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Unscrambling the Organic Eggs

THE GROWING DIVERGENCE BETWEEN THE DOJ AND THE FTC IN MERGER REVIEW AFTER *WHOLE FOODS*

INTRODUCTION

When the merger between Whole Foods Market Inc. (“Whole Foods”) and Wild Oats Markets, Inc. (“Wild Oats”) was first announced in 2007, few people suspected that this \$565 million merger would set off such a massive (organic) food fight, forcing the Federal Trade Commission (“FTC”), the Department of Justice (“DOJ”), and the judiciary to re-evaluate their roles in the merger process.¹ On March 6, 2009, Whole Foods and the FTC announced a settlement.² The tortuous legal battle between the FTC and Whole Foods might be over, but the most important result of the battle is not the settlement between the FTC and Whole Foods. Rather, it is the D.C. Circuit Court of Appeals’ controversial decision in *FTC v. Whole Foods Market, Inc.*, which articulated a preliminary injunction standard making it much easier for the FTC to block future mergers, compared to its antitrust enforcement counterpart at the DOJ.³ In a system of shared responsibility for enforcement of the federal antitrust laws, such an outcome is unacceptable. Merging parties should expect the same treatment and burden in the merger review process. The substantive outcome of a proposed merger should not depend on the arbitrary allocation of the merger to either the FTC or the DOJ for review. However, after *Whole Foods*, the outcome of a proposed transaction might very well depend on which antitrust enforcement agency is reviewing it.

¹ See Andrew Martin, *Whole Foods Makes Offer for a Smaller Rival*, N.Y. TIMES, Feb. 22, 2007, at C1. The deal was a tender offer for all of Wild Oats stock at a price of \$18.50 per share—a 23% premium over the average share price in January of 2007. *Id.*

² Press Release, Fed. Trade Comm’n, FTC Consent Order Settles Charges that Whole Foods’ Acquisition of Rival Wild Oats was Anticompetitive (March 6, 2009), available at <http://www.ftc.gov/opa/2009/03/wholefoods.shtm>.

³ 548 F.3d 1028 (D.C. Cir. 2008), *amended and reissued*, 548 F.3d 1028 (D.C. Cir. 2008).

In *Whole Foods*, the FTC sought a preliminary injunction to stop the proposed merger of two organic supermarkets, Whole Foods and Wild Oats.⁴ The FTC argued that Whole Foods and Wild Oats were the two largest competitors in the “premium, natural, and organic supermarkets” or “PNOS” market and a merger of the two companies would harm consumers by reducing competition in a number of geographic markets.⁵ The D.C. District Court rejected the FTC’s argument that PNOS were a distinct market and concluded that a merger of Whole Foods and Wild Oats would not substantially lessen competition in the broad market of all supermarkets.⁶ Nearly a full year after the closing of the merger and the integration of the two firms,⁷ a panel of D.C. Circuit judges (Judge Brown, Judge Tatel, and Judge Kavanaugh) issued three separate opinions reversing the denial of the preliminary injunction.⁸ In *Whole Foods*, the D.C. Circuit explicitly articulated a standard that significantly reduces the FTC’s burden of proof in its request for preliminary injunctions. This lowered preliminary injunction standard, and the ability of the FTC to commence administrative proceedings, create a disturbing perception that the outcome of a challenged merger depends on which agency is reviewing the merger, rather than on the antitrust merits of the case.

The effect of the *Whole Foods* decision has already been felt. Less than a week after Whole Foods and the FTC settled, a \$1.4 billion merger between CCC Holdings, Inc., (“CCC Holdings”) and Mitchell International, Inc., (“Mitchell International”) was abandoned after a judge relied on *Whole*

⁴ Preliminary injunctions are used by the antitrust enforcement agencies to “preserve the status quo by preventing the consummation of a merger.” AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MERGER AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 546 (3d. ed. 2008) [hereinafter UNDERSTANDING THE ANTITRUST ISSUES]. Normally, a plaintiff seeking injunctive relief must prove: (1) irreparable harm if the injunction is not granted, (2) this injury outweighs any harm to the defendant by the injunction, (3) the plaintiff has a substantial likelihood of success on the merits, and (4) the injunction is in the public interest. *Id.* at 564-65. For a more in depth discussion for each of the different factors, see *id.* at 570-95.

⁵ *Whole Foods*, 548 F.3d at 1032.

⁶ *FTC v. Whole Foods Mkt, Inc.*, 502 F. Supp. 2d 1, 49-50 (D.D.C. 2007), rev’d., 533 F.3d 869 (D.C. Cir. 2008).

⁷ See Alicia Wallace, *Boulder’s Whole Foods-Wild Oats: One Year Later*, BOULDER DAILY CAMERA, Aug. 25, 2008, at D1. There were significant changes in personnel, suppliers, distribution systems, and leasing agreements. *Id.*

⁸ *FTC v. Whole Foods Mkt, Inc.*, 533 F.3d 869 (D.C. Cir. 2008), *reprinted as amended*, 548 F.3d 1028 (D.C. Cir. 2008).

Foods to issue a preliminary injunction that stopped the proposed transaction.⁹ In November 2008, the three-judge panel had amended and reissued its original opinions in *Whole Foods*, so that Judge Tatel no longer concurred in Judge Brown's opinion, but rather only with the judgment of the court.¹⁰ As a result of Judge Tatel's revision, Judge Brown's opinion was no longer the majority opinion of the court and there were questions about the precedential value of the decision.¹¹ However, *FTC v. CCC Holdings, Inc.* made it clear that *Whole Foods* and its articulation of the preliminary injunction standard for the FTC was now binding precedent.¹²

In a system where the DOJ and the FTC have shared responsibility for enforcement of the federal antitrust laws, merging parties should expect comparable treatment and burden, as well as a comparable outcome, regardless of whether the FTC or the DOJ is reviewing their merger.¹³ Antitrust enforcement has an enormous impact on the economy, so consistency, predictability, and fairness are crucial in the merger review process. However, the settlement between the FTC and *Whole Foods* after a prolonged and expensive fight, and the termination of the proposed merger between CCC Holdings and Mitchell International, provide disturbing illustrations that the choice of enforcement agency for merger review clearly does influence the outcome of a transaction. In light of *Whole Foods*, the best outcome for parties to a proposed merger would be for the DOJ to clear the proposed transaction.

This Note will address the growing divergence in merger enforcement between the FTC and the DOJ. It argues

⁹ See *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 30 (D.D.C. 2009). On March 9, 2009, Judge Collyer granted the FTC's request for a preliminary injunction. On March 11, 2009, the parties announced the termination of the merger. See Press Release, CCC Information Services Inc., CCC-Mitchell mutually agree to terminate merger (March 11, 2009), available at http://ccc.cccis.com/filebin/pdf/CCCMITCHELL_Nonpursuit.pdf.

¹⁰ *Whole Foods*, 548 F.3d at 1028.

¹¹ See *id.* at 1061 n.8 (Kavanaugh, J., dissenting). According to Judge Kavanaugh, "this confused decision will invite years of uncertainty and litigation over what the holding of this case is—a separate but important problem with the Court's approach." *Id.*

¹² See *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d at 36. According to Judge Collyer, "precedents irrefutably teach that in this context 'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases. *Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law." *Id.* at 36 n.11.

¹³ See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 129 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter ANTITRUST MODERNIZATION REPORT].

that the FTC's lower preliminary injunction standard and its ability to commence administrative litigation gives the FTC a significant advantage over the DOJ in challenging a merger and extracting a settlement, a result that is unacceptable in a dual enforcement system. Specifically, the Note argues that after *Whole Foods*, the ultimate decision as to whether a merger may proceed depends on which agency is reviewing the transaction, which can lead to both expensive litigation and disruptive post-closing divestitures. Part I examines the relevant antitrust statutes, the enforcement agencies involved, and how the merger review process works. Part II reviews the history of the FTC's challenge to the merger between Whole Foods and Wild Oats. It begins with a discussion of the merger, followed by a discussion of the district court and the D.C. Circuit Court of Appeals' decisions. It concludes with a review of the settlement between the FTC and Whole Foods. Part III discusses how the divergence in preliminary injunction standards applicable to the DOJ and the FTC, and the ability of the FTC to pursue administrative trials, produce inconsistent results between the FTC and the DOJ in merger enforcement. This Part argues that due to these divergences, the choice of which antitrust enforcement agency is to review a proposed merger is outcome-determinative.¹⁴ Finally, Part IV suggests two approaches to harmonizing the divergences: a judicial solution and a legislative solution. It argues that in light of *CCC Holdings, Inc.*, a judicial solution is unlikely, so the most politically promising solution to stem the growing divergence between the DOJ and the FTC enforcement standards is for Congress to amend the Federal Trade Commission Act to specify that the same preliminary injunction standard applies to both enforcement agencies.

¹⁴ See American Bar Association, Public Comments Submitted to AMC Regarding Government Enforcement Institutions: Differential Merger Enforcement Standards, at 9 (Oct. 28, 2005), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051028_ABA_Fed_Enforc_Inst_Differential_S tandards.pdf [hereinafter ABA Comments re Differential Standards].

I. THE PROCESS OF MERGER REVIEW BY THE DOJ AND THE FTC

The DOJ's Antitrust Division and the FTC have shared responsibility for enforcement of the federal antitrust laws.¹⁵ To avoid duplication of effort, the agencies consult with one another and a proposed transaction is "cleared" to one agency or the other for review in a process known as the "clearance process."¹⁶ This Part examines how the dual enforcement system functions. It begins with a discussion of the relevant federal antitrust statutes. It then discusses the clearance process between the FTC and the DOJ, the decision to challenge a proposed transaction in court or in an administrative trial (for the FTC), and the potential remedies available to the enforcement agencies, such as divestitures, for a merger with anticompetitive concerns.

A. *Overview of the Applicable Antitrust Statutes*

At the federal level, the framework for the merger review process is contained in a few relevant statutes, namely Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the FTC Act.¹⁷ Modern antitrust law really began with the enactment of the Sherman Act in 1890.¹⁸ Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade.¹⁹ Section 2 prohibits monopolies and attempts at monopolies.²⁰ The Sherman Act only prohibits restraints of trade that are unreasonable.²¹ To build upon the protection afforded in the Sherman Act,

¹⁵ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 129; Fed. Trade Comm'n, Bureau of Competition, Guide to the Antitrust Laws, the Enforcers, <http://www.ftc.gov/bc/antitrust/enforcers.shtm>.

¹⁶ Fed. Trade Comm'n, Bureau of Competition, Guide to the Antitrust Laws, Mergers: Premerger Notification and the Merger Review Process, http://www.ftc.gov/bc/antitrust/premerger_notification.shtm.

¹⁷ Of course, every state and the District of Columbia have its own statutes regulating the competitive effects of mergers and acquisitions. See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 678 (2003). However, this note will only focus on the federal statutes.

