Unit 6. Merger Antitrust Settlements

Merger Antitrust Law

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Topics

- Overview of adjudicated relief and consent settlements
- Consent remedies in horizontal cases[1]
- Consent settlement procedures and documents
- Consent decree violations

[1] We will focus on remedies in horizontal transactions in this unit. We will pick up remedies in nonhorizontal transactions later in the course.

Overview of Adjudicated Relief and Consent Settlements

Recall possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court
  Seeks permanent injunctive relief in administrative trial

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

Adjudicated relief/consent decrees

- Usual outcome of DOJ/FTC reviews: Overwhelmingly consent relief
  - Rare for merger cases to go to court
  - Even so, noticeable increase in litigations in recent years
    - The agency concludes that nothing less than enjoining the transaction in its entirety is acceptable and the parties are willing to litigate, or
    - Prelitigation agency demands for a consent settlement are too high and the parties think that they can do better if they begin litigation and then settle
- But—
  - Current policy
    - Consent solutions should match adjudicated permanent injunctive relief if the agency were to litigate and win (i.e., no substantive compromises)
    - Up until 2012, agencies showed somewhat more of a willingness to compromise
  - Agency negotiates consent relief—
    - Not only to remediate competitive concern with the immediate deal
    - But also with an eye to implications for consent decree negotiations in future deals
- Upshot
  - Agencies have found that they do not have to give much away in negotiations compared to what they would ask a court to order in adjudicated relief

Agency perspectives

- Consent settlements
  - If the parties are willing to offer a consent settlement (“fix”) that satisfies the agency that the restructured transaction will not be anticompetitive, the agency will accept it
  - If the parties are unwilling to offer a fix that satisfies the agency’s requirements, the agency will litigate to obtain what the agency believes is a suitable permanent injunction (almost always a blocking injunction in a preclosing challenge)
    - Sometimes, when the parties offer a curative divestiture that they believe should solve the problem and the agency rejects it as the basis for a consent decree, the parties will sign a contract anyway with a divestiture buyer to implement the fix contingent on the closing of the main transaction. In this situation, courts will assess the competitive effects of the transaction assuming that the fix has occurred (“litigating the fix”).
- To satisfy the agency, the consent settlement must—
  - Fix the agency’s competitive concern
  - Be workable in practice
  - Must not involve the agency in continuous oversight or affirmative regulation
    - Although price increases are the central concern in merger antitrust law, DOJ/FTC will not accept settlements that impose price caps
    - Some state consent decrees impose price caps and other behavioral relief

Agency perspectives

- Some deals cannot be fixed
  - In some situations, the investigating agency will conclude that there is no remedy that will resolve its concerns and that the deal must be blocked in its entirety
    - Examples:

      Staples/Office Depot (2015)
      Sysco/US Foods (2015)
      NASDAQ/NYSE Euronext (2011)
      AT&T/T-Mobile (2011)
    - Where the transaction is not fixable the agency's satisfaction, the agency will go to court and seek injunctive relief unless the parties voluntarily terminate the transaction
- Enforceability
  - Federal judicial consent decrees are injunctions
    - Violations are enforceable through civil and criminal contempt sanctions
  - FTC consent orders are administrative "cease and desist orders"
    - Violation is enforceable through federal district court action for civil penalties
      - Penalties are inflation adjusted
      - In 2018, the maximum penalty is $41,484 per day
    - District court will also issue injunction to prevent future violations
      - These district court orders are enforceable through contempt sanctions

Consent Remedies in Horizontal Cases

Agency requirements

- Almost always require the sale of a complete “business”
  - *Agency view*: Essential to the effectiveness/viability of the solution
  - Implication: Entire business of one or the other merger parties in the problematic market must be sold
    - Example: In a supermarket chain store acquisition, Buyer has 10 stores and Seller has 4 stores in a problematic market.
      - If Buyer elects to fix the transaction with the sale of Seller’s stores, it must sell all of Seller’s 4 stores, even if acquiring only 1 of the Seller’s stores would not have raised an antitrust concern
      - Moreover, Buyer cannot sell 2 of its stores and 2 of the Seller’s stores, even if the two Buyer stores are comparable to the 2 Seller’s stores that the Buyer wants to keep (no “mix and match” within a relevant market)
    - Where there a multiple problematic markets, the Buyer pick whether to sell Buyer or Seller business market-by-market (can “mix and match” across markets)
  - Exceptions:
    - Divestiture buyer has necessary infrastructure and limited divestiture assets will enable rapid and effective entry into divestiture business
    - Divestiture assets are commonly traded (e.g., grocery stores)
- Will permit “trade up” solutions
  - Buyer may sell its own business in order to purchase a larger business

