Unit 5. Merger Antitrust Settlements

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August 14, 2022

Topics[1]

- Consent settlements: An introduction
- The DOJ/FTC's "acceptance calculus"
- Consent remedies in horizontal cases: The details
- Some new developments
- Drafting the settlement documents
- The consent decree approval process
- 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.

Consent Settlements: An Introduction

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

"Fix it first"

- Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party
- Merging parties file new HSR notifications for the restructured transaction
  - HSR reports also may need to be filed for the restructured transaction
- When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement act

Consent decree relief: The basic idea

- The basic idea
  - A horizontal transaction violates Section 7 because the combination of the respective businesses of the parties would likely result in a substantial lessening of competition or a tendency to monopoly in some relevant market
  - The violation could be avoided if the parties did not combine the problematic businesses in the relevant market
  - *Solution*:
    - Divest the business of one of the parties to a third party capable of operating the divested business postmerger with the same competitive force as the divestiture seller premerger. Make the divestiture and related relief enforceable as a judicial order
    - *Schematically*: Buyer is to acquire multiple businesses from Seller. Both parties manufacture and sell widgets nationwide, and the FTC alleges that the combination of two widget businesses would violate Section 7. The merging parties agree in a consent decree with the FTC that the combined firm will sell the Seller's widget business to a Divestiture Buyer who can operate the business with the same competitive force postmerger as did the Seller premerger. Premerger, Buyer competed with Seller in the manufacture and sale of widgets. Postmerger, Buyer competes with Divestiture Buyer in the manufacture and sale of widgets. In principle, no competition will be lost and the Buyer is permitted to acquire the other nonproblematic businesses of the Seller without interference from the FTC.

Consent decree relief: The basic idea

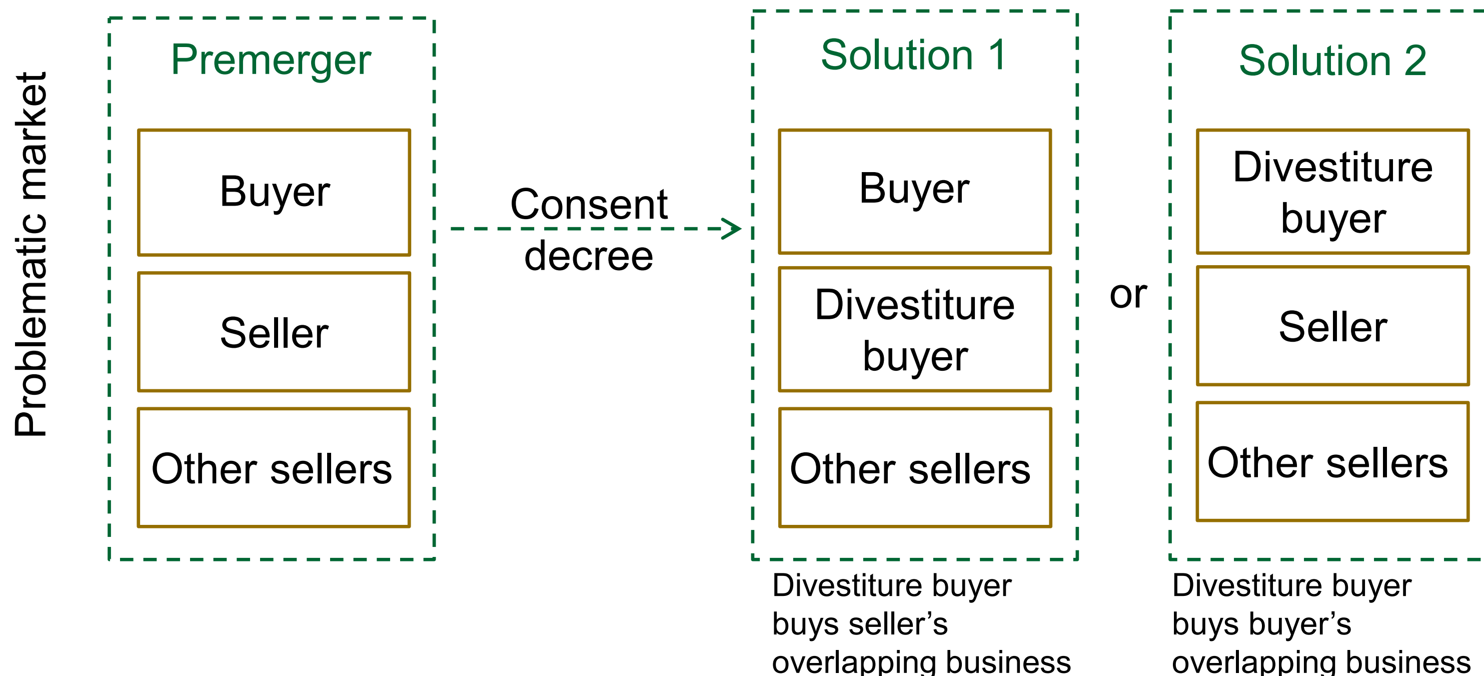
- The legal nature of a consent decree
  - The obligation to divest is entered as a final judgment in a judicial or administrative proceeding
    - A judicial or administrative complaint must initiate these civil proceedings
  - DOJ consent decrees are federal district court injunctions
    - Violations 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 2022, the maximum penalty is $46,517 per day (adjusted annually)
    - The district court will also issue an injunction to prevent future violations of the FTC consent order
      - 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

Consent decree relief: The basic idea

- The basic requirement:

  The divestiture buyer must preserve the level of premerger competition in the market of concern following the closing of the main transaction

  - The divestiture buyer is said to “step into the shoes” of the divestiture seller
    - The identity of the owner of the divestiture business changes, but the structure of the problematic market remains unchanged:



Consent decree relief: The basic idea

- The process
  1. The enforcement agency and parties agree on the antitrust concern to be resolved
  2. The parties negotiate a package of business operations, assets, and ancillary commitments that would permit a qualified third-party divestiture buyer to maintain the premerger level of competition
  3. The parties memorialize the divestiture package in a proposed consent decree and related documents
  4. The merging parties find a divestiture buyer
  5. The divestiture buyer applies for agency approval
  6. The agency approves the divestiture package and divestiture buyer
     - Assumes the agency requires a "buyer upfront"
     - In some cases, the agency will accept a consent agreement that provides for the identification of the divestiture buyer after the agency accepts the consent settlement
  7. DOJ files complaint and motion for entry of consent decree in federal district court/ FTC provisionally accepts consent order
  8. The agency publishes the proposed consent decree in the federal register and other venues inviting public comments
  9. The court/FTC consider public comments and agency response
  10. The court/FTC enters the consent decree as a final judgment

Consent decree relief: The basic idea

- *Illustration*: DaVita/University of Utah[1]
  - The deal
    - In September 2021, DaVita, the largest operator of outpatient dialysis clinics in the United States, agreed to acquire the University of Utah's 18 dialysis clinics in and around Utah in a non-HSR reportable transaction
  - The antitrust problem
    - In the greater Provo market, there are only three dialysis providers: UoU (3 clinics); DaVita (4 clinics); Fresenius (1 clinic)
    - Barriers to entry into dialysis clinics are very high and no new entry was likely postmerger
    - The transaction would reduce the number of competitors in the Provo market from three to two (a "3 → 2 transaction"), with DaVita operating seven out of the eight clinics in the area
  - The FTC found no antitrust problems with DaVita's acquisition of the other 15 UoU clinics

The key to a consent decree is the existence of other parts of the deal that do not present antitrust problems and the separability of the parts of the deal that do

[1] For the consent order and related documents, see the DaVita/University of Utah case study in the Unit 5 supplemental materials.