¹⁸ See Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 45 (2004) (tracking the development of modern antitrust law and analyzing numerous cases involving closed merger challenges by the FTC and DOJ).

¹⁹ 15 U.S.C. § 1 (2006).

²⁰ 15 U.S.C. § 2 (2006).

²¹ Fed. Trade Comm'n, Bureau of Competition, Guide to the Antitrust Laws, the Antitrust Laws, http://www.ftc.gov/bc/antitrust/antitrust_laws.shtm.

Congress passed the Clayton Act in 1914,²² amended it in 1950 with the Celler-Kefauver amendments to close some loopholes,²³ and amended it again in 1976 with the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (“HSR Act”).²⁴

1. The Clayton Act

Today, the principal federal antitrust statute is the Clayton Act, specifically Section 7, which prohibits mergers or acquisitions “in any line of commerce or in any activity affecting commerce in any section of the country, [when] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”²⁵ Even though the Clayton Act was much more expansive than the Sherman Act, the lack of a requirement for pre-closing notifications meant that the government could challenge an anticompetitive transaction only after it closed.²⁶ By then, it was often too late to enforce the Clayton Act.²⁷ Aware of the substantial costs and time involved in such post-consummation challenges, Congress enacted the HSR Act with the goal of “giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated.”²⁸ The HSR Act and the establishment of the premerger notification program would give the antitrust enforcement agencies such an opportunity.

2. The Hart-Scott-Rodino Act

The HSR Act is often credited with establishing the modern merger review process by giving the DOJ and the FTC

²² Clayton Act, 15 U.S.C. § 18 (2006).

²³ Celler-Kefauver Amendments, Pub. L. No. 81-899, 64 Stat. 1125 (Codified as amended at 15 U.S.C. § 18 (2006)). After the Celler-Kefauver amendments, Section 7 of the Clayton Act covers both asset acquisitions and stock acquisitions. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962). In *Brown Shoe*, the Supreme Court reviewed the legislative history and purpose of the amendments. *See id.* at 315-23.

²⁴ Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (Current version at 15 U.S.C. § 18a (2006)).

²⁵ 15 U.S.C. § 18 (2006).

²⁶ *See Sher*, *supra* note 18, at 52-53.

²⁷ Litigation often took years and even if the government won, there was often no remedy because the firms were already well integrated. *Id.* at 52-54.

²⁸ H.R. REP. No. 94-1373, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2637.

the ability to block mergers before consummation.²⁹ Before the passage of the HSR Act, it was very difficult to challenge a merger successfully.³⁰ Without advance notice of the transaction, mergers were typically challenged after they were already consummated.³¹ The government also had very little time to prepare, and carried the burden of proof for obtaining a preliminary injunction.³² Since these challenges often took years to litigate, it was very difficult for courts to come up with an appropriate remedy to restore competition—“that is, to unscramble the eggs”—because it was very difficult to recreate the acquired entity as an independent “competitively viable firm.”³³ So even when the government was successful in its challenge, it was often a hollow victory and too late to gain any “meaningful relief.”³⁴

The Hart-Scott-Rodino Act changed all of this by requiring the parties to notify the FTC and the DOJ about mergers and acquisitions of certain sizes before they occur, and to give the antitrust agencies time to review such transactions before consummating the proposed transaction.³⁵ Under the HSR Act, the parties to certain proposed transactions must notify both the FTC and the DOJ by submitting a “Notification and Report Form” with some information about the parties and

²⁹ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 47, 151; Sher, *supra* note 18, at 52-54.

³⁰ See H.R. REP. No. 94-1373, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 2637, 2640; see also Sher, *supra* note 18, at 52-54 (discussing the difficulties of post-consummation challenges).

³¹ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 47; Sher, *supra* note 18, at 52-53.

³² See H.R. REP. No. 94-1373, at 8 (1976), as 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 has no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7. The weight of this burden cannot be overemphasized.”).

³³ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 47. “Unscrambling the eggs” is a term used to express the difficulty of a divestiture remedy when a merger is already closed and the assets of the combined firms are integrated. H.R. REP. No. 94-1373, at 4-5 (1976), as reprinted in 1976 U.S.C.C.A.N. 2637, 2640-41 (After closing, “the acquired firm’s assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, restrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly ‘scrambled’ together.”).

³⁴ H.R. REP. No. 94-1373, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 2637, 2640. See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 151.

³⁵ See 15 U.S.C. § 18a(a) (2006); see also Fed. Trade Comm’n, Bureau of Competition, Guide to the Antitrust Laws, Mergers: Premerger Notification and the Merger Review Process, http://www.ftc.gov/bc/antitrust/premerger_notification.shtm.

the proposed transaction.³⁶ The HSR Act does not require a premerger filing for all mergers or acquisitions.³⁷ The filing thresholds are updated annually, but generally, the parties must be of a certain size and the deal must be of a certain value.³⁸ Under the HSR Act, advance notice must be provided to both the DOJ and the FTC even though only one agency will review the proposed merger.³⁹ The HSR Act also enables the agencies to obtain documents and other necessary information from the parties and third parties to assess whether to challenge the proposed transaction.⁴⁰ Congress's solution to the time constraint problem was to establish a thirty-day waiting period.⁴¹ During this time, the parties are prohibited from closing their deal unless the waiting period is granted early termination by the FTC or the DOJ.⁴² As a result of the HSR Act, challenges to consummated deal are relatively rare because the agencies are able to challenge mergers before they are consummated.⁴³ Nevertheless, over the last decade, the FTC has been much more aggressive in challenging closed deals where the anticompetitive concerns were not apparent during the merger review process.⁴⁴

³⁶ Fed. Trade Comm'n, Bureau of Competition, *Hart-Scott-Rodino Premerger Notification Program Introductory Guide I, What is the Premerger Notification Program? An Overview*, at 6, (2008) available at <http://www.ftc.gov/bc/hsr/introguides/guide1.pdf> [hereinafter *Guide I*]. Copies of the form and instructions are available at <http://www.ftc.gov/bc/hsr/hsrforms.htm>.

³⁷ In addition to the size of the parties or of the deal, there are a limited number of exceptions to the HSR Act. See 15 U.S.C. § 18a(c) (2006) (exempting certain transactions from HSR Act's requirements).

³⁸ See Fed. Trade Comm'n, Bureau of Competition, *Hart-Scott-Rodino Premerger Introductory Guide II, To File or Not to File—When you must file a premerger notification report form*, available at <http://www.ftc.gov/bc/hsr/introguides/guide2.pdf>. Guide II describes the criteria used to determine whether a transaction is subject to the requirements of the HSR Act.

³⁹ *Guide I*, *supra* note 36, at 11.

⁴⁰ *Id.* at 12.

⁴¹ See *id.* at 9. In the case of an all cash tender offer or an acquisition in bankruptcy, there is a fifteen-day waiting period. *Id.*

⁴² *Id.* at 9.

⁴³ Sher, *supra* note 18, at 41.

⁴⁴ See *id.* at 42 (describing how since 2001, the FTC has challenged consummated mergers involving MSC Software, Chicago Bridge, Airgas, and Aspen Technology, as well as seriously investigated dozens more); see also ABA Comments re Differential Standards, *supra* note 14, at app. a 2-7 (list of mergers and acquisitions the FTC has challenged post-closing); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 319-20 (2003) ("The FTC today is aggressively continuing to use the administrative litigation process in the manner envisioned by the agency's creators . . . the FTC's administrative litigation process has become the forum in which many of our day's most complex and interesting antitrust issues are being litigated.").

3. The Federal Trade Commission Act

The FTC is an administrative agency created by Congress in 1914 under the Federal Trade Commission Act (“FTC Act”).⁴⁵ Only the FTC can bring cases under the FTC Act.⁴⁶ The FTC was formed to police “unfair methods of competition”⁴⁷ and “unfair or deceptive acts or practices in or affecting commerce.”⁴⁸ Congress created the FTC to supplement the DOJ’s enforcement of the antitrust laws, and to help develop and clarify antitrust policy by giving the FTC adjudicative power under Section 5(b) of the FTC Act.⁴⁹ As a result, the FTC can challenge a transaction in federal courts as well as through an internal administrative proceeding (known as a Part III proceeding) before an administrative law judge.⁵⁰ Whether it wins or loses at the federal court level, the FTC can still challenge a transaction through administrative litigation. This allows the FTC to initiate an administrative proceeding to challenge a transaction pre-consummation or post-consummation.⁵¹

B. Overview of the Merger Review Process

Although the DOJ’s Antitrust Division and the FTC have shared responsibility for enforcement of the federal antitrust laws, in practice, only one agency is responsible for

⁴⁵ See 15 U.S.C. § 41 (2006). Fed. Trade Comm’n, Bureau of Competition, Guide to the Antitrust Laws, The Antitrust Laws, http://www.ftc.gov/bc/antitrust/antitrust_laws.shtm.

⁴⁶ See *id.* Unlike the DOJ, the FTC does not have criminal enforcement authority.

⁴⁷ The term “unfair methods of competition” is generally thought to mean the same as the prohibitions of the Sherman and Clayton Acts. ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 129.

⁴⁸ 15 U.S.C. § 45(a)(2) (2006) (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”).

⁴⁹ Hoffman & Royall, *supra* note 44, at 319-20. See American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Dual Federal Merger Enforcement, at 2 (Oct. 28, 2005) (“[T]he FTC was designed to function as an expert body in antitrust law, capable of assessing and adjudicating the competitive effects of complex transactions”) [hereinafter ABA Comments re Dual Enforcement]; Fed. Trade Comm’n, Guide to the Federal Trade Commission, <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm> (“Congress created the FTC as a source of expertise and information on the economy.”).

⁵⁰ The FTC may seek a preliminary permanent injunction in federal court under 15 U.S.C. § 53(b) (2006). It can commence an administrative proceeding under 15 U.S.C. § 45(b)-(c) (2006).

⁵¹ See generally Hoffman & Royall, *supra* note 44.

investigating a particular merger. As the law enforcement agency of the executive branch, the DOJ is entrusted with the power to bring criminal antitrust cases or civil actions seeking an injunction and to take steps to remedy past violations.⁵² As an administrative agency, the FTC is allowed to seek a preliminary or permanent injunction in federal court or commence an internal administrative proceeding.⁵³ Despite criticism that this dual enforcement arrangement was unnecessarily duplicative, it has worked relatively well with few conflicts between the two agencies.⁵⁴ One of the reasons for the lack of clashes is that over the years, the two agencies have developed a “clearance process” where the FTC and the DOJ will consult with each other, and the matter is “cleared” to one agency for review.⁵⁵

1. The Clearance Process

To avoid duplication of enforcement efforts, the DOJ and the FTC will consult with each other to decide which agency will conduct a formal investigation of a particular transaction. During the waiting period, the FTC and the DOJ will assign the filing to a specific division or section within the agency having expertise over the industry of the proposed transaction.⁵⁶ Initially, both agencies will perform a preliminary review of the proposed transaction.⁵⁷ If the assigned division or section within one agency determines that a formal investigation is necessary, that agency will seek clearance from the other agency to conduct an investigation.⁵⁸ Since only one agency will be conducting the investigation of the proposed

⁵² Dep’t of Justice, Antitrust Div., Mission of the Antitrust Division, <http://www.justice.gov/atr/about/mission.htm>.