Horizontal remedies: Agency starting point

- Everything associated with the business to be divested must go
  - Principle
    - Start with an obligation to divest everything
    - DOJ/FTC will then negotiate exclusions
  - But must be convinced that the exclusions will not undermine the effectiveness or viability of the solution
    - Agencies tend to be very deferential to the divestiture buyer
    - Can permit the divestiture buyer to “double dip” on the businesses or assets to be acquired:
      1. Negotiate a purchase agreement with the divestiture seller
      2. Then tell the DOJ/FTC that it is not enough in the hope that the agency will refuse to accept the consent settlement unless the divestiture buyer is given more

NB: As noted above, consent settlements must not only “fix” the competitive concerns, the divested businesses or assets must be economically viable in the hands of the divestiture buyer. This sometimes requires the divestiture package to include business or assets that are not competitively problematic.

Horizontal remedies: Elements

- Divest physical assets
  - Production plants, distribution facilities, sales offices, R&D operations
  - All associated equipment
  - Leases/property from which business operated
- Divest IP
  - Sale of any IP rights used exclusively in the divestiture business
  - Sale and license back/license of IP rights used in both retained and divested operations
  - Divestiture buyer must have ability to develop and own future IP

Horizontal remedies: Elements

- Make "key" employees available for hire by divestiture buyer
  - All employees necessary for—
    - production,
    - R&D,
    - sales & marketing, and
    - any other specific function connected with the divestiture business
  - Must facilitate access to key employees
  - Divestiture may make offers to key employees
  - Merging parties annot make counteroffer or offer other inducement to prevent defection

Horizontal remedies: Elements

- Assign/release customer contracts and revenues
  - Matter of course for contracts served out of divestiture facilities
  - May also include other contracts to "bulk up" the divestiture business
  - If contracts not assignable, offer customers ability to terminate with no penalties in order to rebid business
- Transfer business information
  - Especially customer-related information
- Provide short-term transition services and support
  - Usually limited to one year
  - May include input supply agreement, technical support, administrative support
- No long-term entanglements
  - Agencies require complete separation between the merged company and the divestiture buyer
  - Long-term entanglements are usually fatal to a consent settlement
    - *Example*: Long-term agreement for merged company to provide divestiture buyer with an input

Horizontal remedies: Agency right of approval

- Agency will demand right of approval over divestiture buyer *and* the divestiture sales agreement
  1. Must restore competition
     - Divestiture buyer must have the incentive and ability to replace competition the agency believes would otherwise be lost as a result of the acquisition
  2. Must be financially viable
     - Divestiture business/assets must be financially viable in the hands of the particular divestiture buyer
     - The FTC has experienced several failed divestitures because of lack of viability (now very sensitive to the issue)
  3. Most not create its own antitrust problem
     - Divestiture buyer must have no antitrust problem in acquiring divested business
  4. Approval in the agency's sole discretion
     - Not reviewable by a court

Horizontal remedies: Agency right of approval

- Can be problematic for the merging parties even after the consent decree has been negotiated
  - Agency wants to know if the divested assets are "enough" to make the divestiture buyer a meaningful firm in the market for the divested product
  - If the staff concludes that more assets or other content needs to be added to the divestiture commitment (regardless of what the decree requires), the agency can refuse to approve the divestiture buyer and the divestiture sales agreement
    - The divestiture seller has essentially no option other than to make the requested changes due to consent decree time limits on finding an approved divestiture buyer and an approved divestiture sales agreement
    - Can create incentive and ability for the divestiture buyer to engage in "strategic behavior"

Horizontal remedies: Divestiture deadlines

- Agency will require a very tight deadline for closing the divestiture
  - More often than not will require a buyer "up front"
    - That is, the parties must—
      1. find a divestiture buyer,
      2. negotiate and sign a sale and purchase agreement (subject to agency approval and the closing of the main transaction), and
      3. obtain approval of the agency of the divestiture buyer and the divestiture agreement

      before the agency will allow the main transaction to close
  - Typical deadlines for divestiture closing
    - 10 business for buyers upfront
    - 3 months otherwise
  - Almost always results in a "fire sale"
    - That is, a sale with a purchase price materially below fair market value
    - The fire sale nature of a divestiture should be anticipated and taken into account with the buyer at the time the seller is deciding on its offer price

> *Practice note*: Unless protected by attorney-client privilege or the work doctrine, business documents and financial modeling of any possible anticipated divestitures in the antitrust risk analysis will be disclosable to the investigating agency in response to the second request.

