar with the divestiture businesses move to Keysight, such as requiring that Respondents for one year facilitate Keysight's hiring of relevant employees of the Respondents' divisions responsible for the divestiture assets. The proposed Order similarly creates a three-year prohibition on Respondents soliciting employees who moved to Keysight to work in the divestiture businesses. With certain limited exceptions, it also prohibits Respondents from enforcing noncompete or non-solicit provisions or agreements against employees who seek or obtain a position at Keysight working on the divestiture businesses.

Under the proposed Order, the Commission appoints a Monitor to ensure that Synopsys complies with its obligations under the Orders and to report to the Commission regarding the same. The Commission appoints S&W Partners LLP (formerly known as Evelyn Partners LLP) as the Monitor. Among the individuals from S&W Partners who will comprise the Monitor team is the head of the firm's Monitoring Trustee Services practice with experience overseeing merger remedies. The monitor team has prior monitoring experience in Commission-ordered divestitures.

In addition to requiring divestitures, the proposed Order prohibits Synopsys from reacquiring any of the divestiture assets for ten years. The proposed Order also includes provisions designed to ensure the effectiveness of the relief, including requirements that the Respondents report on how they are complying with the Order, submit compliance reports, maintain specific written communications, and grant representatives of the Commission access to information and personnel for purposes of determining compliance with the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador

Today, the Commission unanimously authorizes the filing of an administrative complaint and proposed decision and order requiring Synopsys, Inc. and Ansys, Inc. to divest several lines of business, and publishes that order for public comment.[1] It does so because it has concluded that the merger without the divestitures would have violated the Clayton Act's prohibition on mergers ''the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly.'' [2] Because this order is the first settlement of a merger-enforcement action by this Commission under President Donald J. Trump, I write to explain briefly my understanding of the role that remedies should play in the Commission's mission to protect competition in the American economy. But this will not be the Commission's last word on the subject. In due course, this Commission will publish a policy statement on its understanding of the role of remedies.

Competition makes the American economy great. It promotes economic freedom by preventing barriers to new businesses and new ideas. It breeds entrepreneurialism and innovation. The American entrepreneurial spirit is what sets our economy apart from the rest of the world. America is an engine of innovation in no small part because our economy is built on competition—on the drive to create and build better than your opponent in order to convince consumers to buy your product or service, rather than those of your competitor.

The Federal Trade Commission's mandate is to promote economic freedom, innovation, and dynamism by protecting competition. One of the Commission's most vital tasks in protecting competition is to guard against anticompetitive mergers. The danger that mergers and acquisitions could pose to a healthy business environment is obvious. For example, if two rival companies were to merge, the intensity of competition in that market may diminish. With fewer competitors and less competitive pressure, consumers may suffer. Prices may increase. Product quality may decline as firms feel less pressure to maintain the same standard of their products or services in order to win over consumers. The rate of innovation may diminish as companies feel less pressure to develop new products or industrial techniques to improve their product offerings. Consumers may have fewer choices in a market with fewer companies fighting to win their business. And by reducing the number of buyers of labor in a given market, mergers can undermine labor competition and injure American workers too. Safeguarding the markets from mergers that ''may . . . substantially . . . lessen competition, or . . . tend to create a monopoly,'' [3] then, is critical to protecting the vibrancy of the American economy.

But for all these possibilities, the Commission must not reflexively oppose mergers and acquisitions. Innovation does not occur randomly. New ideas do not appear in the market on their own. Taking an idea from its inception to a product offering requires capital, and lots of it. Innovation and competition therefore require healthy capital markets. Upstarts cannot take on dominant incumbents without tremendous resources. And investors will not contribute these resources if they cannot realize a return on that investment.

Mergers and acquisitions are a critical way in which capital fuels innovation because they are part of how investors realize returns on their investments.

[1] 16 CFR 2.34(c).

[2] 15 U.S.C. 18.

[3] 15 U.S.C. 18.

After all, the majority of startup firms in the U.S.—which bring many innovative ideas to market—expect to be acquired rather than go public.[4] If acquisition by a larger company is not a realistic potential exit strategy, investors will have less incentive to invest. Less investment means less fuel for the fires of innovation, which in turn could stunt the development of new technology and economic growth.[5] The benefits of mergers are not limited to startups. If a business is underperforming, an acquisition of that business and replacement of its management can unleash new vitality, innovation, and growth.