⁵³ See *supra* note 50.

⁵⁴ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 129. According to the Antitrust Modernization Report, “[c]ritics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement.” *Id.*

⁵⁵ *Id.* at 132-33; *Guide I*, *supra* note 36, at 11.

⁵⁶ AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW 26 (3d. ed. 2006) [hereinafter MERGER REVIEW GUIDE].

⁵⁷ *Guide I*, *supra* note 36, at 11.

⁵⁸ MERGER REVIEW GUIDE, *supra* note 56, at 26-27, 134-36. At the DOJ, the Office of Operations will ask the Premerger Office at the FTC for clearance to investigate. At the FTC, the Premerger Office will notify the Office of Operations at the DOJ to coordinate which agency will conduct the investigation. *Id.* at 27.

transaction, neither agency will contact the parties or third parties until it has been decided which agency will be responsible for investigating the proposed transaction.⁵⁹ This minimizes the potential for confusion and duplication of efforts if both agencies contacted the parties at different times for the same matter.⁶⁰

This clearance process determines which agency will conduct the investigation; this is usually the agency with the most relevant staff expertise and experience in the industry potentially affected by the proposed merger.⁶¹ For example, the FTC is responsible for industries where consumer spending is high, such as health care, pharmaceuticals, food, energy, computer technology, and internet services.⁶² If there are disputes over which agency has more expertise in a given area, the matter is passed to increasingly senior staff until it is resolved, potentially all the way up to the Chairman of the FTC and the Assistant Attorney General for Antitrust at the DOJ.⁶³ As a result of the clearance process, only one agency takes control of the investigation.

⁵⁹ *Guide I*, *supra* note 36, at 11; MERGER REVIEW GUIDE, *supra* note 56, at 136. However, any interested person, including the parties to the proposed transaction, is free to present information to either or both agencies at any time. *Guide I*, *supra* note 36, at 11.

⁶⁰ See *Guide I*, *supra* note 36, at 11.

⁶¹ See MERGER REVIEW GUIDE, *supra* note 56, at 27. In 2002, the DOJ and the FTC reached an accord to explicitly allocate certain industries to each agency. See Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), available at <http://www.justice.gov/atr/public/10170.pdf>. However, the accord was short-lived and ended after objections from Senator Ernest F. Hollings. As a result, the two agencies have continued to decide based on staff expertise and experience. See Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1308-10 (2007) (discussing the failure of the 2002 accord and potential approaches to improving the interaction between the FTC, the DOJ, and Congress).

⁶² Fed. Trade Comm'n, Bureau of Competition, An FTC Guide to the Antitrust Laws: The Enforcers, <http://www.ftc.gov/bc/antitrust/enforcers.shtm>. However, if one agency decides not to initiate an investigation, even in an industry where it has quite an amount of expertise in, the other agency is free to start an investigation. See MERGER REVIEW GUIDE, *supra* note 56, at 135.

⁶³ See ABA Comments re Dual Enforcement, *supra* note 49, at 11 & n.16; MERGER REVIEW GUIDE, *supra* note 56, at 135. Although not common, these disputes between the agencies may cause significant delays in the merger review process. *Id.* at 136.

2. Further Investigation Required: Second Request

Once clearance is granted, the investigating agency will notify the merging parties that an investigation has been opened. The investigating agency can now obtain information from various sources, including the merging parties.⁶⁴ After the initial investigation, the agency can decide to do three things: it can grant early termination of the waiting period, allow the waiting period to expire, or it can issue a Request for Additional Information (a “second request”).⁶⁵ The second request is commonly used to allow the staff more time to investigate,⁶⁶ and will often require the parties to provide more information about the transaction and its potential anticompetitive effects.⁶⁷ After the parties have substantially complied with the second request for information, there is an additional thirty-day waiting period, after which the agency must decide whether to approve the merger, seek a preliminary injunction in federal court to stop the merger, or seek a voluntary agreement not to close the deal until further investigation can be completed.⁶⁸ During this time, the parties can meet with review officials to argue that their transaction should not be challenged.⁶⁹ The investigating agency can also grant an early termination of the waiting period, or allow it to expire if they decline to pursue a challenge.⁷⁰ Either way, the parties are free to close their transaction at that point.

3. Agency Action: Approve or Litigate

At the DOJ, the staff’s recommendation is first reviewed by the appropriate section chiefs and increasingly senior officials before it goes to the ultimate decision maker, the

⁶⁴ See *Guide I*, *supra* note 36, at 12.

⁶⁵ See MERGER REVIEW GUIDE, *supra* note 56, at 138.

⁶⁶ See *id.* at 27-29. The extended waiting period is normally thirty days from the date of substantial compliance by both merging parties. It is ten days for “a cash tender offer or certain bankruptcy filings.” *Guide I*, *supra* note 36, at 13.

⁶⁷ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 151; see also *Guide I*, *supra* note 36, at 12.

⁶⁸ MERGER REVIEW GUIDE, *supra* note 56, at 29; see also 15 U.S.C. § 18a(e)(2) (2006). Parties are often willing to extend the time period voluntarily because it gives them more time to prepare and to meet with reviewing officials to persuade them not to challenge the transaction. MERGER REVIEW GUIDE, *supra* note 56, at 247-50.

⁶⁹ MERGER REVIEW GUIDE, *supra* note 56, at 29.

⁷⁰ 15 U.S.C. § 18a(b)(2) (2006); see also *Guide I*, *supra* note 36, at 10.

Assistant Attorney General for Antitrust.⁷¹ At the FTC, the staff recommendation is forwarded to the appropriate deputy directors and directors before it goes to the final decision makers, the five commissioners.⁷² If the merger is approved, or if thirty days has passed since the parties substantially complied with the second request, the parties are free to consummate their transaction.⁷³ If the investigating agency determines that a merger may substantially lessen competition, the agency can try to reach a settlement, or it can seek a preliminary and permanent injunction in the appropriate district court to enjoin the consummation of the merger.⁷⁴

In practice, the agencies will usually try to negotiate with the merging parties to reach a settlement, either through a consent decree where the parties agree to a divestiture of certain assets to ease concerns about the merger's anticompetitive effects, or through a less common "fix-it-first" restructuring of their transaction.⁷⁵ Depending on the circumstances, parties can either abandon the transaction,⁷⁶ or agree to settle as a way to avoid costly and time-intensive litigation that could delay the closing of the transaction and the ensuing efficiencies of the merger.⁷⁷

C. *Proceeding to Litigation: Challenging a Proposed Transaction*

1. Seeking Injunctive Relief in Federal Court

If the merging parties and the enforcement agency fail to negotiate a settlement, the FTC and the DOJ are authorized

⁷¹ MERGER REVIEW GUIDE, *supra* note 56, at 29. For a more in depth discussion of the process and the decision makers that are involved, see *id.* at 232-36, 242-47.

⁷² *Id.* at 29-30. Parties are given the opportunity to present their case at each step of the approval process. This includes meeting with each commissioner separately. A majority vote of the commissioners is necessary for any action. For a more in depth discussion of the process and the decision makers that are involved, see *id.* at 232-42.

⁷³ *Guide I*, *supra* note 36, at 13.

⁷⁴ MERGER REVIEW GUIDE, *supra* note 56, at 30-31, 254.

⁷⁵ See *id.* at 252-53; DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 1 (2004) [hereinafter DOJ MERGER REMEDIES GUIDE], available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>; see also Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 181 (2008).

⁷⁶ See MERGER REVIEW GUIDE, *supra* note 56, at 256-57.

⁷⁷ See *id.* at 255.

to seek injunctive relief in federal court to enjoin a transaction that they believe raises competitive concerns.⁷⁸ The DOJ and the FTC have different approaches when seeking injunctive relief. Unlike the FTC, the DOJ does not have another avenue for permanent relief other than the federal court process. As a result, the DOJ often asks for both a preliminary injunction and a permanent injunction from the district courts.⁷⁹ If the DOJ's request is denied, the parties can usually consummate their merger without further concerns of antitrust litigation.⁸⁰ In contrast, the FTC only seeks a preliminary injunction; if the FTC loses, the parties still have to worry about the FTC potentially pursuing costly and lengthy administrative litigation.⁸¹

Due to the need to close a proposed transaction quickly (to enjoy the efficiencies that come from a merger and to avoid the costs of litigation), preliminary injunctions are particularly important to both the parties and the enforcement agencies.⁸² If the district court denies the injunction, the agencies normally treat the denial as final and will not take any further action.⁸³ As a result, the parties can close the merger relatively quickly.⁸⁴ However, if a court grants the injunction, the parties will most likely abandon the transaction because very few firms can withstand the time, costs, and uncertainty involved in an appeal or an administrative trial.⁸⁵

⁷⁸ The DOJ is authorized to seek an injunction under 15 U.S.C. § 25 (2006). The FTC is authorized to seek an injunction under 15 U.S.C. § 53(b) (2006).

⁷⁹ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 138.

⁸⁰ The ABA Section of Antitrust Law has not been able to find any example of the DOJ seeking a permanent injunction after failing to obtain a preliminary injunction. ABA Comments re Differential Standards, *supra* note 14, at 5.

⁸¹ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 139.

⁸² See MERGER REVIEW GUIDE, *supra* note 56, at 255 ("In many cases, the preliminary injunction motion will determine the outcome of the case.").

⁸³ UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 4, at 546 ("An unsuccessful effort to obtain a preliminary injunction can be the plaintiff's final battle to block a merger. . .").

⁸⁴ See MERGER REVIEW GUIDE, *supra* note 56, at 255; UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 4, at 546-47. This is assuming the Court of Appeals fails to grant a stay pending appeal by the enforcement agency or the FTC decides not to pursue an administrative proceeding. See *infra* Part I.C.2.

⁸⁵ UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 4, at 547. ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 139.

2. The FTC Pursuing Administrative Litigation

If the DOJ fails to obtain an injunction, it will abandon any further litigation.⁸⁶ However, the FTC has pursued administrative proceedings after losing at the preliminary injunction stage.⁸⁷ The decision by the FTC to pursue an administrative proceeding is made on a case-by-case basis with the standard being whether the “pursuit of administrative litigation after the denial of a preliminary injunction motion would serve the public interest.”⁸⁸ Some of the criteria the FTC uses in its decision include “the district court’s factual findings and conclusions of law; any new evidence developed during the preliminary injunction proceeding; whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; the costs and benefits of further proceedings; and any additional relevant factor.”⁸⁹ An administrative proceeding takes place before an FTC administrative law judge, with review by the five commissioners.⁹⁰ The decision can then be appealed to a federal appellate court.⁹¹

3. Relief: Structural Remedies and Conduct Remedies

Merger concerns can be resolved through negotiation, resulting in a settlement, or through litigation in court. The FTC has stated that its remedial objective is to “prevent the anticompetitive effects likely to result from a merger that the [FTC] has determined is unlawful.”⁹² Similarly, according to the DOJ, “[a]lthough the remedy should always be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to restore it.”⁹³ Coming up with an appropriate remedy can be extremely difficult. In

⁸⁶ MERGER REVIEW GUIDE, *supra* note 56, at 255.

