Unit 4. 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 on the merits
  - Agency negotiates consent relief—
    - Not only to remediate competitive concerns with the immediate deal
    - *But also* with an eye to implications for consent decree negotiations in future deals
- Upshot: The current practice
  - Agencies do not compromise in consent decree negotiations and do not accept less relief than they believe is necessary to cure the competitive problem

Agency perspectives

- Consent settlements
  - If the parties offer a consent settlement (a “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)
    - The parties can preempt litigation by voluntarily terminating their merger agreement and withdrawing their HSR filings

Agency perspectives

- To satisfy the agency, the consent settlement must—
  1. Eliminate the agency's competitive concerns with the main acquisition
  2. Be workable in practice
     - In a divestiture consent decree, the agency must be convince that there is a divestiture buyer that can—
       a. Acquire the divestiture lines of business/assets without creating its own Section 7 problem
       b. Operate the divestiture business with the sale competitive force postmerger and the divestiture seller did premerger
       c. Do so profitably (i.e., it will not fail in the foreseeable future and exit the divestiture business)
  3. 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 have imposed price caps and other behavioral relief in horizontal merger settlements
  4. Must not create its own antitrust concerns
     - For example, if a consent decrees requires a curative divestiture, then the acquisition of the divestiture assets by the divestiture buyer cannot itself create an anticompetitive concern

Agency perspectives

- Consent settlements
  - "Litigating the fix"
    - 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, the practice of the courts is to assess the competitive effects of the transaction assuming that the fix has occurred
    - The courts, of course, allow the agency to challenge the competitive sufficiency of the fix
      - Presumably, the agency has already examined the proposed fix in detail during the consent decree negotiation process
      - If not, the court should allow the agency to take discovery on the fix (including discovery of the divestiture buyer)
    - Third parties can collaterally attack the sufficiency of a DOJ/FTC consent decree in their own Section 7 action
      - That is, the third party can file a complaint alleging that the merger, even if restructured according to a DOJ or FTC consent decree, nonetheless is anticompetitive and violates Section 7[1]
      - The DOJ/FTC consent decree does not preclude a collateral attack

[1] This is what a group of states did in the T-Mobile/Sprit deal after the DOJ accepted a consent decree. *See* New York v. Deutsche Telekom AG , 439 F. Supp. 3d 179 (S.D.N.Y. 2020). Unfortunately, the states did not prevail in their challenge. In retrospect, most observers now believe that the DOJ consent decree in fact failed to preserve competition. We will examine T-Mobile/Sprint later in the course.

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 a blocking injunction unless the parties voluntarily terminate the transaction

Agency perspectives

- 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”
    - Violations are enforceable through federal district court action for civil penalties
      - Penalties are inflation adjusted
      - In 2021, the maximum penalty is $43,792 per day (adjusted annually)
    - District court will also issue injunctions to prevent future violations
      - These district court orders are enforceable through judicial contempt sanctions (criminal and civil)
      - Contempt sanctions can expose the company to greater liability than the per day civil penalty

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 all of the substantive problems
- Typically, staff will discuss substantive concerns but not propose remedies
  - The practice is for the parties to propose remedies
  - Staff reacts to acceptability, but typically does not counterpropose
    - That is, the staff will tell the parties what is wrong with their proposal but typically will not suggest how to fix it (there are exceptions depending on the investigating staff and senior agency management)
    - Parties often fear "negotiating against themselves"
- Staff and parties (often only the buyer) reach agreement in principle on substantive terms of a consent order
  - The staff is in contact with agency "front office" throughout negotiations, so that the staff and front office are aligned[1]
  - The next step is to draft the proposed consent decree

[1] As a matter of convention, the "front office" at the FTC means the Office of the Director of the Bureau of Competition, not the five Commissioners. The "front office" at the DOJ means the AAG and the responsible DAAGs.

Consent Remedies in Horizontal Cases

Mergers and acquisitions involving competitors are by far most common type of business combination challenged under the merger antitrust laws. We will examine relief in vertical cases later in the course.

Agency requirements

- Almost always requires 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 party in each 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
      - The agencies usually will not accept a divestiture solutions that involves—
        - 4 stores of the Buyer that are comparable to the four stores operated by the Seller, *or*
        - 2 of the Buyer's 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 (i.e., no "mix and match" within a relevant market)
    - Where there a multiple problematic markets, the Buyer may pick whether to sell the Buyer's or Seller's business market-by-market (can "mix and match" across markets)
  - Exception:
    - The divestiture buyer has necessary infrastructure and the divestiture of something less than all of the divestiture seller's business nonetheless will enable the divestiture buyer to rapidly and effectively compete in the divestiture business
- Will permit "trade up" solutions
  - Buyer may sell its own entire business in order to purchase a larger business

Agency requirements

- Divestiture buyers
  - "Buyer upfront"
    - The default practice today is to require a buyer upfront
      - This means that the DOJ will not file the settlement papers in court, and the Commission will not provisionally accept a consent decree, unless and until the parties have produced a buyer for the divestiture assets and signed a definitive divestiture agreement, both of which must be satisfactory to the agency
      - This can add weeks or months to the settlement process
        - Weeks if negotiations with a divestiture buyer are in progress but not completed by the time the divestiture terms of the consent decree have been agreed by the agency and the parties
          - Usually results in a "fire sale" of the divestiture assets (with the divestiture price substantially below fair market value)
        - Months if the parties wish to conduct an auction process to maximize value in the sale of the divestiture assets
  - No buyer upfront
    - Requires the parties to show to the satisfaction of the agency that—
      1. There are multiple buyers likely to be acceptable to the agency that are interested in acquiring the divestiture package
      2. The divestiture package consists of an ongoing, stand-alone business and, once divested to an acceptable buyer, will maintain or restore competition in the market at issue, *and*
      3. The premerger level of competition and the viability of the assets will be preserved pending divestiture