But the Commission does not implement industrial policy. It is not a central planner. It is a cop on the beat. When it sees a violation of the competition laws, it blows the whistle and takes the offending businesses to court. When a merger would not violate the antitrust laws, the Commission must get out of the way quickly to avoid bogging down innovation and interfering with the forces of a free and competitive market.

The Commission has a single tool to prevent anticompetitive mergers: litigation to block the merger's consummation.[6] If the Commission pursues litigation to block an anticompetitive deal and successfully litigates it to judgment, the court enjoins the proposed merger.[7] But the Commission, like any litigant, also has the option of settling litigation. A settlement may be the best way to protect competition in some cases for two reasons. First, settlement can temper the potentially over-inclusive effects of an injunction blocking an entire merger. If, for example, a merger has anticompetitive and procompetitive features, a lawsuit blocking the entire merger would protect the public from the merger's anticompetitive effects but would also deny the public the benefit of the procompetitive effects. A settlement that successfully prevents the merger's anticompetitive features can strike a balance that permits the procompetitive aspects to proceed. Assuming the settlement would in fact prevent the merger's anticompetitive effects, the settlement would fully protect the competitive process while also promoting the innovation and growth that the remainder of the merger might foment.

Second, settlement maximizes the Commission's finite enforcement resources. Antitrust litigation is expensive.[8] It is also uncertain. Even when the Commission is confident that a merger will lessen competition, it may have difficulty convincing a district judge of that fact. If the Commission's only option when confronting an anticompetitive merger is litigating a case all the way to judgment, the Commission may have no choice but to decline bringing winnable suits in order to conserve its resources, or to avoid the risk of a loss in a close case. Settlement, by contrast, is much cheaper. If the Commission can successfully settle merger cases that are likely to result in anticompetitive harm, it can block more anticompetitive effects in the aggregate than it would if its only choice were litigating every one of those cases to judgment.

In antitrust parlance, a settlement in a merger case is called a ''remedy'' because it is supposed to remedy a merger's anticompetitive effects.[9] Because most of the Commission's merger-enforcement actions involve horizontal mergers—mergers between direct competitors at the same place in the supply chain—the classic example of a remedy is a divestiture of each competing line of business of the merging parties, such that the consummated merger will not involve the combination of directly competing products or services.[10] We generally call this sort of remedy a ''structural remedy,'' because it affects the structure of the market in which the merged firm operates.[11] A ''behavioral remedy'' or ''conduct remedy,'' by contrast, is an enforceable commitment by the merged firm to engage in some behavior, or not to engage in some behavior.[12]

The Biden FTC expressed hostility to settlements in merger cases. The former Chairwoman said that the FTC should focus on litigating to block

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[4] See Silicon Valley Bank, 2020 Global Startup Outlook, at 7 (last accessed May 28, 2025), *https://www.svb.com/startup-outlook-report-2020/* (58% of U.S. startups surveyed reported acquisition as the most realistic long-term goal); Silicon Valley Bank, 2019 Startup Outlook, US Report (last accessed May 28, 2025) (''2019 Startup Outlook''), *https://www.svb.com/startup-outlook-report-2019/us/* (in 2019, 50% of U.S. startups surveyed report acquisition as the most realistic long-term goal, down from 57% in 2018); National Venture Capital Association, 2019 Yearbook (March 2019), *https://nvca.org/wp-content/uploads/2019/08/NVCA-2019-Yearbook.pdf* (in 2018, 85 venture-backed companies went public, whereas 799 were acquired—nearly ten times as many).

[5] Cf. 2019 Startup Outlook, *supra* note 4 (venture capital is the go-to source of funding with over half of U.S. startups expecting their next source of funding to be from venture capital from 2017 through 2019; fewer than 10% expected their funding to come from organic growth during that same timeframe).

[6] 15 U.S.C. 53(b); 15 U.S.C. 21(b); Merger Review, FTC (last accessed May 28, 2025), *https://www.ftc.gov/enforcement/merger-review* (''When necessary, the FTC may take formal legal action to stop the merger, either in [F]ederal court or before an FTC administrative law judge.'').