⁸⁷ *Id.*

⁸⁸ Press Release, Fed. Trade Comm’n, FTC Closes Its Investigation of Arch Coal’s Acquisition of Triton Coal Company’s North Rochelle Mine (June 13, 2005) (internal quotation marks omitted), *available at* <http://www.ftc.gov/opa/2005/06/archcoal.htm>.

⁸⁹ *Id.*

⁹⁰ Hoffman & Royall, *supra* note 44, at 322.

⁹¹ *Id.*

⁹² Federal Trade Comm’n, Negotiating Merger Remedies, Statement of the Bureau of Competition of the Federal Trade Commission, at 4 (April 2, 2003), *available at* <http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf>.

⁹³ DOJ MERGER REMEDIES GUIDE, *supra* note 75, at 4.

fashioning a remedy, the speed, certainty, cost, efficacy, and ease of monitoring are all important factors that need to be taken into consideration.⁹⁴

Merger remedies usually take two basic forms.⁹⁵ The first form, a structural remedy, usually involves a divestiture or the sale of assets by the merged firms.⁹⁶ The second form, a conduct remedy, is usually an injunctive provision that regulates or changes the business conduct of the merged firm.⁹⁷ Structural remedies are preferred because they require very little ongoing monitoring by the enforcement agency.⁹⁸ In contrast, conduct remedies are not preferred because of the monitoring costs involved, and the fact that consumers would ultimately be harmed if the restrained firm fails to survive in a competitive market.⁹⁹ A remedy can be a combination of structural and injunctive remedies.

Divestiture is the primary post-consummation remedy for a Section 7 violation (or Section 5 of the FTC Act) because the logical solution to excessive concentration is divestiture of the assets that caused the antitrust problems.¹⁰⁰ Since the goal of divestiture is to restore competition, the agencies try to ensure that the divestiture remedy contains enough assets for the purchaser to function as a long-term viable competitor, with the hope of replacing the competition prior to the merger.¹⁰¹

II. *FTC v. WHOLE FOODS MARKET, INC.*

The tortuous legal battle between the FTC and Whole Foods might be over, but the D.C. Circuit's controversial decision in *Whole Foods* continues to give the FTC a significant advantage over the DOJ in challenging a merger and extracting a settlement. This Part examines the D.C. Circuit

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.* at 7.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* "Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market." *Id.* This is in contrast to conduct remedies, which are often "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." *Id.* at 8.

⁹⁹ *Id.* at 8-9.

¹⁰⁰ See UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 4, at 603; see also DOJ MERGER REMEDIES GUIDE, *supra* note 75, at 7-8.

¹⁰¹ DOJ MERGER REMEDIES GUIDE, *supra* note 75, at 9-11.

Court's fractured opinion. It begins with a discussion of the merger between Whole Foods and Wild Oats, and the FTC's decision to challenge the merger. It then reviews the district court and the D.C. Circuit's opinions, and concludes with a review of the settlement between the FTC and Whole Foods.

A. *Background: The Merger Between Whole Foods and Wild Oats*

At the time of the merger, Whole Foods and Wild Oats, respectively, were the largest and second largest nationwide operators of organic supermarkets in the United States.¹⁰² Whole Foods operated approximately 194 stores,¹⁰³ and Wild Oats operated approximately 110 stores.¹⁰⁴ Whole Foods is a Texas corporation that opened its first store in 1980.¹⁰⁵ Wild Oats is a Delaware corporation that opened its first store in 1987.¹⁰⁶ Both chains have expanded over the years by opening new stores and acquiring other premium natural and organic supermarkets.¹⁰⁷ Both Whole Foods and Wild Oats tried to differentiate themselves from other supermarkets by focusing on natural and organic products, as well as a commitment to quality and service.¹⁰⁸ In February 2007, Whole Foods announced its intent to purchase Wild Oats for an estimated \$565 million.¹⁰⁹ The market reacted positively after the announcement as investors and analysts generally applauded the merger as necessary in the face of intense competition from

¹⁰² Martin, *supra* note 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Whole Foods Market Home Page, About Whole Foods Market, <http://www.wholefoodsmarket.com/company/index.php> (last visited Feb. 27, 2010).

¹⁰⁶ Whole Foods Market Home Page, Company History, <http://www.wholefoodsmarket.com/company/history.php#18> (last visited Feb. 27, 2010).

¹⁰⁷ *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 10-11 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008). Whole Foods acknowledges on its website that “[m]uch of the growth of [the] company has been accomplished through mergers and acquisitions. The story of Whole Foods is incomplete without honoring these notable companies in their own right.” Whole Foods Market Home Page, Company History, <http://www.wholefoodsmarket.com/company/history.php#18> (last visited Feb. 27, 2010).

¹⁰⁸ Proof Brief for Appellant FTC at 5-6, *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (No. 07-5276).

¹⁰⁹ Martin, *supra* note 1. The deal was a tender offer for all of Wild Oats stock at a price of \$18.50 per share—a 23% premium over the average share price in January of 2007. Proof Brief for Appellant FTC, *supra* note 108, at 6.

larger rivals like Wal-Mart, Safeway, Kroger, and Trader Joe's.¹¹⁰

In February 2007, Whole Foods filed the Premerger Notification and Report Forms with the FTC and DOJ as required by the HSR Act.¹¹¹ The merger caught the FTC's attention.¹¹² After going through the clearance process, the FTC was chosen as the investigating agency due to its traditional expertise in the supermarkets industry.¹¹³ After reviewing the documents from the second request, the FTC authorized its staff to seek a preliminary injunction under Section 7 of the Clayton Act and Section 5 of the FTC Act.¹¹⁴ In June 2007, the FTC filed a complaint in the District of Columbia seeking a preliminary injunction to enjoin the merger.¹¹⁵ All five commissioners voted in favor of bringing the case.¹¹⁶

In its complaint, the FTC argued that a merger of the two biggest chains in the premium natural and organic supermarkets, or PNOS, market would "substantially lessen competition and thereby cause significant harm to consumers" by increasing prices and reducing quality and services.¹¹⁷ In defining the relevant markets, the FTC found that premium natural and organic supermarkets are different from

¹¹⁰ Martin, *supra* note 1. One commentator described the merger as "consistent with how Whole Foods has created value for shareholders for much of its history. . . ." *Id.* The chief executive of Wild Oats, Gregory Mays, said he considered the merger a "perfect marriage" and a "natural fit" because of the intense competition from much larger rivals who were eager to move into this lucrative and growing market. *Id.* In fact, Mr. Mays stated that since "the two stores were the leaders in the natural and organic marketplace . . . it [was] a 'perfect marriage' because the combined company could focus on larger rivals." *Id.*

¹¹¹ See *supra* Part I.A.2.

¹¹² See Proof Brief for Appellant FTC, *supra* note 108, at 6.

¹¹³ See FED. TRADE COMM'N, AN FTC GUIDE TO THE ENFORCERS: THE FEDERAL GOV'T, STATES AND PRIVATE PARTIES (2008), http://www.ftc.gov/bc/antitrust/factsheets/FactSheet_FedEnforcers.pdf.

¹¹⁴ Press Release, Fed. Trade Comm'n, FTC Seeks to Block Whole Foods Market's Acquisition of Wild Oats Markets (June 5, 2007), <http://www.ftc.gov/opa/2007/06/wholefoods.shtm>.

¹¹⁵ *Id.*; Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act at 2, 5-6, FTC v. Whole Foods Mkt. Inc., 502 F. Supp. 2d 1 (D.D.C. 2007) (No. 07-cv-01021) [hereinafter FTC Complaint].

¹¹⁶ Press Release, Fed. Trade Comm'n, *supra* note 114.

¹¹⁷ FTC Complaint, *supra* note 115, at 1. See Andrew Martin, *F.T.C. to Sue in Bid to Halt Food Merger*, N.Y. TIMES, Jun. 6, 2007, at C1 (Jeffrey Schmidt, the director of the FTC's Bureau of Competition, said in a statement that "Whole Foods and Wild Oats are each other's closest competitors in premium natural and organic supermarkets, and are engaged in intense head-to-head competition in markets across the country. If Whole Foods is allowed to devour Wild Oats, it will mean higher prices, reduced quality and fewer choices for consumers.").

conventional retail supermarkets because PNOS offer a unique upscale shopping experience for their customer that is characterized by a large selection of organic foods and excellent customer service.¹¹⁸ The FTC alleged that the customer base for PNOS is different from that of traditional supermarkets because PNOS customers seek an experience where the shopping environment can matter as much as the price.¹¹⁹ The FTC also alleged that Whole Foods and Wild Oats were each other's closest competitors in twenty one geographic markets and that the merger would create monopolies in eighteen cities.¹²⁰

Needless to say, the parties involved as well as analysts who follow the companies and industry were surprised by the FTC's decision.¹²¹ Analysts and reporters were quick to point out that the combined entity would only operate about 300 supermarkets.¹²² By comparison, Wal-Mart, the largest supermarket chain in the U.S., owns about 3,000 stores that sell groceries, and Kroger, the second-largest supermarket chain in the U.S., owns about 2,500 grocery stores.¹²³ Due to the need to close the merger quickly, the lawsuit at the district court level was litigated on a very fast track so as to allow the losing side sufficient time to appeal the decision before the consummation of the proposed deal, which was scheduled for August 31, 2007.¹²⁴

¹¹⁸ FTC Complaint, *supra* note 115, at 10.

¹¹⁹ *See id.* at 8-9.

¹²⁰ *Id.* at 11-12.

¹²¹ *See* Martin, *supra* note 117. One "somewhat bemused" research analyst remarked that the FTC's decision was "somewhat at odds' with the recent blurring of lines between stores like Whole Foods and Trader Joe's and more conventional chains like Publix and Wegmans" and the fact that "74 percent of natural and organic foods were now sold through mass-market channels like conventional supermarkets." *Id.* Whole Foods' Chief Executive John Mackey said in a statement that "[t]he FTC has failed to recognize the robust competition in the supermarket industry, which has grown more intense as competitors increase their offerings of natural, organic and fresh products; renovate their stores; and open stores with new banners and formats resembling Whole Foods Market." *Id.*

¹²² David Kesmodel & John R. Wilke, *Why Whole Foods Deal Is in Peril—Pending FTC Challenge To Wild Oats Deal Argues Firms Are in Narrow Arena*, WALL ST. J., Jun. 6, 2007, at A3. Whole Foods and Wild Oats together only accounted for 15% of the \$46 billion natural-foods market. *Id.*

¹²³ *Id.*

¹²⁴ *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 4 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008). The merger was consummated on August 28, 2007.

