SUPPLEMENTAL CLASS NOTES

Unit 1. Merger Antitrust Settlements: Advanced Topics and Agency Practice

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Topics[1]

- The DOJ/FTC's "acceptance calculus"
- Consent remedies in horizontal cases: The details
- Some new developments in consent decree provisions
- Drafting the settlement documents
- Consent decree violations

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

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 the substantive problems with the transaction
- 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 usually 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 consent 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

Postcomplaint settlements

- Settling after litigation commences
  - When the problem areas in a transaction are clear and unambiguous, the parties usually can settle during litigation for the same relief as they could obtain from the agency at the end of the investigation
    - When settling an investigation, the agency can draft the complaint so that the consent decree resolves all problems alleged in the complaint.
    - Consequently, the costs of litigating and then settling are time, resources, and delay in the transaction's closing and not in harsher settlement relief
  - But when there are borderline problem areas, waiting to settle after litigation commences can be risker
    - If litigation commences without a consent decree, the agency may draft a complaint that includes borderline problem areas that the agency would not have raised in settling the investigation.
    - Once the borderline problem areas are in the complaint, they will need to be addressed in a postcomplaint consent decree.

The history

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

Year	Consent Decree	Abandoned	Litigation	Closing Statement	Total
2011	20	2	4	2	28
2012	18	1	3	6	28
2013	13	1	3	5	22
2014	22	2	3		27
2015	24	3	7	3	37
2016	26	1	6		33
2017	23	1	3		27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6		27
2022	8	2	10		20
2023	1	5	6		12
2024 H1	2	6	3		11

NB: 2023 and 2024H1 each contains one Section 8 interlocking directorate consent decree, and 2024H1 also contains one "fix-it-first." So, neither 2023 nor 2024H1 contained a traditional Section 7 consent decree.

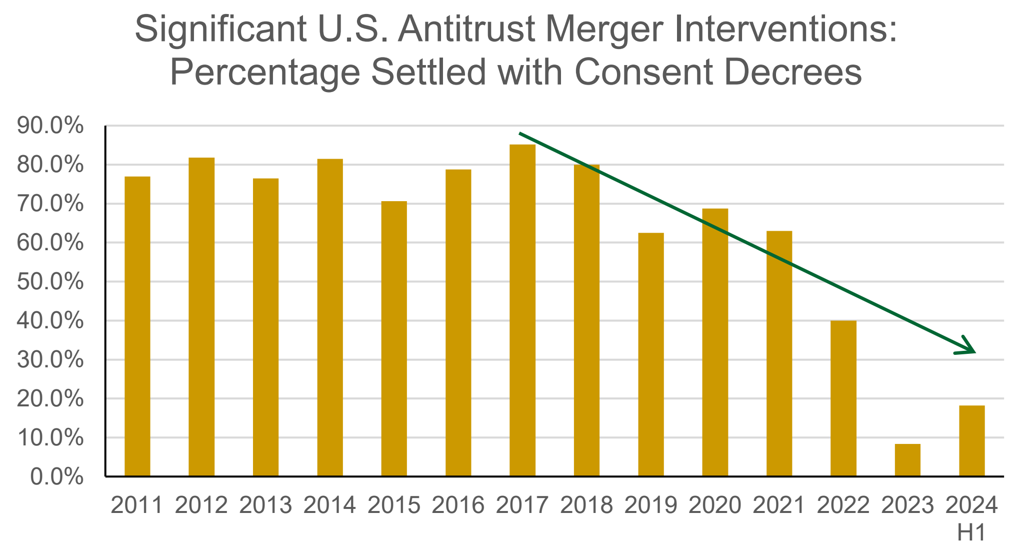
Source: Dechert LLP, DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement (Aug. 6, 2024); Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019). Dechert tracks "significant" investigations, which they define as one that involves a deal that is HSR reportable for which the result of 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



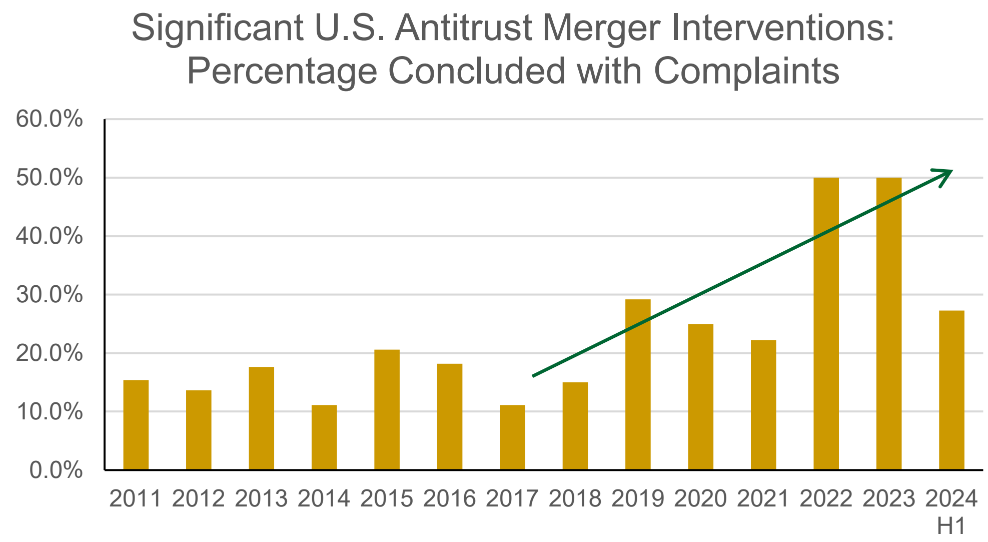
Note the decline in the Trump administration and the Biden administration to date

Also, 2023 and 2024H1 each contains one Section 8 interlocking directorate consent decree, and 2024H1 also contains one "fix-it-first." So, neither 2023 nor 2024H1 contained a traditional Section 7 consent decree.

