Negotiating Merger Remedies

Statement of the Bureau of Competition of the Federal Trade Commission

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January 2012

The views expressed herein are those of the Bureau of Competition and do not necessarily reflect the views of the Commission or of any individual Commissioner.

Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies

The Federal Trade Commission's Bureau of Competition has revised this Statement, which provides guidance to those negotiating a settlement in a merger case.[1] This guidance should answer many of the questions that frequently arise and should expedite negotiations.[2] In addition, merging parties should review the Commission's past complaints, orders, and related documents, to see various order provisions that the Commission has required in past cases.[3] Each merger is unique, however, and any proposed remedy is evaluated on the particular facts of the case. Accordingly, that the Commission has accepted a particular provision in the past will not on that basis alone be persuasive that the same provision should be accepted in a new matter. The Commission and its staff are constantly learning from their experiences; provisions in previous cases that proved insufficient may not be acceptable in a subsequent case.

This statement assumes that the staff have identified concerns with a proposed or consummated transaction, and that the merging parties and staff are negotiating a settlement. This statement addresses issues arising in the following areas: (1) the assets to be divested, (2) an acceptable buyer, (3) the divestiture agreement, (4) additional order provisions, (5) orders to hold separate and/or maintain assets pending divestiture, (6) divestiture applications, and (7) timing.[4]

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[1] See http://www.ftc.gov/bc/bestpractices/index.shtm for transcripts and related submissions of the 2002 workshops that the Bureau held on merger remedies; see, also, Frequently Asked Questions about Merger Consent Order Provisions at http://www.ftc.gov/bc/mergerfaq.shtm, and the Bureau of Competition's Divestiture Study at http://www.ftc.gov/os/1999/08/divestiture.pdf.

[2] The Commission's Rules of Practice and Procedure are available at 16 C.F.R. §§ 1.1 *et seq.*, and on the FTC web site at http://www.ftc.gov/os/rules/index.htm and at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3ad5b48a02eb1707974872e00175bbb5&c=ecfr&tpl=/ecfrbrowse/Title16/16cfrv1_02.tpl.

This Statement is intended to supplement available information. It is not intended to be exhaustive, nor is it a statement of law. The staff compiled it, and it reflects their views; it does not necessarily reflect the Commission's view or any individual Commissioner's view. It is intended to be illustrative only, and as such, cannot be used to bind the staff, the Commission, or any individual Commissioner.

[3] Commission Enforcement Database (containing merger cases since 1996) is available at http://www.ftc.gov/bc/caselist/merger/index.shtml.

[4] Once a complaint and order are issued, the named party is a "respondent," a term that will be used throughout this Statement to distinguish that party from the "buyer," which is the acquirer of assets that are divested.

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The Proposed Divestiture

- **Anticompetitive horizontal mergers are most often remedied by a divestiture; a proposal to divest one party's demonstrably autonomous, on-going business unit will usually expedite settlement.**

The Commission and the staff analyze proposed or consummated mergers between competitors to determine whether they will cause or have caused anticompetitive effects in violation of Section 7 of the Clayton Act. If staff determines that anticompetitive effects are likely, it will discuss with the parties what it has learned and what it believes an acceptable remedy must include to maintain or restore competition in the markets affected by the merger. A negotiated settlement is intended to achieve that remedy while allowing the parties to proceed with the merger's non-problematic portions.

The parties must decide whether they wish to engage in settlement discussions with the staff. On the Commission's side, the discussions will involve the Commission's Bureau of Competition (including the Compliance Division) and the Bureau of Economics. On the parties' side, the discussion should include not only outside counsel if the parties are so represented, but in-house representatives as well, including lawyers and operations people.

Although the parties and the staff negotiate a proposed settlement and finalize terms, the Commission ultimately determines whether the proposal is acceptable. It does so by a majority vote of the Commissioners after they review the materials that staff prepares and forwards to them. If the Commission concludes that a proposed settlement will remedy the merger's anticompetitive effects, it will likely accept that settlement and not seek to prevent the proposed merger or unwind the consummated merger.

