FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Frequently Asked Questions About Merger Consent Order Provisions

These materials reflect the views of the staff, and not of the Commission or of any Commissioner.

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***The Setting**:* A firm (the acquiring firm) proposes to acquire a second firm (the acquired firm), but recognizes that it may compete with the second firm in a relevant antitrust market. The FTC staff is investigating the transaction, the Commission has issued second requests or subpoenas, and the firms are assembling their response. At some point, lawyers for the acquiring (or acquired) firm approach the FTC staff about settling the matter. The acquiring firm might be willing to agree to a divestiture, but it wants to minimize the extent of the divestiture as much as possible. The Commission might be willing to accept a settlement, but it wants to minimize as much as possible the risk to consumers from the anticompetitive effects of an otherwise unlawful acquisition. The staff, thus, needs confidence that any consent order that it recommends to the Commission will result in effective relief. The firms are anxious to wrap up the negotiations and settle the matter as quickly as possible. The following are some questions that have arisen in the past. (1)

Overview

Q. 1. What provisions does the Commission generally expect to see in a consent order?

A: Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets. Although there is no "magic formula" to achieve that goal and developing appropriate merger remedies is a very fact-specific inquiry, many provisions have been developed over the years that appear in almost every merger order. For example, most orders relating to a horizontal merger will require a divestiture; the divestiture will have to be "absolute"; the order will state the purpose of the divestiture; the Commission will be authorized to appoint a divestiture trustee if the assets aren't divested on time; the divestiture trustee may have authority to divest a larger package of assets; the assets to be divested will have to be maintained pending divestiture; the parties must represent that they

can accomplish the remedy; certain reporting obligations will be imposed; and the staff's access to documents and employees will have to be assured. This general listing is not exhaustive; past orders have frequently included other provisions, such as certain transitional obligations, employee non-solicitation and incentive provisions and information firewalls. Finally, the Commission's Rules of Practice require a number of waivers and other recitations that will appear in every consent agreement. *See* Rule 2.32 of the Commission's Rules of Practice, 16 C.F.R. § 2.32.

We do, however, supplement our learning and review what we learn on a continuous basis. Some provisions and requirements may change as we learn more.

Q. 2. Where would I look to see what type of provisions the Commission has recently required?

A. Past orders, including the related complaints, decisions, and other public statements (*e.g.*, the "analysis to aid public comment"), provide information regarding what the Commission has required in particular cases in the past. The Commission's more recent orders (from 1996 to the present) are available on the Commission's web site, listed alphabetically. The Bureau's *Study of the Commission's Divestiture Process* describes provisions that the Commission has required in recent orders.

Q. 3. What happens if a company with continuing obligations under the Commission's order is acquired by another company?

A. If a respondent to a Commission order is acquired in its entirety by a second company, that second company will likely become a "successor" to the respondent and, as such, obligated to comply with the Commission's order. Other acquisitions of significant portions of a respondent's business or a line of respondent's business, which comprise less than the entirety of the respondent, will likely also create successor entities. The analysis is fact-specific and is not precisely the same analysis undertaken under corporate successorship law, but is conducted with an eye towards how the FTC's consent order and remedy provisions will be effected.

Q. 4. What reporting obligations are generally imposed on respondents?

A: In cases in which respondents have a post-order divestiture obligation, they are generally required to keep the Commission and the Compliance Division staff informed of their divestiture efforts. In the consent agreement itself, respondents generally agree to submit an "Initial Compliance Report" either at the time that the Commission considers whether to accept the consent order for placement on the public record, or within a short time thereafter. Subsequent reports on the divestiture effort are required either monthly or bi-monthly. To the extent there are obligations in the order beyond the divestiture obligation, respondents are usually required to submit annual reports to the Commission on their continued compliance with those obligations. Compliance Division staff is always available to speak with respondents on their compliance efforts, and the Compliance Division encourages representatives of respondents to maintain communication with the staff.

Specific Topics

Buyers

Q. 5. Does the Commission have a preferred type of buyer?

A. The Commission's sole requirement is that the buyer be ready, willing, and able to operate the assets in a manner that maintains or restores competition in the relevant market to effectuate the remedial objectives of the order. The Commission has approved different types of buyers in different cases. For example, parties who do not operate in the market, but who have a track record of operating similar assets successfully have been found to be acceptable purchasers. Additionally, parties who have operated other businesses successfully and have brought together a

management team experienced in the relevant market have been found to be acceptable buyers. Firms operating in different geographic markets but within the same product market have been found to be acceptable buyers. Firms who operate in related product markets, either in the relevant geographic market or outside the relevant geographic market, have been found to be acceptable buyers. Smaller firms, sometimes identified as fringe firms or mavericks, operating within the same geographic and product markets have been found to be acceptable buyers. In every case, the respondent must show that the proposed divestiture will satisfy the remedial objectives of the Commission's order.