Source: Dechert LLP, DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement (Aug. 6, 2024). Interventions occur when the investigation concludes that the transaction violates Section 7, which is resolved either 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 are 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 2024: Abandonments Dominate the Podium in Merger Enforcement (Aug. 6, 2024).

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 lack of ability to assess the effectiveness 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 the preferred solution:

> 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]

- Since Jonathan Kanter became AAG on November 16, 2021, the Antitrust Division has not willingly accepted a consent decree to settle a merger investigation or litigation
  - The DOJ refused to accept a divestiture consent decree to settle its investigation into Assa Abloy's pending acquisition of Spectrum Brands' Hardware and Home Improvement Division. The DOJ commenced litigation and the merging parties "litigated the fix" they had proposed. After six days of trial, the court abruptly paused the proceedings. Four days later, with the trial still paused, the DOJ accepted the "fix" in a consent settlement. Although there has been no formal acknowledgment of what happened, it appears clear that the court informed the DOJ that it was going to lose the case and reminded the merging parties of their continuing offer to accept a consent decree. The DOJ then settled.[2]

[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).
[2] *See* Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023).

The history

- The Biden administration
  - *FTC*: The Commission under Chair Lina Khan appears to be increasingly unwilling to negotiate consent decrees to resolve merger investigations, but it continues to be very demanding in what it requires to settle
    - In 2022, the FTC accepted consent decrees in ten merger investigations
    - After 2022, the FTC has accepted no consent decrees to settle a merger investigation[1]
      - During the week of August 27, 2023, the FTC provisionally accepted two consent settlements to settle ongoing litigations[2]
        - *WDC*: Although the FTC touts these settlements as wins, I consider them losses. The FTC could have obtained substantially the same settlements at the end of the investigations, but rejected the settlement offers. When it appeared that the FTC were going to lose on the merits in court, the agency turned to negotiate consent decree relief.

[1] The FTC has accepted two novel consent decrees restricting who could sit on the boards of one or more of the companies in the transaction. *See* Decision, Exxon Mobil Corp., No. C-____, (F.T.C. provisionally accepted May 1, 2024); Decision and Order, QEP, LP, No. C-4799 (F.T.C. Oct. 10, 2023) (final order).
[2] *See* Decision, Amgen, Inc., No. 9414 (F.T.C. Dec. 13, 2023) (final order); Decision, Intercontinental Exchange, Inc. , No. 9413 (F.T.C. Nov. 3, 2023) (final order).

The history

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

- 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

“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 the relevant markets of concern to the agency,
      2. Fails to include all 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 can preserve the premerger level of competition

"Litigating the fix"

- There is a vigorous debate over the burden of proof in "litigating the fix"
  - There are three options for allocating the burden of proof
    1. Require the plaintiff to account for the fix as part of its prima facie case by showing either—
       - The fix does not address markets in which the transaction violates Section 7 (i.e., the fix is incomplete)
       - The fix is not reasonably likely to preserve competition even in the markets it was intended to fix (i.e., the fix in practice will not work as proposed)
    2. Consider the fix only as a remedy after finding on the merits that the originally structured transaction violated Section 7
    3. Allow the plaintiff to make out its prima facie case on the originally structured transaction, but allow the merging parties to raise the fix as part of their rebuttal case
       - Under the *Baker Hughes* three-step burden-shifting approach, the merging parties only have the burden of production in their rebuttal[1]
       - If they satisfy this burden, the burden of persuasion falls on the plaintiffs

[1] We will examine the *Baker Hughes* burden-shifting framework in Class 11.

“Litigating the fix”

- There is a vigorous debate over the burden of proof in “litigating the fix”
  - The DOJ/FTC’s position: Option 2
    - The government can make out its prima facie case against the original transaction without the fix
      - The parties often accept for the purposes of trial the original transaction violated Section 7
    - The government views the fix as a remedy to the prima facie case and contends that the merging parties bear the burden of persuasion in showing that the fix will continue the premerger level of competition in the problematic market postmerger without any diminution
      - NB: Section 7 prohibits transactions that have a reasonable probability of *substantially* lessening competition. Under the government’s approach to litigating the fix, the merging parties would have to show that there is *no* lessening of competition in the relevant market—showing that there would be no substantial lessening of competition in the relevant market is not sufficient
    - Depending on the case, this may require the merging parties to—
      - Defeat the agency prima facie case in relevant markets not addressed by the fix
      - Persuade the court that the necessary assets in the hands of a qualified divestiture buyer will preserve the premerger level of competition 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

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”

- There is a vigorous debate over the burden of proof in “litigating the fix”
  - The merging parties’ position: Option 1, then Option 3
    - The original transaction will never happen, and the government must make out its prima facie case that the transaction that will occur—the one with the fix—violates Section 7
    - This would require the government to show as part of its prima facie case, and ultimately bear the burden of persuasion on, either—
      - The assets to be divested are insufficient to enable the divestiture buyer to maintain competition in the relevant market so as to prevent a substantial lessening of competition;
      - The divestiture buyer lacks the capacity or incentive to maintain competition in the relevant market so as to prevent a substantial lessening of competition; *or*
      - There are relevant markets not addressed by the fix in which the main transaction would likely cause a substantial lessening of competition

"Litigating the fix"

- There is a vigorous debate over the burden of proof in "litigating the fix"
  - The courts: To date, two opinions address the issue
    - UnitedHealth/Change:[1] Option 1
      - Judge Carl Nichols' opinion in UnitedHealth/Change concluded that it makes no sense to enable the government to prove a prima facie case on a transaction that will never happen and so was inclined to accept the parties' position as the proper one
        - Among other things, Judge Nichols' observed: "The Government's standard (at least in its strongest form) is not only inconsistent with the text of Section 7 but would make a mess of the *Baker Hughes* framework and the ultimate burden of persuasion."[2]
      - However, since Judge Nichols found that the DOJ would lose even under its proposed standard, he found it unnecessary to decide the issue

[1] United States v. UnitedHealth Grp., No. 1:22-cv-00481-CJN, 2022 WL 4365867, at *8-*10 (D.D.C. Sept. 21, 2022).
[2] *Id*. at *9.