The Commission and the staff review most mergers prior to consummation, but they also review consummated deals. The legal analysis of a proposed transaction does not differ significantly from the legal analysis of a consummated deal; however, remedying a consummated deal poses different issues. The Commission's objective in all cases is to eliminate, to the extent possible, the anticompetitive effects that will result or have resulted from the merger, which most often requires divestiture. In a consummated deal, the parties have already acquired assets and have often integrated them. If the acquired assets are well integrated, crafting an effective divestiture to eliminate the anticompetitive effects may be problematic,[5] but it nonetheless may be necessary to undo the illegal effects of the merger.[6]

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[5] The difficulty of "unscrambling of the eggs" led Congress to enact the Hart-Scott-Rodino Act in 1976 and authorize the antitrust enforcement agencies to implement the Premerger Notification Program in 1978. Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.§ 18a; Premerger Notification Rules, 16 C.F.R. § 800 *et seq.*

[6] For instance, in one consummated case in which the respondent had fully integrated

(continued...)

Most merger cases involve horizontal mergers, and the Commission prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger. Non-structural, or conduct, relief may also be required in aid of a required divestiture to remedy those effects. Such additional relief may include supply agreements, employee obligations, confidentiality protections, and other provisions necessary to support a successful divestiture. Conduct relief also may be required to remedy the anticompetitive effects of a vertical merger. Such conduct relief may include a requirement to erect firewalls to protect confidential information or a requirement not to favor certain entities.

The staff is most likely to accept the parties' offer to divest an autonomous, on-going business unit that comprises at least one party's entire business in the relevant market. Such a remedy will most immediately eliminate the competitive problems created by the merger by preserving or re-creating the competitive status quo, and it entails the least amount of risk. It also requires the Commission and the staff to make the fewest assumptions about the market and its participants and about the viability and competitiveness of the proposed divestiture.

The parties should be prepared to show that the business unit contains all components necessary to operate autonomously, that it has operated autonomously, that it is segregable from the parent, and that the unit's buyer will be able to maintain or restore competition almost immediately. The business people should be prepared to explain the unit's business operations and to provide relevant financial information and separate financial documents. As discussed below, a proposal short of that requires the staff to ask additional questions and conduct further analysis; as a result, completing negotiations will likely take more time.

The staff will examine a proposed divestiture to determine whether it includes all of the unit's components. These components generally include:

- manufacturing and other facilities
- access to key inputs and other supply
- access to markets for ancillary outputs
- research and development capability
- intellectual property, whether owned or licensed
- technology, including know-how and trade secrets as well as information technology

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[6](...continued)
acquired assets, the Commission required the respondent to reorganize the company into two separate, stand-alone divisions, and divest one of them. *In the matter of Chicago Bridge & Iron*, FTC Docket No. 9300, *aff'd Chicago Bridge & Iron Company v. Federal Trade Commission*, 534 F.3d 410 (5th Cir. 2008), available at http://www.ftc.gov/os/adjpro/d9300/index.shtm. The Commission also recently ordered divestiture in a consummated merger after the administrative law judge determined that the merger resulted in anticompetitive price increases. *In the matter of Polypore International, Inc*., FTC Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/index.shtm. Respondents have appealed the Commission's order to the Eleventh Circuit. http://www.ftc.gov/os/caselist/0810131/index.shtm.

- identification of and access to personnel
- marketing and distribution capabilities
- supply, service, and customer relationships
- capital resources
- anything else necessary to compete effectively in the relevant market

The proposed package may also include business components relating to markets outside the relevant geographic or product market, if such components are necessary to assure that the buyer retains the same efficiencies that the respondent had. For example, when the product is marketed and distributed with other products, the assets to be divested may include assets relating to these other products in order to remain efficient. Similarly, if vertical integration is an important competitive element, it may be necessary to include assets at more than one level of the industry.

- **If the proposed package of assets does not comprise a separate business unit that has operated autonomously in the past, the staff is unlikely to recommend that the Commission accept such a proposal until the parties show that the package includes all necessary components, or that those components are otherwise available to a prospective buyer.**

If the parties seek to exclude any of these components, they must explain why the components are not included and what a buyer would use instead. The parties must also explain how the buyer will be able to integrate the divested components into its own operations to operate competitively. The parties' operational employees tend to be the most knowledgeable about these issues. Suppliers, customers, competitors, and other possible buyers may also provide instructive evidence; the parties should be prepared to make such evidence available if necessary or direct the staff to where it can be obtained.