Q. 6. What criteria does the Commission use to determine that divestiture to a proposed buyer will satisfy those remedial objectives?

A: The staff evaluates both the proposed buyer and the proposed agreement. The staff evaluates whether the buyer has the financial resources to consummate the proposed divestiture and to remain a vigorous competitor in the market. The staff examines the proposed buyer's commitment to remain in the market by analyzing its past operations and business plans as well as its future business plans for the divested assets. The staff evaluates the proposed buyer's experience and expertise to operate effectively in the market. The staff examines both the proposed buyer's historical financial documents and its future business plans for the proposed divestiture. The staff will likely talk with industry members familiar with the proposed buyer such as competitors, suppliers, and customers. The staff may also talk with lenders and other creditors of the proposed buyer, particularly those involved in possible financing of the proposed deal. The staff also examines the proposed buyer's current position in the relevant market to determine whether a divestiture to the proposed buyer will adequately address concerns about anticompetitive effects arising from the original transaction. Proposals to divest to an incumbent may raise concerns about likely anticompetitive effects; on the other hand, divestiture to an incumbent may assure that an experienced operator with expertise in the market acquires the divested assets, a crucial factor in some divestitures.

Buyer Up Front

Q. 7. What is a "buyer up front"?

A: When the Commission requires a "buyer up front" (or up front buyer), it requires that the respondent find an acceptable buyer for the package of assets it proposes to divest and that it execute an acceptable agreement - and all necessary ancillary agreements - with the buyer (and third parties, if required) before the Commission accepts the proposed consent order for public comment. It is important to involve FTC staff in this process as early as possible, to make sure that any negotiated agreement includes all the assets and contains all the provisions that staff believes are necessary to resolve the competitive concerns. In addition, the FTC staff will want to discuss with the buyer its business plans and whether it believes the assets being acquired are sufficient to maintain or restore competition. The Commission will then evaluate the buyer and the agreements at the time it determines whether to accept the proposed order for public comment. If the Commission accepts it for public comment, in most cases it will require that the up front divestiture be consummated within a very short period of time.

Q. 8. Are buyers up front required in all Commission consent orders?

A: No.The facts of each case are particularly important to this topic. In those cases in which the Commission is concerned about the adequacy of the asset package or the possible lack of an acceptable buyer, the Commission will, by requiring a buyer up front, attempt to minimize the risk that the remedy will be ineffective. Buyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy. Buyers up front have, thus, been used primarily (but not exclusively) when there was concern about whether the proposed asset package was adequate to maintain or restore competition or whether the asset package was sufficient to attract an acceptable buyer or buyers, when the pool of acceptable buyers was thought to be very limited because of specialized needs, or when there were concerns about deterioration of the assets (including human capital, good will and other intangible assets) pending divestiture. Up front buyers are more likely to be required when the respondent has urged that only selected assets be divested.

When the assets to be divested have been operated as a stand-alone business in the past, the Commission has frequently not required a buyer up front. In all cases, however, the Commission must be confident that an acceptable buyer exists and that the package of assets to be divested is, when operated by the buyer, sufficient to maintain or restore competition in the relevant market. When the respondent has shown that a good buyer will emerge, that the asset package is an ongoing, stand-alone business and will maintain or restore competition in the market at issue, and that interim competition and the viability of the assets will be preserved pending divestiture, post-order divestitures have been accepted. *See, e.g., Diageo/Vivendi*, Dkt. No. C-4032*; Valero/UDS,* Dkt. No. 4031; *Lafarge, SA*, Dkt. No. 4014 (in which the Commission required a buyer up front and a post-order divestiture in different markets); *El Paso/Coastal*, Dkt. No. C-3996; *BPAmoco/Arco*, Dkt. No. C-3938 (in which the Commission required a buyer up front and a post-order divestiture in different markets); *Duke Energy*, Dkt. No. C-3932; *FNF/CT*, Dkt. No. C-3929; *El Paso/Sonat*, Dkt. No. C-3915; *Exxon/Mobil*, Dkt. No. C-3907; *Precision Castparts*, Dkt. No. C-3904 (in which the Commission required a buyer up front and a post-order divestiture in different markets).