"Litigating the fix"

- There is a vigorous debate over the burden of proof in "litigating the fix"
  - The courts: To date, two opinions address the issue (con't)
    - Illumina/Grail:[1] Option 3 (when the fix is not conditional on a finding of liability)
      - Distinguished fixes that were conditional on a finding of liability and those that were not
      - Nonconditional fixes fall "somewhere in between a fact and a remedy—a post-signing, preclosing adjustment to the status quo implemented by the merging parties to stave off concerns about potential anticompetitive conduct."[2]
        - The court appears to have found the "Open Offer" to be nonconditional
        - But by its express terms, both parts of the Open Offer were conditional:[3]
          - "The Supply Agreement shall not be effective unless and until the Transaction closes."
          - "The IVD Test Kit Agreement shall not be effective unless and until the Transaction closes."

          WDC: But perhaps the condition the Fifth Circuit was addressing was a finding of a Section 7 violation, not the closing of the main transaction. But most "litigate the fix" solutions are conditioned, as in *Illumina*, only on the closing of the main transaction.
      - To satisfy its burden on rebuttal, "Illumina was only required to show that the Open Offer sufficiently *mitigated* the merger's effect such that it was no longer likely to *substantially* lessen competition. Illumina was not required to show that the Open Offer would negate the anticompetitive effects of the merger entirely."[4]
        - *WDC*: I do not think this is correct: the burden is one of production, so Illumina only need to adduce sufficient evidence to raise a genuine issue of fact on the competitive effects of the merger

[1] Illumina, Inc. v. FTC, No. 23-60167, 2023 WL 8664628, at *11 (5th Cir. Dec. 15, 2023).
[2] *Id*. at *12 (analogizing to fixes in AT&T/Time Warner and Microsoft/Activision).
[3] Illumina, Inc., "Open Offer" (Mar. 29, 2021).
[4] *Illumiina,* 2023 WL 8664628, at *14 (emphasis in original).

"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 any necessary discovery
      - In most cases, the fix in litigation will be the same fix that the merging parties proposed—and the investigating agency presumably vetted—in the investigation
    - 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.

Consent Remedies in Horizontal Cases: The Details

Horizontal mergers (that is, transaction involving competitors) are by far most common type of business combination challenged under the merger antitrust laws. We will examine relief in potential competition and 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: In each problematic market, must divest the entire business of one or the other merger party
    - *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" divestitures within a relevant market)
    - Where there are multiple problematic markets, the Buyer may choose 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 the divestiture seller's business nonetheless will still 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
    - Rare but possible where the parties can 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 for specific assets
      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

      Since this happens 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 material additional assets are added to the divestiture package

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 business 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 the 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* the 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, 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* the TransDigm/Takata case study in supplemental reading materials.

Horizontal remedies: Agency right of approval

- Agency will require the right of approval over the 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
  - The default position is to 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 agree to the consent settlement and 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

- Compliance 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
    - Historically, monitors were proposed by the merging parties but subject to the approval of and appointed by the agency[1]
    - Paid for by the merging parties, but obligations run to the agency
    - Not an enforcement authority—only reports on compliance to the agency
  - Qualifications
    - There are no set qualifications for a monitor
    - WDC: My impression is that many monitors have been appointed that have few if any qualifications for the job and can be quite a nuisance to the combined company
      - Key: Propose persons to serve as monitors who understand the job and will interfere in the business to the minimum extent necessary to discharge the monitor's duties

[1] This may be changing. In Assa Abloy/Spectrum Brands, where a consent decree was negotiated in the middle of the trial, the appointment provision provided:

> Upon application of the United States, *which Defendants may not oppose*, the Court will appoint a monitoring trustee selected by the United States, after consultation with Defendants, and approved by the Court.

Final Judgment, United States v. Assa Abloy AB § X(A), No. 1:22-cv-02791-ACR (D.D.C. Sept. 13, 2023) (emphasis added). The provision that the defendants may not object is draconian and in retrospect the merging parties should have rejected it. The DOJ appointed a partner from one of the nation's most prominent antitrust plaintiff's law firms. The monitor has adopted an aggressive interpretation of she powers under the consent decree, which Assa Abloy has challenged in court. (See the next slide.)

Horizontal remedies: Monitors and trustees

- Compliance monitors (con't)
  - Problems with monitors
    - Some monitors insist on becoming overly involved in the business
      - They have a financial incentive to do so since they are typically paid (like lawyers) on an hourly basis plus expenses
    - *Extreme example*: Assa Abloy/Spectrum[1]
      - The consent decree authorized the monitor, "after three years following the Divestiture Date" to determine whether the residential smart lock business that the divestiture buyer acquired diminished in "competitive intensity" as compared to 2023 (when that business was under Assa Abloy's direction), because of limitations on Fortune's rights to use the Yale brand name or trademarks in the United States and Canada. The monitor had between June 20, 2026, and September 13, 2028, to make this determination.
      - Assa Abloy assumed that this assessment would be straightforward. The DOJ had complied an extensive record on the state of competition in the residential smart lock business in the course of its investigation of the transaction, and ASSA Abloy believed that the monitor could simply assess the divestiture buyer's competitiveness at the end of three years and compare that to what the DOJ had found in the investigation.
      - The monitor, however, contended that the consent decree empowered it to conduct a continuing industry-wide study that evaluates all facets of competition in the smart locks industry from the date of the divestiture in June 2023 and lasting for the entire five-year period of the monitorship. The monitor commenced this work and, in the first six months, billed Assa Abloy $3.3 million and estimated that the monitor fees would amount to $20 million over the five-year period of the monitorship.
      - Assa Abloy is contesting the monitor's interpretation and seeking clarification from the court.