B. *The District Court's Opinion in FTC v. Whole Foods Market, Inc.*

In a thorough opinion, Judge Friedman denied the FTC's request for a preliminary injunction because he concluded the FTC had not demonstrated a likelihood of success on the merits—that is, that the effects of the merger “may substantially lessen competition [or] tend to create a monopoly” in a properly defined relevant product market.¹²⁵ As with most antitrust cases, the product market definition was key.¹²⁶ After going over the arguments on both sides, Judge Friedman found that the “economic evidence, market research studies, and evidence concerning the realities on the ground . . . all lead to the conclusion that the relevant product market in this case is not [PNOS] as argued by the FTC but . . . at least all supermarkets.”¹²⁷ Judge Friedman also noted that so-called conventional supermarkets like Wal-Mart, Kroger, and Safeway were all carrying natural and organic foods.¹²⁸ In fact, market research indicated that a majority of natural and organic goods are now being sold in conventional supermarkets as they move aggressively into the sale of organic foods.¹²⁹ With such stiff competition from more conventional supermarkets, Judge Friedman believed that post-merger, customers would still have plenty of competing options to choose from.¹³⁰ As a result, Judge Friedman concluded that there was no substantial likelihood that the FTC would be able to prove its asserted product market, or that the Whole Foods-Wild Oats merger would “substantially lessen competition or tend to create a monopoly.”¹³¹

Following the district court's decision, the FTC filed an emergency motion for an injunction pending the outcome of the appeal, which was unanimously denied by a three-judge panel of the D.C. Circuit Court.¹³² At that point, four federal judges had looked at the case and all concluded that the FTC had failed to meet the preliminary injunction standard. Shortly

¹²⁵ *Id.* (quoting 15 U.S.C. §§ 18, 53(b) (2006)).

¹²⁶ *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

¹²⁷ *Whole Foods*, 502 F. Supp. 2d at 34.

¹²⁸ *Id.* at 26-27.

¹²⁹ *Id.* at 27.

¹³⁰ *Id.* at 36.

¹³¹ *Id.* at 49-50.

¹³² *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008), *amended and reissued*, 592 F. Supp. 2d 107 (D.D.C. 2009).

thereafter, the parties closed the merger.¹³³ After closing, Whole Foods started integrating Wild Oats by converting certain stores and selling other stores under the Wild Oats family.¹³⁴

C. *The D.C. Circuit's Opinions in FTC v. Whole Foods Market, Inc.*

In July 2008, almost a full year after the merger was consummated, a panel of the D.C. Circuit reversed and remanded the district court's decision to deny the FTC's motion for a preliminary injunction in a splintered decision with no majority opinion.¹³⁵ The decision was amended and reissued in November 2008.¹³⁶ Judge Brown, Judge Tatel, and Judge Kavanaugh each wrote a separate opinion in the July and November rulings.¹³⁷ In the July ruling, Judge Brown wrote the opinion for the court. Judge Tatel wrote a concurring opinion, and Judge Kavanaugh wrote a dissenting opinion.¹³⁸ According to Judge Brown, the district court committed legal error by rejecting the FTC's market definition so that it failed to give adequate weight to the FTC's evidence.¹³⁹ The majority thus held that the FTC had raised enough questions about the merits of its case against the merger.¹⁴⁰ Following the decision, Whole Foods petitioned the D.C. Circuit for a rehearing en banc. The petition for rehearing en banc was denied on November 21, 2008.¹⁴¹ However, on that same day, the three-judge panel amended and reissued its original opinions.¹⁴² The most significant difference between the July and November rulings was that Judge Tatel no longer concurred in Judge Brown's opinion but only in the judgment of the court.¹⁴³ Judge Brown and Judge Tatel continued to agree, however, that the

¹³³ Proof Brief for Appellant FTC, *supra* note 108, at 4 n.3.

¹³⁴ *Whole Foods*, 548 F.3d at 1033 ("Whole Foods has already closed some Wild Oats stores and sold others. In addition, Whole Foods has sold two complete lines of stores, Sun Harvest and Harvey's, as well as some unspecified distribution facilities.").

¹³⁵ *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 869 (D.C. Cir. 2008).

¹³⁶ *Whole Foods*, 548 F.3d at 1028.

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *Id.* at 873.

¹⁴⁰ *Id.* at 882.

¹⁴¹ *Whole Foods*, 548 F.3d at 1028.

¹⁴² *Id.*

¹⁴³ *Id.*

district court's decision should be reversed and remanded for further proceedings.¹⁴⁴

Judge Brown believed that the district court used the correct standard for granting a preliminary injunction, but incorrectly applied the standard in its analysis of the product market.¹⁴⁵ According to Judge Brown, in deciding whether to grant an injunction, "a district court must balance the likelihood of the FTC's success against the equities, under a sliding scale."¹⁴⁶ However, this balancing test will often weigh in favor of the FTC because "the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting the provision."¹⁴⁷ Thus, the FTC will usually be able to obtain a preliminary injunction by "rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation."¹⁴⁸

According to Judge Brown, the district court did not appropriately apply the standard because it incorrectly found that the FTC failed to present evidence of a likelihood of success and therefore never weighed the equities.¹⁴⁹ The district court erred when it assumed that "marginal customers,"¹⁵⁰ and not "core customers,"¹⁵¹ must be the focus of an antitrust analysis.¹⁵² Instead, Judge Brown stated that core consumers should be given consideration as a separate submarket in certain cases, such as when there is a distinct service or a specialized or "unique environment."¹⁵³ Judge Brown believed that the FTC's evidence demonstrated that there was a distinct PNOS submarket of core customers who shop exclusively at Whole Foods or Wild Oats for their unique environment.¹⁵⁴ As a result, the district court had underestimated the FTC's

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1034-36.

¹⁴⁶ *Id.* at 1035.

¹⁴⁷ *Id.* (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001)).

¹⁴⁸ *Id.* (quoting *Heinz*, 246 F.3d at 714-15).

¹⁴⁹ *Id.* at 1035-36.

¹⁵⁰ A marginal consumer is someone who would switch to a competitor if his primary choice imposed a small but significant and nontransitory price increase (typically 5%). See *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 17 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008).

¹⁵¹ Core customers are the customers who refuse to switch despite a price increase. *Id.* at 16-17.

¹⁵² *Whole Foods*, 548 F.3d at 1037.

¹⁵³ *Id.* at 1037-39.

¹⁵⁴ *Id.* at 1039-40.

likelihood of success on the merits.¹⁵⁵ Since the district court did not reach the equities in its decision, Judge Brown and Judge Tatel both agreed to remand the case back to the district court to determine whether policy considerations weighed against the injunction.¹⁵⁶

After the D.C. Circuit's decision, the FTC made it clear that it wanted to commence an in-house administrative trial on the merger, scheduled to begin in April of 2009.¹⁵⁷ Thus, the FTC had two cases on parallel tracks: one in the district court (*Whole Foods*), and the other in an internal administrative proceeding. On January 29, 2009, the FTC announced that it would temporarily halt its review of the merger so that the FTC and Whole Foods could engage in settlement talks.¹⁵⁸ On March 6, 2009, almost 21 months after the FTC first sued Whole Foods in federal court to stop the deal, Whole Foods and the FTC announced a settlement.¹⁵⁹

D. *The Settlement Between the FTC and Whole Foods*

The consent agreement between Whole Foods and the FTC required Whole Foods to divest thirty-two Wild Oats stores and assets related to those stores in seventeen separate geographic markets.¹⁶⁰ However, out of the thirty-two stores, only thirteen stores were operating at the time of the agreement.¹⁶¹ Whole Foods had closed the other nineteen stores, but still retained control over them.¹⁶² Whole Foods was also required to divest Wild Oats intellectual property, including the rights to the Wild Oats brand.¹⁶³ The FTC believed that “[e]ven months after the acquisition, the Wild Oats brand name

¹⁵⁵ *Id.* at 1041.

¹⁵⁶ *Id.*

¹⁵⁷ See Brent Kendall, *FTC is Planning Hearings on Whole Foods Merger*, WALL ST. J., Aug. 12, 2008, at B8.

¹⁵⁸ Commission Order Withdrawing Matter From Adjudication, Fed. Trade Comm'n, *In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc.*, No. 9324 (2009), <http://www.ftc.gov/os/adjpro/d9324/090128orderwithdrawingmatter.pdf>.

¹⁵⁹ Press Release, Fed. Trade Comm'n, *supra* note 2.

¹⁶⁰ Analysis of Agreement Containing Consent Orders To Aid Public Comment at 3, *In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc.*, No. 9324 (2009), <http://www.ftc.gov/os/adjpro/d9324/090306wfanal.pdf> [hereinafter *Analysis of Agreement*].

¹⁶¹ *Id.* at 3. These are referred to as live stores. *Id.* at 3 n.4.

¹⁶² *Id.* at 3. These are referred to as dark stores. *Id.* at 3 n.4.

¹⁶³ Decision and Order at 2, *In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc.*, No. 9324 (2009), <http://www.ftc.gov/os/adjpro/d9324/090306wfdo.pdf> [hereinafter *Decision and Order*].

retains significant brand equity that has been developed over the past 20 years.”¹⁶⁴ While the stores may be divested to more than one FTC-approved buyer, the Wild Oats intellectual property may be divested to only a single FTC-approved buyer.¹⁶⁵ The consent agreement appointed a divestiture trustee to oversee the marketing and sale of the assets.¹⁶⁶ The consent agreement also includes an order to maintain assets, which requires Whole Foods to continue to operate the stores in a way that preserves marketability and competitiveness until a FTC-approved buyer is found.¹⁶⁷ In the end, the divestitures will only “offer relief in 17 of the 29 geographic markets alleged in the amended administrative complaint.”¹⁶⁸

III. THE CHOICE OF THE ENFORCEMENT AGENCY IS OUTCOME-DETERMINATIVE AFTER *WHOLE FOODS*

Due to the statutory authority granted to the FTC in the FTC Act, there are important procedural differences between the FTC and the DOJ. First, as seen in *Whole Foods*, the FTC enjoys a lower standard for obtaining a preliminary injunction than the DOJ.¹⁶⁹ Second, the FTC’s statutory authority to commence administrative litigation, even after a denial of a request for a preliminary injunction, creates uncertainty about the proposed transaction—a risk not faced if the DOJ is challenging the merger.¹⁷⁰ The divergence between the two agencies is most troubling when the FTC decides to pursue an administrative trial post-consummation, as seen in its battle with Whole Foods. With the status of their merger in legal limbo (and already well integrated), the parties are forced to defend their merger in a long and costly administrative proceeding, a risk they do not face if the DOJ is challenging it. This Part argues that the substantive outcome of a merger challenge depends on which agency is challenging it; that is, the choice of enforcement agency is outcome-determinative.¹⁷¹ The preliminary injunction standard for the FTC as articulated in *Whole Foods* puts the debate on whether the choice of

¹⁶⁴ Analysis of Agreement, *supra* note 160, at 3.