Q. 9. Are there any industries in which the Commission has been more likely to require a buyer up front?

A: Whether a buyer up front will be required is dependent upon the circumstances of each individual case, and not (generally) on the particular industry in which the merging firms operate. Buyers up front have been required in such varied markets as medical devices, pharmaceutical products, mirror coatings, mining equipment, industrial gases, general aviation fuel, and many others. However, supermarkets and other retail operations (e.g., retail pharmacies) are particularly vulnerable to having their assets deteriorate during the search for a post order buyer; this affects the ability of the assets to be operated in a manner that maintains or restores competition in the relevant market. Accordingly, the Commission has now more uniformly required up front buyers in such divestitures. *See, e.g., Ahold/Bruno's*, Dkt. No. C-4027; *Albertson's, Inc./American*, Dkt. No. C-3986; *Shaw's/Star*, Dkt. No. C-3934 (divestiture in one market was post-order requirement); *Kroger/Fred Meyer*, Dkt. No. C-3917; *Kroger/Groub*, Dkt. No. C-3905;*Ahold*, Dkt. No. C-3861; *CVS/Revco*, Dkt. No. C-3762.

Q. 10. The buyer up front divestiture typically occurs before the Commission makes the order final. What happens if the Commission, in deciding whether to make the order final, decides the buyer or the agreement is unacceptable after the divestiture has already occurred?

A: To preserve the Commission's ability to reject the up front buyer following the public comment period, the Commission's orders require that the respondent include an "unwind" (rescission) provision in any divestiture contracts in which closing on the divestiture will occur before final Commission approval of the order. The parties themselves may include contract provisions in divestiture contracts to handle the orderly implementation of an unwind provision if the Commission rejects the up front buyer. Invoking rescission should be very rare. *See* Q.11.

Q. 11. Has the Commission ever ordered rescission?

A: As of March 13, 2002, the Commission has not ordered rescission of an up front divestiture.

Q. 12. Are there cases in which the package of assets to be divested comprises an ongoing business, but the Commission has nonetheless required an buyer up front?

A. The Commission may require a buyer up front for an ongoing business if, for example, the business is so specialized that the Commission is concerned that there are very few acceptable buyers. The Commission may also require a buyer up front for an ongoing business if it concludes that even a hold separate agreement will not effectively minimize the interim competitive harm pending a post-order divestiture. *See, e.g., Siemens/Vodafone*, Dkt. No. 4011. *See* Q.19.

Q. 13. What concerns does the Commission have that result from delay in divestiture?

A. Concerns regarding diminished viability, interim competitive harm and the eventual competitive significance of the assets to be divested arise whether there is a buyer up front or a post-order divestiture. Wasting or deterioration of the assets of the business during the Commission's investigation of the transaction or the acceptability of the remedy package may affect the scope of the package of assets necessary to be divested, or whether an acceptable divestiture is possible. For example, there may be an adverse impact on the morale of employees of the business to be divested, leading them to leave the company; alternatively, long standing, important relationships among suppliers or customers of the acquired firm may deteriorate because of uncertainty regarding the acquired business.

Q. 14. What can be done by the parties to reduce the time it takes to identify acceptable up front divestiture candidates?

A. The parties, working with FTC staff, should consider taking steps to minimize the time it takes to define an asset package likely to be acceptable to the Commission and to finding an acceptable buyer. The parties should consider implementing or maintaining incentives for managers and key employees to stay on through the remedy process, and take or continue steps to prevent the wasting of the assets likely to be divested and the deterioration of customer and supplier relationships.

The Assets To Be Divested

Q. 15. What is an acceptable divestiture package?

A: An acceptable divestiture package is one that maintains or restores competition in the relevant market. The divestiture of an entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets) of either the acquired or acquiring firm relating to the markets in which there is a concern about anticompetitive effects, is most likely to maintain or restore competition in the relevant market, and thus will usually be an acceptable divestiture package. The divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately, thereby remedying the likely anticompetitive effects of the proposed acquisition and minimizing the Commission's risk that it will be unable to obtain effective relief. *See* Q.18.

There have been instances in which the divestiture of one firm's entire business in a relevant market was not sufficient to maintain or restore competition in that relevant market and thus was not an acceptable divestiture package. To assure effective relief, the Commission may thus order the inclusion of additional assets beyond those operating in the relevant market. For example, in*Guinness/Grand Met*, Dkt. No. C-3801, the Commission required divestiture of foreign assets even though the relevant geographic market was limited to the United States. On the other hand, there have been occasions when the respondent demonstrated with compelling evidence that it was not necessary or not efficient (from the eventual buyer's perspective) to require it to divest an entire business.*See*Q.16. In all cases, the objective is to effectuate a divestiture most likely to maintain or restore competition in the relevant market.