Example: TransDigm/Takata

- DOJ concern
  - The completed acquisition by TransDigm of the SCHROTH from Takata eliminated competition in three worldwide markets for airline restraints:
    - Traditional two-point lapbelts
    - Three-point shoulder belts
    - Technical restraints
    - Iinflatable restraint systems
- Consent decree: Requires—
  - TransDigm to divest all of the shares and assets it acquired from Takata in their entirety (including its facilities in Pompano Beach, Florida, and Arnsberg, Germany)
  - A buyer upfront: A consortium including SCHROTH management and financial investors
  - Divestiture to occur within 30 calendar days of the receipt of all regulatory approvals
    - Committee on Foreign Investment in the United States ("CFIUS")
    - German Federal Ministry of Economic Affairs and Energy
  - Separate operation of the divestiture assets pending the closing of the divestiture sale

Example: Albertsons/Safeway

- FTC concern
  - Proposed $9.2 acquisition by Albertsons or Safeway would lessen supermarket competition to the detriment of consumers in 130 local markets[1]
- Consent decree
  - Divestiture of 168 supermarkets to cure problematic local markets
  - Upfront buyers
    - Haggen Holdings, LLC will acquire 146 Albertsons and Safeway stores located in Arizona, California, Nevada, Oregon, and Washington
    - Supervalu Inc. will acquire two Albertsons stores in Washington
    - Associated Wholesale Grocers, Inc. will acquire 12 Albertsons and Safeway stores in Texas
    - Associated Food Stores Inc. will acquire eight Albertsons and Safeway stores in Montana and Wyoming
  - Divestiture package
    - Everything associated with each divestiture store had to be divested to the divestiture buyer
    - Exceptions: None of Albertsons' or Safeway's trademarks had to be sold

[1] Complaint, *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. filed Jan. 27, 2015).

Example: Albertsons/Safeway

- Assets to be Divested

H. "Assets To Be Divested" means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. Assets To Be Divested includes any of Respondents' other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. At each Acquirer's option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that the Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s).

Provided, further, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

[1] Decision and Order, *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. July 2, 2015).

Example: Panasonic/Sanyo

- FTC concern
  - Merging parties produce the highest quality NiMH batteries and are closest competitors – effectively control the market[1]
- Consent decree—Divestiture of Sanyo's NiMH assets[2]
  - Buyer upfront—Fujitsu
  - Divestiture package
    - Manufacturing facility in Takasaki, Japan
    - Supply agreement for NiMH battery sizes not produced at Takasaki
    - All Sanyo IP, including patents and licenses related to portable NiMH batteries
    - Access to identified "key" employees
      - Financial incentives to employees (up to 20% of salary) to move to divestiture buyer
    - Transition services and support for 12 months

[1] Complaint, *In re* Panasonic Corp., No. C-4274 (F.T.C. filed Nov. 23, 2009).
[2] Decision and Order, *In re* Panasonic Corp., No. C-4274 (F.T.C. Jan. 6, 2010).

Consent Settlements:
Procedures and Documents

Typical settlement process—Overview

Negotiations with investigating staff

Staff drafts consent decree and other necessary documents

DOJ

AAG proves filing of settlement papers with federal district court

Court "so orders" stipulation (including maintain assets/hold separate)

Merging firms may close transaction

60-day public comment period commences with Federal Register and newspaper notice

DOJ responds in court filing to public comments (if any)

Court enters proposed consent decree as the final judgment in the case

FTC

FTC Bureau management recommends settlement

Commission provisionally accepts consent settlement and enters Maintain Assets/Hold Separate Order

Merging firms may close transaction

30-day public comment period commences with Federal Register notice

Commission enters provisionally accepted consent order as the final cease and desist order in the case

Consent settlement documents

- Summary of document types

DOJ (federal district court proceeding)	FTC (FTC administrative proceeding)
Complaint	Administrative complaint
Proposed Hold Separate Stipulation and Order —Proposed Final Judgment —[Contained in body of stipulation]	Agreement Containing Consent Orders —Proposed Decision and Order —Order to Maintain Assets
Competitive Impact Statement	Analysis of Proposed Consent Order to Aid Public Comment
Hold Separate Stipulation and Order (so ordered by the court)	Decision and Order (accepting consent settlement for public comment and entering Order to Maintain Assets)
Federal Register and newspaper notice [Public comment period: 60 days]	Federal Register notice [Public comment period: 30 days]
Final Judgment	Decision and Order (final)