The merging parties should anticipate that they will be required to produce a buyer upfront

Horizontal remedies: Agency starting point

- Everything associated with the business to be divested must be sold
  - Principle
    - Start with an obligation to divest everything
    - DOJ/FTC will then negotiate exclusions of assets that are immaterial or unnecessary to a successful divestiture (which may depend on the particulars of the divestiture buyer)
  - Agency 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
      - Frequently gives the divestiture buyer considerable leverage in negotiating the divestiture package with the merging parties
    - 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 the divestiture package is not enough in the hope that the agency will refuse to accept the consent settlement unless the divestiture buyer is given more

      Given that this happens so late the process, the divestiture buyer has enormous leverage over the divestiture seller and can usually maintain the original divestiture purchase price even if the assets are increased materially

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 in order to ensure financial viability.

Horizontal remedies: Elements

- Requirements
  1. Divest all physical assets
  2. Divest all IP
  3. Make designated "key" employees available for hire by divestiture buyer
  4. Assign/release customer contracts and revenues
  5. Transfer all business information
  6. Provide short-term transition services and support to enable the divestiture buyer to enter the business immediately
  7. No long-term entanglements between the combined firm and the divestiture buyer

Will look at each of these in more detail in the subsequent slides

- New development: Prior approval provisions
  - Provision requiring prior approval by the reviewing agency of future acquisitions by the defendant-buyer
    - When used in the past, applied only to acquisitions that were not HSR-reportable
      - Remains to be seen what the Biden antitrust enforcement policy will similarly limited
    - Likely to be included to consent decrees for all types of mergers

Horizontal remedies: Elements

1. Divest physical assets
   - Divest all physical assets that are part of the business plus any additional assets reasonably necessary for the divestiture buyer to operate the business competitively, including—
     - Production plants, stores, sales offices, distribution facilities, R&D operations
     - All equipment, inventory, and supplies associated with these facilities
     - All property associated with these facilities
       - If property is leased rather than owned, the lease must be assigned
   - Additional assets or lines of lines must be included if either—
     - They are so integrated with the divestiture assets that the divestiture assets cannot be sold separately (i.e., they are part of the same integrated manufacturing facility)
     - They are necessary to support the financial viability of the divestiture buyer
   - The scope of the physical assets to be divested is usually the most contested issue in the consent decree negotiations

Horizontal remedies: Elements

2. Divest IP
   - Sale of any IP rights used exclusively in the divestiture business
   - License, or sale and license back, of IP rights used in both retained and divested operations
     - *Exception*: Shared tradenames and trade dress may be licensed to the divestiture buyer for three years or so to enable the divestiture to transition to a new trade name
     - If the IP is licensed by the combined company to the divestiture buyer, then the license must be perpetual, sublicensable, transferable, and royalty-free to avoid any future entanglements with the divestiture buyer
   - Divestiture buyer must have the ability to develop and own future IP (including IP built on the divestiture IP)
   - The scope of the IP to be divested—and the manner of divestiture (license or sale)—can be a very contested issue in the consent decree negotiations

Horizontal remedies: Elements

3. Make "key" employees available for hire by divestiture buyer
   - "Key employees" include all employees necessary for—
     - production,
     - R&D,
     - sales & marketing, and
     - any other specific function connected with the divestiture business
   - Divestiture seller must provide divestiture buyer with access to key employees
     - Divestiture buyer may make offers to key employees
     - Merging parties cannot make counteroffers or offer other inducements to prevent defection of employees to divestiture buyer
   - Who are "key" employees can be a major issue in the consent decree negotiations
     - Especially if the agency is reaching beyond employees dedicated to the divestiture lines of business and into senior employees (including in R&D) with responsibilities beyond the divestiture line of business

Horizontal remedies: Elements

4. Assign/release customer contracts and revenues
   - All contracts served out of divestiture facilities
   - May also include other contracts to “bulk up” the divestiture business to make it viable
   - If contracts not assignable, the combined company must agree to offer customers the right to terminate their existing contracts without penalty (independently of the termination provisions in the contract) in order to give the divestiture buyer the opportunity to compete for these customers
5. Transfer all information related to the divested line of business
   - Especially customer-related information, technical information, trade secrets, know-how
6. Provide short-term transition services and support necessary for the divestiture buyer to enter the divestiture business and compete immediately
   - But usually limited to no more than one year
     - The agencies are very wary about long-term entanglements between the combined firm and the divestiture buyer
   - May include input supply agreement, technical support, administrative support

Horizontal remedies: Elements

7. 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

Example: Albertsons/Safeway[1]

- FTC concern
  - Proposed $9.2 billion acquisition by Albertsons or Safeway would lessen supermarket competition to the detriment of consumers in 130 local markets
- 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
    - *Exception*: None of Albertsons' or Safeway's trademarks had to be sold
      - NB: Each of the divestiture buyers had an established tradename in the supermarket business under which they could operate the divested stores
      - If this had not been the case, the FTC likely would have required Albertsons to license the tradename for three years or so

[1] *See* Albertsons/Safeway case study in the supplemental reading materials.