¹⁶⁵ Decision and Order, *supra* note 163, at 4.

¹⁶⁶ *Id.* at 3. The FTC appointed The Food Partners as the divestiture trustee.

¹⁶⁷ Analysis of Agreement, *supra* note 160, at 4.

¹⁶⁸ *Id.* at 3.

¹⁶⁹ See *infra* Part III.A.

¹⁷⁰ See *supra* Part I.C.2.

¹⁷¹ See ABA Comments re Differential Standards, *supra* note 14, at 9.

enforcement agency is outcome-determinative to rest with an empathetic “yes” in the D.C. Circuit.

A. *The Divergence in Preliminary Injunction Standards for the DOJ and the FTC*

The most significant aspect of the *Whole Foods* decision is not the substance of the decision, but rather the preliminary injunction standard for the FTC. There has been an ongoing debate about whether the FTC faces a preliminary injunction burden that is lower than that of the DOJ.¹⁷² In its report, the Antitrust Modernization Commission stated that “[t]here is at least a perception, if not a reality, that the FTC and the DOJ face different standards” and the standard for the FTC is “less burdensome, or is generally perceived to be less burdensome, than the standard applicable to DOJ actions” for obtaining a preliminary injunction.¹⁷³ After Judge Brown’s opinion in *Whole Foods*, the perception that the FTC faces a lower preliminary injunction standard is no longer just perception, it is a fact.

Traditionally, a plaintiff seeking injunctive relief must prove: (1) irreparable harm if the injunction is not granted, (2) the injury outweighs any harm to the defendant by the

¹⁷² See Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission at 10 (2004), <http://govinfo.library.unt.edu/amc/comments/abaantitrustsec.pdf> (“DOJ has to meet the regular district court standards when seeking preliminary injunctive relief . . . subjecting itself to a full hearing on the merits and a higher standard of proof. In contrast, the FTC typically seeks only preliminary injunctive relief from the district court and does so under a standard that, as written, appears to be less demanding than that facing other litigants (including the DOJ), reserving trial on the merits for agency adjudication. Most transactions are abandoned if an injunction under any standard is granted. Thus, some lawyers believe that the apparently lower burden for the FTC could lead to different outcomes.”). *But see* Hearing on Federal Civil Remedies for Antitrust Offenses: Statement of Commissioner Thomas B. Leary Before the Antitrust Modernization Commission at 5 (2005), <http://www.ftc.gov/speeches/leary/051201civilremedies.pdf> (“The ABA submission points out, first, that some decisions seem to apply a more lenient standard when the FTC applies for a preliminary injunction than they do when the DOJ applies. It is not possible to know whether the facially different standards have been outcome-determinative; I personally doubt that they have been in recent years, and suspect our litigators would agree.”); Observations on Federal Antitrust Enforcement Institutions: Comments of W. Blumenthal to the Antitrust Modernization Commission at 6 (2005), <http://www.ftc.gov/os/2005/11/051103gcstmnntonfedantitrustenforcement.pdf> (“Because the preliminary injunction standards applied to actions brought by the FTC and DOJ appear to be substantially identical, any differences in their application would seem more likely to be based upon the specific facts of a given matter than substantive legal standards. So far as I am aware there is no evidence that any cases or group of cases were or would have been decided differently based on which of the antitrust agencies was the plaintiff.”).

¹⁷³ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 141-42.

injunction, (3) the plaintiff has a substantial likelihood of success on the merits, and (4) the injunction is in the public interest.¹⁷⁴ Due to its status as an administrative agency, the FTC is subjected to a different preliminary injunction standard than the DOJ. The DOJ is subjected to the traditional test articulated above,¹⁷⁵ while the FTC is subjected to the standard set forth in Section 13(b) of the FTC Act.¹⁷⁶ Under Section 13(b) of the FTC Act, the FTC can obtain an injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”¹⁷⁷ Courts have read Congress’s intent in Section 13(b) as making injunctive relief “broadly available to the FTC”¹⁷⁸ and the appropriate test to be a “public interest” test—that is, “the court evaluates whether it is in the public interest to enjoin the proposed merger.”¹⁷⁹

At the preliminary injunction stage, the FTC is not required to prove that the proposed merger would in fact violate Section 7 of the Clayton Act.¹⁸⁰ Instead, the FTC is only required to show that it is likely to succeed in showing under Section 7 that the proposed merger “may be substantially to lessen competition” or “tend to create a monopoly.”¹⁸¹ In *Whole Foods*, Judge Brown made it clear that the FTC will usually be able to obtain a preliminary injunction blocking a merger by “rais[ing] questions going to the merits so serious, substantial,

¹⁷⁴ DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL IV-15 (4th ed. 2008), available at <http://www.justice.gov/atr/public/divisionmanual/atrdvman.pdf> [hereinafter ANTITRUST DIVISION MANUAL]; UNDERSTANDING THE ANTITRUST ISSUES, *supra* note 4, at 564.

¹⁷⁵ ANTITRUST DIVISION MANUAL, *supra* note 174 (“The Federal Rules do not prescribe a standard for granting or denying a PI. Traditional equitable considerations apply.”).

¹⁷⁶ See 15 U.S.C. § 53(b) (2006); see also *United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993) (comparing the preliminary injunction standards for the DOJ and FTC).

¹⁷⁷ 15 U.S.C. § 53(b) (2006); see *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (“Congress intended this standard to depart from what it regarded as the then-traditional equity standard.”).

¹⁷⁸ *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (“Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique ‘public interest’ standard in 15 U.S.C. § 53(b), rather than the more stringent, traditional ‘equity’ standard for injunctive relief.”).

¹⁷⁹ *H.J. Heinz*, 246 F.3d at 713.

¹⁸⁰ *E.g., id.* at 714; *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44 (D.D.C. 2002) (“Congress used the words *may* be substantially to lessen competition . . . to indicate that its concern was with probabilities, not certainties.” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962))).

¹⁸¹ *H.J. Heinz*, 246 F.3d at 714; *Libbey*, 211 F. Supp. 2d at 44; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997).

difficult[,] and doubtful as to make them fair ground for thorough investigation.”¹⁸² Despite “at best, poorly explained evidence” on the FTC’s part,¹⁸³ the FTC’s statutory authority to engage in adjudicative administrative proceedings means that it can create a presumption in favor of an injunction just by raising serious and doubtful questions about the merits of the case.¹⁸⁴ In other words, the FTC is entitled to an injunction unless the FTC has “entirely failed to show a likelihood of success.”¹⁸⁵ In his dissenting opinion, Judge Kavanaugh argued that Judge Brown and Judge Tatel’s dilution of the preliminary injunction standard amounted to allowing “the FTC to just snap its fingers and temporarily block a merger.”¹⁸⁶ After *Whole Foods*, the question is no longer how much the FTC must show in order to obtain a preliminary injunction, but rather how little the FTC can show in order to obtain such an injunction.

Furthermore, Judge Brown stated that it “is not to say market definition will always be crucial to the FTC’s likelihood of success on the merits. Nor does the FTC necessarily need to settle on a market definition at this preliminary stage.”¹⁸⁷ Basically, Judge Brown believes that while the FTC must define a relevant market to prevail on the merits, it does not need to do so to at the preliminary injunction stage.¹⁸⁸ Judge Brown believes that the FTC can satisfy its burden of proof by simply showing that it has a chance of defining a market, even if it initially defines the market incorrectly. Under this standard, the FTC will be able to obtain a preliminary injunction just by speculating that a merger may reduce competition. Parties seeking to merge would be at a severe disadvantage when responding to the FTC’s requests because the FTC can put forth ambiguous market definitions and argue that it will prove the correct market definition in a later administrative proceeding. Since the FTC does not have to define the market correctly at the preliminary injunction stage,

¹⁸² FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (citing *H.J. Heinz*, 246 F.3d at 714-15).

¹⁸³ *Id.* at 1032.

¹⁸⁴ *Id.* at 1035.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1052 (Kavanaugh, J., dissenting).

¹⁸⁷ *Id.* at 1036.

¹⁸⁸ *See id.* at 1036-37. (“[T]he FTC may have alternate theories of the merger’s anticompetitive harm, depending on inconsistent market definitions One may have such doubts without knowing exactly what arguments will eventually prevail. Therefore, a district court’s assessment of the FTC’s chances will not depend, in every case, on a threshold matter of market definition.”).

this deference to the FTC allows the FTC to challenge previously marginal cases, resulting in a greater number of merger challenges.¹⁸⁹ Going forward, this lowered preliminary injunction standard makes it far easier for the FTC to block mergers in the D.C. Circuit.

B. The Whole Foods Preliminary Injunction Standard Combined with the FTC's Ability to Pursue Administrative Litigation Is Outcome-Determinative

After *Whole Foods*, it is difficult to see how the FTC would not win at the district court level, especially when it is entitled to a presumption of injunctive relief unless it has “entirely failed to show a likelihood of success.”¹⁹⁰ Even if the district court somehow denies the preliminary injunction, the FTC can still use the threat of an administrative proceeding to force the parties to settle or to terminate the transaction. The FTC’s ability to prolong a merger challenge with an administrative trial puts enormous pressure on merging parties to either settle or terminate the transaction, even though the transaction had closed. As seen in *Whole Foods*, the choice of the FTC as the investigating agency played a big role in the outcome of the case and subsequent settlement. These divergences between the DOJ and the FTC subject merging parties to different legal obligations, and impose costs and inefficiencies on parties that may be passed on to consumers.

1. The FTC Has More Leverage in the Settlement Context

The FTC’s ability to pursue administrative litigation gives it a significant advantage that the DOJ lacks in negotiating a settlement, as few parties will want to litigate a full administrative trial and face the risk of expensive and disruptive divestitures.¹⁹¹ Unlike the FTC, the DOJ enjoys no presumption in favor of preliminary injunctive relief.¹⁹² To avoid duplication of efforts, the DOJ usually agrees with the merging parties to consolidate the hearings for preliminary and

¹⁸⁹ See *infra* Part III.B.2.

¹⁹⁰ *Whole Foods*, 548 F.3d at 1035.

¹⁹¹ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 142.