Negotiations with investigating staff

- Can happen any time during the investigation
  - But staff will not enter into serious discussions until they are confident that they have identified the substantive problems
- Typically, staff will discuss substantive concerns, but not propose remedies
  - Parties propose remedies
  - Staff reacts to acceptability, but typically does not counterpropose
    - Parties often fear "negotiating against themselves"
- Staff and parties (often only the buyer) reach agreement in principle on substantive terms of a consent order
  - Staff in contact with agency "front office" throughout negotiations, so that staff and front office are aligned

Draft consent decree

- The settlement documents for the DOJ and the FTC are essentially the same, although—
  - The names of the documents differ somewhat
    - DOJ: Called a Proposed Final Judgment (a "consent decree")
    - FTC: Call a Proposed Cease and Desist Order (a "consent order")
    - We will use "consent decree" and "consent order" interchangeably to refer to both the DOJ and FTC documents
  - DOJ consent settlements are governed by the Tunney Act;[1] FTC settlements are governed by administrative regulations modelled after the Tunney Act[2]

[1] Antitrust Procedures and Penalties Act, Pub. L. No 93-528, § 2. 88 Stat. 1706, § 2 (Dec. 21, 1974) (current version at 15 U.S.C. § 16(b)-(h)).

[2] 16 C.F.R. §§ 2.31-2.34 (for pre-administrative complaint settlements ("Part 2 settlements")); 16 C.F.R. § 3.25 (for post-administrative complaint settlements ("Part 3 settlements)). After the Commission has voted to issue an administrative complaint, whether or not it actually has been served by the Secretary, the case is in adjudicative status and is subject to the prohibition on ex parte communications to the Commission. *See* 16 C.F.R. 4.7. A consent agreement or settlement offer may be considered by the Commission, and the Commission may receive advice and comments of the staff concerning the terms of the settlement. only after the case is withdrawn from adjudication. As a result, Part 3 settlements are governed by different rules than Part 2 settlements, although apart from the withdrawal from adjudication the documents and the procedures are roughly the same.

Draft consent decree

- For settlement purposes only
  - No admission of liability or of any nonjurisdictional fact
  - Agency cannot use any “admissions” in settlement negotiations against the parties if the negotiations collapse and the case is litigated
- Drafting
  - Once an agreement in principle has been reached, the agency staff drafts the consent decree that will embody the substantive provisions of the settlement
  - Parties often create their own draft of the consent decree
    - Use recently accepted consent orders for boilerplate (DOJ/FTC, as the case may be)
    - Incorporate substantive relief provisions to reflect merging parties’ settlement proposal
    - Use
      - Provide to clients to illustrate in concrete terms the parties’ consent settlement proposal
      - Can provide to agency as the settlement proposal (as opposed to a term sheet)
      - BUT the staff is very jealous of its prerogative of doing the drafting and is unlikely to use the parties’ draft as the starting point

Draft consent decree

- An important institutional detail
  - FTC
    - The investigating section is responsible for negotiating the substantive terms of the settlement
      (e.g., what needs to be divested)
    - BUT the FTC Compliance Section, not the investigating section, is responsible for drafting the consent settlement papers
      - This means that the FTC staff members who are negotiating the consent settlement typically lack familiarity with the markets
      - Also, the Compliance Section views its job as ensuring that no problem the FTC has ever faced in a consent settlement ever reoccurs
      - This means that it is difficult if not impossible to change the "boilerplate" in a draft consent decree
    - This can lead to a serious disconnect, when the Compliance Section insists on provisions in the consent decree that parties (and even the investigating section) considers either unnecessary or counterproductive
    - Often, the parties and the investigating staff will align to arguing for changes in the Compliance Section's draft of the consent decree
  - DOJ
    - Moving in the direction of the FTC (with the Division General Counsel responsible for the drafting)

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Whereas clauses
  - I. Jurisdiction
  - II. Definitions
  - III. Applicability
  - IV. Divestitures
  - V. Appointment of Divestiture Trustee
  - VI. Notice of Proposed Divestitures
  - VII. Financing
  - VIII. Hold Separate
  - IX. Affidavits
  - X. Compliance Inspection
  - XI. Notification
  - XII. No Reacquisition
  - XIII. Retention of Jurisdiction
  - XIV. Expiration of final Judgment
  - XV. Public Interest Determination
  - Signature line for judge

Note: The remedial obligations in the settlement are drafted in the form of a court order (or an FTC cease and desist order), so that the judge of the FTC may enter the settlement as a final order without having to adapt its form.