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: TransDigm/Takata[1]

- DOJ concern
  - The acquisition by TransDigm of SCHROTH from Takata (which had already closed) eliminated competition in three worldwide markets for airline restraints:
    - Two-point lapbelts used on commercial airplanes
    - Three-point shoulder belts used on commercial airplanes
    - Technical restraints used on commercial airplanes
    - Inflatable restraint systems used on commercial airplanes
- 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: Here, 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") and German Federal Ministry of Economic Affairs and Energy, or
    - the Court's signing of the Hold Separate Stipulation and Order in this matter

    whichever is later
  - Combined company had to operate the divestiture assets separately from the rest of the its business pending the closing of the divestiture sale ("hold separate")

[1] *See* TransDigm/Takata case study in optional reading materials.

Horizontal remedies: Agency right of approval

- Agency will require the right of approval over divestiture buyer *and* the divestiture sales agreement
  1. Manner of divestiture 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. Divestiture business 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. Divestiture must not create its own antitrust problem
     - Divestiture buyer must have no antitrust problem in acquiring divested business
  4. Approval is in the agency's sole discretion
     - Agency decision to accept or reject a divestiture buyer and the manner of divestiture is not reviewable by a court
     - Surprisingly, no court has objected to its exclusion

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
      - Unless the merging parties are willing to litigate or voluntarily terminate their merger agreement
    - Can create incentive and ability for the divestiture buyer to engage in "strategic behavior" to obtain additional assets beyond those negotiated in the divestiture agreement

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 days 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.

Horizontal remedies: Monitors and trustees

- Monitors
  - If the consent decree imposes obligations on the merging parties over some period of time, the consent decree may provide for the appointment of a "monitor" to oversee compliance with these obligations
    - Proposed by the merging parties but subject to the approval of the agency
    - Paid for by the merging parties but obligations run to the agency
    - Not an enforcement authority—only reports on compliance to the agency

Horizontal remedies: Monitors and trustees

- Divestiture trustees
  - If the consent decree has a divestiture obligation, it will contain a provision for the appointment of a “trustee” in the event the merged firm fails to divest in the time required by the decree
    - Trustee is proposed by the merging parties but subject to the approval of the agency
    - Paid for by the merging parties but obligations run to the agency
      - The trustee is a fiduciary to the agency, *not* to the combined firm
    - *Key*: Once appointed, the power to divest is removed from the combined firm and lodged solely in the trustee
      - The combined firm must cooperate with the trustee but has no control or influence over the sales process, the selection of bidders, the selection of the divestiture buyer, or the sales price
      - Trustee required to sell the divestiture package to a buyer acceptable to the agency
      - *No minimum price threshold:* The trustee’s primary obligation is to divest to an acceptable buyer regardless of price

Consent Remedies: A New Development

Mergers and acquisitions involving competitors are by far most common type of business combination challenged under the merger antitrust laws. We will examine relief in vertical cases later in the course.

Acquisition prior approval

- History
  - Prior to 1995, the FTC routinely included an "acquisition prior approval" provision in consent and adjudicated requiring respondents, for a period of typically ten years, to obtain the prior approval of the Commission before making an acquisition in the relevant market alleged in the complaint
  - *Example*: Dow/Rugby consent order:

> *It is further ordered*, That for a period of ten (10) years from the date this order becomes final, respondents shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:
>
> (a) Any stock, share capital, equity, leasehold or other interest in any concern , corporate or non-corporate , presently engaged in, or within the two years preceding such acquisition engaged in, the manufacture, production, distribution or sale of dicyclomine tablets and capsules in the United States [the alleged relevant market]; or
>
> (b) Any assets currently used for or previously used for (and still suitable for use for) the manufacture and production of dicyclomine tablets and capsules in the United States from any concern, corporate or noncorporate, presently engaged in, or within the two years preceding the acquisition engaged in the manufacture , production, distribution or sale of dicyclomine tablets and capsules in the United States.[1]

[1] Decision and Order § IV, *In re* Dow Chem. Co., No. C-3533, 118 F.T.C. 730, 742 (1994).

Acquisition prior approval

- 1995 Policy Statement[1]
  - On July 22, 1995, the FTC issued a policy statement limiting the use of acquisition prior approval provisions in consent and adjudicated decrees:
    - Will no longer routinely require prior approval of future acquisitions in in its orders and will rely instead on the premerger notification and waiting period requirements of the HSR Act.
    - May require narrow prior notice or approval requirements in certain limited situations where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision:
      - attempt the same or approximately the same merger, *or*
      - engage in an otherwise unreportable anticompetitive merger

[1] Fed. Trade Comm'n, Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 22, 1995); *see* Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745 (Aug. 3, 1995).