[1] *See* Assa Abloy AB's Motion for Clarification of the Final Judgment, United States v. Assa Abloy AB, No. 1:22-cv-02791 (D.D.C. filed June 18, 2024).

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
    - *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
    - Historically, the divestiture 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 the divestiture trustee’s obligations run to the agency
      - The trustee is a fiduciary to the agency, *not* to the merged firm

Horizontal remedies: Withdrawal rights

- Withdrawal rights
  - The boilerplate of a DOJ Stipulation and Order provides for the DOJ with the unilateral right in a Tunney Act proceeding in federal district court to 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, 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 in Consent Decree Provisions

“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, 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:[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 the prior approval provisions were in consent decrees, and there is no finding of liability in a consent decree—so it was not established 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 supplemental reading for commissioner statements regarding the repeal.

"Prior approval" provisions

- Some problems with prior approval provisions
  - An acquisition prior approval requirement in effect implements 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 could be brought under Section 706(1) of the Administrative Procedure Act for a failure to act[2]
    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 in effect implements 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 in effect implements 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, 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] 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
  - Requires the combined firm 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, 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 [the upfront divestiture buyer], 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 prior 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, 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 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, 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)

Consent decrees: Typical provisions

1. Introduction/Whereas clauses
2. Jurisdiction
3. Definitions
4. Applicability
5. Divestitures
6. Supply and transition assistance
7. Key employees
8. Monitor
9. Appointment of divestiture trustee
10. Notice of proposed divestitures
11. Financing
12. Asset maintenance
13. Hold separate
14. Employment noncompetes
15. Prior notification of future acquisitions
16. Prior approval of future acquisitions
17. Respondents' compliance reports
18. Compliance inspections
19. No reacquisition
20. Restrictions on divestiture buyers
21. Purpose provision
22. Dispute resolution
23. Retention of jurisdiction
24. Expiration of final judgment
25. Public interest determination
26. Signature line for the judge (DOJ only)

Note 1: 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.

Note 2: The structure and form of a consent order varies between the DOJ and the FTC and can vary over time with an agency. When mocking up a possible consent decree for a client, use the investigating agency's most recent consent decrees as models.

Note 3: Not all these provisions are in every consent decree.

Consent decrees: Typical provisions

- Introduction/Whereas clauses
  - The introduction to an FTC consent decree with state (among other things) that:

> 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]

- The Agreement Containing Consent Orders (i.e., the Decision and Order embodying what is commonly called the consent order and the Order to Maintain Assets) provides the Commission with the consent of the parties necessary to enter the orders without an adjudication of the facts or the finding of a violation
- Two critical features:
  1. The respondents admit the jurisdiction facts, *and*
  2. The parties stipulate that the signing of the agreement does not constitute an admission of liability of the finding of any fact other than the jurisdictional facts

[1] Decision and Order, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Introduction/Whereas clauses
  - In DOJ consent decrees, the introduction is contained within the whereas clauses
  - Recent DOJ example:

> WHEREAS, Plaintiff, United States of America, filed its Complaint on September 15, 2022;
>
> AND WHEREAS, the United States and Defendants, ASSA ABLOY AB ("ASSA ABLOY") and Spectrum Brands Holdings, Inc. ("Spectrum") have consented to entry of this Final Judgment without this Final Judgment constituting any evidence against or admission by any party relating to any issue of fact or law;
>
> AND WHEREAS, Defendants agree to make certain divestitures;
>
> AND WHEREAS, Defendants represent that the divestitures and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;
>
> NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:[1]

  - Critical features:
    - By appearing in court, the defendants submit themselves to the court's jurisdiction, thereby eliminating the need for an explicit jurisdictional provision
    - The entry of the final judgment does not constitute evidence or an admission by any party of any issue or fact or law
    - The defendants represent that they can comply with the obligations imposed by the consent decree

[1] Proposed Final Judgment, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Jurisdiction
  - Used in DOJ consent decrees
    - States that the court has subject matter jurisdiction over the complaint
    - States that the complaint states a cause of action that the defendants have violated Section 7
  - Recent DOJ example:

> The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act (15 U.S.C. § 18).[1]

[1] Proposed Final Judgment § I, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

Consent decrees: Typical provisions

- 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)

NB: A great deal of substance is packed into the definitions. They require careful attention with negotiating a consent decree.

Consent decrees: Typical provisions

- Applicability
  - In DOJ consent decrees, 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
  - The FTC does not have a corresponding provision
  - Recent DOJ example:

> A. This Final Judgment applies to ASSA ABLOY and Spectrum, as defined above, and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment.
>
> B. If, prior to complying with Section V and Section VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of business units that include the Divestiture Assets, Defendants must require any purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from Acquirer.[1]

    - Note that the second provision requires any divestiture buyer (other than the identified upfront buyer) to agree *by contract* to be bound by the applicable provisions in the consent decree
      - *Query*: Does this mean that the DOJ must enforce the consent order as a third-party beneficiary to the contract, or does is this sufficient to trigger the "in active concert" jurisdiction of the first provision?