Consent decree relief: The basic idea

- *Illustration*: DaVita/University of Utah
  - The consent decree
    - The FTC and DaVita resolved the FTC's concerns at the end of the investigation through a consent decree requiring DaVita to—
      - Divest the three UoU Provo clinics to Sanderling Renal Services, Inc. ("SRS"), a small but established operator of dialysis clinics nationwide but without any presence in Utah ← Requires a "buyer upfront" (standard in most cases)
      - Provide transition services to SRS for up to one year ← Standard provision
      - Assist SRS in hiring the employees at the divested clinics and refrain from soliciting those employees for 180 days ← Standard provision
      - Prohibits DaVita from entering into or enforcing noncompete agreements with any University nephrologist ← New provision
      - Prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire ← New provision
      - Requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah ← New provision

Reflects the FTC's new concerns about the effect of mergers on labor (applies to the three new provisions)

> Once the FTC provisionally accepted the consent order on October 25, 2021, the parties were free to close the main transaction. The settlement, however, required DaVita to divest the three Provo clinics to SRS within ten days of the closing of the main transaction.

Consent decree relief: The basic idea

- Some observations
  1. The divestiture assets must encompass everything necessary for the divestiture seller to operate the divestiture business postmerger with at least the same competitive force as the divesture seller premerger
     - The agencies strongly prefer complete, stand-alone businesses to be divested
  2. The divestiture buyer must have the incentive and the ability to operate the divestiture assets postmerger with at least the same competitive force as the divesture seller premerger
     - The agencies will insist on approving the divestiture buyer and will vet the divestiture buyer, its experience, financial condition, and business plan to operate the divesture assets
  3. The divestiture seller must operate the business independently in the ordinary course until the closing of the divestiture sale with the divestiture buyer
  4. The divestiture buyer must be able to operate in the divestiture business immediately upon the divestiture's closing to ensure that there is no temporary loss of competition in the relevant market
     - This often requires the combined company to offer the divesture buyer some short-term *transition services* as the divestiture buyer gets up and running
  5. The divestiture seller must be able to operate the divestiture business without any entanglements with or impediments from the combined company
     - For example, the combined company cannot supply the divestiture seller with a critical input (apart from any transition services agreement) or provide the divestiture buyer with financing, and the combined company may have to release key employees from any noncompete employment restrictions to enable the employees to accept employment with the divestiture buyer
  6. The divestiture to the divestiture buyer cannot create its own antitrust problems

Consent decree relief: The basic idea

- Three basic divestiture consent decree paradigms
  1. Divest standalone business
     - Complete with all necessary back office and other support
     - *Example*: Ardagh/St. Gobain[1]
       - Ardagh agreed to divest Anchor Glass Container Corporation, which Ardagh acquired in 2012 to build its U.S. glass bottle business, to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P., a private equity firm, in connection with Ardagh's acquisition of Saint-Gobain Containers, Inc.
       - In addition to Anchor's manufacturing facilities, the divestiture operation included U.S. management and all of Ardagh's U.S. back office operations
       - As a standalone business unit, the Commission was willing to entertain and ultimately approve a private equity firm as the divestiture buyer
     - Observations
       - Divestiture of a legal entity—a corporation or an LLC—is desirable since all employees and contacts with the company follow the sale to the divestiture buyer
       - Since the Commission was unsure whether an acceptable divestiture buyer would emerge, the Commission insisted on a "buyer upfront"—that is, it would not accept the consent decree until the Commission vetted and approved the divestiture buyer and the definitive purchase agreement
         - This delayed the closing of the main transaction for several months
       - Today, buyers upfront are more the rule than the exception

[1] Complaint, *In re* Ardagh Group, S.A., 157 F.T.C. 1548 (June 28, 2013); Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC, *In re* Ardagh Group, S.A., No 9356 (F.T.C. June Apr. 28, 2014); Decision and Order, *id*. (F.T.C. June 17, 2014); Letter Order Approving Divestiture Of Certain Assets, *In re* Ardagh Group, S.A., 157 F.T.C. 1879 (June 17, 2014).

Consent decree relief: The basic idea

- Three basic divestiture consent decree paradigms
  2. Divest operating business
     - Core business operations divested—Divestiture buyer to provide back office and other support
     - *Example*: Koninklijke Ahold/Delhaize Group[1]
       - Merging parties
         - Ahold owns and operates a number of supermarket chains in ten states in the United States, including supermarkets operating under the Giant, Martin's, and Stop & Shop banners
         - Delhaize owns and operates a number of supermarket chains in 17 states in the United States, including supermarkets operating under the Food Lion and Hannaford banners
       - Ahold and Delhaize agreed to sell 81 stores to settle FTC concerns that their proposed $28 billion merger would likely be anticompetitive in 46 local markets in Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia, and West Virginia
       - The 81 stores were divided into seen regional packages and sold to seven different divestiture buyers
       - Each divestiture buyer operated a supermarket chain in the region and was able to provide management, wholesale supply, back office support, and strategic direction to the divestiture stores
         - Back office support includes, for example, customer service, information technology and data processing, human resources, accounting, and related administrative functions

[1] Complaint, *In re* Koninklijke Ahold, N.V., C-4588, 162 F.T.C. 945 (July 22, 2016); Decision and Order, *id*. at 964 (F.T.C. provisionally accepted June 22, 2016); Decision and Order, *id*. (F.T.C. Oct. 14, 2016) (final acceptance).

Consent decree relief: The basic idea

- Three basic divestiture consent decree paradigms
  3. Divest assets necessary for divestiture buyer to operate the divestiture business
     - Divestiture buyer to provide all support necessary to operate the business
     - *Example*: Danaher/GE Biopharma[1]
       - Danaher agreed to divest to Sartorius AG all rights and assets to research, develop, manufacture, market, and sell ten products that companies use to manufacture biopharmaceutical drugs to resolve the FTC's concerns about overlapping chromatography equipment businesses in connection with Danaher's $21.4 million acquisition of GE Biopharma (General Electric's biopharmaceutical business)
       - Sartorius AG, the divestiture buyer, had to satisfy the FTC that it could provide all of the infrastructure, management, and distribution necessary to operate the divestiture assets and maintain competition in the problematic market
       - Although Sartorius AG, the divestiture buyer, was a new entrant into the business, in approving the divestiture sale, the FTC found that "Sartorius's existing biopharma business includes products that are highly complementary to the divestiture assets. Sartorius has the expertise, worldwide sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition."[2]

[1] Decision and Order, *In re* Danaher Corp., No. C-4710 (F.T.C. May 29, 2020); *see* Petition for Prior Approval of Sartorius Stedim Biotech S.A.'s Proposed Acquisition of Novasep Process SAS's Chromatography Equipment Business, *id*. (F.T.C. Oct. 28, 2021); Letter Order Approving Acquisition, *id*. (F.T.C. Jan. 31, 2022).