Acquisition prior approval

- 2021 withdrawal of the policy statement
  - On July 21, 2021, the Commission, in a 3-2 vote, withdrew the 1995 policy statement
  - The press release noted:[1]
    - “Prior to 1995, the Commission required all companies that had violated the law in a previous merger to obtain prior approval by the FTC for any future transaction in at least the same product and geographic market for which a violation was alleged.”
      - *Remember*: Almost all of the prior approval provisions were in consent decrees, and there is no finding of liability in a consent decree—so it is not clear that the companies had “violated” the law
    - “Since the 1995 Policy Statement was implemented, the Commission has been forced to re-review the same transaction on numerous occasions at considerable expense.”
      - The press release noted that the FTC twice litigated (and won) legal challenges to Staples’ acquisition of Office Depot. But the press release did not note that market conditions had vastly changed between the two acquisition attempts. Nor did it note that the anticompetitive concerns were in different relevant markets in the two cases, so that the concerns present in the first review could not inform the second review.
      - The number of cases where the FTC had to review the same transaction are vanishing small compared to the total number of transaction the FTC has reviewed. The press release identifies only four markets in which the same transaction has been attempted in addition to Staples/Office Depot; Chair Khan’s statement identified only one other market.
  - The DOJ has not raised any similar concerns

[1] Press Release, Fed. Trade Comm’n, FTC Rescinds 1995 Policy Statement that Limited the Agency’s Ability to Deter Problematic Mergers (July 21, 2021). See the optional reading for commissioner statements regarding the repeal.

Acquisition prior approval

- Some problems with prior approval provisions
  - An acquisition prior approval requirement replaced the reporting and waiting period requirements of the HSR Act but without the Act's procedural protections:[1]
    1. While the merging parties can control the duration of the HSR waiting period by complying with their second requests, the duration of a prior approval review is decided completely by the agency
       - In the extreme, the agency might be able to "pocket veto" an acquisition simply by never acting on a prior approval petition
       - However, arguably an action to compel a decision would be brought under Section 706(1) of the Administrative Procedure Act
    2. A party in a HSR Act review can be subjected to only one second request; a party in a prior approval review can be subject to an unlimited number of agency requests for documents, data, and narrative responses
       - The agency can issue CIDs to the merging parties, but compliance with these CIDs will not affect the duration of the waiting period
    3. Compliance with a second request, at least in principle, can be tested through a declaratory judgment action under Section 7A(g)(2) of the HSR Act; compliance with agency requests in a prior approval review cannot be judicially tested
       - While there are means to limit or test compliance an agency CID through a federal district court, in a prior approval review the agency does not have to use CIDs: since timing is in the control of the agency, the agency can issue "voluntary" requests and simply withhold a decision until compliance

[1] The HRS Act's implementing rules exempt acquisitions subject to a prior approval requirement from the Act's reporting and waiting period requirements. HSR Rule 802.70, 16 C.F.R. § 802.70.
[2] 5 U.S.C. § 706(1) (authorizing courts to "compel agency action unlawfully withheld or unreasonably delayed").

Acquisition prior approval

- Some problems with prior approval provisions (con't)
  - An acquisition prior approval requirement replaced the reporting and waiting period requirements of the HSR Act but without the Act's procedural protections:
    4. To block a merger at the end of a second request investigation, the agency must obtain an injunction from a federal district court; in a prior approval review, the agency has complete discretion to block the acquisition simply by not approving it
    5. Section 7 of the Clayton Act sets the statutory standard in a judicial proceeding for blocking a merger; there is no statutory standard for assessing a merger in a prior approval review
    6. A agency decision to disapprove a merger is reviewable, at least in principle, as "final agency action" under the Administrative Procedure Act but under a very deferential standard
       - Section 704 provides for the judicial review of "final agency action for which there is no other adequate remedy in a court"[1]
       - Section 706 authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[2]

       NB: In a APA action, the FTC might argue that the APA does not apply because action on a prior approval petition is "agency action is committed to agency discretion by law" and hence outside the APA[3]

[1] 5 U.S.C. § 704.
[2] *Id*. § 706(2)(A).
[3] *See id*. § 701(b)(2) (excluding discretion action from APA review).

Acquisition prior approval

- Some problems with prior approval provisions (con't)
  - An acquisition prior approval requirement replaced the reporting and waiting period requirements of the HSR Act but without the Act's procedural protections:
    7. Although the pre-1995 prior approval provisions were usually limited to the relevant market in which the original merger was alleged to be unlawful, the FTC could expand the coverage to as broad a field as three commissioners would demand
       - This could be a serious problem if the Commission reaches significantly beyond a narrow alleged relevant market into something more industry-wide
         - A not unlikely possibility in the high tech space, especially for the major tech companies

Acquisition prior approval

- Some problems with prior approval provisions
  - *An object lesson*: Coca-Cola/Dr Pepper (1986-1995)[1]
    - In 1986, Coca-Cola sought to acquire Dr Pepper at the same time PepsiCo was seeking to acquire Seven-Up
    - The FTC challenged both deals
      - PepsiCo and Seven-Up voluntarily terminated their merger agreement with respect to the United States business rather than litigate
      - Coca-Cola and Dr Pepper put the FTC to its proof in a Section 13(b) preliminary injunction action
    - When the district court preliminarily enjoined the Coca-Cola/Dr Pepper merger, Dr Pepper—
      - Terminated the merger agreement, and
      - Entered into an agreement to sell itself to a Hicks& Hass-led investor group (private equity)
    - The FTC, however, said it would continue its litigation against Coca-Cola unless Coca-Cola agreement to a consent decree containing a prior approval provision that included bottlers within its coverage.
    - Coca-Cola refused and the FTC continued its administrative litigation.
    - In 1990, the ALJ found liability but denied relief as contrary to the public interest. Both parties appeal to the full Commission
    - In 1994, the full Commission affirmed liability, vacated the ALJ's denial of relief, and entered an order requiring prior approval of the FTC before acquiring any interest in a company that manufactures or sells branded concentrate, syrup, or carbonated soft drinks in the United States. Coca-Cola appeals to the D.C. Circuit.
    - In 1995, nine years after the filing of the complaint, FTC settles appeal by modifying the order to require prior approval only if Coca-Cola acquires an interest in Dr Pepper or a Dr Pepper brand name

[1] *In re* Coca-Cola Co., No. 9207, 117 F.T.C. 795 (1994) (containing complaint, initial decision, and final FTC decision and order); *appeal dismissed sub nom.* Coca-Cola Enters., Inc. v. FTC, No. 94-1595, 1995 WL 364095 (D.C. Cir. May 18, 1995).