Q. 16. Can you explain those cases in which the Commission has not required the divestiture of an entire business?

A: The Commission has issued orders that require a divestiture of less than the entire business operating in, or producing for, the relevant market. In those cases the Commission has concluded that the assets to be divested are sufficient to allow the buyer of the assets to begin to compete in the market immediately, thereby remedying the likely or actual anticompetitive effects of the challenged acquisition. For example, interested buyers of divested assets may have their own assets (or have secured access to such assets) that are good substitutes for some of those of the stand alone business, and the inclusion of such additional assets is unnecessary or potentially inefficient. Similarly, certain assets controlled by the seller may only be minimally used in the production or distribution of the relevant product, and it may be significantly more efficient and competition enhancing for the parties to enter into a supply or lease contract for such assets. *See, e.g., INA/FAG*, Dkt. No. C-4033; *Rohm & Haas*, Dkt. No.C-3883.

At all times, the burden is on the parties to provide concrete and convincing evidence indicating that the asset package is sufficient to allow the proposed buyer to operate in a manner that maintains or restores competition in the relevant market.

Q. 17. To remedy competitive concerns resulting from horizontal mergers, does the Commission insist that respondents divest sufficient assets to result in a zero concentration, or HHI, change?

A: No. The focus of the inquiry is whether the proposed divestiture is sufficient to maintain or restore competition in the relevant market.

Q. 18. How does the FTC determine whether the assets to be divested are viable and will restore competition?

A: This is the most critical question in crafting effective relief. A divestiture of the entire overlapping business (one that is operating effectively now), provides some comfort that those assets are viable and would restore competition. Such a divestiture reduces the risk to the Commission that it will be unable to obtain effective relief. However, with any divestiture proposal, we must examine the proposed divestiture and buyer to determine whether it will maintain or restore competition in the relevant market. See Q.6. for the criteria examined relating to a proposed buyer. Our inquiry is directed at current and future competitive issues, and respondents have the burden of showing that their proposal will have the likely effect of maintaining or restoring competition.

One way we consider whether a divestiture package is sufficient to restore competition is to look at how the companies currently conduct their businesses. We also look to others operating in the industry and related fields, including suppliers and customers, to get their assessment of what is required. Discussions with prospective buyers can also help determine if the assets to be divested are sufficient to maintain or restore competition. Because we recognize that prospective buyers of the divested assets may have imperfect or insufficient information regarding the assets to be acquired and the relevant market, or that they may have different incentives from the Commission, we carefully question prospective buyers about their requirements, operating plans and business plans regarding the to be acquired assets.

Q. 19. If the parties propose to divest all of one firm's assets used in the production, distribution and sale of the relevant product, doesn't that end the inquiry?

A. No. Although the competitive analysis focuses on specific product markets, remedy analysis focuses on what a business needs to be an effective competitor in the relevant market. Different businesses will likely have different existing production, distribution and selling facilities; assuring that a buyer can operate the assets to be acquired and maintain or restore competition in the relevant market may require the reconfiguration of, or increase in, the buyer's existing assets or the acquisition of complementary assets from the seller. Because the operations of the buyer and seller may be of a different scale and/or scope, something more than just the assets used in the production, distribution and/or sale of the relevant product may be required. (For similar reasons, something less than the assets used in the production, distribution and sale of the relevant product may be a sufficient remedy if there is convincing evidence that divestiture of less will effectively maintain or restore competition.)

Q. 20. In cases in which the Commission required that certain contract rights be divested or assigned, how have firms handled the problem of a third party with some rights in these contracts?

A: In some cases, third-party consents were required before the respondent could assign contract rights. These consents must usually be obtained before the settlement is accepted, so that the divestiture proceeds without contingencies or incident. One advantage of an up front buyer is that all issues relating to third-party rights will tend to be raised *before* the specific divestiture proposal is executed, so that alternatives and substitutes are possible if third-party rights make the original proposal unworkable or too complex.

Respondents often have two sets of assets they can divest: their own and the overlapping assets of the firm being acquired. Respondents are thus responsible for knowing what legal issues or other impediments to their divestiture proposal will arise and for either dealing with them or delivering a fully-acceptable alternative. If third-party rights might make it impossible for respondents to divest to an acceptable acquirer, then respondents must deal with that issue, perhaps by divesting different assets. The Commission may insist that respondents do whatever it takes to make the agreed-to divestiture occur. *See, e.g., West Texas Transmission, L.P. v. Enron Corp.*, 1989-1 Trade Cases (CCH) ¶ 68,424 (W.D. Texas 1988), *aff'd*, 907 F.2d 1554 (5th Cir. 1990) (the FTC is not required to approve divestiture of a pipeline interest to a buyer with a contract right of first refusal if it would raise competitive problems).

Q. 21. Under what circumstances can an acceptable package of assets be created by including some of the acquiring firm's assets and some of the acquired firm's assets in the package?