A blanket assertion by the parties that certain components – for example, the research and development unit – are not necessary will generally not be persuasive. The parties should provide evidence that the carve out will not undermine the buyer's viability or competitiveness. For instance, an explanation that any buyer acceptable to the Commission will have its own research and development unit may be persuasive if the parties provide evidence to support the explanation. The parties may also demonstrate that manufacturing facilities need not be divested if they can show that appropriate third-party contract manufacturing is readily and competitively available. The parties must show that such arrangements are common, are readily available, and will not disadvantage the buyer. Providing evidence that competitors use such arrangements and that customers will purchase the contract-manufactured finished product may expedite negotiations.

If the parties propose to assemble all necessary components by combining assets that have never been combined in the past (*e.g.*, combining one party's assets with some of the other party's assets, rather than including all of one party's assets), the parties must show that the proposed divestiture will enable the buyer to maintain or restore competition in the market. For example, in the grocery retailing market, the parties might provide detailed analysis of each supermarket that the parties propose to divest to show that the proposed divestiture would maintain or restore competition in the market. If, however, the parties have proposed divesting lower performing, higher operating cost, older, less conveniently located supermarkets, they will have difficulty persuading the staff to accept such a package. The Bureau is willing to examine any proposal, but it will always require sufficient evidence to conclude that the proposed divestiture will maintain or restore competition and will require sufficient time to analyze the evidence. In general, a "mix and match" proposal tends to slow the negotiations down, requiring a more fact-specific, detailed, and time-consuming evaluation of each asset.

- **The Commission will typically require an up-front buyer if the parties seek to divest assets comprising less than an autonomous, on-going business or if the to-be-divested assets are susceptible to deterioration pending divestiture.**

If the parties propose to divest more limited assets, the staff will typically consider such a package only if the proposed order specifies an "up-front buyer"; that is, the parties must identify an acceptable buyer and then negotiate, finalize, and execute the purchase agreement and all ancillary agreements with that buyer before staff forwards the proposed order to the Commission. The staff will carefully review both the buyer and the agreement before making its recommendation. The proposed order will specifically identify the buyer and require divestiture to that buyer pursuant to the reviewed agreement; the agreement will be attached as a confidential exhibit and incorporated into the order. The divestiture to the named up-front buyer must be completed immediately after the Commission accepts the proposed order. By requiring an up-front buyer, the staff seeks to minimize the risks that there will not be an acceptable buyer for such limited assets or that the buyer of the limited assets will not be able to maintain or restore competition.

Divestiture to an up-front buyer also minimizes the possibility that the assets and competition will diminish pending divestiture, which causes immediate competitive harm. The staff's experience has shown that some assets, such as supermarkets, tend to deteriorate pending divestiture; such deterioration harms competition and may make it more difficult for the buyer to maintain or restore competition. In these situations, the Commission has required up-front buyers. The staff remains willing, however, to consider on a case-by-case basis whether certain protections (such as orders to hold separate or maintain assets, crown jewels, and monitors, all discussed below) can eliminate the need for an up-front buyer.

An order that specifies an up-front buyer typically requires that the parties divest the assets to the up-front buyer quickly and pursuant to the agreement attached to the order. In fact, the parties may consummate the up-front deal before the public comment period on the proposed order ends and the order becomes final. To assure that the Commission can reject the up-front buyer if it determines to do so after the public comment period, the Commission typically requires a rescission clause in the purchase agreement. (As of December 2011, the Commission has never required rescission of such an agreement.) In most cases with an up-front buyer, the order states that, if the parties fail to divest to the up-front buyer pursuant to the up-front agreement in a timely manner, the Commission may appoint a trustee to divest the same assets or a "crown jewel" package of assets.

If staff is likely to require an up-front buyer, the parties should begin negotiations with an acceptable buyer as soon as they understand the scope of the assets that they must divest. Involving the staff as early as possible may expedite approval, although the staff will not be directly involved in the actual negotiations. The staff will, however, provide guidance, suggestions, and requirements about the provisions that should or should not appear in the final purchase agreement. For example, some non-compete, non-solicit, or royalty clauses may not be acceptable.