Drafting the Settlement Documents

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 —[Preservation obligations contained in the body of the 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)

Complaint

- Settlements occur *only* in the context of a litigation
  - Merger antitrust settlements take place in the context of a litigation in a district court or in an administrative adjudicative proceeding
  - 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 (see, e.g., FRCP 408)

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: Called a Proposed Cease and Desist Order (a "consent order")
    - Consistent with common practice, we will use "consent decree" and "consent order" interchangeably to refer to both the DOJ and FTC documents

Draft consent decree

- For settlement purposes only
  - No admission of liability or of any nonjurisdictional fact
    - Parties will have to admit facts providing for jurisdiction (to prevent the possibility of a subsequent collateral attack on the decree's validity)
    - Recent FTC boilerplate:

> Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing
> (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint,
> (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true,
> (3) waivers and other provisions as required by the Commission's Rules, and
> (4) a proposed Decision and Order and Order to Maintain Assets.[1]

  - *Query*: Can the investigating agency use any "admissions" in settlement negotiations against the parties if the negotiations collapse and the case is litigated
    - DOJ: No. Settlement discussions are privileged under Federal Rule of Evidence 408
    - FTC: Maybe yes. The FTC does not have a rule analogous to FRE 408 and the rule governing the admissibility of evidence is very broad (see 16 CFR 3.43)

[1] Decision and Order, In re Seven & i Holdings, Co., No. C-4748 (F.T.C. provisionally accepted June 25, 2021) (provisional consent order in 7-Eleven/Marathon).

Draft consent decree

- 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 language typically lack familiarity with the markets in issue
      - Also, the Compliance Section views its job as ensuring that no problem the FTC has ever faced in a consent settlement ever reoccurs
      - The upshot is 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 argue 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's office 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 but 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 require the merged firm to provide transition services to divestiture buyer
        - *Example*: A supply agreement for the divestiture product until the divestiture buyer can take over production on its own
        - The agencies do not like transition services agreements with a duration of longer than a year (although they have accepted consent settlements with longer terms)
      - 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]

      - This is presumably designed to aid the court in construing the consent order in the event that there is a dispute over what the order requires.

[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]

- NB: In FTC settlements, the Commission enters a separate administrative order to maintain assets or, alternatively, to hold separate (see below)

[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
      - Affidavit obligation continues until the required divestiture is completed
      - Obligation begins within 20 days after the filing of the complaint
    - 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
    - Requires defendants to keep all records of all efforts made to preserve and divest the divestiture assets until one year after such divestiture has been completed.

[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 information
    - 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
      - But we are seeing an increasing number with a term of seven 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.

Maintain assets orders/hold separate

- Order to maintain assets
  - In most cases, to ensure that the businesses and assets to be divested will be maintained so that they van be divested with their full premerger competitive force the agency will require the combined firm to "maintain" these businesses and assets and operate them in the ordinary course
    - In DOJ settlements, the obligation to maintain the businesses and assets will be included in the stipulation and proposed order that memorializes the consent settlement[1]
    - In FTC settlements, the Commission will enter a separate administrative order entitled Order to Maintain Assets
      - Example: A typical FTC maintain assets obligation:

> Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested. Respondents shall not cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Assets To Be Divested. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.[3]

[1] For example, see the Proposed Final Judgment § VIII, United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. filed Mar. 31, 2016) (*see supra* slide 38).
[2] For example, see the Order To Maintain Assets (Jan. 27, 2015), *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. filed Jan. 27, 2015), which may be found in the Albertsons/Safeway case study at p. 49).
[3] *Id*. § II (in the Albertsons/Safeway case study at p. 50).

Maintain assets orders/hold separate

- Hold to hold separate
  - Where—
    - the divestiture assets have been identified but will not be divested for several months, and
    - It is possible to operate the divestiture assets as separately from the business of the divestiture seller,

    the FTC may order that the divestiture assets be "held separate" and operated separately.
  - Example:

> IT IS FURTHER ORDERED that from the date this Order to Hold Separate is issued until the date that all of the Industrial Gases Assets and HyCO SMR Assets have been divested pursuant to the Decision and Order:
>
> A. Respondents shall continue to operate Linde and Praxair as independent, ongoing, economically viable, competitive businesses held separate, distinct, and apart from each other's operations.
>
> B. Respondents shall not coordinate any aspect of the operations of Linde and Praxair, including the marketing or sale of any products. Respondents shall take all steps necessary to ensure that:
>
> 1. Neither Linde nor Praxair attempts to influence, direct, or control the management of the other with regard to any aspects of its operations; and
> 2. The management of Linde and Praxair each shall act to maintain and increase their respective sales and income, and maintain operational, promotional, advertising, sales, technical, customer service, and marketing support at 2018 levels or previously approved levels for 2019, whichever are higher.
>
> C. Linde and Praxair shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, and income of each.[1]

[1] Order to Hold Separate and Maintain Assets § II, In re Linde AG, No. C-4660 (F.T.C. issued Oct. 19, 2018).