¹⁹² See *Whole Foods*, 548 F.3d at 1035. Unlike the FTC, the DOJ is still subject to the traditional equity test for a preliminary injunction. See *supra* Part III.A.1.

permanent injunctions.¹⁹³ If the DOJ fails to obtain a preliminary injunction, and barring an appeal, the parties are free to consummate their transaction.¹⁹⁴ In contrast, the FTC's ability to commence administrative litigation imposes a different timeframe and uncertainties on the merging parties, giving the FTC greater leverage in negotiating a consent agreement with the parties than the DOJ.¹⁹⁵ In its Antitrust Modernization Report, the Antitrust Modernization Commission recognized that the "mere availability" of a potential administrative trial "can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger."¹⁹⁶ The threat of administrative litigation imposes delays, uncertainties, and costs on parties whose merger is reviewed by the FTC, a risk they do not face if the merger was reviewed by the DOJ.¹⁹⁷ Rather than risking lengthy and expensive litigation, parties to a proposed transaction will be more likely to either settle or terminate the transaction if the FTC is adamant about challenging the transaction.¹⁹⁸

The divergences between the two agencies are particularly acute when the FTC decides to pursue an administrative trial post-consummation. The leverage the FTC has over merging parties is even more apparent in the consummated merger context, where the parties have little choice but to either litigate the administrative trial or settle. By then, the assets are all "scrambled" and the combined entity is already well integrated. Since the parties are already well integrated, the parties will be forced to either settle from a disadvantaged bargaining position or defend their merger in a long and costly administrative proceeding, a risk they do not face if the DOJ was challenging the merger. Thus, there is

¹⁹³ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 139.

¹⁹⁴ *Id.* According to the American Bar Association's Section of Antitrust Law, "[a]lthough the DOJ has the option of seeking permanent relief in federal court after failing to obtain a [preliminary injunction], we have not been able to find any examples of the DOJ having done so." ABA Comments re Differential Standards, *supra* note 14, at 5.

¹⁹⁵ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 140-42.

¹⁹⁶ *Id.* at 139.

¹⁹⁷ See *id.*

¹⁹⁸ See Frankel, *supra* note 75, at 182 ("Relatedly, and perhaps more importantly, it is evident (particularly to members of the defense bar) that an antitrust agency seeking a merger remedy typically has considerable negotiating leverage given that it may be difficult and costly for the defendants to fight the agency in court; indeed; the merger may not survive long enough to permit a court fight.").

much greater pressure to settle a matter when the transaction is being challenged by the FTC.

2. The FTC Has More Freedom to Challenge Marginal Cases

Commentators were surprised by the FTC's persistence in its battle with Whole Foods.¹⁹⁹ The settlement between the FTC and Whole Foods confirmed their suspicions that the case against Whole Foods was marginal at best. Despite what appears to be a significant divestiture of the Wild Oats assets, the settlement demonstrates the difficulties the FTC faces in fashioning effective post-closing relief. Not only is the burden on the parties and the divergence between the agencies particularly acute when the FTC pursues administrative litigation post-consumption, but the post-closing relief that it attains is not even necessarily in the public's interest. As seen in the Whole Foods consent agreement, post-closing relief often does not fully resolve the anticompetitive harm or restore competition, thus wasting time and resources, as well as potentially harming consumers when parties pass on the costs to them.

First, the settlement does not resolve the anticompetitive harms. After the merger closed, Whole Foods began integrating Wild Oats by rebranding Wild Oats stores, closing certain Wild Oats locations, and terminating certain leases.²⁰⁰ With this amount of "scrambling," it becomes very difficult to "unscramble the eggs" and restore the acquired firm to its former status as a competitively viable company.²⁰¹ As a result, the terms of the consent agreement are certainly much less vigorous than what the FTC would have sought before the

¹⁹⁹ The influential Wall Street Journal denounced the FTC's persistence in challenging the merger as antitrust double jeopardy and a "rigged game" in an editorial. Editorial, *Whole Foods Fiasco*, WALL ST. J., Dec. 31, 2008, at A8. According to the Journal,

[t]he Whole Foods fiasco is an embarrassment for the Bush Administration's antitrust policy. This month, eight Senators on the Judiciary Committee sounded a note of caution about the FTC's actions, and no less than Democratic antitrust scourge John Conyers has said he would like to hold hearings on abolishing the FTC's administrative proceedings. When antitrust enforcement becomes a law unto itself, it's time for some organic changes for regulators.

Id.

²⁰⁰ *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008).

²⁰¹ Sher, *supra* note 18, at 52-53.

consumption of the merger.²⁰² For example, the thirty two stores that Whole Foods is to divest will only provide relief in seventeen of the twenty nine geographic markets where the FTC alleged the merger would cause competitive harm.²⁰³ Over this two-year period, Whole Foods spent at least \$16.5 million defending the merger.²⁰⁴ The FTC declined to say how much it spent but it was no doubt quite a substantial amount of taxpayer's money.²⁰⁵ Despite all this time and resources, the only relief for the twelve other affected geographic markets is the mere divestiture of the Wild Oats name.

Second, it is doubtful that the settlement will restore competition. Although the FTC hopes that reestablishing a PNOS competition under the Wild Oats name will restore the competition that was eliminated by the acquisition, and provide a "springboard for broader competition nationwide," it is unclear when this future competition will occur, if it occurs at all.²⁰⁶ The two separate organic grocers before the merger, and the combined entity since the merger has forced its competitors—much larger supermarket chains with thousands of more stores—to adopt a similar strategy of offering organic natural foods and better customer services.²⁰⁷ When the merger was first announced, many analysts hailed the move as a

²⁰² Analysis of Agreement, *supra* note 160, at 5 ("The absence of pre-consummation relief from the district court, and Whole Foods' subsequent integration activities, have made it more difficult for the Commission to obtain complete relief in this matter.").

²⁰³ *Id.* at 3.

²⁰⁴ Andrew Martin, *Wait. Why Is the F.T.C. After Whole Foods?*, N.Y. TIMES, Dec. 14, 2008, at BU8.

²⁰⁵ *Id.*

²⁰⁶ Analysis of Agreement, *supra* note 160, at 5.

²⁰⁷ See David Kesmodel, *Supervalu to Launch Organic-Foods Line*, WALL ST. J., Apr. 9, 2008, at B2. For example, Supervalu Inc., the third largest U.S. food retailer by sales, recently announced a line of organic and natural foods to compete with its rivals like Whole Foods and Trader Joe's, and also to meet consumer demand. *Id.* "The company trails other conventional grocers in launching an organics line, but its selection will be among the largest. Safeway Inc. has had success with its O Organics brand, begun in late 2005, while Kroger last August introduced an expanded array of organic products under its Private Selection label." *Id.* The successes of the other supermarkets are reflected in the decline of Whole Foods'. As Andrew Martin writes:

It was not too long ago that Whole Foods, based in Austin, Tex., was a darling of Wall Street and routinely registered double-digit growth in comparable store sales, a common industry measure of the health of stores. But the company has been battered by competition from traditional grocery stores that have expanded their offerings of organic and natural foods.

Andrew Martin, *Private Equity Firm Buys 17% of Whole Foods*, N.Y. TIMES, Nov. 5, 2008 at B12.

sensible deal and necessary if both firms wanted to continue growing as they tried to fend off much larger supermarkets.²⁰⁸ However, due to intense competition from other supermarkets, the general economic condition over the last few years, and the ensuing decrease in consumer spending, little has gone right for Whole Foods since 2007.²⁰⁹ Fortunately, amid a stabilizing economy, recent earnings data suggest the company is on the road to recovery.²¹⁰

As supermarket chains continue to enter this lucrative market, consumers have benefitted from the increased number of competitors.²¹¹ It is difficult to see how consumers will benefit from a reconstituted Wild Oats or a weakened Whole Foods, and even more difficult to see who would buy the Wild Oats name. A reconstituted Wild Oats will be a greatly weakened firm, facing off against a greater number of competitors than before the merger. Whatever the benefits of the divestiture, it is outweighed by the time and resources the FTC has put into this matter. It is difficult to believe that a divestiture of thirteen operating stores and the Wild Oats name is a victory for the FTC after a two year legal battle.

Before the *Whole Foods* decision, it was debatable if the different legal preliminary injunction standards would produce different results.²¹² But as *Whole Foods* made clear, whether a proposed transaction may proceed does depend on which

²⁰⁸ One analyst compared the merger “to two knights who decide to stop fighting each other so they can protect the castle against bigger competitors.” Martin, *supra* note 1.

²⁰⁹ See David Kesmodel, *Corporate News: Whole Foods Gets Infusion, Posts Steep Drop in Net*, WALL ST. J, Nov. 6, 2008, at B2 (“[Whole Foods] has been hit hard by the weak economy as consumers cut back on discretionary spending and buy more store brands and discounted groceries.”); Timothy W. Martin, *Corporate News: Whole Foods to Sell 31 Stores in FTC Deal*, WALL ST. J, March 7, 2009, at B5 (“A lot has changed since 2007, when the FTC said the merger would ‘mean higher prices, reduced quality and fewer choices for consumers.’ In the past year, Whole Foods has seen its profits battered by the economic recession and stiffer competition from traditional food retailers like Safeway Inc. and Supervalu Inc.”).

²¹⁰ See Paul Sonne & Timothy W. Martin, *Whole Foods Profit Jumps as Turnaround Takes Root*, WALL ST. J, Feb. 17, 2010, at B5. “The Austin, Texas-based grocery chain reported profit of \$49.7 million, or 32 cents a share, compared with \$27.8 million, or 20 cents a share [in 2009]. Same-store sales, a key measure of retail health, rose 2.5%. Total sales for the quarter ended Jan. 17 climbed 7% to \$2.6 billion from \$2.47 billion.” *Id.* Whole Foods attributed the gains to a retooled strategy of lower prices and smaller stores to gain customers back. *Id.*

²¹¹ See Editorial, *supra* note 199 (“The market for natural and organic produce has exploded, with every discount outlet from Wal-Mart to Wegmans now offering organic products.”).

²¹² See *supra* note 172; see also ABA Comments re Differential Standards, *supra* note 14, at 4.

agency is reviewing the transaction. Unlike the FTC, the DOJ enjoys no presumption in favor of preliminary injunctive relief.²¹³ If the DOJ fails to obtain a preliminary injunction, and any appeals (very unlikely) are exhausted, the parties are free to consummate their transaction. If the DOJ was the investigating agency in *Whole Foods*, Whole Foods would have been free to consummate the merger after its victory at the district court level. Unlike the FTC, the DOJ lacks the power to prolong challenged mergers until the parties settle. The effect of this divergence between the agencies is inconsistency and unpredictability in the marketplace. After *Whole Foods*, it is clear that the best possible outcome for parties seeking to merge would be for the proposed transaction to be cleared for review by the DOJ. The perception that the choice of investigating agency is outcome-determinative is no longer just perception. It is a fact.