The parties will likely negotiate the proposed order with the staff while they are negotiating the purchase agreement with the proposed up-front buyer. The staff will not disclose to the buyer details of the negotiations between the staff and the parties. The parties should be aware, however, that the staff will discuss relevant issues with the buyer, especially those concerning the assets to be divested. The staff may also discuss these issues with others who might be knowledgeable about the market and be able to evaluate the proposed divestiture, such as other competitors, customers, suppliers, and employees. The process, therefore, will be an iterative one; as the staff learns more about the market and competition, it may require changes to the asset package, the proposed decision and order, or the purchase agreement.

The parties should finalize the purchase agreement and all ancillary agreements expeditiously. The staff will review the purchase agreement carefully, including all ancillary agreements, to assure that they convey all required assets and that they are consistent with the proposed order. (See discussion on the Divestiture Agreement below.)

By contrast, an order that requires what is referred to as a "post-order buyer" requires the parties to divest certain assets within a certain time period after the Commission has considered the proposed order "to a buyer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission." Thus, a post-order buyer and the relevant agreements are typically neither identified nor reviewed before the Commission issues a final order; they are instead negotiated, finalized, and then reviewed some months later.

- **If the parties propose to divest primarily intellectual property or other limited assets, then the Commission will typically require an up-front buyer.**

The staff and the Commission may consider a divestiture of primarily intellectual property or other limited assets; however, the parties must persuade the staff and the Commission that such a divestiture will achieve the remedial purposes of the order. To show that such a divestiture will address the competitive concerns, the parties must show that there is an acceptable buyer that can enter the market by acquiring the intellectual property or other limited assets, is willing to make the acquisition, and has the necessary incentives to compete in the market. In all likelihood, staff will recommend accepting such a proposal only with an up-front buyer.

If the assets are primarily intellectual property, the parties must show that the buyer will acquire all intellectual property necessary to maintain or restore competition in the relevant market and will have access to all relevant and necessary rights. The parties should be prepared to convey all rights necessary so that the buyer can develop, produce, use, distribute, and sell the relevant product in the relevant geographic market. (See discussion below relating to obtaining necessary third-party consents and approvals.) If the buyer cannot produce the product immediately, the staff may require that the parties supply product to the buyer temporarily until the buyer can produce the product itself. The parties should be prepared to enter into a supply agreement – reviewed by the staff – that will enable the buyer to compete effectively immediately. (See discussion below relating to such agreements.) The parties may be required to provide technical assistance to the buyer when, for example, the relevant product involves highly sophisticated or complex technologies. On the other hand, technical assistance alone may not be sufficient when, for example, access to key employees is critical to effective competition. The parties should then be prepared to assure the transfer of those key employees. (See discussion below relating to such steps.)

Supply agreements and technical assistance may, however, create what the staff refers to as "continuing entanglements." The staff seeks to avoid these because competitive issues may arise and complex monitoring may be required. In addition, the more a proposed buyer requires these provisions, the more difficult it may be to persuade the staff that such a divestiture would remedy the Commission's competitive concerns. When they cannot be avoided, staff will seek to minimize the length of the agreements and may require independent monitoring.

In some cases, the buyer's ability and incentive to develop the relevant product may be affected by whether it also has the right to develop other products or sell outside the relevant geographic markets. The staff may thus require that the divestiture include the right to use the intellectual property to develop products outside the relevant product market, or the right to use the intellectual property outside the relevant geographic market. The divestiture may also require exclusive, rather than co-exclusive or non-exclusive, rights to certain technology. The staff has found that access to patent lawyers and others knowledgeable about the transfer and use of intellectual property in the industry and access to the scientists or other professionals involved in the development and use of the intellectual property often expedite negotiations.

In some cases, parties propose to license necessary intellectual property instead of divesting it. This occurs often when the parties assert that they need to use the intellectual property in the research, development, or production of other products outside the relevant product market or in other locations outside of the relevant geographic market. If the parties seek to transfer only limited rights to the intellectual property, they should be prepared to show that such limitations will not adversely affect the buyer's ability to compete effectively. Licensing intellectual property rights instead of divesting the intellectual property may not be sufficient if it limits how the buyer can use the intellectual property and adversely affects the buyer's long-term viability; in such cases, the staff may require that the parties divest the intellectual property but agree that the parties can license back rights to the divested intellectual property. If the parties anticipate that they will require continued access to intellectual property that may be the subject of a proposed divestiture, they should raise that issue as early as possible.