[1] Proposed Final Judgment § II, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Divestiture obligations
  - The practice of the FTC and the DOJ is to require divestiture relief to settle a horizontal merger matter
  - Example: Buyer upfront (including an agency-approved divestiture agreement)

> IT IS FURTHER ORDERED that:
>
> A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; Provided, however, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.
>
> B. B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).[1]

[1] Decision and Order § III, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Divestiture obligations
  - Timing—Tends to be accelerating: Some examples over time:
    - Assa Abloy/Spectrum Brands (DOJ 2023)[1]
      - *Buyer unfront*: 3 days after consummation of the main transaction
    - Tractor Supply/Orscheln (FTC 2022)[2]
      - *Buyer unfront*: 10 days after consummation of the main transaction
    - S&P/ IHS Markit (DOJ 2022—but negotiated prior to Jonathan Kanter becoming AAG)[3]
      - *Buyer unfront*: 30 days after consummation of the main transaction
    - Iron Mountain/Recall (DOJ 2016)[4]
      - *Buyer upfront*: 10 days after consummation of the main transaction for certain assets to an identified preapproved buyer upfront
      - *Other buyers*: 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
    - SCI/Stewart Enterprises (FTC—2014)[5]
      - *No buyer upfront*: 180 days from final approval to a buyer to be approved by the FTC
      - Multiple divestitures to multiple buyers in local markets

[1] Proposed Final Judgment § II, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).
[2] Decision and Order § II(A), Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).
[3] Final Judgment § IV(A), United States v. S&P Global, No. 1:21-cv-03003-JEB (D.D.C. Mar. 21, 2022).
[4] Final Judgment § IV, United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).
[5] Decision and Order § II, Service Corp. Int'l, No. C-4423 (F.T.C. Apr. 29, 2014).

Consent decrees: Typical provisions

- Divestiture obligations (con't)
  - Approval of divestiture buyer and manner of divestiture by agency when there is no buyer upfront:

> 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] Final Judgment § IV(L), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).

Consent decrees: Typical provisions

- Supply and transition assistance
  - The consent order may require the merged firm to provide transition services to divestiture buyer
    - 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)
  - Recent example:

> J. At the option of Acquirer, and subject to approval by the United States in its sole discretion, on or before the Divestiture Date, ASSA ABLOY must enter into a supply contract or contracts for all products necessary to operate the Premium Mechanical Divestiture Business for a period of up to 12 months, on terms and conditions reasonably related to market conditions for the provision of such products, as agreed to by Acquirer.
>
> . . .
>
> L. At the option of Acquirer, and subject to approval by the United States in its sole discretion, on or before the Divestiture Date, ASSA ABLOY must enter into a contract to provide transition services to cover all services necessary to operate the Premium Mechanical Divestiture Business, including services for back office, human resources, accounting, employee health and safety, and information technology services and support for a period of up to 12 months on terms and conditions reasonably related to market conditions for the provision of the transition services, as agreed to by Acquirer.[1]

    - Modifications or amendments to any required supply or transition agreement must be approved by the investigating agency

[1] Proposed Final Judgment § V(J), (L), United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Key employees
  - In many businesses, there are key employees that are necessary for the company to operate competitively in the marketplace
    - To the extent that the divestiture assets are in some juridical form—say a corporation or LLC—all employees and contacts with the company follow the sale to the divestiture buyer
    - However,
      - Some personnel key to the divestiture business may be employed by an affiliated entity, such as a parent or sister company, and would not follow the sale of the company, *or*
      - The divestiture consists of assets and not a juridical entity, so no employees would automatically go the divestiture buyer
    - In these situations, the consent decree will contain a key employee access/hiring provision giving the divestiture buyer access to the key employees and enabling the divestiture buyer to make employment offers to these employees
    - Moreover, the consent decree will prohibit the merging firms from many counteroffers to retain these employees and may prohibit the merged company from soliciting employees for rehire who had accepted employment from the divestiture buyer for a specified period of time

The coverage of a key employees provision can be a critical part of the consent decree negotiations, both for the viability and competitiveness of the divesture business and for the merged firm (which could lose employees critical to its remaining operations)

Consent decrees: Typical provisions

- Key employees
  - Example: Key employee provision in an asset divestiture sale

IT IS FURTHER ORDERED that:

A. Until 6 months after a Divestiture Date, Respondents shall cooperate with and assist an Acquirer to evaluate independently and offer employment to each Farm Store Employee relating to the Farm Store Assets divested to the Acquirer on that Divestiture Date.

B. Until 6 months after the applicable Divestiture Date, Respondents shall:

1. No later than 10 days after a request from an Acquirer, provide a list of all applicable Farm Store Employees and provide Employee Information for each;
2. No later than 10 days after a request from an Acquirer, provide the Acquirer an opportunity to privately interview any applicable Farm Store Employee outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any applicable Farm Store Employee;
3. Remove any impediments within the control of Respondents that may deter any applicable Farm Store Employee from accepting employment with an Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the applicable Acquirer, and shall not make any counteroffer to a Farm Store Employee who receives an offer of employment from the applicable Acquirer;

   Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; (con't)

Consent decrees: Typical provisions

- Key employees
  - Example: Key employee provision in an asset divestiture sale (con't)

> 4. Continue to provide Farm Store Employees employed by Respondents with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;
> 5. Provide reasonable financial incentives for Farm Store Employees to continue in their positions, as may be necessary, to facilitate the employment of such Farm Store Employees by an Acquirer; and
> 6. Not interfere, directly or indirectly, with the hiring or employing by an Acquirer of any applicable Farm Store Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any applicable Farm Store Employee by the Acquirer.[1]