IV. SOLUTION: MINIMIZING THE DIVERGENCES

In a dual enforcement system, it should not matter which agency is challenging the merger. The merging parties should “receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger.”²¹⁴ Divergences between the FTC and the DOJ undermine consistency, predictability, efficiency, and fairness in the merger review process.²¹⁵ More importantly, such divergences make it clear that the ultimate decision as to whether a transaction may proceed depends on which agency is reviewing the transaction.²¹⁶

This Note discusses two approaches to harmonizing the divergences between the FTC and the DOJ. The first approach is a judicial solution: to limit the expansive language in *Whole Foods*. The second approach is a legislative approach, specifically for Congress to amend the FTC Act to specify that the FTC is subject to the same standard for the grant of a preliminary injunction as the DOJ.

²¹³ See *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).

²¹⁴ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 138.

²¹⁵ See *id.* at 138-39.

²¹⁶ See *id.*

A. *Judicial Solution*

The most significant difference between the July and November rulings in *Whole Foods* was that Judge Tatel no longer concurred in Judge Brown's opinion but only in the judgment of the court.²¹⁷ As a result of Judge Tatel's revision, Judge Brown's opinion was no longer the majority opinion of the court, and there were questions about the precedential value of the decision.²¹⁸ However, any hope that the D.C. Circuit would limit the expansive language found in *Whole Foods* was dashed in *FTC v. CCC Holdings, Inc.*,²¹⁹ where the preliminary injunction standard articulated in *Whole Foods* helped the FTC obtain their first preliminary injunction from a federal district court in nearly seven years.²²⁰ On March 18, 2009, less than a week after *Whole Foods* settled with the FTC, Judge Collyer issued a preliminary injunction that stopped the proposed merger between CCC Holdings and Mitchell International.²²¹ The FTC had argued that the merger of CCC Holdings and Mitchell International would reduce the number of competitors in the relevant market from three to two.²²² In enjoining the CCC Holdings merger, Judge Collyer adopted Judge Brown's diluted preliminary injunction standard articulated in *Whole Foods*.²²³ As a result, Judge Collyer granted the injunction because the FTC had "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC."²²⁴ Rather than risking an administrative trial, CCC Holdings and Mitchell International abandoned their transaction on March 11, 2009.²²⁵

²¹⁷ *Whole Foods*, 548 F.3d at 1028.

²¹⁸ See *id.* at 1061 n.8 (Kavanaugh, J., dissenting). According to Judge Kavanaugh, "this confused decision will invite years of uncertainty and litigation over what the holding of this case is—a separate but important problem with the Court's approach." *Id.*

²¹⁹ 605 F. Supp. 2d 26 (D.D.C. 2009).

²²⁰ Press Release, Fed. Trade Comm'n, *Competition Acting Director David Wales to Leave FTC*, (April 1, 2009), available at <http://www.ftc.gov/opa/2009/04/dwales.shtm>.

²²¹ *CCC Holdings*, 605 F. Supp. 2d at 30.

²²² *Id.*

²²³ *Id.* at 35-36.

²²⁴ *Id.* at 30 (citing *Heinz*, 246 F.3d at 714-15; *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *id.* at 1042 (Tatel, J., concurring)).

²²⁵ See Press Release, CCC Information Services Inc., *supra* note 9.

CCC Holdings, Inc. made it clear that Judge Brown's opinion was now binding precedent.²²⁶ The FTC read the case in the same way. In a speech about the FTC's relationship to the legislative, executive, and judicial branches, FTC Commissioner Thomas Rosch stated that:

The *CCC* case confirms that *Whole Foods* established a new standard for FTC preliminary injunctions—at least for the D.C. Circuit. It is also clear, based on the express language in both the *Whole Foods* and *CCC* opinions, that this new standard will allow the FTC to more readily obtain a preliminary injunction from a federal district court. We are unlikely to see decisions like *Arch Coal* again in the D.C. District Court, where the FTC brings most of its merger enforcement actions and which is required to apply the law of the D.C. Circuit. Of course, there are 11 other regional circuit courts for which *Whole Foods* is not binding authority, but I expect that these courts will adopt the D.C. Circuit's 13(b) standard as the opportunity arises.²²⁷

After *CCC Holdings*, it appears that the best approach to harmonizing the divergences between the DOJ and the FTC would have to be a legislative approach.

B. *Legislative Solution*

The Antitrust Modernization Commission was created to undertake “a comprehensive review of U.S. antitrust law to determine whether it should be modernized.”²²⁸ It delivered its final report in 2007.²²⁹ One area of antitrust law the Commission reviewed and recommended improvements for was the enforcement process. The Commission recognized that there was “a perception, if not a reality, that the FTC and the DOJ face different standards for obtaining a preliminary injunction,” and called for Congress to remedy the growing

²²⁶ See *CCC Holdings*, 605 F. Supp. 2d at 36. According to Judge Collyer, “precedents irrefutably teach that in this context ‘likelihood of success on the merits’ has a less substantial meaning than in other preliminary injunction cases. *Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law.” *Id.* at 36 n.11.

²²⁷ J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, Thoughts on the FTC’s Relationship (Constitutional and Otherwise) to the Legislative, Executive, and Judicial Branches, Remarks before the Berlin Forum for EU-US Legal-Economics Affairs, at 20-21 (Sept. 19, 2009), available at <http://www.ftc.gov/speeches/rosch/090919roschberlinspeech.pdf>.

²²⁸ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at i.

²²⁹ *Id.*

divergences between the DOJ and the FTC.²³⁰ The Commission made three recommendations in this regard:

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.²³¹

The Commission believed these recommendations would eliminate the divergences between the DOJ and the FTC. If the FTC seeks both preliminary and permanent injunctive relief in the same proceeding, this practice would be consistent with the DOJ's current approach, and would eliminate the difference in burden of proof for the two agencies.²³² To avoid the appearance of inconsistency, unpredictability, and unfairness in the merger review process, the Commission recommended the elimination of the FTC's ability to commence administrative litigation in HSR Act merger cases.²³³ The Commission believed that the elimination of administrative litigation would provide the FTC with further incentive to seek permanent relief in a district court, and not in an administrative trial.²³⁴ Finally, to ensure

²³⁰ *Id.* at 141.

²³¹ *Id.* at 139-41.

²³² *Id.* at 139. Since the DOJ seeks both preliminary and permanent injunctions in the same proceeding, it has to prove the proposed transaction "would violate Section 7 of the Clayton Act by a preponderance of the evidence." In contrast, the FTC only seeks a preliminary injunction so its burden required for obtaining a preliminary injunction is lower. *Id.*

²³³ *See id.* at 140.

²³⁴ *Id.* at 141. The Commission noted that the elimination of administrative trials would only apply in HSR Act merger cases, and would not affect the FTC's ability to commence administrative trials for consummated mergers. "The proposed statutory

that courts apply the same preliminary injunction standard for both enforcement agencies, the Commission recommended that Congress amend the FTC Act to remove any standard for granting a preliminary injunction in HSR cases.²³⁵ The Commission believed that the elimination of the “public interest” language would lead courts to apply the traditional equity test used for the DOJ.²³⁶

While the Commission’s recommendations will likely play a large role in the implementation of any legislative solution, it appears the recommendation with the best chance for success would be for Congress to amend Section 13(b) of the FTC Act to specify that the DOJ and the FTC is subject to the same preliminary injunction standard. The Commission’s other two recommendations, eliminating administrative proceedings in HSR Act merger cases and requiring the FTC to seek both preliminary and permanent injunctive relief in the same proceedings, are likely to engender significant opposition from the FTC and the Obama administration. During his presidential campaign, President Obama made it clear that he would direct his administration “to reinvigorate antitrust enforcement” and “step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”²³⁷ It is unlikely that the Obama administration, which has signaled its support for vigorous antitrust enforcement, would weaken the FTC’s antitrust enforcement ability by eliminating its administrative litigation authority.²³⁸ Any such efforts to require the FTC to emulate the DOJ’s current practice would be politically very difficult. Thus, the recommendation with the best chance of success is to amend

bar would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects.” *Id.*

²³⁵ *Id.* at 141-42.

²³⁶ *Id.* at 142.

²³⁷ Senator Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute (2007), available at http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

²³⁸ See Justin Blum, *Intel Case May Signal Increased Antitrust Enforcement*, BLOOMBERG, Dec. 17, 2009, <http://www.bloomberg.com/apps/news?pid=20670001&sid=a4BNq.ad67N0>; Stephen Labaton, *Administration Plans to Strengthen Antitrust Rules*, N.Y. TIMES, May 11, 2009, at A1; Elizabeth Williamson & Matthew Karnitschnig, *U.S. Signals More Scrutiny of Mergers, Antitrust*, WALL ST. J., May 12, 2009, at B1.

the FTC Act to specify that the FTC be subject to the same standard for the grant of a preliminary injunction as the DOJ.

CONCLUSION

To be effective, an enforcement system “must be clear, fairly administered, and not unreasonably burdensome.”²³⁹ After *Whole Foods*, our dual antitrust enforcement system is anything but that. There has been a running debate as to whether the FTC and the DOJ face different standards for obtaining a preliminary injunction, namely that the FTC enjoys a lower preliminary injunction standard than the DOJ.²⁴⁰ The D.C. Circuit Court’s opinion in *Whole Foods* puts that debate to rest in the D.C. Circuit with an empathetic “yes.”²⁴¹ The FTC’s ability to commence administrative litigation,²⁴² coupled with *Whole Foods*’ articulation of the preliminary injunction standard for the FTC,²⁴³ create divergences between the DOJ and the FTC. In a dual enforcement system, such divergences undermine consistency, predictability, efficiency, and fairness in the merger review process. More importantly, such divergences make it clear that the ultimate decision as to whether a transaction may proceed depends on which agency is reviewing the transaction.

After *Whole Foods*, the arbitrary allocation of a proposed transaction to either the FTC or the DOJ for review can result in a very different substantive outcome for the transaction. In a system of shared responsibility for enforcement of the federal antitrust laws, such an outcome is unacceptable. In such a system, merging parties should expect comparable treatment and burden, as well as a comparable outcome.²⁴⁴ Since a judicial solution is unlikely,²⁴⁵ and any attempt to eliminate the FTC’s administrative litigation authority is politically difficult,²⁴⁶ the most politically promising solution to stem the growing divergence between the DOJ and the FTC is for Congress to amend the FTC Act to specify that the same preliminary injunction standard applies to both

²³⁹ ANTITRUST MODERNIZATION REPORT, *supra* note 13, at iv.

²⁴⁰ See *supra* note 172 and accompanying text.

²⁴¹ See *supra* Part III.A.

²⁴² See *supra* Part I.A.3.

²⁴³ See *supra* Part III.A.

²⁴⁴ See ANTITRUST MODERNIZATION REPORT, *supra* note 13, at 131.

²⁴⁵ See *supra* Part IV.A.

²⁴⁶ See *supra* Part IV.B.

enforcement agencies. By doing so, Congress will ensure that the costs of merger review do not overwhelm the benefits of a fair and effective antitrust enforcement system.

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