An Acceptable Buyer

- **To be acceptable, a buyer must be competitively and financially viable; a proposed buyer that does not satisfy these tests will be rejected, and the parties will be required to propose an acceptable one.**

Whether the buyer is post-order or up-front, it must be one that can maintain or restore competition in the relevant market after acquiring the divested assets. The staff will therefore evaluate a proposed buyer to determine whether it has (1) the financial capability and incentives to acquire and operate the assets, and (2) the competitive ability to maintain or restore competition in the market.

The staff will be prepared to discuss with the parties an acceptable buyer's characteristics. It is, however, the responsibility of the parties to propose the buyer, and, as discussed below, the parties must show that the buyer is acceptable. Proposing a buyer that does not clearly satisfy the necessary criteria will delay approval.

The staff generally has no preference as to the method the parties use to select an acceptable buyer. Some parties prepare an offering memorandum (sometimes with the help of an investment bank) and solicit bids. Some parties approach individual firms that they believe may be acceptable buyers. Another possibility is an auction process. Auction processes have the advantage of excluding the parties from the selection of the proposed bidders or buyer; on the other hand, there is no guarantee that the Commission will approve the winning bidder (the high bidder may be, for example, an incumbent that raises independent competitive concerns or a financial investor that lacks the expertise to succeed, notwithstanding its high bid). The staff is not opposed to an auction as long as it can be completed within the required time period, although parties have typically been reluctant to use auctions because of the additional time involved. In the first instance, however, the parties select the search method. Should the parties have any questions about the method they intend to use, they should consult staff as soon as possible.

The staff will evaluate a proposed buyer very carefully to determine whether the buyer is financially and competitively viable. The parties should thus evaluate and select a proposed buyer with these criteria in mind. The proposed buyer's financial condition should be thoroughly scrutinized by reviewing balance sheets and other financial data to determine whether the buyer has the necessary financial resources. To protect the buyer's competitively sensitive information, the parties should have counsel or some other third party, rather than their own business people, conduct the review. The staff's review of a buyer will be broader than the parties might conduct if they were considering selling significant assets in a deal not ordered by the Commission; in a Commission-ordered divestiture, the parties must demonstrate not only that the proposed buyer has the financial ability to close on the proposed transaction, but also that it has both the financial ability and economic incentive to maintain or restore competition in the relevant market.

The parties and the buyer should determine whether any financial information raises concerns and, if so, notify staff as soon as possible. Such information would include, for example, significant debt due soon, other recent acquisitions that may implicate the buyer's financial position, or imminent adverse financial announcements. The parties should inform the buyer that the staff will be requesting financial information directly from the buyer; obviously, it is in the parties' interest to obtain the buyer's cooperation.

All orders require divestiture "at no minimum price." The Commission does not typically evaluate the proposed purchase price, but an offer to pay a price that is less than the break-up value of the assets may raise concerns about the buyer's incentives to compete and its commitment to the market. The Commission will not approve a divestiture to a buyer that intends to re-sell the assets for their break-up value.

The parties should ascertain whether the buyer will need financing. If the buyer will need financing, the parties should assure that the buyer is making those arrangements. The parties should inform the buyer that the staff may wish to interview the entity providing the financing. If the ability to obtain financing becomes an issue, decreasing the purchase price may be an option; seller financing, in all likelihood, is not. A buyer that requires seller financing because it cannot otherwise obtain financing may not be financially sound. In some cases in which the buyer's ability to obtain financing was in doubt the parties agreed to a limited, up-front payment followed by subsequent payments over time; however, the staff will not accept such an arrangement if the subsequent payments are tied to the assets' future performance, such as royalty payments or other performance-based payments. Such an arrangement may skew incentives and will likely require sharing competitively sensitive information. The requirement that the divestiture be "absolute" prohibits other continuing relationships between the parties and the buyer, such as, for example, lease arrangements or security interests retained by the parties.