A: As with any divestiture of less than a stand-alone business, an asset package of this type, frequently referred to as "mix and match," may provide a sufficient competitive remedy. However, because these assets have never been operated by the same owner and will likely require some reconfiguration by the buyer, it is more difficult to determine whether the selected assets are appropriate and whether they can be operated together effectively. Therefore, there are no easily identifiable circumstances when a mix and match divestiture may be adequate. In such instances when it is proposed, the parties must present sufficient evidence to convince the Commission that the asset package is viable and that it will enable the acquirer of these assets to compete effectively.

Q. 22. Can parties create such a package if an up front buyer is offered?

A: One concern, that a "mix and match" package of assets would not be attractive to a potential buyer, is eliminated by the presence of an up front buyer. However, simply finding an entity that is willing (even excited) to acquire a "mix and match" package of assets does not necessarily resolve the question whether competition in the relevant market will be maintained or restored. Staff and the Commission will still have to carefully review the buyer's intentions and ability to operate the assets in a manner that maintains or restores competition in the relevant market(s). The burden remains on the parties and the buyer to convince staff and the Commission that the proposed divestiture will address any concerns about likely anticompetitive effects in the relevant market.

Q. 23. Under what circumstances does the Commission require that an entire package of assets be divested to a single acquirer only?

A: This is both an issue of viability and competition. Operations of a certain scale and/or scope may be necessary for the buyer of the assets to operate them efficiently or to have the incentive or means to operate them for anything but a short term. In certain industries, such as retail operations, it may be necessary to maintain or restore competition for the buyer of the divested assets to have a substantial "footprint" within the relevant geographic markets; this presence may make the buyer more likely to seek to increase or maintain "brand awareness" through advertising, or make it more likely that the buyer can obtain significant internal distribution efficiencies or cost savings. This requirement has been imposed in general in cases in which there were concerns that dividing up the assets to be divested among several buyers would not fully restore the competition that existed before the merger.

Crown Jewels

Q. 24. What is a "crown jewel" provision?

A: A "crown jewel" provision requires divestiture of a different package of assets from what a respondent was originally required to divest, and is typically to be divested by a trustee appointed by the Commission if the respondent fails to divest the original asset package on time or does so in a manner or condition that does not comply with the order (there may be other circumstances that can trigger possible trustee appointment in a given case). A crown jewel should be a

more marketable package for the trustee to sell, in light of the respondent's inability to find an acceptable buyer for the original package of assets. The crown jewel may be a package of assets that includes more than the original package of assets to be divested, such as total domestic assets when only a subset of the domestic assets were included in the original package. Or the crown jewel may be a different package of assets, such as the respondent's assets instead of the acquired firm's assets.

The crown jewel provisions of an order are not included as a penalty clause or as punishment for failure to comply with the order. Failure to divest on time, or in a manner consistent with an order, constitutes an order violation and subjects the respondent to civil penalties and other relief under section 5(*l*) of the FTC Act, 15 U.S.C. § 45(*l*). These civil penalties are in addition to any additional provisions in the consent order that may be triggered by the failure to comply with the provisions of the order.

Q. 25. Has the Commission ever required divestiture of the "crown jewels"?

A: Yes; as of March 13, 2002, once. In *Aventis*, Dkt. No. C-3919, the Commission required divestiture of the alternate assets, and appointed a trustee to accomplish that divestiture when respondent failed to divest the original assets on time.

Q. 26. When does the Commission require a crown jewel provision?

A: A crown jewel is appropriate where there is a risk that, if the respondent fails to divest the original divestiture package on time (including to an up front buyer) or if the original divestiture falls through for some reason, a divestiture trustee may need an expanded or alternative package of assets to accomplish the divestiture remedy. This may be because another buyer may need a bigger (or different) package of assets to make the divestiture viable and competitive, or because it will likely be faster and easier for the trustee to sell a bigger, more complete package of assets later on.

Q. 27. Is a crown jewel required in cases in which there is an up front buyer?

A: We assess the need for an up front buyer and for a crown jewel separately and on a case-by-case basis. An up front buyer does not necessarily eliminate the need for a crown jewel provision. Agreements with up front buyers occasionally fall through. In such a case, the original asset package may be unattractive to any other buyer, so there may be a need to alter or expand the original divestiture package to accomplish relief if the "up front" deal falls through. *See, e.g.*, *AHP/Solvay*, Dkt. No. C-3740;*Chevron/Texaco*, Dkt. No. C-4023.

Divestiture Period

Q. 28. If there is no up front buyer, how much time will the parties get to divest?

A: In recent cases, the Commission has required that all divestitures be completed within 3 to 6 months from the date the parties sign the Agreement Containing Consent Order. This means the respondent must find a buyer, negotiate a contract, submit that deal to the Commission for its approval, and complete the divestiture within that time. Respondent must submit its application early enough to allow for the 30-day public comment period (required by the Rules) and review by the Commission. If there is a buyer up front, the divestiture is required almost immediately upon consummation of the subject merger.