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Whereas clauses—Set forth:
    - The consent of the parties to the entry of the proposed final judgment
    - The agreement of the parties to be bound by the proposed final judgment pending its approval and entry by the court
    - The purpose of the decree settlement is the prompt divestiture of rights and assets by the defendants to assure that competition is not substantially lessened by their merger
    - The parties' representation that the required divestitures "can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions"
  - Section I. Jurisdiction
    - States that the court has subject matter jurisdiction over the complaint
      - Required by the Federal Rules of Civil Procedure as part of any final judgment
    - States that the complaint states a cause of action that the defendants has violated Section 7

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section II. Definitions
    - Defines who the merging parties are
    - Defines the assets to be divested in detail (the "Divestiture Assets")
      - This is almost always the most heavily negotiated portion of the consent settlement
    - Defines the divestiture buyer (if a "buyer upfront" is required)
  - Section III. Applicability
    - States the final judgment applies not only to the named defendants bust also to "all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise"
      - This is a standard provision in all federal injunctions

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section IV. Divestitures
    - Divestiture obligation
      - Timing—Tends to be accelerated
        - Iron Mountain/Recall (DOJ)
          - 10 days after consummation of the main transaction for certain assets to an identified preapproved buyer upfront
          - 90 days after consummation of the main transaction, or 5 days of the entry by the court of the final judgment for other assets to a buyer to be approved by the DOJ
        - Hertz Dollar Thrifty (FTC)
          - 15 days after Hertz acquires a majority of the shares of Dollar Thrifty to divest Advantage to an identified preapproved buyer upfront
        - Albertsons/Safeway (FTC)
          - 60 days after consummation of the main transaction for certain assets to an identified preapproved buyer upfront
        - SCI/Stewart Enterprises
          - 180 days from final approval to a buyer to be approved by the FTC (no buyer upfront)
      - May merging parties to provide transition services to divestiture buyer
      - Typically provides for the divestiture buyer to have reasonable access to and recruitment of employees key to operation of divestiture business/assets

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section IV. Divestitures
    - Approval of divestiture buyer and manner of divestiture by agency

> Unless the United States otherwise consents in writing, the divestiture . . .
>
> (1) shall include the entire Divestiture Assets (unless the United States in its sole discretion approves the divestiture of a subset of the Divestiture Assets), and
>
> (2) shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing Records Management business.
>
> Divestiture of the Divestiture Assets may be made to one or more Acquirers provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint.
>
> The divestitures . . .
>
> (1) shall be made to an Acquirer(s) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the records management business; and
>
> (2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise.[1]

[1] Proposed Final Judgment § IV(L), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section IV. Divestitures
    - Purpose provision
      - Often found in FTC consent orders

> The purposes of this Section II [requiring divestitures] are
>
> [1] to remedy the lessening of competition resulting from the Acquisition, as alleged in the Commission's complaint, and
>
> [2] to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the same businesses in which they are engaged at the time of the Acquisition.[1]

[1] [Proposed] Decision and Order § II(L), *In re* SCI Corp., No. C-4433 (F.T.C. filed Dec. 23, 2014).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section V. Appointment of a Divestiture Trustee
    - Permits the agency to appoint a “divestiture trustee” (think exclusive sales agent) for the divestiture assets if the required divestitures were not made by the merged firm in the time set by the consent order
      - Once a divestiture trustee is appointed, the merged firm no longer has the right to control, be involved in, or approve the sale of the divestiture assets—those powers reside exclusively in the divestiture trustee (subject to final approval of the divestiture buyer and manner of sale by the agency)
    - Powers and duties
      - The divestiture trustee has the power to accomplish the divestiture to a divestiture buyer approved by the agency “at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee”[1]
      - The divestiture trustee has no fiduciary or other duty to the merged firm
        - In particular, the divestiture trustee has no duty to obtain the highest price possible for the divestiture assets
    - Payment
      - The merged firm is required to pay reasonable compensation to the divestiture trustee
      - The divestiture trustee has the right to retain investment bankers, attorneys, or other agents reasonably necessary in the divestiture trustee’s judgment to assist in the divestiture
        - These agents are solely accountable to the divestiture trustee
        - The merged firm must pay for any agents the divestiture appoints
    - Boilerplate provisions—Not subject to negotiation by parties