Competitive impact analysis

- DOJ
  - Section 2(b) of the Tunney Act requires the DOJ to file with the district court and publish in the Federal Register a *competitive impact statement* providing—
    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] 15 U.S.C. § 16(b).

Analysis to Aid Public Comment

- FTC
  - Rule 2.34(c) of the Commission's Rules of Practice
    - Provides that "the Commission will place on the public record an explanation of the provisions of the order and the relief to be obtained thereby and any other information that it believes may help interested persons understand the order."[2]
    - This explanation is traditionally styled an analysis of *Agreement Containing Consent Orders to Aid Public Comment*
    - Performs the same function and is largely modelled in practice after the DOJ's competitive impact statements

[1] 16 C.R.F. 2.34(c).

The Consent Decree Approval Process

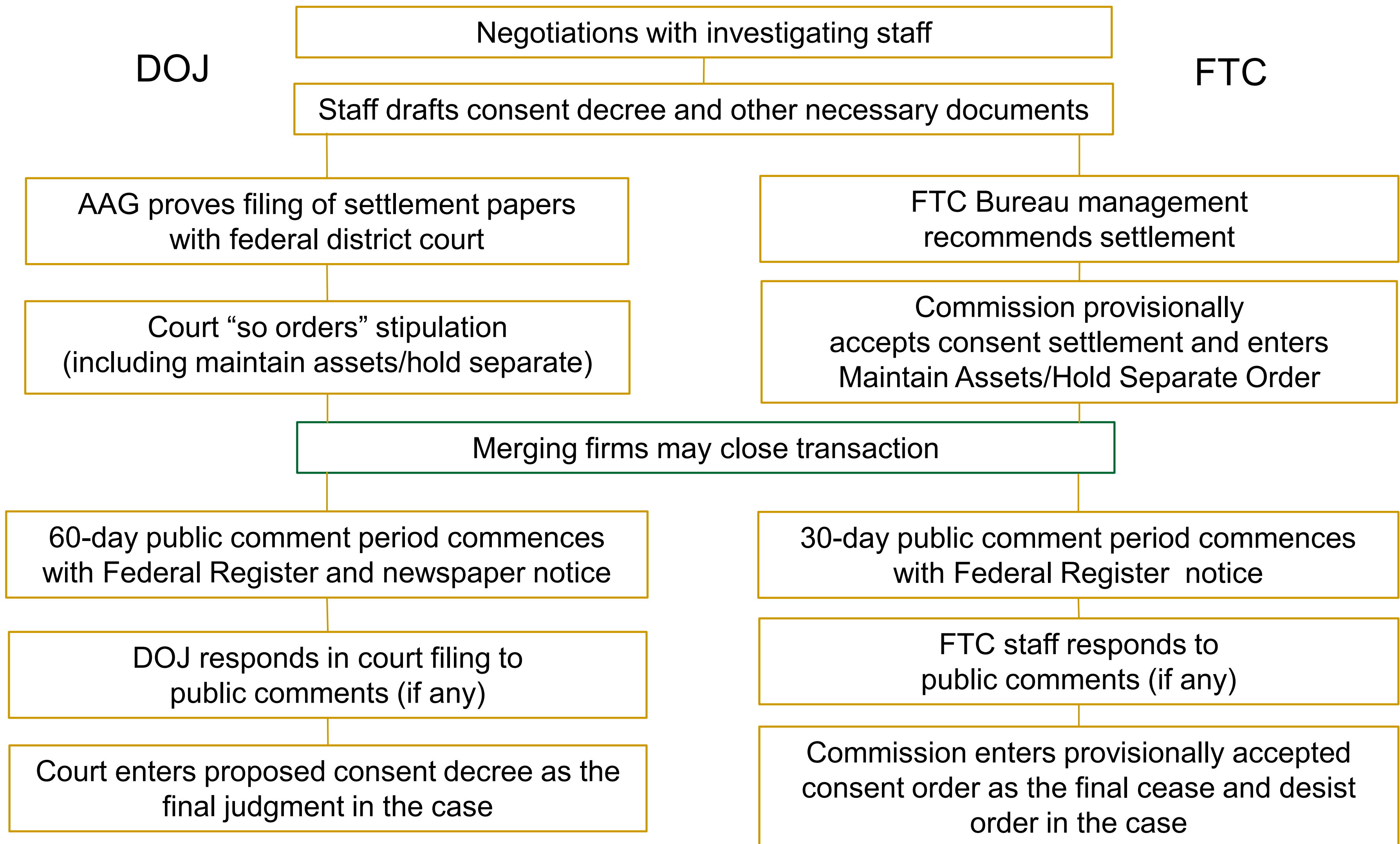
The law governing the approval process

- Law governing the procedure for the entry of consent decrees
  - 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)); *see* U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual Ch. 4 D (5th ed. updated Mar. 2014).

[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.

Typical settlement process—Overview



Closing the main transaction

- Merging parties can close their transaction upon—
  - The "so ordering" by the court of the stipulation in a DOJ action
  - The provisional acceptance of the consent order by the Commission in an FTC action

  and not have to wait for final entry of the consent judgment

- From the perspective of the merging parties, the ability to close the main transaction quickly after the conclusion of settlement negotiations is one of the most import features of the current consent decree process
  - Allows the merging parties to close several months before the final entry of the consent judgment[1]

[1] At least in one case, the district court judge was surprised—and not too happy—to learn that the merging parties had closed the main transaction before the judge had an opportunity to review the settlement agreement under the Tunney Act. *See* Transcript of Motions Hearing 4-18, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. Nov. 29, 2018) (Richard J. Leon, J.). The transcript is a good lesson of what can happen in court. It is part of the required reading and I strongly encourage you to read it. Subsequently, Judge Leon held an evidentiary hearing, including opponents of the transaction, as part of his Tunney Act inquiry. For links to somne of the major filings in the case, see Unit 13 in AppliedAntitrust.com.