[7] See, *e.g., FTC* v. *Kroger.,* No. 3:24–CV–00347–AN, 2024 WL 5053016, at *39 (D. Or. Dec. 10, 2024) (enjoining preliminarily the proposed merger between Kroger and Albertsons in its entirety). Generally, of course, the Commission files an administrative action to block the deal, and simultaneously seeks a preliminary injunction of the merger pending the resolution of the administrative action. See 15 U.S.C. 53(b); FTC, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority (last accessed May 28, 2025), *https://www.ftc.gov/about-ftc/mission/enforcement-authority* (''In the competition context, the Commission has used section 13(b) primarily to obtain preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding.''). For nearly all of the Commission's merger-enforcement actions, however, the preliminary-injunction litigation and subsequent appeal are dispositive. See, *e.g., In re Hackensack Meridian Health, Inc.,* Dkt. 9399, 2021 WL 2379546, at *2 (FTC May 25, 2021) (recognizing that the resolution of a district court action ''could obviate the need for an administrative hearing.''). If the Commission prevails in Federal court, the parties generally abandon the merger and the administrative action is moot. See, *e.g., FTC* v. *Tapestry,* 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (granting FTC's motion for preliminary injunction); Capri and Tapestry abandon plans to merge, citing regulatory hurdles (Nov. 14, 2024), *https://www.cnbc.com/2024/11/14/capri-and-tapestry-abandon-plans-to-merge.html.* If the Commission loses, the merger closes and the Commission appropriately dismisses the pending administrative action. See, *e.g., FTC* v. *Tempur Sealy Int'l,* No. 4:24–CV–02508, 2025 WL 617735 (S.D. Tex. Feb. 26, 2025) (denying FTC's motion for preliminary injunction); Order Returning Matter to Adjudication and Dismissing Complaint, *In the Matter of Tempur Sealy Intn'l, Inc. and Mattress Firm Group Inc.,* Matter No. 2310016 (April 11, 2025).

[8] *New York* v. *Deutsche Telekom AG,* 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020) (''Perhaps most remarkable about antitrust litigation is the blurry product that not infrequently emerges from the parties' huge expenditures and correspondingly exhaustive efforts.''); *Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544, 546 (2007) (''[P]roceeding to antitrust discovery can be expensive.''); *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 633 (1966) (Fortas, J., dissenting) (''[T]here is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation.''); Kimberly L. King, An Antitrust Primer for Trade Association Counsel, 75 Fla. B.J. 26 (May 2001) (''No litigation is more complex, drawn out, or expensive than antitrust litigation.''); Donald I. Baker & Mark R. Stabile, Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel, 48 Bus. Law 395, 396 (1993) (''Antitrust litigation is notoriously fact-intensive, time-consuming and expensive.''); Assistant Attorney General Jonathan Kanter Delivers Farewell Address (Dec. 17, 2024), *https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address* (DOJ can ''accrue expert fees of up to 30 million dollars—just for a single case.'').

[9] See, *e.g.,* FTC, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 17 (Jan. 2012), *https://www.ftc.gov/advice-guidance/competition-guidance/negotiating-merger-remedies* (''BC Remedies Statement'').

[10] *Ibid.*

[11] See United States Note on Remedies in Merger Cases, OECD Working Party No. 3 on Co-operation and Enforcement, at 3 (June 24, 2011), *https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf.*

[12] *Ibid.*

anticompetitive mergers rather than negotiating fixes.[13] And a former Director of the Bureau of Competition lamented that previous FTC structural remedies had not worked as well as had been hoped and announced that the FTC would not spend inordinate time helping merging companies work out a resolution of anticompetitive aspects of their deal.[14] ''Executives should not presume,'' she warned, ''that the FTC will agree to piecemeal divestitures that would allow the remainder of the merger to proceed. The FTC has neither the resources nor the mandate to function as an industrial planner.'' [15]

I am sympathetic to this view. In the past, the Commission became too comfortable with behavioral remedies that were difficult or impossible to enforce.[16] And although research demonstrates that a majority of divestiture settlements succeeded,[17] some did not. One very prominent divestiture package—*Albertsons/Safeway*—failed spectacularly, with the company that divested the stores buying many of them back at bargain-basement prices after the divestiture buyer went bankrupt.[18]

Nevertheless, remedies must be an option for the FTC as it fulfills its mission of protecting competition. First, for all of the Biden FTC's hostile rhetoric against merger settlements, it accepted them in lieu of suing—and it did so even after 2022, when it publicly expressed hostility toward such remedies.[19] Indeed, in the final months of the Biden Administration, the Commission accepted novel remedies in two oil mergers.[20] The Commission also accepted settlements in the middle of litigation.[21]