Some important legal technicalities

1. Committed to agency discretion
   - The decision whether to enter into consent decree negotiations or to reject a consent decree is committed to the investigating agency's discretion
     - The investigating agency can refuse to accept a proffer consent decree for any reason, including an arbitrary reason
   - Agency decisions to refuse to accept a consent decree are not subject to review under the Administrative Procedure Act
     - Unless provided by statute, only "final agency actions" are reviewable under the APA[1]
     - A decision to refuse to settle an investigation is not a "final agency action" because it is interlocutory and does not impose an obligation, deny a right, or fix a legal relationship
       - Agency action is "final" within the meaning of the APA only if—
         - The action marks the "consummation" of the agency's decision-making process, *and*
         - the action is one by which "rights or obligations have been determined" or from which "legal consequences will flow"[2]
       - Moreover, it is likely that a decision to refuse to settle is "committed to agency discretion by law" within the APA and so separately exempt from APA review[3]

[1] 5 U.S.C. § 704.
[2] Bennett v. Spear, 520 U.S. 154, 177 (1997).
[3] 5 U.S.C. § 701(a)(2).

Some important legal technicalities

2. No finding of facts or liability
   - Consent decrees are entered by the court or FTC without adjudication of the merits or the finding of any facts
     - There is typically no active litigation: Most consent decrees are negotiated prior to the filing of the complaint and filed simultaneously with the complaint
     - Antitrust consent decrees historically have contained an explicit disclaimer that the parties' acceptance of the consent settlement—
       1. Is for settlement purposes only
       2. Does not constitute an admission by Respondents that they violated the law as alleged in the complaint
       3. Does not constitute an admission by the respondents that the facts as alleged in the complaint (other than jurisdictional facts) are true
          - *Note*: An admission of jurisdictional facts is necessary to provide the court or administrative tribunal with subject matter jurisdiction to enter the consent decree

Some important legal technicalities

3. The role of consent
   - In the absence of an adjudication of the merits, the power of the court or agency to enter a consent settlement as a final order rests on the consent of the parties to the settlement:

> [I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.[1]

   - Corollaries
     - Because the source of the court's authority to enter a consent decree is the parties' agreement and not a violation of law, no proof or admission of a violation of a legal obligation is needed before a court can enter and enforce a consent decree as a judicial order
     - Conversely, a person (including a party in the same litigation) that is not a signatory to a consent decree is not bound by it, nor can a consent decree modify a third-party's rights or impose obligations or duties on a third party[2]
       - Accordingly, if a consent decree imposes obligations on a party that results in a breach of that party's obligations to a third party, the third party may sue for breach and the consent decree does not provide immunity for the breach

[1] Int'l Ass'n of Firefighters Local 93. v. City of 478 U.S. 501, 522 (1986) (citations omitted).
[2] *Id.* at 529; United States v. Ward Baking Co., 376 U.S. 327 (1964); Hughes v. United States, 342 U.S. 353 (1952);

Some important legal technicalities

4. Consent decrees are final judgments
   - A consent decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."[1]
   - As such, the litigation must be commenced by the filing of a complaint
   - As a final judgment, a consent order has the same res judicata/claim preclusion effect as a litigated judgment[2]
     - Special rules may apply in some areas of the law (e.g., patent validity and infringement), but there is no reason to believe that antitrust consent decrees are not claim preclusive absent a clear indication in the decree to the contrary
     - *WDC*: But no doubt antitrust consent decrees could be clearer on the preclusive effect. The standard boilerplate that the agencies use, for example, contains no language to the effect that the final judgment settles all claims raised by the complaint

[1] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

[2] *See* United States v. S. Ute Tribe or Band of Indians, 402 U.S. 159, 174 (1971); United States v. Int'l Bldg. Co., 345 U.S. 502, 506 (1953) ("Certainly the [consent] judgments entered are res judicata of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits."). *See generally* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4443 (update Apr. 2022) ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus settlement agreements and consent judgments ordinarily support claim preclusion but not issue preclusion.") (footnote omitted).

Some important legal technicalities

5. Dual nature of consent decrees
   - *Basic rule*: United States v. ITT Cont'l Baking Co. (1975):

     > Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.[1]

   - Whether a consent decree will be treated as a contract will depend upon the particular context in which the issue arises

[1] United States v. ITT Cont'l Baking Co., 420 U.S. 223, 237 n. 10 (1975) (internal citation omitted).

Some important legal technicalities

6. Construing consent decrees
   - Courts generally construe consent decrees as contracts between the settling parties
     - Consent decrees "closely resemble contracts" and their "most fundamental characteristic" is that they are voluntary agreements negotiated by the parties for their own purposes[1]
     - As a general rule, courts construe consent decrees to give effect to the parties' intent as expressed in the decree itself
     - "[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation."[2]
       - *Query*: Is this still the state of the law?
   - But the contract analogy does not extend to third-party beneficiary enforcement
     - A consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it[3]
     - Even intended third-party beneficiaries of a consent decree lack standing to enforce its terms

[1] Int'l Ass'n of Firefighters Local 93. v. City of 478 U.S. 501, 519, 522 (1986).
[2] United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236-37 (1975).
[3] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975).

Some important legal technicalities

7. Modifying consent decrees
   - Modification with consent of all parties
     - Courts generally will modify the terms of a consent decree with the consent of all parties, provided that the modification does not contravene the public interest
   - Modification over the opposition of a party
     - In *United States v. Swift & Co.*, the Supreme Court rejected the contention that a consent decree should be considered a contract for purposes of determining whether the courts have the power to modify such a decree absent the parties' consent:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. The result is all one whether the decree has been entered after litigation or by consent. In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.[1]

[1] 286 U.S. 106, 114-15 (1932) (internal citations omitted); *see* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378 (1992) ("[A consent decree] is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.").