Q. 29. Is six months the maximum?

A: There have been exceptions but there needs to be a very good reason why the divestiture cannot be done in that time frame and why it is not likely there would be harm from a longer period.

Q. 30. The FTC used to give firms a year to divest. Why has the FTC reduced the divestiture period to six months?

A: It was taking too long for the divestitures to occur because respondents tended to wait until the end of the period, and there were examples of the assets deteriorating in the interim. Delay in implementation of a divestiture order increases the period in which competition in the relevant market may be affected because the acquiring company may have little incentive to maintain the assets (because they will be operated by a competitor in the future) or to operate them in a manner that maintains competition during the interim period. It may be more profitable, for example, for the acquiring firm to keep the acquired production capacity off the market. (These are some of the reasons that a "monitor" trustee is used; *see* Q.36.) Our experience confirms that firms can, with some rare exceptions, complete divestitures in less than six months.

Q. 31. When is a divestiture completed?

A: To satisfy its obligation to divest by the date required in the order, a respondent has to actually consummate the sale by that date. Executing an agreement or filing an application for the Commission's approval by that date does NOT satisfy the obligation to divest by that date. For a respondent to make sure it has enough time to get the necessary approvals and still close in time, it must file its application with the Commission early enough to allow for the thirty day period for public comment, the staff's review and investigation including responses to any comments that were filed, and the Commission's consideration of the matter. Filing only a month before the deadline will not be sufficient and will delay the transaction, potentially subjecting the respondent to civil penalties. If there is a timing concern submit a letter to the Commission including all the reasons why expedited treatment is necessary, and include materials documenting the problem(s). The general considerations that apply to all transactions, such as anxious customers, deteriorating employee morale, may not be persuasive. Of course, all else equal, the Commission has an interest in speedy relief.

Q. 32. Past orders have required that a divestiture be absolute; what does this mean?

A: What this means is that the respondent shall have no continuing ties to the divested business or assets, no continuing relationship with the buyer, and no financial stake in the buyer's success. Encouraging the establishment or further development of a competitor with incentives to compete vigorously is thought to preclude, in most, if not all, cases, a continuing interest in the divested assets or in the buyer's success in operating those assets. Thus, divestiture proposals in which the buyer intends to rely on the respondent to finance the divestiture, or where the proposal includes performance payments by the buyer have been rejected. Financial arrangements that rely on performance-based payments are always troubling to the extent they may skew either parties' incentives to compete vigorously.

Q. 33. Are any types of continuing relationships ever acceptable?

A. Some cases have provided for continuing relationships post-divestiture (*e.g.*, supply contracts, technical assistance requirements) to ensure the competitiveness and viability of the buyer as it begins to compete. These have been required on a case-by-case basis, and in such cases the Commission has recently required the use of a monitor trustee to review and help assure respondent's compliance with these obligations.

Q. 34. If there are questions about a divestiture that arise before or after it has been approved, how should interested parties proceed?

A: The staff of the Compliance Division maintains communication with the respondents and with the proposed buyer. If there is additional information that you think the Commission and its staff need to know, you should not hesitate to contact the Compliance Division staff handling the matter. In addition, if a buyer of divested assets has any concerns about the respondent's compliance with the Commission's order, the buyer should raise those concerns with the staff of the Compliance Division as soon as possible. To the extent that any disputes between the respondent and the buyer implicate terms of the Commission's order, the Commission and its staff need to hear about them to attempt to resolve

them. The Commission takes an active interest in making sure its orders are adhered to, and will take steps to insure that the provisions of its orders are complied with.

(For procedures involving applications for approval of post-order divestitures generally, *see* the Commission's Rules of Practice, § 2.41(f), 16 C.F.R. §2.41(f).)

Q. 35. What happens if the parties have not divested within the time period required?

A: The failure to effectuate a required divestiture by the deadline in the order violates the order and subjects the parties to civil penalties of up to $11,000 per day per violation, in addition to other relief, pursuant to Section 5(*l*) of the FTC Act, 15 U.S.C. § 45(*l*). At the expiration of the divestiture period, in addition to considering whether to seek civil penalties and other relief, the Commission may appoint a trustee to accomplish the divestiture, including divestiture of crown jewels pursuant to specific order provisions; alternatively, it may hold off on doing so and still require the parties to continue their efforts to divest. The Commission's options are not mutually exclusive.

