The uphill case for a post-Order divestiture

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Designing effective merger remedy orders is one of the Commission's most important tasks. An effective merger remedy prevents the merger from causing harm.

For many years – ever since our 1999 Divestiture Study identified a number of factors that caused remedies to fail – the Bureau of Competition has strongly favored divesting assets to an upfront buyer. Plainly put, while no approach is foolproof, divesting assets to an upfront buyer has been the most consistently effective means for achieving successful merger remedies. That's because upfront buyers minimize the risks that acquired assets will lose value (due to the loss of employees, customers, and business opportunities) or that competition will be diminished while ownership of the assets remains uncertain.

That said, the Commission's strong preference for upfront buyers still allows for post-Order divestitures to a Commission-approved buyer in certain limited circumstances where this approach has been shown to be effective in maintaining pre-merger levels of competition. For instance, the 2017 Remedy Study found that divestitures of ongoing businesses have been successful, whether upfront or post-Order. In other situations, where there are numerous potential strong buyers for divested assets, the Commission may accept a settlement providing for a post-Order divestiture and allow the merger to close. But incentives being what they are post-merger, many protections must be included in any settlement providing for a post-Order divestiture to ensure that the eventual buyer is able to maintain competition at the pre-merger level. In accepting a settlement of charges that a merger is likely to result in harm, the Commission simply cannot place the risk of a failed post-merger remedy on customers or ultimate consumers without requiring significant protections that prevent that outcome.

If you plan to advocate for a post-Order divestiture, be prepared to address the factors that will be examined and weighed, which include whether:

- The assets to be divested are an ongoing, standalone business unit;
- The risk of lost business opportunities during the post-Order/pre-divestiture period is low, for example, because of long-term contracts that can be transferred to the buyer;
- The risk of the business deteriorating is low;
- The business does not rely on significant support from the merged firm to remain operational and viable; and
- There are multiple approvable buyers that can persuade the Bureau that they will likely bid for the assets. The Bureau may request to meet with the potential buyers prior to recommending a post-Order divestiture.

This list is not exhaustive, but rather sets out the primary factors that might lead the Bureau to recommend that the Commission accept a post-Order divestiture. In addition, the Commission likely will require the Respondent to hold separate and maintain the assets, and may appoint a Hold Separate Monitor or Hold Separate Manager to assure that the divested business continues to operate in the normal course of business and without influence by the merged firm. (Keep in mind, Respondents pay the costs associated with a Monitor or a Manager as a standard term of any settlement.)

There are also factors that may make it unlikely that the Bureau will recommend a settlement containing a post-Order divestiture, such as:

- One of the merging parties failed to find an approvable buyer in a similar past case or a divestiture trustee was needed to complete the divestiture as required by the Order;
- One of the merging parties previously missed the deadline for divesting assets in a post-Order divestiture without good cause; or
- Prior post-Order divestitures in the same industry failed.

A word about timing. When parties delay discussing acceptable remedies during an in-depth merger review, they limit their options for offering an acceptable remedy and avoiding litigation. Specifically, a delay could limit the time available to seek an acceptable upfront buyer, and also makes it less likely that the Bureau will recommend a post-Order divestiture. If the parties condition a settlement on the Bureau's willingness to recommend a post-Order divestiture, from the Bureau's perspective, it may be preferable to seek to stop the merger rather than support a proposed remedy that the Bureau has not adequately considered and which creates the risk of post-merger failure.

Finally, parties should always be mindful that failing to divest on time pursuant to a post-Order divestiture requirement is a *per se* violation of the Order, which can result in the imposition of significant civil penalties, the appointment of a divestiture trustee, and other relief.

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