Some important legal technicalities

7. Modifying consent decrees
    - Modification over the opposition of a party
        - Some different scenarios
            1. Conditions have changed since the entry of the consent decree, the restrictions in the consent decree now affirmatively harm the public interest, and the private party bound by the restrictions seeks modification. The government opposes.
                - Following *Swift*, courts will modify or terminate a consent order over the government's opposition if, because of changed circumstances, the consent order harms the public interest
                - Rule 60(b)(5) also provides that a court may relieve a party from a final judgment or order if "applying [the judgment] prospectively is no longer equitable"[2]
            2. Conditions have changed since the entry of the consent decree, and the government concludes that the restrictions it negotiated in the consent decree are now inadequate to preserve competition and seeks modification to include new or enhanced restrictions. The private party opposes.
                - WDC: Most likely, courts will be reluctant to impose new obligations on the respondent over the respondent's opposition unless the consent agreement contemplates such changes in light of changed circumstances.
            3. Conditions have not changed since the entry of the consent decree, but the government concludes it has negotiated inadequate relief to preserve competition and seeks to include new or enhanced restrictions. The private party opposes.
                - WDC: In the absence of changed circumstances, courts are likely to deny modifications to strengthen the consent order over the respondent's opposition, reasoning that the government must live with the relief it originally negotiated.

[1] 286 U.S. 106, 114 (1932).
[2] Fed. R. Civ. P. 60(b)(5); *see* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378 (1992) (noting application of Rule 60(b) to a consent decree).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - *Rule*: A court may enter a consent decree as a final judgment even if the consent decree contains relief that a court could not award in a litigated proceeding

> [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must com[e] within the general scope of the case made by the pleadings, and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. *Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.*[1]

- *Corollary*: An agency may demand relief in a consent decree that a court could not award the agency in a litigated proceeding
- The Court qualified this rule in two significant ways:
  1. The consent decree cannot conflict with or violate the law on which the complaint was based
  2. Inclusion of relief in a consent does not immunize the parties from an attack that discharging their consent decree obligations does not violate some other law or breach some contractual obligation to a third party
     - *Query*: Would the court abuse its discretion if it entered a consent decree that it knew required the respondent to violate some law or breach some contract?

[1] Int'l Ass'n of Firefighters Local 93. v. City of Cleveland, 478 U.S. 501, 525 (1986) (internal quotation marks and citations omitted; emphasis added).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - Facts*:*
    - In 1980, the Vanguards, an organization of Black and Hispanic firefighters, filed a class action against the City of Cleveland alleging employment discrimination on the basis of race and national origin in hiring, assigning, and promoting firefighters
    - The district court entered a consent decree that encompassed race-conscious relief (including specific numbers of promotions to be given to minority firefighters and minority promotional goals)
    - The Cleveland firefighters union, which had intervened as a party-plaintiff, objected on the grounds that—
      - the consent decree's racial preferences (embodied in the quotas) may benefit individuals who are not themselves actual victims of illegal discrimination
      - When the statute (Title VII) on which the plaintiffs' claims were premised prohibits a court from ordering relief requiring the promotion of an individual for a reason other than illegal discrimination[1]
  - Holding
    - Whether or not Title VII's enforcement provision precludes a court from ordering race-conscious relief after trial, that restriction does not apply to relief awarded in a consent decree
      - The Court found that in fashioning the enforcement provision, Congress sought to avoid undue federal interference with managerial discretion
      - But with a consent decree, management agrees with its terms, and hence there is no interference with managerial discretion

[1] Civil Rights Act of 1964, § 706(g) (current version at 42 U.S.C. § 2000e-5(g)) (Title VII enforcement provision).

The DOJ/FTC's "Acceptance Calculus"

Agency perspectives

- Consent settlements
  - The agency's willingness to accept a consent decree settlement depends largely on the confidence the agency has that the settlement will in fact negate the anticompetitive effect the agency believes the transaction will create
    - Depending on administration, the requisite level of confidence can be anything from likely to a near-certainty that the consent settlement will negate all anticompetitive effects of the merger
  - 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 convinced 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 same 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 decree requires a curative divestiture, then the acquisition of the divestiture assets by the divestiture buyer cannot itself create an anticompetitive concern

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 an agreement in principle on substantive terms of a consent order
  - The staff is in contact with the 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.

Options if the agency refuses to settle

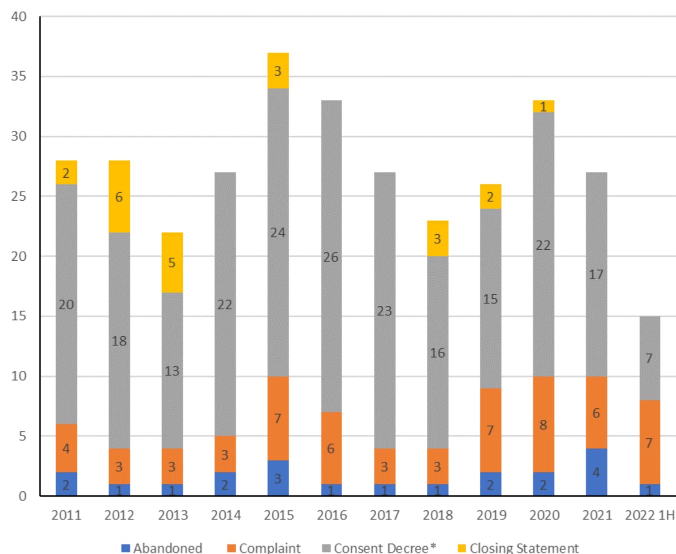
- If the agency refuses to settle at the end of an investigation, the merging parties have three choices—
  1. They can proceed to court and litigate the merits of the original deal
     - The agency will litigate to obtain what the agency believes is a suitable permanent injunction (almost always a blocking injunction in a preclosing challenge)
  2. They can "litigate the fix"
     - That is, they can contractually implement their proposed divestiture consent decree by agreeing to sell the proposed divestiture business and assets to a third party
     - The court will evaluate the merits of the transaction with the "fix" in place, that is, it will evaluate—
       - Whether the main transaction, without the business and assets subject to the fix, violates Section 7, *and*
       - Whether the fix—including the business and assets to be divested and the qualifications of the divestiture buyer—is sufficient to preserve competition in the alleged problematic market
         - If the fix will not preserve competition, then the main transaction violates Section 7
  3. The merging parties can preempt litigation by voluntarily terminating their merger agreement and withdrawing their HSR filings

Postcomplaint settlements

- Even when the investigation concludes with a complaint, the merging parties will often reach a consent settlement prior to trial
  - This can be a useful strategy if the parties need more information about the evidentiary support for the government's case, which they can get during postcomplaint discovery, to understand the strength of the government's case
    - Recall that during the second request investigation, while the investigating agency can conduct full discovery of both the parities and third parties through compulsory process, the merging parties have no access to the agency's discovery nor can they take discovery of third parties
    - The merging parties, of course, can attempt to talk to third parties (typically customers) about what information they provided the investigation during the second request period, but third parties are under no obligation to speak to the parties
    - Even if some third parties are willing to speak to the merging parties, these third parties are under no obligation to be complete or even truthful—third parties not infrequently tell the agency one thing and tell the merging parties something different
  - WDC: In my experience, the parties can settle during litigation for the same relief as they could obtain from the agency at the end of the investigation, so the costs of litigating and then settling are time, resources, and delay in the transaction's closing and not in harsher settlement relief

The history

- Since at least 1982, the DOJ/FTC has accepted divestiture consent decrees in most cases to resolve competitive concerns