[1] Decision and Order §§ V(A)-(B), Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Key employees
  - Example: Nonsolicit provision for employees hired by divestiture buyer

C. Respondents shall not, for a period of one year after divesting any of the Farm Store Assets pursuant to Paragraph II.A of this Order, directly or indirectly, solicit or otherwise attempt to induce any Farm Store Employee who has accepted an offer of employment with the applicable Acquirer in connection with such divestiture to terminate his or her employment with the Acquirer; provided, however, Respondents may:

1. Hire any such Farm Store Employee whose employment has been terminated by the Acquirer;
2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Farm Store Employee employed by the Acquirer; or
3. Hire a Farm Store Employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section V.[1]

[1] Decision and Order § V(C), Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Key employees
  - Example: Abrogation of employment noncompete agreements

> D. Respondent shall not enforce any non-compete provision or non-compete agreement against any individual who seeks or obtains a position with the Farm Store Business or does business with the Farm Store Business.[1]

- NB: The Farm Store Business is limited to the business conducted by the target at the time of the merger at the divestiture stores, so it does not abrogate all noncompetes by the merged firm

[1] Decision and Order §§ V(D), Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Monitors
  - Biden agency consent decrees provide for the appointment of a third-party "monitor" to oversee and report to the agency on compliance with the consent decree
  - Recent FTC consent orders contain several notable provisions, including:[1]
    - The monitor serves as an independent third party and not as an employee or agent of the respondents or the Commission;
    - The monitor employ consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to carry out the monitor's duties and responsibilities;
    - Respondents must cooperate with the monitor in performing his or her duties, including—
      - providing the monitor full and complete access to personnel, information, and facilities, and
      - making such arrangements with third parties to facilitate access by the Monitor;
    - Respondents must pay the monitor's fees and expenses as set forth in an agreement approved by the Commission;
    - Respondents must not require the monitor to disclose the substance of the monitor's communications with the Commission or any other person;
    - Respondents may require the monitor and the monitor's assistants and agents to enter into a customary confidentiality agreement, so long as the agreement does not interfere with the performance of the monitor's duties

[1] *See, e.g.*, Decision and Order § VIII, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- 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 by 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)
  - Recent example:

> A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Farm Store Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.
>
> . . .
>
> E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Section IX, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
>
> 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;[1]

[1] Decision and Order §§ IX, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Appointment of a divestiture trustee
  - 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 language in recent FTC consent orders is more precise:

> The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer that receives the prior approve of the Commission as required by this Order,
>
> *Provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,
>
> *Provided further, however*, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;[2]

    - 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

[1] Final Judgment § V(B), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).
[2] Decision and Order § IX(E)(4), Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Appointment of a divestiture trustee (con't)
  - 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

Consent decrees: Typical provisions

- 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 contact 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

Consent decrees: Typical provisions

- 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
  - Recent example:

> Defendants may not finance all or any part of Acquirer's purchase of all or part of the Divestiture Assets.[1]

[1] Proposed Final Judgment § VII, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Asset maintenance
  - Consent decrees typically contain an "asset maintenance" provision to ensure the divestiture assets are preserved until the time of divestiture
    - 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, although it may also be included in the consent order

[1] For example, see Final Judgment § VIII, United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).

Consent decrees: Typical provisions

- Asset maintenance: Recent FTC example in a consent order:

> IT IS FURTHER ORDERED that Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Farm Store Assets relating to each Farm Store identified on Appendix E and Appendix F and the Moberly Distribution Center are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the relevant Acquirer, and during such period shall:
>
> A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Farm Store Business and related Farm Store Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear);
>
> B. Not sell, transfer, encumber, or otherwise impair the Farm Store Business and related Farm Store Assets (other than in the manner prescribed in this Order and the Order to Maintain Assets) or take any action that lessens their full economic viability, marketability, or competitiveness;
>
> C. Not terminate the operations of any part of the Farm Store Business and related Farm Store Assets, and shall conduct or cause to be conducted the operations of the Farm Store Business and related Farm Store Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Farm Store Business and related Farm Store Assets; and
>
> D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Farm Store Business and related Farm Store Assets.[1]

[1] Decision and Order §§ I(FF), VI, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Index to Typical Provisions

Consent decrees: Typical provisions

- Hold separate
  - Where—
    - the divestiture assets have been identified but will not be divested until after the closing of the main transaction, *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 from the merged firm
  - At both the FTC and DOJ, there may be a separate Hold Separate Order entered by the court or the Commission, as the case may be
    - DOJ example: Hold separate provision in the consent decree (referencing a separate Hold Separate Order):

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

[1] Final Judgment § VII United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).

Consent decrees: Typical provisions

- Hold separate
  - DOJ example: Hold separate order

> 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, Linde AG, No. C-4660 (F.T.C. issued Oct. 19, 2018).

Consent decrees: Typical provisions

- Employment noncompetes
  - The Biden FTC is including a provision banning employment noncompetes in its consent orders in the geographic areas in which divestitures are ordered
  - Recent example

> IT IS FURTHER ORDERED that Respondents shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Farm Store at any location formerly owned or operated by Respondents in a Relevant Area.[1]
>
> The consent order defines "Relevant Area" as a 60-mile radius from any of the divestiture store locations[1]

[1] Decision and Order §§ I(FF), XI, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Prior 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]

[1] *E.g.*, Proposed Decision and Order § VIII, Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. filed Jan. 27, 2015)
[2] *E.g.*, Final Judgment § XI(A), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).
[3] *E.g.*, Proposed Decision and Order § III, 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.