Second, a categorical refusal to consider settlement complicates subsequent litigation. If the Commission simply disregards proposed settlements that would have addressed a merger's competition problems, nothing stops the parties from presenting that settlement as a remedy to the court during litigation.[22] And nothing stops parties from proposing or executing remedies after the agencies have already initiated litigation. In these circumstances, courts often choose to adjudicate whether the transaction, as modified by the proposed structural or behavioral remedies, would violate section 7 of the Clayton Act. Litigation over a proposed remedy is widely known as ''litigating the fix,'' [23] and it does not always play out well for the agencies.[24] Of course, that is not to say that any and all remedy proposals may lead to the agencies losing their case—inadequate or uncertain remedies will not fare well before a court either.[25] Additionally, antagonism toward remedies may spur firms to employ a ''fix it first'' strategy, meaning that parties purport to address potential competitive concerns before submitting their merger notifications to the Commission for formal review.[26] This may sound like a good approach, but it involves serious risks. For example, the parties may craft and execute their own remedies beyond the oversight and involvement of the Commission. Those remedies may not be adequate to address fully the competitive problems posed by the merger—for example, involving divestiture sales to subpar buyers—but may be sufficient to make litigation challenging the ''fixed'' merger difficult or impossible. A settlement with the Commission, by contrast, ensures that

[13] FTC's new stance: Litigate, don't negotiate, Axios (June 8, 2022), *https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.*

[14] Remarks by Holly Vedova, Director, Bureau of Competition, FTC, at 12th Annual GCR Live: Law Leaders Global Conference, at 10–12 (Feb. 3, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.*

[15] *Id.* at 12.

[16] See, *e.g.,* The Courage to Learn, A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach, American Economic Liberties Project, at 49 (2021) (''Evaluating this experiment [with more behavioral remedies] after the end of the Obama administration, the American Antitrust Institute concluded that it was largely a failure—providing little in the way of deterrence and actually encouraging corporations to circumvent the remedy and creating a situation that precluded realistic oversight and enforcement of the remedy.'').

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

[18] Decision and Order, *In the Matter of Cerberus Institutional Partners V, LP., AB Acquisition LLC, and Safeway Inc.,* Matter No. 1410108 (July 2, 2015); West Coast Grocer Haggen Files for Chapter 11 Bankruptcy, Wall. St. J. (Sept. 9, 2015), *https://www.wsj.com/articles/west-coast-grocer-haggen-files-for-chapter-11-bankruptcy-1441798163;* Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway, Wall. St. J. (Nov. 24, 2015), *https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193;* FTC attorney shines light on failed Albertsons/Safeway remedy, Glob. Competition Rev. (June 17, 2016), *https://globalcompetitionreview.com/gcr-usa/article/ftc-attorney-shines-light-failed-albertsons-safeway-remedy.*

[19] Three years running: Merger enforcement activity continues at historically low levels according to the agencies' most recent HSR report, Westlaw Today (Oct. 23, 2024), *https://www.cov.com/-/media/files/corporate/publications/2024/10/three-years-running-merger-enforcement-activity-continues-at-historically-low-levels-according-to-the-agencies-most-recent-hsr-report.pdf* (''From 2001 to 2020, the agencies averaged almost 20 consent decrees per year; in 2023 they entered two, and in 2024 they entered zero.''); FTC, Merger Enforcement Actions (last accessed May 28, 2025), *https://www.ftc.gov/competition-enforcement-database* (showing that as part of its merger enforcement activity, the FTC accepted five Part 2 consents in 2021, 12 in 2022, and two in 2023).

[20] Decision & Order, *In the Matter of Chevron Corporation,* Matter No. 2410008 (Jan. 17, 2025), *https://www.ftc.gov/system/files/ftc_gov/pdf/2410008c4814chevronhessorder.pdf* (settlement propounding section 7 theory entirely unsupported by judicial precedent); Decision & Order, *In the Matter of ExxonMobil Corporation,* Matter No. 2410004 (Jan. 17, 2025), *https://www.ftc.gov/system/files/ftc_gov/pdf/2410004-c4815-exxonpioneerfinalorderpublic.pdf* (same).

[21] Decision & Order, *In the Matter of Amgen, Inc. and Horizon Therapeutics plc,* Matter No. 2310037 (Dec. 14, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09414amgenhorizon finalorderpublic.pdf* (no divestiture during litigation); Decision & Order, *In the Matter of Intercontinental Exchange, Inc./Black Knight, Inc.,* Matter No. 2210142 (Nov. 3, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/D09413ICEBKFinalOrderPublic.pdf* (divestiture during litigation—five months after complaint).