Year	Abandoned	Complaint	Consent Decree*	Closing Statement	Total
2011	2	4	20	2	28
2012	1	3	18	6	28
2013	1	3	13	5	22
2014	2	3	22		27
2015	3	7	24	3	37
2016	1	6	26		33
2017	1	3	23		27
2018	1	3	16	3	23
2019	2	7	15	2	26
2020	2	8	22	1	33
2021	4	6	17		27
2022 1H	1	7	7		15

* Includes two "fix it first" resolutions in 2012

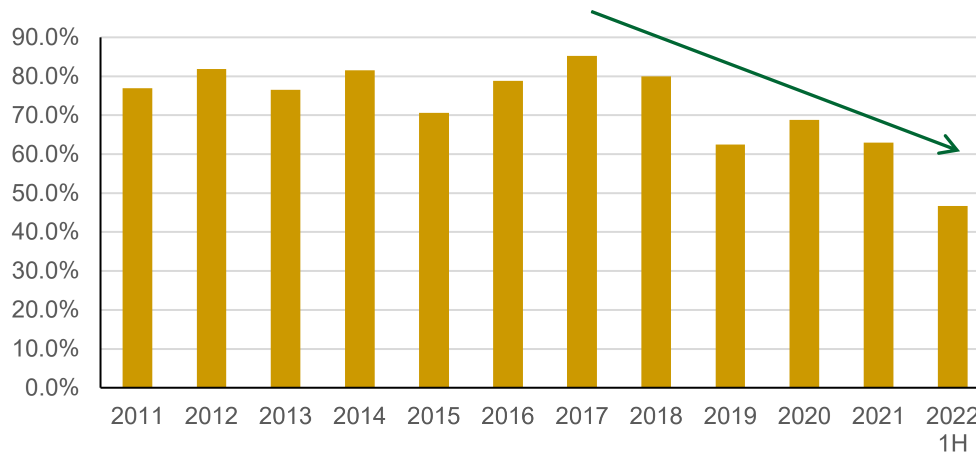
Source: Dechert LLP, DAMITT Q2 2022: Is Merger Enforcement Taking a Conservative Turn? (July 26, 2022); Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019). Dechert declines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include an in-depth second request investigation in which the investigating agency concludes there is no antitrust concern but issues no closing statement, resulting in the number of investigations in which the agency takes no enforcement action is undercounted. Dechert calculates the duration of an investigation from the date of announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

The history

- Prior to the Obama administration, the agencies believed that consent decrees provided the best way to resolve the agency concerns from society's perspective
  - The agencies presumed that there were likely significant efficiencies in the nonproblematic parts of the deal, and if the agency did not accept a consent decree and the deal collapsed, consumers would lose the benefits of the nonproblematic parts of the deal
  - So even if the consent decree did not completely negate the transaction's anticompetitive effect, there was an offsetting social benefit from the efficiencies from the part of the transaction that was allowed to close

The history

- Beginning in 2017, however, the DOJ/FTC have resolved a decreasing percentage of their interventions with consent relief
  - Nonetheless, the percentage of interventions resolved through consent relief remains high

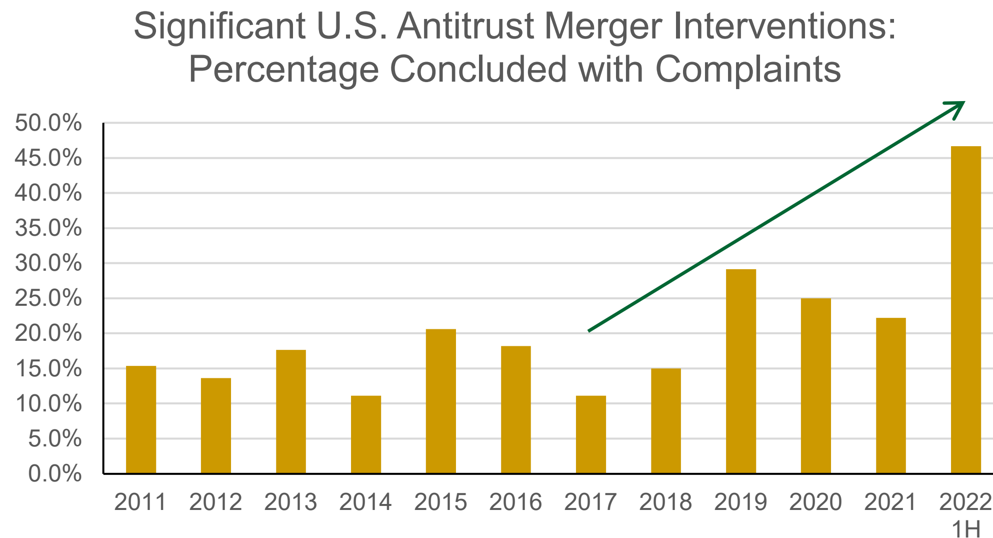


Note the decline in the Trump administration and the Biden administration to date

Source: Dechert LLP, DAMITT Q2 2022: Is Merger Enforcement Taking a Conservative Turn? (July 26, 2022); Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019). Interventions occur when the investigation concludes that the transaction violates Section 7, which is resolved wither by consent decree, a complaint, or the parties voluntarily abandoning the transaction.

The history

- As resolutions through consent relief have decreased, the percentage of interventions resolved through complaints has increased
  - NB: Some of these litigations may have been settled by consent decree before trial



- Agencies increasingly less willing to accept consent settlements at the end of an investigation
- Merging parties increasingly more willing to litigate

Source: Dechert LLP, DAMITT Q2 2022: Is Merger Enforcement Taking a Conservative Turn? (July 26, 2022); Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019).

The history

- Obama/Trump administrations
  - Beginning late in the Obama administration and continuing to some degree in the Trump administration, the agencies began to become more skeptical that consent decrees would cure their perceived competitive problems
    - Two sources for this skepticism—
      1. The emergence of several studies purportedly finding anticompetitive price increases in the market in the wake of a divestiture consent decree,[1] *and*
      2. An increasing view that the nonproblematic parts of a merger did not yield significant efficiencies[2]

Note: Both results are subject to vigorous academic dispute

[1] The most influential of these studies was a book by John Kwoka, a prominent antitrust economist at Northeastern University. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015). After a survey of the literature, Kwoka concluded that merger enforcement has become increasingly lax over time and that merger remedies "generally fail to prevent postmerger price increases." *Id*. at 126-27. For a methodological critique, see, for example, Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 Antitrust L.J. 361 (2018) (both FTC economists), and John D. Harkrider, *Are Merger Enforcement and Remedies Too Permissive: A Look at Two Current Merger Studies*, 32 Antitrust 96 (2017). In 2017, the FTC prepared its own detailed retrospective study of consent decrees between 2006 and 2012. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017). The FTC study found that in horizontal consent decrees, all of the divestitures involving an on-going business, and approximately 70% of limited asset divestiture packages, succeeded in maintaining or restoring competition in the relevant market. *Id*. at 1-2.
[2] *See, e.g.*, Bruce A. Blonigen & Justin R. Pierce, Evidence for the Effects of Mergers on Market Power and Efficiency (Finance and Economics Discussion Series 2016-082, Board of Governors of the Federal Reserve System 2016) ("In summary, we find evidence that M&As increase markups on average across U.S. manufacturing industries, but find little evidence for channels often mentioned as potential sources of productivity and efficiency gains.").