Trustee Provision

Q. 36. What is a "monitor trustee"?

A: A monitor trustee is an independent third party appointed by the Commission to oversee certain terms of the consent order. The Commission has required a monitor trustee, sometimes called an auditor trustee or an interim trustee, in cases in which the order imposes obligations on the respondent of a specialized nature that may result in a temporary relationship between the respondent and the buyer of divested assets. *See, e.g., Dow/Union Carbide*, Dkt. No. C-3999; *El Paso/Coastal*, Dkt. No. C-3996; *Boeing Company*, Dkt. No. C-3992; *Glaxo/SmithKline Beecham*, Dkt. No. C-3990; *AOL/TW*, Dkt. No. C-3989; *Ceridian*, Dkt. No. C-3933. The Commission has also required a monitor in connection with respondent's obligations in a hold separate order or an order to maintain assets. *See, e.g., Valero/UDS*, Dkt. No. 4031; *Exxon/Mobil,* Dkt. No. C-3907.

Q. 37. What is a divestiture trustee?

A: A divestiture trustee is an independent third party appointed by the Commission to divest assets in those cases in which the respondent has failed to divest assets as required by the Commission's order. Virtually every merger order issued by the Commission includes a provision authorizing the Commission to appoint a divestiture trustee.

Q. 38. How often in recent years has the FTC actually appointed a divestiture trustee to divest assets?

A: As of March 13, 2002, the Commission has appointed a trustee to divest assets in the following cases: *Louisiana Pacific*, Dkt. No. C-2956 (where the court appointed a trustee to effectuate the required divestiture); *Flowers Industries Inc.*, Dkt. No. 9148;*Promodes S.A.*, Dkt. No. 9228; *Red Apple Companies, Inc.*, *et al*., Dkt. No. 9266; *Panhandle Eastern Corp.*, Dkt. No. 3260; *Cooper Industries Inc.*, Dkt. No. C-3469; *Revco Inc.*, Dkt. No. C-3540; *Rite-Aid Corporation*, Dkt. No. C-3546; *Schwegmann Giant Super Markets*, Dkt. No. C-3584; *Columbia/HCA Healthcare Corporation,* Dkt. No. C-3619; *Softsearch Holdings, Inc.*, Dkt. No. C-3759;*Hoechst AG and Rhone-Poulenc S.A. (Aventis S.A.)*, Dkt. No. C-3919.

Q. 39. How does the Commission select a divestiture trustee?

A: Typically, Commission staff uses its sources in the industry, as well as the respondents, to provide names of trustee candidates. The staff assures that the candidates have no conflict, or appearance of conflict, of interest. Then it interviews candidates, speaks with references, and makes a determination whether a particular candidate should be recommended to the Commission. Staff is looking for someone who - in addition to having no conflict - may have

experience divesting assets in the affected industry or under these type of circumstances. Staff's experience with both divestiture trustees and monitor trustees has been very positive to date.

Hold Separate Orders

Q. 40. What is a hold separate order, and what is its purpose?

A: A hold separate order keeps the "eggs unscrambled" pending divestiture by requiring the divestiture assets to be operated separately from and independently of respondent's business. It preserves the assets to be divested and maintains interim competition (as well as the Commission's remedial options if it changes its views on the scope of assets to be divested after the public comment period) by preventing commingling with the respondent's business. It prevents the transfer of competitively sensitive information. The purpose is to prevent interim competitive harm and to preserve the viability and competitiveness of the assets pending divestiture. By taking the assets out of the hands of the respondent, they should be better protected from intentional or unintentional physical or intangible deterioration that would impact their ability to be operated in a manner that maintains or restores competition. Further, the respondent should be unable to exercise any market power it might have gained from the merger. As an alternative to (and sometimes in conjunction with) taking control of the assets from the respondent, a monitor trustee may be used to oversee the operations and maintenance of the assets. *See* Q.36.

Q. 41. Are hold separates required?

A: Generally, yes, if there is no up front buyer. (A recent change in Commission practice provides that the Commission may issue an order to hold separate when it accepts the consent for public comment, thus dispensing with the previous use of "Agreements to Hold Separate" that then became part of the order when it became final.)

The hold separate order has usually covered the assets to be divested rather than the assets to be retained by respondents. A monitor trustee has usually been appointed to monitor compliance and oversee the business. The held-separate business is an independent, autonomous operating business unit. *See, e.g., BPAmoco/Arco*, Dkt. No. C-3938; *Exxon/Mobil*, Dkt. No. C-3907;*Precision Castparts*, Dkt. No. C-3904; *Dominion*, Dkt. No. C-3901; and *VNU*, Dkt. No. C-3900.