[22] Parties are More Willing Than Ever to 'Litigate the Fix' in the United States, Glob. Competition Rev. (Oct. 25, 2023), *https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states* (''[T]he FTC or DOJ may determine that the fix is insufficient to address its concerns and decide to sue to block consummation of the proposed transaction. When the latter occurs, the parties are said to be litigating the fix.'').

[23] *Id.*

[24] See, *e.g., FTC* v. *Microsoft,* 681 F. Supp. 3d 1069, 1095 (N.D. Cal. 2023), aff'd, No. 23–15992, 2025 WL 1319069 (9th Cir. May 7, 2025) (denying the FTC's motion for preliminary injunction, highlighting Microsoft's decision, after the FTC filed its complaint, to enter into contracts that mitigate concerns about an intent to foreclose access to the product at issue); *United States* v. *UnitedHealth Grp. Inc.,* 630 F. Supp. 3d 118, 135 (D.D.C. 2022), dismissed, No. 22–5301, 2023 WL 2717667 (D.C. Cir. Mar. 27, 2023) (denying DOJ's bid to block merger, holding proposed divestiture will preserve competition in relevant market); *United States* v. *AT&T,* 310 F. Supp. 3d 161, 251 & n.51, 254 (D.D.C. 2018), aff'd sub nom. *United States* v. *AT&T,* 916 F.3d 1029 (D.C. Cir. 2019) (denying DOJ's bid to block merger, where parties' arbitration agreement undercut governments' theory of competitive harm).

[25] *FTC* v. *Sysco Corp.,* 113 F. Supp. 3d 1 (D.D.C. 2015) (enjoining the proposed transaction, noting that the proposed remedy was not sufficient to eliminate the anticompetitive effects of the transaction); *FTC* v. *Libbey, Inc.,* 211 F. Supp. 2d 34 (D.D.C. 2002) (enjoining the proposed transaction, finding that even as modified the proposed deal was likely to substantially lessen competition); Transcript of Pre-Hearing Conference at 18, 21–29, *FTC* v. *Ardagh Grp.,* No. 13–1021 (D.D.C. Sept. 24, 2013), *https://www.ftc.gov/sites/default/files/documents/cases/130924ardaghtranscript.pdf* (bench ruling to not consider proposed divestiture where initial contours of parties' structural remedy proposal came after the close of discovery on the eve of the CEO's deposition and without an identified buyer so that it was not definitive enough for the FTC to evaluate).

[26] Fix-it-first: navigating a seismic shift in US antitrust agency approaches to merger remedies, Financier Worldwide (Aug. 2023), *https://www.financierworldwide.com/fix-it-first-navigating-a-seismic-shift-in-us-antitrust-agency-approaches-to-merger-remedies.*

the Commission can bring its expertise and experience to bare, while also promoting transparency and accountability on merger remedies. Thus, if the Commission takes remedies off the table, it will find itself fighting a more complex battle in court, and effectively little by little relegates its judgment about what constitutes an acceptable remedy to the parties themselves and the judiciary.

Finally, categorically refusing to settle merger cases diminishes the effect of the FTC's finite enforcement resources. As already noted, litigating antitrust cases is expensive—in terms of the costs the Commission must bear for experts and other costs related to discovery and trial, but also in terms of staff's time. Such litigation can tie up staff for six to eight months or even longer.[27] Every litigation entails costly tradeoffs. Every case the Commission brings forecloses other potential merger cases or actions challenging anticompetitive conduct. Thus settlements, where they resolve the competitive concerns that a proposed transaction creates, save the Commission time and money that it can then deploy toward other matters. Settlements therefore must be on the table if the FTC is to protect competition efficiently and as fully as its resources allow.

Although I believe the Trump FTC must be open to settling merger cases, I am clear-eyed about the dangers of inadequate or unworkable settlements. The object of settlement is to protect competition as fully as would successful litigation without the expense and risk of litigation. It is not to paper over an anticompetitive transaction.

Accordingly, I believe that the Commission should accept settlements in merger cases only when it is confident that the settlement will protect competition in the relevant market to the same extent that successful litigation would. Specifically, experience teaches that behavioral remedies should be treated with substantial caution. They are often difficult or impossible for the Commission to enforce effectively and can lock the Commission into the status of a monitor for individual firms rather than a guardian of competition across the entire economy. They are therefore disfavored.