Closing the main transaction

- Timing (in a precomplaint settlement)
  - DOJ
    - The staff will have been in contact with the AAG during the negotiation process and will not conclude settlement negotiations unless and until the settlement agreement is one the AAG will approve
    - The AAG will approve the settlement almost immediately after the conclusion of the settlement negotiations
    - The DOJ will simultaneously file the complaint, the proposed consent order, and the joint stipulation almost immediately after the AAG approves the settlement agreement
    - The court typically will "so order" the stipulation within 2-3 days
  - FTC
    - The staff will have been in contract with the FTC chair and probably other commissioners during the negotiation process and will not conclude settlements negotiations until it appears that a majority of the commissioners will provisionally approve the settlement
    - The Bureau of Competition will submit the consent order papers to the Commission almost immediately after the conclusion of the settlement negotiations
    - The Commission will vote on the provisional acceptance of the consent order within 1-2 weeks

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
- Evidentiary hearing
  - Although not required, the judge in a Tunney Act proceeding has the power to conduct an evidentiary hearing into whether the proposed consent settlement is in the public interest[1]
  - Presumably the Commission in its review has the same power
    - BUT it is unlikely to be exercised, since the commissioners should have been informed by the Bureau of Competition about the details of the proposed consent settlement during negotiations. If a majority objected to the proposed settlement, the consent decree papers would not have been formally submitted to the commissioners for their approval.

[1] A hotly contested evidentiary hearing was conducted in United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. Sept. 4, 2019).

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 its 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 have 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).

Final judgment

- DOJ
  - *Public interest standard*: The legal standard—

III. LEGAL STANDARD

The Tunney Act requires courts, “[b]efore entering any consent judgment proposed by the United States,” to “determine that the entry of such judgment is in the public interest.” 15 U.S.C. § 16(e). The parameters of the Tunney Act’s “public interest” standard are well defined by statute, *see* 15 U.S.C. § 16(e)(1), and case law, *see*, *e.g., United States v. Newpage Holdings, Inc*., No. 14–cv–2216, 2015 WL 9982691, at *4–5 (D.D.C. Dec. 11, 2015). The court, therefore, need not provide a fulsome recitation of the applicable standards. It suffices for present purposes to note that the government enjoys “broad discretion to settle with the defendant within the reaches of the public interest.” *United States v. Microsoft Corp*., 56 F.3d 1448, 1461 (D.C. Cir. 1995). And, although a court may not simply “rubber stamp” the government’s proposal and is required to “make an independent determination” as to the public interest, *id*. at 1458 (internal quotation marks omitted), it “is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable,” *United States v. SBC Commc'ns, Inc*., 489 F.Supp.2d 1, 15 (D.D.C. 2007). Indeed, the court is required to be “deferential to the government’s predictions as to the effect of the proposed remedies.” *Microsoft Corp.,* 56 F.3d at 1461. In short, “the relevant inquiry is whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlement are reasonable. *SBC Commc'ns, Inc*., 489 F.Supp.2d at 15-16.[1]

[1] United States v. Iron Mountain, Inc., 217 F. Supp. 3d 146, 150 (D.D.C. 2016), *judgment entered*, No. 1:16-CV-00595-APM, 2016 WL 9455556 (D.D.C. Nov. 11, 2016).

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]

[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] *See* United States v. TransDigm Grp. Inc., No. 1:17-CV-02735-ABJ, 2018 WL 2382602, at *9 (D.D.C. Apr. 4, 2018).

Consent decree violations

- DOJ
  - New innovation in the Trump administration (con't)
    - This has been standard in DOJ settlements
    - *Query*: Can the settling parties change by agreement the standard for imposing the judicial sanction of contempt?
      - To my knowledge, the effectiveness of this provision has not yet been tested in court
      - WDC: My personal view is that the provision is void. The entry of a contempt sanction is an exercise of the judicial power under Article III and I doubt that the litigating parties can change an Article III standard by agreement

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 $43,280 for 2020
    - 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

- Failure to divest completely: *Boston Scientific/CVIS*[1]
  - In 1995, Boston Scientific (BSC) 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 highly contested patent infringement cross-litigation to block each other from continuing to manufacture and sell IVUS catheters
  - To settle the investigation, BSC agreed to an FTC consent order requiring it to license specific intellectual property rights in IVUS catheter technology to Hewlett-Packard to enable HP to enter into the manufacture and sell of IVUS catheters
    - HP had been in a joint venture with BSC whereby HP developed, manufactured and sold the electronic console that displayed the images generated by the BSC IVUS catheter.
  - BSC signed an IP license agreement with HP to provide HP with the rights specified in the FTC consent order but BSC 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). We will examine this case in Class 21.