In some cases, the Commission has issued an order to maintain assets to preserve the assets to be divested without requiring that they be operated separately. The Commission has also appointed a monitor trustee in some of those cases. *See, e.g., Dow/Union Carbide*, Dkt. No. C-3999; *El Paso/Coastal*, Dkt. No. C-3996; *CSC/Mynd*, Dkt. No. C-3991; *Glaxo/SmithKline Beecham*, Dkt. No. C-3990 (monitor appointed); *Philip Morris/Nabisco*, Dkt. No. C-3987; *Novartis, A.G./AstraZeneca*, Dkt. No. C-3979 (monitor appointed); *Delhaize/Hannaford*, Dkt. No. C-3962; *Pfizer Inc./Warner-Lambert*, Dkt. No. C-3957; *FMC Corp./ Solutia Inc*. and*Astaris*, Dkt. No. C-3935 (monitor appointed); *Duke Energy*, Dkt. No. C-3932; *Rhodia*, Dkt. No. C-3930.

Q. 42. How broad will the hold separate entity have to be to satisfy the FTC?

A: It depends on the facts of the individual case and on what business units as a practical matter can be held separate. If the assets to be divested are part of a larger operating unit, the whole unit will generally be held separate.

Q. 43. Do up front buyers eliminate the need for hold separates?

A: Not necessarily. To the extent that the buyers are going to take over the divested assets immediately, this might eliminate the need for a hold separate. However, where the buyer of the divested assets may not take immediate, or almost immediate, possession of the assets, the mere presence of an up front buyer does not eliminate the need for a hold separate order. All assets, some more quickly than others, are subject to wasting or deterioration; potentially reducing both interim and long term competition. A hold separate order is intended, in part, to eliminate the

respondent's ability to influence that pace of wasting or deterioration, and to eliminate the ability of the respondent to manipulate the use of those assets to obtain or maintain short term market power. Although the buyer of the divested assets could insert general and specific clauses, including penalties, into the purchase agreement to address the possibility of the wasting and deterioration of assets to be acquired, enforcement of such clauses, if required, will take time, and competition in the interim may be reduced.

Prior Notice/Approval

Q. 44. When are prior notice provisions required?

A: It depends on the nature of the complaint market. *See* Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions (Policy Statement), issued June 21, 1995, 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241. The Commission stated there that a prior notice requirement may be used in a merger order if the Commission determines there is a "credible risk" that the respondent might "engage in an otherwise unreportable [under the HSR Act] anticompetitive merger." The Policy Statement explains that the need for a prior notice requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and characteristics of the market participants, and other relevant factors. The test is, thus, whether there are firms in the market in question, the acquisition of which would not likely be reportable, and whether market conditions suggest that a non-reportable transaction might have likely anticompetitive effects. Recent increases in the Hart-Scott-Rodino filing thresholds may make use of the prior notice provision more common. *See, e.g., In the Matter of Deutsche Gelatine-Fabriken Stoess AG and Goodman Fielder Limited*, File No. 011 0117, which requires Goodman Fielder (the acquired firm) to notify the Commission if it intends to complete certain described transactions, some of which might otherwise not be reportable.

Q. 45. When are prior approval provisions required?

A: The Policy Statement also stated that the Commission may include *a narrow prior approval provision* in a merger order "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." *See, e.g. In the Matter of Deutsche Gelatine-Fabriken Stoess AG and Goodman Fielder Limited*, File No. 011 0117, which prohibits DGF from acquiring any of the assets Goodman Fielder retained (which would approximate the same anticompetitive merger) without the prior approval of the Commission. Generally the required divestiture would not be covered because it is not the "same merger."

The Commission has recently issued an order imposing a prior approval requirement on a *buyer* of divested assets in *Nestle*, Dkt. No. C-4028. As stated in the Commission's Analysis Of Proposed Consent Order To Aid Public Comment in connection with that matter, the Commission does not routinely require acquirers of divested assets to obtain approval before subsequent sales. In this case, however, the Commission concluded that such a provision was appropriate because there was a high probability that the acquirer would resell the assets, possibly within the next two to five years.

Endnote:

1. It is clear that the Commission has wide discretion in its ability to order effective relief. *See, e.g., Olin Corp.,* 113 F.T.C. 400 (1990), *aff'd*,*Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993); *Ekco Products Company v. F.T.C.,* 347 F.2d 745 (7th Cir. 1965). Thus, these "frequently asked questions" do not include questions as to whether the Commission has the authority to order a specific type of relief; instead they have been compiled from many years of negotiations between the FTC's staff and the parties and relate to the questions that have arisen most often as to the specific requirements the Commission has determined are necessary to achieve effective relief in horizontal merger cases. They are being published in order both to give guidance as to past practice and to elicit comment and further dialogue from interested

parties with an eye towards future practice. The answers are drawn from prior cases, as well as positions that have been set out by the staff in speeches, articles, and elsewhere. The discussion here is only about horizontal merger cases; however, the principle - that any divestiture or remedial provision must be considered sufficient to maintain or restore competition - applies to vertical mergers and non-merger joint ventures as well.

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