Nor should the Commission ordinarily accept a structural remedy unless it involves the sale of a standalone or discrete business, or something very close to it, along with all tangible and intangible assets necessary (1) to make that line of business viable, (2) to give the divestiture buyer the incentive and ability to compete vigorously against the merged firm, and (3) to eliminate to the to the extent possible any ongoing entanglements between the divested business and the merged firm. The Commission must also be confident that the divestiture buyer has the resources and experience necessary to make that standalone business competitive in the market. Unless these conditions obtain, the Commission should proceed to litigation. When confronted with an anticompetitive merger, I will favor litigation to guarantee that competition will be protected rather than accepting an uncertain settlement.

Today's settlement satisfies these requirements. Staff conducted a thorough investigation and identified substantial anticompetitive effects likely to flow from the proposed transaction across three relevant markets.[28] Had the Commission proceeded to litigation, I am confident the Commission would have prevailed in demonstrating that the merger as originally filed would have violated section 7 of the Clayton Act. But the parties proposed divestitures in the three relevant markets,[29] and the divestitures satisfy the conditions of a successful structural remedy.[30] They involve the sale of standalone or discrete business units, or as close to it as possible, with all tangible and intangible assets necessary for a buyer to succeed in the market after the divestiture.[31] And the divestiture buyer has a long track record of acquiring assets in related markets and making them successful, as well as the financial resources to compete effectively after the divestiture.[32]

The upshot of today's Commission action for the American people and business community is that the Commission is willing to consider settlements in merger cases. But it must do so consistently with its mission to protect competition to the fullest extent possible, maximizing its resources, and in light of the lessons learned from remedies of the past. If the Commission is confident that a settlement will prevent a substantial lessening of competition as fully as would litigation, while sparing the Commission and the American people the expense and uncertainty of litigation, then it should accept that settlement.

But the Commission's standards for evaluating remedies should be exacting, and its strong preference should be for structural remedies over conduct remedies. The Commission must learn the lessons of unsuccessful past remedies and avoid returning to an era when it sometimes accepted weak remedies in lieu of the hard work of litigating to protect competition. Learning from the past, the Trump FTC should err in favor of litigating to protect competition where it believes it can prevail, rather than accepting a questionable settlement. But I am confident that accepting sound remedies in the right cases will allow the Commission to support a strong American economy that promotes human flourishing through competition and economic freedom.

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[27] See, *e.g., FTC* v. *Tempur Sealy Int'l,* No. 4:24–CV–02508, 2025 WL 617735, at *9 (S.D. Tex. Feb. 26, 2025) (roughly seven months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC* v. *Tapestry,* 755 F. Supp. 3d 386, 406 (S.D.N.Y. 2024) (roughly six months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC* v. *Kroger Company,* No. 3:24–cv–00347–AN, 2024 WL 5053016, at *5 (D. Or. Dec. 10, 2024) (roughly ten months from filing of complaint and motion for preliminary injunction to district court ruling); *FTC* v. *Cmty. Health Sys.,* 736 F. Supp. 3d 335, 350 (W.D.N.C. 2024), opinion vacated, appeal dismissed sub nom. *FTC* v. *Novant Health,* No. 24–1526, 2024 WL 3561941 (4th Cir. July 24, 2024) (roughly four and a half months from filing of complaint and motion for preliminary injunction to district court ruling, and another month for appellate resolution after which parties abandoned transaction); *FTC* v. *IQVIA Holdings,* 710 F. Supp. 3d 329, 346 (S.D.N.Y. 2024) (just under six months from filing of complaint and motion for preliminary injunction to district court ruling). See also Farrell J. Malone & Ian C. Thresher, Leaving Time to Litigate: Lessons from Recent Merger Challenge, Antitrust Source (Oct. 2018) (''among the 13 cases that were litigated to a decision in 2011–2017, the average time from the filing of a complaint until a district court's decision on the merits has increased from 99 days in 2011 to as high as 221 days in 2017.'').

[28] Complaint, *In the Matter of Synopsys, Inc. and ANSYS, Inc.,* Matter No. 2410059, ¶¶ 5–18 (May 27, 2025).

[29] See Decision and Order, *In the Matter of Synopsys, Inc. and ANSYS, Inc.,* Matter No. 2410059 (May 27, 2025) (''Decision and Order''); Analysis of Agreement Containing Consent Orders, *In the Matter of Synopsys, Inc. and ANSYS, Inc.,* Matter No. 2410059, at 3–4 (May 27, 2025) (''AAOC'').

[30] See, *e.g.,* BC Remedies Statement, *supra* note 9.

[31] See Decision and Order.

[32] AAOC at 3–4.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2025–D–1150]

Hernia Mesh—Package Labeling Recommendations; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.