[1] Proposed Final Judgment § V(B), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section VI. Notice of Proposed Divestiture
    - Provides for notice to the agency once a definitive agreement is signed with the divestiture buyer
      - Boilerplate provision—Not subject to negotiation by the parties
    - Practice
      - Typically a formality, since the parties almost always are in contract with the investigating staff over the identity and acceptability of a potent divestiture buyer long before the signing of a definitive agreement
        - Neither the merged firm nor the potential divestiture buyer wants to go through the process of negotiating a definitive agreement unless they have confidence that the divestiture buyer will be acceptable to the agency
      - Unnecessary when the agency requires a buyer upfront that will be preapproved prior to the filing of the consent settlement papers with the court of the full Commission

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section VII. Financing
    - Prohibits the defendants from financing all or any part of the purchase price of the divestiture assets
    - Rationale
      - Provides a market test whether the divestiture assets are likely to be viable in the hands of the divestiture buyer
        - A divestiture buyer is unwilling to put up its own funds—or cannot obtain the necessary financing from third parties—indicates that the market does not believe that the divestiture is viable
      - Prevents the merged firm from influencing the divestiture buyer through any financing agreement
      - Maximizes the incentive of the merged firm to compete with the divestiture buyer
        - If the divestiture buyer risks failing and thereby defaulting on the loan from the merged firm, the merged firm may “pull its punches” in competing with the divestiture buyer to support the divestiture buyer and enable it to continue to make its loan payments

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section VIII. Hold Separate

> Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.[1]

[1] Proposed Final Judgment § VII, United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section IX. Affidavits
    - Requires merged firm to file every 30 days an affidavit with the agency reporting on its compliance with the terms of the consent decree
    - Especially directed at efforts to secure a divestiture buyer—Among other things, must include:
      - The "name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period."[1]
      - A description of the efforts the merged firm has taken to solicit divestiture buyers and to provide required information to prospective Acquirers (including the limitations, if any, on such information)
    - Also directed toward compliance with the hold separate obligations
    - Obligation begins within 20 days after the filing of the complaint

[1] Proposed Final Judgment § IX(A), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section X. Compliance Inspections
    - Requires merged firm to provide access to agency to—
      - Inspect and copy merged firm's business records
      - Interview merged firm's officers, employees, and agents
        - Individuals may have their own counsel present
        - Merged firm may not interfere with interviews
    - Requires merged firm to submit written reports at the request of the agency

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section XI. Notification of non-HSR reportable transactions
    - Requires merged firm to notify non-HSR reportable transactions in the relevant product market as if they were HSR reportable
      - Agency can issue a request for additional information and documents (effectively, a second request)
      - Merged firm cannot close transaction until 30 calendar days following the submission of the requested documents and infromation
    - Typically required when the merged firm in the future may acquire small facilities in the relevant product market, such as:
      - Supermarkets[1]
      - Record management facilities[2]
      - Outpatient dialysis facilities[3]

[1] *E.g.*, Proposed Decision and Order § VIII, *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. filed Jan. 27, 2015)
[2] *E.g.*, Proposed Final Judgment § XI(A), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).
[3] e.g., Proposed Decision and Order § III, *In re* Fresenius Medical Care AG & Co. KGaA, No. C-4348 (F.T.C. filed Feb. 28, 2012).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section XII. No Reacquisition
    - Prohibits the merged firm from acquiring all or any part of the divestiture assets
  - Section XIII. Retention of Jurisdiction

> This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.[1]

    - Consent decrees are entered by consent of the parties
      - Common practice for courts to modify (or terminate) consent decrees upon the joint motion of the agency and the merged firm (if the court finds the change in the public interest)
      - *Query*: Under what circumstances may the court modify a consent decree over the objection of a party?
        - If the court finds that the restrictions in the consent decree no longer serve the public interest, it can modify or terminate the consent decree over the objection of the agency
        - But can the court impose new obligations on the merged firm on the agency's motion over the merged firm's objection?

[1] Proposed Final Judgment § XIII, United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016).

Draft consent decree

- Typical contents of a DOJ proposed final judgment
  - Section XIV. Expiration of Final Judgment
    - Modern consent decrees contain a “sunset provision” terminating the consent decree after a specified number of years from the date of its entry
      - Usual time period: 10 years
  - Section XV. Public Interest Determination
    - The Tunney Act requires that the court find that the entry of the proposed final judgment is in the public interest.
    - This provision states that finding