The buyer must have the experience, commitment, and incentives necessary to achieve the order's remedial objective. These attributes can be shown, for example, by the buyer's participation in related product markets or adjacent geographic markets, involvement in up-stream or down-stream markets, past attempts to enter the market (depending on why those attempts were not successful), or previous expressions of interest in the market. The buyer should not currently be a significant market participant or already be pursuing significant entry on its own. A fringe competitor may be acceptable. If any components of an independent business have been omitted from the assets to be divested, the parties should be prepared to show that the buyer has the necessary components or access to them. The parties should inform the buyer that it will need to develop its business plans to present to the staff (not to the parties, of course). The business plans should be thorough enough to persuade the staff that the proposed buyer has sufficient experience to compete in the market, that it has done adequate due diligence, that it knows what is needed to compete in the market, and that it is committed to the market. The parties should ensure that the buyer understands this obligation and is prepared to cooperate with the staff.

The staff will independently evaluate the proposed buyer, interviewing, as necessary, buyer representatives, customers, suppliers, competitors, other possible buyers, and any other individuals that may provide relevant information. As indicated above, the staff will also ask the buyer to submit competitively relevant information, including financial information. The parties should ensure that the proposed buyer will respond quickly and supply the requested information.

The Divestiture Agreement

- **Whether up-front or post-order, the staff will review the divestiture agreement carefully to determine that it conveys all assets required to be divested and contains no provisions inconsistent with the terms of the Commission's order or with the order's remedial objectives.**

The Bureau and the Commission will review and evaluate the purchase agreement, including all appendices, exhibits, and schedules, and all ancillary agreements that the parties and the buyer have negotiated, whether the divestiture is required up-front or post-order. The parties are responsible for transferring to the buyer all assets required to be divested and otherwise complying with the Commission's order; however, the staff makes every effort to assure that the divestiture agreement transfers to the buyer all assets required to be divested and achieves the order's remedial objectives. In addition to questioning the parties and the proposed buyer, the staff may question suppliers, competitors, or customers about the operation, effectiveness, or necessity of certain provisions.

Staff will discuss term sheets as soon as they are created, and the parties may expedite the matter by giving the staff a draft divestiture agreement as soon as one has been negotiated. The earlier the staff is able to begin its evaluation, the more quickly the matter can be resolved. If the staff has questions, it will raise them with the appropriate party. When necessary, the staff will suggest that the parties revise the agreement. Regardless of whether the parties submit a final, executed agreement or a draft of an agreement, the staff will review the agreement carefully and thoroughly and request changes that it believes are warranted and appropriate. Submitting only the final, executed agreement to the staff does not mean that the staff is less likely to request changes than if the parties had submitted drafts to the staff. In fact, it is the staff's experience that submitting drafts (ready for execution, but before execution) expedites the process. Obviously, the more quickly the parties address staff's concerns, the sooner the matter will be resolved. Involving the in-house people who negotiated or are negotiating the agreement, the transaction lawyers who drafted or are drafting the agreement, as well as the in-house personnel who will have to comply with the agreement, will also expedite the matter. Occasionally, transaction lawyers observe that the staff is raising issues about provisions that the lawyers describe as "boilerplate." The competition goals of the Commission are different, however, from the goals of a typical transaction; therefore, otherwise standard provisions, such as non-compete clauses and performance-based payments (*e.g.*, royalties), while acceptable in a typical transaction, may be unacceptable in a divestiture.

The staff will review the divestiture agreement to determine if the agreement transfers all assets required to be divested and is otherwise consistent with the order. Language mirroring the order language typically provides the necessary assurances that the agreement includes all assets required to be divested. The parties sometimes intend to list all of the assets to be divested in an attached schedule; some insist that they cannot prepare such a list until right before closing. But before it recommends that the Commission accept the proposal, the staff must be assured that the agreement includes all assets. A blank schedule does not provide those assurances. In other cases, the parties have agreed to provide transitional services to the buyer, but they intend to work out the details later. If the order requires such services, the parties and the buyer must finalize the transitional services agreement and the staff must review it before the staff can conclude that the parties have satisfied their order obligation. Even if the order does not require the provision of such services, however, any agreement to do so may raise significant competitive concerns and, accordingly, the parties and the buyer must finalize the agreement and the staff must review it before the staff can make its recommendation. Similar concerns may arise about any incomplete schedules, exhibits, appendices, or agreements. The staff will be unable to recommend that the Commission accept such a proposal until all have been completed.