The history

- Obama/Trump administrations
  - Perceived deficiencies
    1. Concern that the agencies lacked the ability to identify precisely what assets needed to be divested
    2. Concern that the agencies lacked the ability to identify divestiture buyers who lacked the ability or incentive to use the divestiture assets to preserve competition
  - To deal with this perceived decrease in the effectiveness/need of consent decrees, the agencies began demanding a higher degree of confidence that consent decree relief would solve their competitive concerns before accepting consent relief
  - This is reflected both in—
    1. the scope of the divestiture assets, *and*
    2. more intensive vetting of the divestiture buyer to ensure that the divestiture assets in the hands of the divestiture buyer would preserve the premerger level of competition
  - Still, consent decree relief remained the primary solution for problematic horizontal mergers in both administrations

The history

- The Biden administration
  - *DOJ*: As a matter of principle, consent decrees are not usually the preferred solution to a problematic merger:

> Our duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. It is no secret that many settlements fail to preserve competition. Even divestitures may not fully preserve competition across all its dimensions in dynamic markets. And too often partial divestitures ship assets to buyers like private equity firms who are incapable or uninterested in using them to their full potential.
>
> At the Department of Justice, we are law enforcers. It is not our role to micromanage corporate decision making under elaborate consent decrees. It is our job to enforce the law. And when we have evidence that a defendant has violated the law, we will litigate to remedy the entire harm to competition. That will almost always mean seeking an injunction to stop the anticompetitive conduct or block an anticompetitive merger.[1]

    - There has been a notable decline in the DOJ's acceptance of consent decrees and a concomitant increase in litigation
  - *FTC*: As of late summer 2022, no apparent change in the Commission's willingness to accept consent decrees—still very strict, but no objection on principle
    - This may be an artifact of the 2-2 split among the commissioners between progressives and traditionalists until the seating of the fifth commissioner, a Biden appointee, on May 16, 2022

[1] Jonathan Kanter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement: The Road to Recovery, Prepared Remarks at the University of Chicago Stigler Center, Chicago, IL (Apr. 21, 2022).

The history

- The Biden administration
  - An emerging work-around: “Fix it first”
    - In a “fix it first,” the parties restructure the transaction to eliminate the problematic horizontal overlap and file their HSR notifications only on the restructured, nonoverlapping transaction
      - The restructuring can take one of two forms:
        1. Prior to the filing of any HSR notifications, one of the merging parties sells its business in the problematic market to a suitable divestiture buyer. The merging parties then file their respective HSR notifications for a transaction that does not contain an overlap in the problematic market. If the divestiture sale is HSR reportable, the divestiture seller and divestiture buyer file their respective HSR notifications at the same time.
        2. If the merging parties are already in an investigation of the original transaction, the parties pull their original HSR filings (preventing them from closing the original transaction) and proceed as above
      - Some observations
        - In either case, although the divestiture closing of the divestiture sale may be delayed until the main (restructured) transaction “clears” the merger review, the divestiture sale must be consummated before the main transaction closes because the HSR filings do not cover a transaction with the overlap
        - The antitrust concern presented by the original overlap must be entirely eliminated by the “fix it first” divestiture—in the business and assets to be divested, the manner of divestiture (including any ancillary transaction agreements), and the identity of the divestiture buyer—to the satisfaction of the investigating agency; otherwise, the agency will challenge the transaction as violating Section 7
        - The merging parties can "litigate the fix" if the investigating agency rejects the "fix it first" solution

Since the buyer never takes control of the two overlapping businesses, there is no need for a consent decree

“Litigating the fix”

- The idea
  - When the investigating agency refuses to accept a consent decree offer that the merging parties believe is sufficient to eliminate the likelihood of an anticompetitive effect, the parties are increasingly willing to “litigate the fix”
  - To “litigate the fix,” the parties in effect implement the proffered fix without the agency’s approval by contracting with a divestiture buyer to buy the divestiture assets

“Litigating the fix”

- The idea
  - *Rule*: Courts will assess the competitive effects of the transaction with the fix in place
    - The usual reasons an agency rejects a fix are because the fix—
      1. Does not cover all of the relevant markets of concern to the agency,
      2. Fails to include all of the assets the agency believes are necessary for the divestiture buyer to preserve the premerger level of competition, *or*
      3. Does not involve a divestiture buyer with the ability or resources the agency believes is capable of preserving the premerger level of competition
    - The burden is on the parties to show that the fix defeats the agency prima facie case against the original deal: Depending on the case, this may require the merging parties too—
      - Defeat the agency prima facie case in the relevant markets not addressed by the fix
      - Persuade the court that the necessary assets in the hands of a qualified divestiture buyer will eliminate any reasonable likelihood of an anticompetitive effect in the relevant market in which the fix operates
      - Persuade the court that the divestiture buyer has the incentive and ability with the divestiture assets to preserve the premerger level of competition in the relevant market in which the fix operates

In many if not most cases, the merging parties will have to do all three

If the “fix” does not defeat the government’s prima facie case in some market, then the restructured transaction violates Section 7

"Litigating the fix"

- Post complaint discovery
  - The agency will demand, and the courts will provide the agency, an opportunity to challenge the competitive sufficiency of the fix
    - This requires the merging parties to implement the fix sufficiency prior to trial to give the agency fair notice of the details of the fix and to permit the agency to conduct the necessary discovery
    - The agency presumably knows about the contours of the fix, but the agency may not have thoroughly vetted it
      - For example, if the investigating agency rejected the fix for insufficient scope (e.g., no divestitures in some markets of agency concern), the agency will not have vetted the manner of divestiture or the divestiture buyer
- Collateral attack
  - 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/Sprint 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.

Consent Remedies in Horizontal Cases: The Details

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.