Consent decrees: Typical provisions

- Prior approval of future acquisitions
  - The idea
    - Unlike prior notifications, prior approval provisions require the affirmative consent of the investigating agency to make a future acquisition of a specified type
    - Can apply to HSR and non-HSR reportable acquisitons
    - While the procedures for prior notification can be quite detailed, the procedures for prior approval are often unspecified and left to the discretion of the agency
  - Recent example

> IT IS FURTHER ORDERED that Respondents shall not, without the prior approval of the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, or otherwise:
>
> A. Any ownership or leasehold interest in any facility that has operated as a Farm Store in a Relevant Area within 6 months prior to the date of such proposed acquisition; or
>
> B. Any stock, share capital, equity, or other interest in any entity that owns any interest in or operates a Farm Store, or owned any interest in or operated a Farm Store in a Relevant Area within 6 months prior to such proposed acquisition.
>
> *Provided however*, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction or opening of new facilities.

[1] Decision and Order § X, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Respondents' compliance reports[1]
  - Requires merged firm to periodic affidavits with the agency reporting on the firm's compliance with the terms of the consent decree
    - Interim compliance reports every 30 days after the consent decree is issued until the respondents have complied with the divestiture provisions of the consent decree
    - Annual compliance reports one year after the date the consent decree is issued and annually thereafter for the next nine years on the anniversary of that date; and
    - Additional compliance reports as the agency or its staff may request.
  - Content
    - Each report must contain sufficient information and documentation to enable the agency to determine independently whether respondents are in compliance with the consent decree
  - Penalty of perjury
    - Each compliance report must be verified under penalty of perjury in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function

[1] For recent examples, see Decision and Order §XIV Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Respondents' compliance reports (con't)
  - Postclosing divestitures
    - Additional reporting will be required for postclosing divestitures (i.e., no buyer up front), including—
      - 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)
    - 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] Final Judgment § IX(A), United States v. Iron Mountain, Inc., No. 1:16-cv-00595 (D.D.C. Nov. 11, 2016).

Consent decrees: Typical provisions

- 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
  - Recent example:

> IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:
>
> A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
>
> B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.[1]

[1] Decision and Order § XVI, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- No reacquisition
  - Prohibits the merged firm from acquiring all or any part of the divestiture assets during the term of the consent decree
  - Recent example

> ASSA ABLOY may not reacquire any part of or any interest in the Divestiture Assets during the term of this Final Judgment without prior authorization of the United States.[1]

[1] Proposed Final Judgment § XIII, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Restrictions on divestiture buyers
  - In its consent orders, the FTC recently has been imposing “prior approval” requirements on divestiture buyers that seek to sale a divestiture asset
    - The covered time periods may vary depending on whether the buyer is a competitor
  - Presumably, the FTC includes this provision because of some concern of a divestiture “flipping” some divestiture assets to another buyer shortly after the original divestiture
  - Recent example

> IT IS FURTHER ORDERED that Bomgaars [a divestiture buyer] shall not:
>
> A. For a period of 3 years after the applicable Divestiture Date, sell, license, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, any Farm Store that was divested to Bomgaars pursuant to Section II of this Order to any Person; and
>
> B. For a period of 7 years after the term of Paragraph XII.A ends, sell, license, or convey, through subsidiaries or otherwise, without the prior approval of the Commission, any Farm Store that was divested to Bomgaars pursuant to Section II of this Order to any Person who owns, or within 6 months prior to such sale date, owned, directly, or indirectly, through subsidiaries or otherwise, a leasehold, ownership interest, or any other interest in whole or in part, in a Farm Store located within a 60-mile radius of the divested Farm Store;[1]

[1] Decision and Order § XVII, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022) (.

Consent decrees: Typical provisions

- Restrictions on divestiture buyers (con't)
  - *Query*: Does the divestiture buyer need to be a party to the consent order for this provision to be binding?
    - Neither the FTC nor the DOJ has joined the divestiture buyers as parties to the consent decree as a matter of practice, even when the consent decree purportedly imposes obligations of the divestiture buyer[1]
    - There is one example, however, of a divestiture buyer intervening as a party-defendant in a DOJ merger litigation, presumably to advocate for the its ability to maintain competition with the divestiture assets
      - When the case settled during litigation, the consent decree imposed obligations of the divestiture buyer and named the divestiture buyer as a bound party[2]

[1] *See, e.g.*, Decision and Order § XVII, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).
[2] *See* Final Judgment, United States v. U.S. v. Anheuser-Busch InBev SA/NV, No. 1:13-cv-00127-RWR (D.D.C.Oct. 21, 2013). We will spend much of the next class on this litigation.

Consent decrees: Typical provisions

- 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]

  - More recently, the Biden FTC has been using the following more precise language:

> IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and to ensure the Acquirer can operate the Farm Store Business in a manner equivalent in all material respects to the manner in which Respondents operated the Farm Store Business prior to the Merger.[2]

  - These provisions are 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), SCI Corp., No. C-4433 (F.T.C. filed Dec. 23, 2014).
[2] Decision and Order § XVII, Tractor Supply Co., No. C-4776 (F.T.C. Dec. 2, 2022).

Consent decrees: Typical provisions

- Dispute resolution between merged firm and divestiture buyer
  - In the Trump administration, the DOJ began including provisions providing for rapid alternative dispute resolution between the merged firm and the divestiture buyer when issues arise under the divestiture, supply, or transition services agreements
    - These provisions are weighted heavily in favor of the divestiture buyer
    - To date, the FTC has not adopted this type of provision
  - Recent DOJ example

> A. ASSA ABLOY and Acquirer will each have the right to initiate an expedited dispute resolution process in the event of a dispute over the extent of either party's rights under this Final Judgment, including whether an application is Multifamily, commercial, or residential and whether the intellectual property rights set forth in Paragraph II.Q.2.vii have been transferred. In any such dispute over whether an application is Multifamily, commercial or residential, ASSA ABLOY will bear the burden of proof and all ambiguities in the agreement with respect to whether an application is Multifamily, commercial or residential will be construed against it; the losing party will pay all expenses. With respect to a dispute under any supply agreement pursuant to Paragraphs V.J, V.K, VI.J, or VI.K of this Final Judgment and until the expiration of the Final Judgment, ASSA ABLOY and Acquirer will each have the right to initiate a one-day binding arbitration to be held within 15 days of notice by either party.
>
> B. This Section XI will not be interpreted to limit or impact the monitoring trustee's responsibilities under Section X.