If the order imposes additional obligations, the staff will review the divestiture agreement to assure that all such additional obligations are satisfied. For example, if the order requires the parties to convey an exclusive license, conveying only a non-exclusive license will not be acceptable. A one-year supply agreement tied to one manufacturing plant would be inconsistent with an order provision that requires the parties to supply the buyer from a different plant. If the parties are required to provide transitional services to the buyer, the divestiture agreement should also provide "firewalls" if providing such services might disclose competitively sensitive information.

The staff evaluates all provisions mindful that this is an agreement between two firms who will be competitors. The staff often reminds the parties that a Commission-ordered divestiture is not the same as a conventional transaction. In the more typical, consensual, arm's-length transaction, the parties are neutral as to the buyer's success in the market; in a divestiture, the merging parties may prefer that the buyer *not* be robustly competitive. The Commission must protect against that preference.

- **In evaluating the terms of the divestiture agreement, the staff will rely primarily on information obtained from the buyer; however, the staff remains aware that the buyer's incentives may not always be consistent with the Commission's objectives.**

As discussed, the staff will thoroughly and carefully review the divestiture agreement. Staff will request information from the buyer and others, and will discuss the agreement with the buyer's legal and operational personnel, among others. The buyer's information is extremely important. But even though the buyer has reviewed the agreement and has agreed to its terms, staff may nonetheless question provisions that the buyer has accepted. The Commission cannot rely solely on the buyer's incentives to achieve the objectives of its order because the buyer's incentives may not necessarily coincide with the Commission's objective.

The Commission's objective is to remedy the merger's likely anticompetitive effects and to maintain or restore competition in the relevant market. The buyer's incentive is to generate an adequate return on its investment, not necessarily to maintain or restore competition. As a result, the buyer may want provisions, such as a long-term non-solicit clause or a long-term supply agreement, that create perverse competitive incentives. Merely because the buyer agreed to a certain provision may not be sufficient justification for the provision. Past experience has shown that some buyers may agree to certain undesirable provisions that later undermine the buyer's effectiveness in the market. Therefore, even if agreed to by the buyer, objectionable provisions will be accepted only with further supporting evidence.

- **The merging parties must obtain all required third-party consents and approvals before the Bureau recommends that the Commission approve a proposed divestiture.**

In many cases, third parties must consent to or approve the transfer of certain assets. If such consents or approvals are necessary, then staff may require that the parties obtain all such third-party consents and approvals before the staff recommends that the Commission accept the proposed divestiture. For example, if a lease is included in the assets to be divested but the landlord's approval is required to transfer the lease, the parties must obtain that approval before the staff will recommend that the Commission accept the proposed divestiture. If the parties must transfer supply or customer contracts and they cannot do so without the supplier's or the customer's consent, the parties must obtain these consents before the staff recommends accepting the proposed divestiture. Transferring licensed intellectual property often requires the original licensor's consent, or assets to be divested may be subject to rights of first refusal. The parties should plan to deal with these rights before the staff recommends that the Commission accept the proposal.

Waiting until the last minute to begin obtaining these consents and approvals may delay negotiations. Further delay may occur if the third parties require compensation before granting the necessary approvals and consents. For example, a customer may not want its contract with the parties transferred to a buyer with whom the customer has had no past dealings, and that customer may insist on some protection (in the form of money or otherwise). The staff recognizes that pre-existing leases, licenses, and the like, can, in the context of a pending merger and divestiture negotiations, transform reasonable third-party approval rights into tools for extracting arguably excessive concessions. The staff will work with the parties, whenever possible, to explore how these conflicts may be minimized consistent with the need to obtain an effective remedy. Letting the staff know as soon as the parties are aware that such consents and approvals will be required can save time in the long run. The staff will work with the parties to resolve these issues. For example, the Commission has included provisions that allow for the substitution of equivalent assets when necessary, subject to the Commission's approval. The parties must show that the particular assets are not critical to the business's success, that substitute assets exist and can be transferred, and that transfer of substitute assets will enable the buyer to be as competitive as the parties had been.