General rules

- 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 divested
    - *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 are 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 the 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 to purchase a larger business

General rules

- 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 on-going, 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 in 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
  - Requires the reviewing agency to give its prior approval to future acquisitions by the defendant-buyer
    - When used in the past, applied only to acquisitions that were not HSR-reportable
      - The Biden administration applies prior approval provisions in all consent decrees whether or not the transaction is HSR reportable
    - Acquisitions that require agency prior approval are exempt from the HSR reporting and waiting period requirements

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 are 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) to allow the divestiture buyer 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 the 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 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 need 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
    - Trustee fees and expenses paid by the merged firm, but obligations run to the agency
      - The trustee is a fiduciary to the agency, *not* to the merged firm
    - *Key*: Once appointed, the power to divest is removed from the merged 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

Horizontal remedies: Withdrawal rights

- Withdrawal rights
  - The boilerplate of a DOJ Stipulation and Order provides for the unilateral right of the DOJ in a Tunney Act proceeding to in federal district court withdraw its consent to a proposed consent decree "at any time before the entry of the proposed Final Judgment by serving notice thereof on [the defendant(s)] and by filing that notice with the Court"[1]
    - The boilerplate of an FTC Agreement Containing Consent Orders has provision to the same effect[2]
      - The FTC boilerplate is silent on the timing of withdrawal and arguably the language of the provision enables the Commission to withdraw its consent even after the entry of a final consent order
  - Available only to agency, not to the parties
    - Once the parties have signed a stipulation and order (DOJ) or an agreement containing consent orders (FTC), the parties cannot withdraw their consent to the consent decree
  - Invoked by infrequently
    - But the DOJ recently invoked its right in a recent non-merger case[3]

[1] *See, e.g.*, Hold Separate Stipulation and Order § IV(A), United States v. TransDigm Group Inc., No. 1:17-cv-02735 (D.D.C. filed Dec. 21. 2017).
[2] *See, e.g.*, Agreement Containing Consent Order ¶ 11, *In re* Seven & I Holdings Co., No. C-4748 (F.T.C. filed June 25, 2021).
[3] *See* Notice of Withdrawal of Consent to Entry of Proposed Final Judgment, United States v. National Ass'n of Realtors, No. 1:20-cv-03356-TJK (D.D.C. filed July 1, 2021).

Some New Developments

"Prior approval" provisions

- History
  - Prior to 1995, the FTC routinely included a "prior approval" provision in consent and adjudicated decrees 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).

"Prior approval" provisions

- 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 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).

"Prior approval" provisions

- 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 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 is vanishing small compared to the total number of transactions 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.

"Prior approval" provisions

- Some problems with prior approval provisions
  - An acquisition prior approval requirement replace 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 for a failure to 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 with 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").

"Prior approval" provisions

- Some problems with prior approval provisions (con't)
  - An acquisition prior approval requirement replace 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. An 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 an 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).

"Prior approval" provisions

- Some problems with prior approval provisions (con't)
  - An acquisition prior approval requirement replace 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
       - So far, the Commission has limited the scope of its prior approval provisions to either:
         - The relevant markets, *or*
         - The states containing the relevant markets[1]
       - This could be a serious issue for companies if the Commission applies its prior approval requirements to something more extensive
         - The Commission could extend its prior approval requirements to a company's acquisitions nationwide, even if the challenged relevant markets are local
         - In the extreme, the Commission could impose a prior approval requirement on all acquisitions a company makes during the term of the consent decree

[1] *See, e.g.*, Decision and Order, *In re* JAB Consumer Partners SCA SICAR § XII, No. C-4766 (F.T.C. Aug. 2, 2022) (applying the prior approval to California and Texas, the states containing the local veterinary clinic markets). For a debate over whether prior notice provisions should be extended beyond the challenged relevant markets and over whether transactions involving private equity firms pose unique competitive concerns that warrant imposing broader, compare Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, *id*. (June 13, 2002), with Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, *id*. (June 13, 2022).

"Prior approval" provisions

- 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 agreed 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, the FTC settled the 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).

“Prior notice” provisions

- The idea
  - Include a requirement in the consent decree to provide the agency with notice prior to any non-HSR reportable acquisition in some defined product and geographic space
    - The notice requirement is designed to mimic the HSR process: The respondent must—
      - Submit the notice in the form of an HSR filing (although no filing fee is required)
      - Submit the form at least thirty calendar days in advance of the acquisition (creating an initial waiting period)
      - If the agency provides a written request for additional information and documentary material, delay the closing for at least thirty days following the respondent’s substantial compliance with the request (creating an opportunity for a “second request” and a final waiting period)
    - The agency may grant early termination of the waiting periods in a prior notice proceeding
  - Example
    - In JABCP/SAGE, an acquisition of veterinary clinics, the FTC’s consent order requires JABCP to give prior notice of any acquisition of any interest in any specialty or emergency veterinary practice, clinic, or facility within the United States within 25 miles of any then-existing NVA specialty or emergency veterinary clinic[1]
      - The relevant markets in issue were specialty veterinary services and emergency veterinary services in three local areas
      - There was a heated disagreement between the Democratic- and Republican-appointed commissioners over extending the prior approval and prior notice provisions beyond the challenged relevant markets

[1] Decision and Order, *In re* JAB Consumer Partners SCA SICAR § XII, No. C-4766 (F.T.C. Aug. 2, 2022).

Prior approval for sales by divestiture buyers

- The idea
  - The FTC has started including provisions in some consent decrees that purport to require the divestiture buyer to obtain the prior approval of the Commission before any sale of the divestiture assets during the term of the consent decree
  - Example:

> IT IS FURTHER ORDERED that, for a period of 10 years after the Divestiture Date, neither Nordic Capital, UVC, nor any other [divestiture buyer] shall sell or otherwise convey to any Person, through subsidiaries or otherwise, without the prior approval of the Commission, any of the Divestiture Clinics that were divested pursuant to Section II;
>
> *Provided, however*, Nordic Capital and UVC are not required to obtain prior approval of the Commission under this Section XII for a change of control, merger, reorganization, or sale of all or substantially all of UVC's business.[1]

- *Query*: Neither Nordic Capital nor UVC is a party to the consent decree. Can a Commission consent order (or any other adjudicative order) bind a nonparty?
  - Very likely, the Commission required the divestiture agreement to contain this a approval requirement on any resale. But this would make the Commission a third-party beneficiary of the contract, and any Commission enforcement action would sound in contract, not a violation of the consent order. Could the Commission sue a breach of this obligation as a Section 5 violation?
  - When the DOJ sought to impose a consent decree obligation on a divestiture buyer, the divestiture buyer had joined the action as party-intervenor[2]

[1] Decision and Order, *In re* JAB Consumer Partners SCA SICAR § XII, No. C-4766 (F.T.C. Aug. 2, 2022) (requiring the divestiture of six veterinary clinics in California and Texas as a condition of JAB Consumer Partners' proposed $1.1 billion acquisition of competing clinic operator SAGE Veterinary Partners).

[2] *See* Final Judgment, United States v. Anheuser-Busch InBev SA/NV, No. 1:13-cv-00127-RWR (D.D.C. Oct. 24, 2013),

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 litigation in a district court or 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 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 FTC 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 the merging parties' settlement proposal
    - Use
      - Provide to clients to illustrate in concrete terms the parties' consent settlement proposal
      - Can provide to the 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 never 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 FTC's investigating attorneys) consider 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 the 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 have 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 the 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, on-going 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 requiring the merging parties 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 the 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 the 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 future non-HSR reportable transactions
    - Requires merged firm to notify future 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 the 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]
    - IMPORTANT: As discussed earlier in the deck, the Biden administration has moved from notification to "prior approval" provisions
      - Requires the written prior approval of the agency of an acquisition by the merged firm in the relevant market (and sometimes beyond the relevant market)
      - Acquisitions subject to agency prior approval are exempt from the HSR reporting and waiting period requirements[4]
      - The pace of an agency prior approval review is entirely within the agency's discretion and not subject to any time limits

[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)
[4] HSR Rule 802.6, 16 C.F. R. § 802.6.