Complaints

- Settlements occur only in the context of a litigation
  - Merger antitrust settlements take place in the context of litigation in a district court or in an administrative adjudicative proceedings
  - The litigation must be commenced by the filing of a complaint
  - In settlements reached prior to the filing of a complaint, a complaint is nonetheless filed and the settlement documents are filed simultaneously with the complaint
- Sufficiency of the complaint
  - A complaint filed in connection with a settlement must comply with all of the requirements of a sufficient complaint to commence litigation
  - BUT in the context of a settlement the merging parties have no reason to challenge the sufficiency of the complaint
  - However, in the (unprecedented to my knowledge) event that the agency withdraws or the court rejects a filed settlement and the matter proceeds to litigation, the complaint filed in the settlement would be the operative complaint for litigation
    - The court is likely to permit the agency to file an amended complaint
    - BUT the amended complaint will not be able to rely on any concessions the merging parties made in settlement negotiations

Competitive impact analysis

- Both the DOJ and the FTC prepared an analysis of the competitive impact of the proposed consent settlement
  - The DOJ analysis is called a *Competitive Impact Statement*
  - The FTC analysis is called an *Analysis of Agreement Containing Consent Orders to Aid Public Comment*

Competitive impact analysis

- The Tunney Act requires that a DOJ competitive impact statement contain the following information—
  1. the nature and purpose of the proceeding;
  2. a description of the practices or events giving rise to the alleged violation of the antitrust laws;
  3. an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
  4. the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
  5. a description of the procedures available for modification of such proposal; and
  6. a description and evaluation of alternatives to such proposal actually considered by the United States[1]

[1] *See* 15 U.S.C. § 16(b).

Competitive impact analysis

- FTC
  - The FTC Analysis contains information similar to that in the DOJ Competitive Impact Analysis
- Time of filing
  - The competitive impact analysis is usually filed by the settling agency either simultaneously with or shortly after the filing of the complaint and settlement documents

Public notice and comment

- DOJ[1]
  - The Tunney Act provides that any proposal for a consent settlement by the DOJ must be filed with the court and published in the Federal Register *and* in appropriate newspapers at least 60 days prior to the effective date of any judgment entered by the court
  - In addition, the notice must inform the public that interested persons may submit comments about the proposed consent decree to the United States Department of Justice, Antitrust Division
  - The DOJ will consider any comments it receives, respond to them, and—
    - Publish the comments and its response in the Federal Register and,
    - File the comments and its response with the court prior to the court's decision whether to enter the consent settlement as a final judgment
  - The settling parties may also respond to any public comments in a filing to the court

[1] *See* 15 U.S.C. §§ 16(b)-(d).

Public notice and comment

- FTC
  - Similar practice, except—
    - No newspaper notice is required
    - The public comment period is only 30 days as opposed to 60 days
- Most consent settlements receive no public comments
  - There are exceptions

Final judgment or order

- DOJ
  - After the expiration of the 60-day period, the DOJ will file with the court any public comments and the DOJ responses, together with a Motion for Entry of the Final Judgment
    - The DOJ, however, may withdraw it consent to entry of the Final Judgment, renegotiate a new consent settlement, or proceed to litigation on the merits if the DOJ decides that the original consent decree is not appropriate
    - The idea here is that the DOJ should the option of withdrawing consent in light of any public comments that are submitted
  - The court may either grant or deny the DOJ's Motion for Entry of the Final Judgment
    - The court may enter the proposed Final Judgment only if the court finds the entry of the judgment in the public interest[1]
    - If the court does not find the proposed final Judgment in the public interest, the court may either—
      - Deny the motion, or
      - More typically, indicate to the DOJ and the settling party what problems or concerns the judge has with the proposed consent decree and give the parties the opportunity to revise the consent decree proposal
        - Except in rare situations, the court is unlikely to require new notice and a new comment period before ruling on whether to accept a revised consent decree proposal

[1] *See* 15 U.S.C. § 16(e)) (reprinted on the next slide).

Final judgment

- DOJ
  - *Public interest standard*: The Tunney Act provides:

> **(e) PUBLIC INTEREST DETERMINATION**
>
> **(1)** Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—
>
> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.
>
> **(2)** Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.[1]

[1] *See* 15 U.S.C. § 16(e).

Consent Decree Violations

Consent decree violations

- DOJ
  - DOJ consent decrees are technically injunctions ordered by a federal district court
  - Violations are punishable by civil or criminal contempt
    - Civil contempt sanctions
      - Designed to enforce compliance with court orders and to compensate those injured by an order violation
      - A sanction designed to coerce compliance, such as a daily fine for each day the defendant violates the order or imprisonment until the defendant complies with the order, remains civil provided that the contempt sanction is subject to purging by compliance with court order
    - Criminal contempt sanctions
      - Designed to vindicate the power of the court by punishing violators: "Criminal contempt is a crime in the ordinary sense."[1]
      - Are punitive rather than remedial, and are characterized by fixed, unconditional sentences or fines

[1] Bloom v. Illinois, 391 U.S. 194, 201 (1968); *accord*, International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994).