[1] Proposed Final Judgment § XI, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Retention of jurisdiction

> The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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 § XI, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (D.D.C. filed Mar. 5, 2023).

Consent decrees: Typical provisions

- 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 for both the DOJ and FTC
    - But we did see an increasing number with a term of seven years during the Trump administration
  - Example:

> Unless the Court grants an extension, this Final Judgment will expire 10 years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and continuation of this Final Judgment is no longer necessary or in the public interest.[1]

    - Extensions
      - *WDC*: To the best of my knowledge, a court has never extended (or been asked to extend) a consent decree
      - *WDC*: It is not clear what standard would apply if the court were asked to extend the consent decree
    - Termination
      - By its terms, the Assa Abloy consent decree expires ten years after the date of entry of the final judgment
      - Since the consent decree is an injunction, a party can always move to modify or terminate

[1] Proposed Final Judgment § 27, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

Consent decrees: Typical provisions

- Public interest determination
  - The Tunney Act requires that the court find that the entry of the proposed final judgment is in the public interest
    - Example:

> Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.[1]

[1] Proposed Final Judgment § 28, United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

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).

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 innovations in the Trump administration
    - Beginning in 2018, DOJ consent decrees contain language designed to—
      1. 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*
      2. 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 decrees, they also contain this standard or similar language[2]

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.").

[2] *See* Proposed Final Judgment § 26(A), United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023).

Consent decree violations

- DOJ: Standard of proof
  - New innovations in the Trump administration
    - Purports to require only a preponderance of the evidence for civil contempt:

> 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.[1]

[1] Proposed Final Judgment § 26(A), United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023); Final Judgment § XIV(1)(A), United States v. S&P Global Inc., No. 1:21-cv-03003-JEB (D.D.C. Mar. 21, 2022) (emphasis added).

Consent decree violations

- DOJ: Standard of proof
  - New innovations in the Trump administration (con't)
    - Purports to change the rules of interpretation
      - *S&P Global* (Trump administration)

> 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]

      - *Assa Abloy* (Biden administration)—Pulls back somewhat from the Trump administration

> 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 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.[2]

[1] Final Judgment § XIV(1)(B), United States v. S&P Global Inc., No. 1:21-cv-03003-JEB (D.D.C. Mar. 21, 2022) (emphasis added).
[2] Proposed Final Judgment § 26(B), United States v. Assa Abloy AB, No. 1:22-cv-02791-ACR (filed Mar. 5, 2023) (emphasis added).

Consent decree violations

- DOJ: Standard of proof
  - New innovations in the Trump administration (con't)
    - *Query*: Can the settling parties change the standard of proof and rules of interpretation 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 $50,120 for 2023
    - 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* (con't)
  - 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* (con't)
  - 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* (con't)
  - 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), 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* (con't)
  - 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

Consent decree violations

- Failure to observe a prior notice provision: *7-Eleven*
  - Consent order prior notice provision
    - To settle an investigation into its pending $3.3 billion acquisition of approximately 1,100 retail fuel outlets with attached convenience stores from Sunoco LP, 7-Eleven agreed to a consent order with the following prior notice provision:

> B. For a period of ten (10) years from the date this Order is issued, Respondent 7-Eleven shall not, without providing advance written notification to the Commission in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Relevant Notice Outlets, provided, however, that prior notification shall not be required by Paragraph VII. of this Order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.[1]

    - Final order issued: March 26, 2018

[1] Decision and Order, In re Seven & I Holdings Co., Ltd., No. C-4641, 165 F.T.C. 409, 470 § VII(B) (Mar. 26, 2018) (final consent order).

Consent decree violations

- Failure to observe a prior notice provision: *7-Eleven*
  - Alleged violation
    - The complaint alleged that 7-Eleven acquired a competing fuel outlet in St. Petersburg, Florida that it was required to give prior notice but failed to do so[1]
      - The acquisition was undetected by the FTC for over three years
      - 7-Eleven apparently notified the Commission of the breach of the consent order[2]
    - Although not alleged as a count, the civil penalties complaint also alleges that the acquisition of the St. Petersburg outlet was "plainly anticompetitive" and, by implication, in violation of Section 7[3]
      - 7-Eleven apparently sold the St. Petersburg outlet and did not own it at the time fo the filing of the complaint[4]
  - Requested relief
    - The alleged violation lasted 1547 days[5]
    - The Commission alleges that the maximum penalty is $77,535,640
      - In 2023, the maximum penalty is $ 50,120 per day (adjusted annually)
      - The Commission applied the maximum 2023 penalty even for years prior to 2023
      - Prayer for relief: "That the Court order Defendants to pay an appropriate civil penalty amount;"

[1] Complaint for Civil Penalties and Other Equitable Relief for Violation of a Federal Trade Commission Decision and Order, FTC v. Seven & I Holdings Co., Ltd., No. 1:23-cv-03600 (D.D.C. filed Dec. 4, 2023).
[2] *Id* ¶ 7. [3] *Id*. ¶ 5. [4] *Id*. ¶ 42. [5] *Id*. Requested Relief b.