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 can 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 separately from the other businesses of the divestiture seller,

    the agency 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 modeled in practice after the DOJ's competitive impact statements

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

The Consent Decree Approval Process

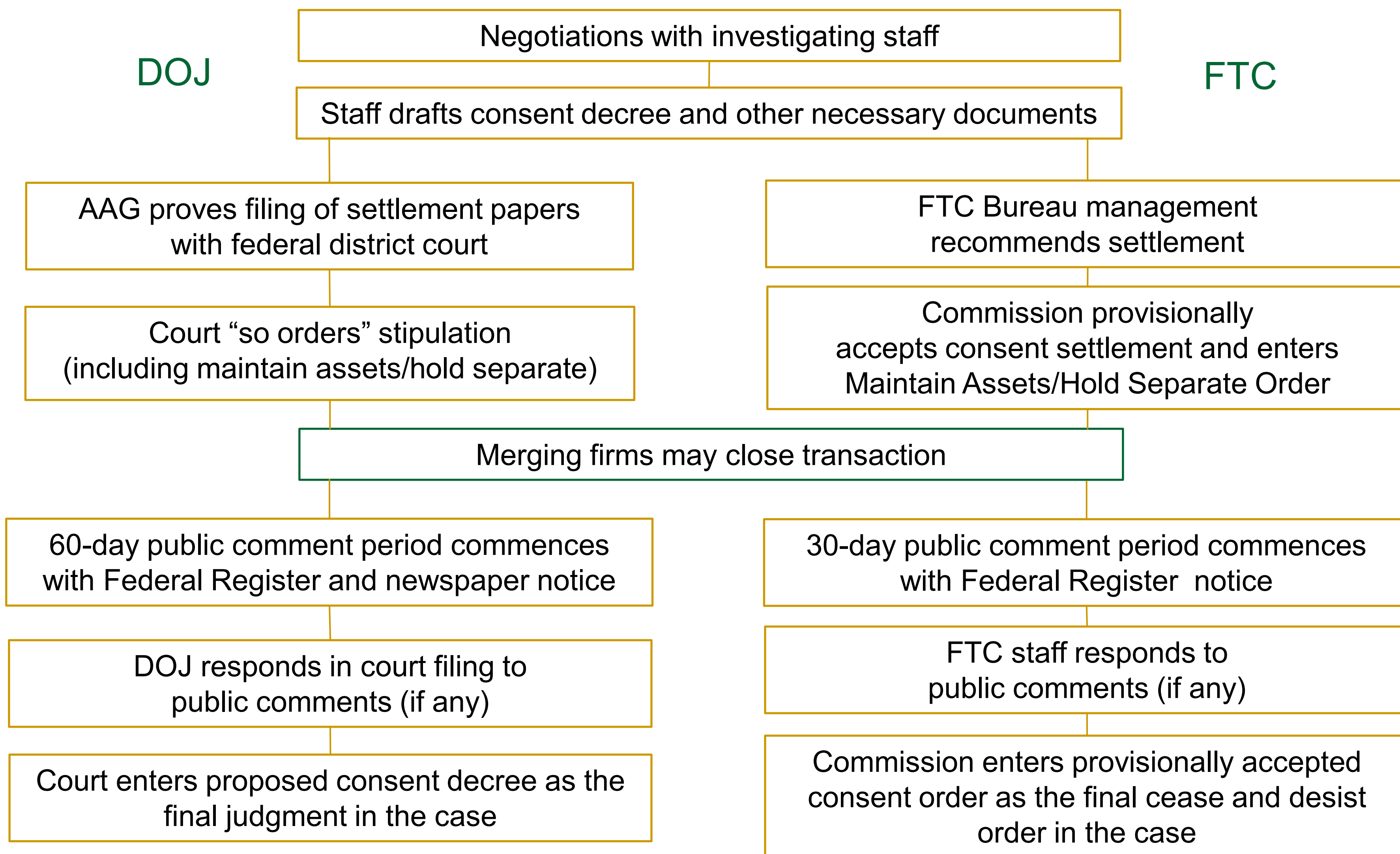
The law governing the approval process

- 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 modeled 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 important 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 some 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 contact 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 the DOJ's 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
  - Practice similar to the DOJ 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 has the same power in its review
    - BUT it is unlikely to be exercised since the Bureau of Competition should have informed the commissioners on the details of the proposed consent settlement as negotiations proceeded
    - 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: Standard of proof
  - A finding of civil 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]

    NB: For criminal contempt, the standard of proof is "beyond a reasonable doubt"
  - Other circuits have similar requirements, although the articulation may be different
  - Conventional wisdom
    - It is very difficult to prove civil contempt for a violation of an antitrust consent decree
    - The DOJ rarely challenges consent decree violations through contempt proceedings
  - New innovation in the Trump administration
    - Beginning in 2018, DOJ consent decrees contain language designed to—
      - Lower the evidentiary standard for the DOJ to prove civil contempt for a consent decree violation from clear and convincing evidence to a preponderance of the evidence, *and*
      - Eliminate the requirement that the violation be of a "clear and unambiguous" prohibition in the decree
    - By the end of the Trump administration, at least 21 DOJ consent decrees contained this standard
    - To the extent the Biden DOJ is accepting consent decree, they also contain this standard

See next slide for language

[1] *See* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by "clear and convincing evidence" that the alleged contemnor has violated a "clear and unambiguous" provision of the consent decree.").

Consent decree violations

- DOJ: Standard of proof
  - New innovation in the Trump administration (con't)

> A. 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.
>
> B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleges was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, **as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face**. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.[1]

[1] United States v. S&P Global Inc. § XIV(1), No. 1:21-cv-03003-JEB (D.D.C. Mar. 21, 2022) (emphasis added).

Consent decree violations

- DOJ: Standard of proof
  - New innovation in the Trump administration (con't)
    - *Query*: Can the settling parties change the standard of proof for imposing the judicial sanction of contempt by agreement?
      - To my knowledge, the effectiveness of this provision has not yet to be in court
        - But courts now routinely enter consent decrees as final judgments with the new language
      - WDC: My personal view is that the provision is probably void. The entry of a contempt sanction is an exercise of the judicial power under Article III and I question whether the litigating parties can change an Article III standard by agreement. That said, *Cleveland Firefighters* may give some support that the parties can change the standard by mutual 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 $46,517 for 2022
    - 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 the 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 argues that the consent order does not require it 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 stores): 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* (con't)
  - Enforcement complaint[1]
    - Counts 1,2, 4, 6-10
      - Defendants did not divest these eight locations 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 eight locations 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 the 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 the 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 maintaining assets requirements