Consent decree violations

- DOJ
  - A finding of contempt in the D.C. Circuit requires a showing by "clear and convincing evidence" that the defendant violated a "clear and unambiguous" prohibition in the consent decree[1]
  - New innovation in the Trump administration
    - Recent DOJ consent decrees contain language designed to lower the evidentiary standard for DOJ to prove civil contempt for a consent decree violation from clear and convincing evidence to a preponderance of the evidence:

      > The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including its right to seek an order of contempt from this Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and they waive any argument that a different standard of proof' should apply.[2]

    - *Query*: Can the settling parties change by agreement the standard for imposing the judicial sanction of contempt?

[1] *See* United States v. Microsoft Corp., 980 F. Supp. 537, 541 (D.D.C. 1997). Other circuits have similar requirements, although the articulation may be different.
[2] *E.g.*, United States v. Knorr-Bremse AG § 10, No. 1:18-cv-00747-CKK (D.D.C. filed July 11, 2018); Proposed Final Judgment, United States v. Walt Disney Co., No. 1:18-cv-05800 (D.D.C. filed June 27, 2018).

Consent decree violations

- FTC
  - Violations of an FTC cease and desist order issued under FTC Act § 5 are subject to civil penalties and possible subsequent criminal sanctions
    - Civil penalty actions are subject to the preponderance of the evidence standard
  - Civil penalties: FTC Act § 5(l)

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.[1]

    - The maximum amount of the penalty today has been inflation-adjusted to $41,484 for 2018
    - If the district court enters an injunction in aid of a Commission order pursuant to Section 5(l), violations of that injunction are subject to civil and criminal contempt sanctions

[1] 15 U.S.C. § 5(l).

Consent decree violations

- Violation of FTC consent order: *Boston Scientific*[1]
  - 1995, Boston Scientific agreed to acquire Cardiovascular Imaging Systems (CVIS)
    - At the time, Boston Scientific and CVIS were the two of the three suppliers of intravascular ultrasound (IVUS) catheters, an emerging new technology for diagnosing heart disease, and collectively accounted for 90% of the sales of IVUS catheters
    - They were also involved in vigorous patent infringement cross-litigation to block each other from continuing to manufacture and sell IVUS catheters
  - Boston Scientific agreed to an FTC consent order requiring it to license specific intellectual property rights in IVUS catheter technology to Hewlett-Packard to enable it to enter into the manufacture and sell of IVUS catheters
    - HP had been in a joint venture with Boston Scientific whereby HP developed, manufactured and sold the electronic console that displayed the images generated by the Boston Scientific IVUS catheter.
  - Boston Scientific signed an IP license agreement requiring it to provide HP with the rights specified in the FTC consent order but it breached this agreement
    - HP gave up trying to enter the catheter market and exited the console market altogether in November 1998
    - In early 1999, HP filed a private action against BSC alleging breach of contract, monopolization and attempted monopolization (subsequently settled)

[1] *See* United States v. Boston Scientific Corp., 253 F. Supp. 2d 85 (D. Mass. 2003).

Consent decree violations

- Violation of FTC consent order: *Boston Scientific/CVIS*
  - In 2000, the DOJ, acting on behalf of the FTC, filed suit for civil penalties under Section 5(l)
  - In 2003, after significant litigation, the court found in favor of the government and ordered Boston Scientific to pay $7.04 million in civil penalties for two violations
    - In determining penalty amount, the court looked at six factors:
      1. harm to the public;
      2. benefit to the violator;
      3. good or bad faith of the violator;
      4. the violator's ability to pay;
      5. deterrence of future violations by this violator and others; and
      6. vindication of the FTC's authority
    - Calculation
      - FTC final decision and order: April 5, 1995
      - ADP violation
        - May 5, 1995: Boston Scientific takes position not to supply ADP technology rights to HP
        - July 9, 1997: FTC staff opines that ADP technology is covered in consent decree
        - March 1, 1998: HP exits market
        - Court: $5000 per day from May 5, 1995 to July 8, 1997 + $10,000 per day from July 9, 1997 to March 1, 1998 = $6,325,000 (maximum civil penalties available in the respective time periods)
      - Discovery violation: $11,000 per day from March 1, 1998 (when samples of the Discovery catheter were available for promotion) and May 5, 1998 (the end of the supply period required by the FTC order) = $715,000