Consent decree violations

- Failure to divest completely: *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

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*[1]
  - To settle an investigation into its pending acquisition of Holiday Companies, Couche-Tard agreed to a consent order requiring it to
    - divest 10 retail fuel stations in Minnesota and Wisconsin a buyer or buyers that were acceptable to the Commission within 120 days after the issue date of the order, and
    - to maintain the economic viability, marketability, and competitiveness of each station until the divestiture is complete under an Order to Maintain Assets (issued Dec. 15, 2017)
  - Final order issued: February 15, 2020
    - 120 later: June 15, 2018
  - Petitions for divestiture approvals
    - May 15, 2018 application (Minnetonka, St. Peter, St. Paul-Oakdale)
      - Approved as modified (2 store): August 16, 2018
      - Divestiture closed: September 17, 2018
    - June 6, 2018 application (Aitkin, Hibbing, Mora, St. Paul-County Road, Hayward, Siren, Spooner)
      - Approved (7 stores): August 29, 2018
      - Divestitures closed: September 26, 2018
    - July 10, 2018 application (St. Paul-Oakdale)
      - Approved (1 store): August 29, 2018
      - Divestiture closed: September 26, 2018

[1] Complaint for Civil Penalties Pursuant to Section 5(i) of the Federal Trade Commission Act, United States v. Alimentation Couche-Tard Inc., No. 1:20-cv-01816 (D.D.C. filed July 6, 2020).

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*
  - Enforcement complaint[1]
    - Counts 1,2, 4, 6-10
      - Defendants did not divest these 8 location until September 26, 2018
      - "Defendants were continuously in violation of the Order for each day of the period from June 15, 2018, through September 26, 2018."
    - Counts 3,5
      - Defendants did not divest these 8 location until September 17, 2018
      - "Defendants were continuously in violation of the Order for each day of the period from June 15, 2018, through September 17, 2018."
    - Count 11
      - "Defendants failed to provide accurate and detailed information in their compliance reports dated March 19, 2018, April 18, 2018, and May 18, 2018, as required by Paragraph IX.B. of the Order"
      - "Defendants were continuously in violation of the Order for each day of the period from March 19, 2018, through at least June 22, 2018."

[1] All quoted language is from Sections 40-66 of the Complaint for Civil Penalties Pursuant to Section 5(i) of the Federal Trade Commission Act, United States v. Alimentation Couche-Tard Inc., No. 1:20-cv-01816 (D.D.C. filed July 6, 2020).

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*
  - Enforcement complaint
    - Count 12
      - "Defendants violated the Order and the OMA in connection with the Hibbing location of the Retail Fuel Assets by:
        a. Failing to divest the Hibbing location as an on-going business as required by Paragraph II.A. of the Order;
        b. Failing to maintain the viability, marketability, and competitiveness of the Hibbing location, as required by Paragraph II.A. of the OMA;
        c. Failing to use best efforts to preserve the existing relationship with the lessee-dealer operator at the Hibbing location, or otherwise cause the business at the Hibbing location to be conducted in the regular and ordinary course, as required by Paragraph II.B. of the OMA; and
        d. Failing to maintain the then-current business operations at the Hibbing location as required by Paragraph II.D. of the OMA."
      - "Defendants were continuously in violation of the Order and the OMA for each day of the period from September 1, 2018, through at least September 26, 2018."
    - Count 13
      - "Defendants violated the OMA by failing to include in their compliance reports a full description of their efforts to comply with their obligations under the OMA as required by Paragraph V. of the OMA."
      - "Defendants were continuously in violation of the Order for each day of the period from June 18, 2018, through at least June 19, 2019."

[1] All quoted language is from Sections 40-66 of the Complaint for Civil Penalties Pursuant to Section 5(i) of the Federal Trade Commission Act, United States v. Alimentation Couche-Tard Inc., No. 1:20-cv-01816 (D.D.C. filed July 6, 2020).

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*
  - Settlement: $3.5 million
    - Maximum settlement (assuming each count reflects a separate violation)

#Counts	Days in Violation	Maximum Daily fine	Maximum Penalty
8	93	$43,280	$32,200,320
2	84	$43,280	$7,271,040
1	95	$43,280	$4,111,600
1	25	$43,280	$1,082,000
1	366	$43,280	$15,840,480
			$60,505,440

    - Settlement as a percentage of the maximum fine: 5.8%

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*
  - Observations: Timing of approval petitions
    - The FTC appears to require the closing of the divestiture sale, not merely the filing of a petition for approval, by the deadline set in the consent decree
      - The Couche-Tard consent order provided:

> No later than 120 days from the date this Order is issued, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, at no minimum price, as an on-going business, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.[1]

      - Dates
        - Consent order provisionally accepted: December 15, 2017
        - Final order issued: Feb. 15, 2018
        - Approval petitions

			Days: Application to—	
Application	**Approval**	**Divestiture**	**Approval**	**Divestiture**
May 15, 2018	August 16, 2018	September 17, 2018	93	125
June 6, 2018	August 29, 2018	September 26, 2018	84	112
July 10, 2018	August 29, 2018	September 26, 2018	50	78

      - Given that the FTC places approval applications on the public record for 30 days and that the Commission does not act immediately after the 30-day public comment period, this table—which may not be representative—suggests that applications should be submitted at least 90 days in advance of the divestiture deadline

[1] Decision and Order § II(A), *In re* Alimentation Couche-Tard Inc., No. C-4635 (F.T.C. provisional acceptance Dec. 15, 2017; issued Feb. 15, 2018)

Consent decree violations

- Failure to meet divestiture deadlines: *Couche-Tard*
  - More observations
    - The FTC appears to view the failure to divest each location as a separate, actionable violation
    - The FTC will seek penalties for violations of reporting and maintain assets requirements