The parties should raise these concerns and issues as early as possible to enable the staff to address them beforehand. After the order becomes final the parties must divest the assets described in the order, and it will be too late to renegotiate the order's terms. If the parties fail to complete the required divestiture by the order's deadline because the parties have not obtained necessary third-party consents, the parties will have violated the order. The Commission can then appoint a divestiture trustee to divest the assets, making all arrangements necessary to do so. The Commission may also seek civil penalties and other relief for failure to divest on time. A final order may be modified pursuant to Rule 2.51 of the Commission's Rules of Practice, but the parties will have a heavy burden to show a modification is warranted.[7]

Additional Order Provisions

- **In some cases, the buyer may need additional, short-term assistance from the merging parties, particularly when less than the entire business of one party is being divested**.

Divestiture of an autonomous, on-going business (including all of the components of a business, as discussed above) to a viable buyer will, in the majority of cases, immediately create a competitor comparable to the competitor that would have been or was lost after the merger. Divestiture of less than an autonomous, on-going business will not create that result until the buyer can fill in the gaps; in some cases, the merging parties may be required to provide short-term transitional assistance to the buyer to fill in these gaps temporarily.

For example, when the staff agrees that the merging parties need not divest manufacturing or production capability, the staff may require that the parties assure a supply of product to the buyer until the buyer can manufacture or obtain the product itself. The parties can offer to supply the product themselves, but the staff will examine the offer to assure that it is temporary and that the buyer is not at a competitive disadvantage, for example by having to reveal competitively sensitive information or being locked in to a non-competitive price. Before the staff can recommend that the Commission approve the proposed order, the parties and the buyer must finalize the supply agreement so that the staff has an opportunity to review the agreement to ensure that adequate safeguards exist. For instance, the parties may have to sell the product to the buyer at some measure of variable cost. The parties must be prepared to provide safeguards for the buyer if the production facility or line stops, and also to ensure that competitively sensitive information is protected.

If the parties are required to divest patents, technology, and know-how, they also may be required to provide technical assistance until the buyer if fully familiar with the patents, technology, and know-how. If certain employees are key to the use of the technology or know-how, the parties may be required to encourage those key employees to transfer to the buyer, for example by providing financial and other incentives to those key employees to accept the buyer's employment offer. If reputation (which cannot be transferred) is a critical component of effective competition, the parties must ensure that the buyer is not at a competitive disadvantage because it lacks the reputation the parties have. The parties may be required to persuade customers to switch to the buyer and then remain with the buyer for some transitional period

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[7] *See* 2.51 of the Commission's Rules of Practice, 16 C.F. R § 2.51.

while the buyer establishes its own reputation. These are intended as short-term, temporary obligations to establish the buyer as a viable competitor; the parties would have already demonstrated that the proposed buyer is one that is likely to be able to establish its own reputation in the market over the long term.

- **If the Commission's order imposes obligations requiring a continuing relationship between the respondent and the buyer, the Commission may appoint an independent third party to monitor the parties' compliance with their obligations under the Commission's order.**

When the parties have proposed divestiture of less than an autonomous, on-going business, the parties often need to provide additional assistance to the buyer. If that assistance perpetuates a relationship between the parties and the buyer, or imposes complex or highly technical obligations on the parties, the staff will recommend that the Commission appoint an independent third party to monitor compliance with the Commission's order. These monitors are typically from the industry or have consulted to the industry so that they have appropriate expertise and know-how, and they have no financial or other tie with the parties or the buyer. They serve as the "eyes and ears" of the Commission and the staff. The obligation of the monitor is to the Commission; however, the parties will be responsible for compensating the monitor.

Often, the parties recommend the monitor, including the category of monitor referred to as "hold separate trustee" or "hold separate monitor" (see discussion below). The most effective monitors have been those who established a positive working relationship with the parties as well as with the buyer. For that reason, the first candidates that the staff considers typically are those the parties suggest. The parties can expedite the matter if – when it appears that appointment of a monitor is likely – they have investigated possibilities early and have provided names to the staff. The staff has rejected candidates the parties have suggested when there appear to be conflicts resulting from stock ownership or pension benefits. In some cases (typically when expertise of a highly technical nature is required), the staff has rejected candidates who do not have the requisite expertise.

If a monitor is required, the staff will insist that the monitor be named in the order, or at least agreed to before the staff forwards its recommendation to the Commission. Ideally at that point, the parties and the monitor will have already finalized and executed an agreement. The staff must review and evaluate this agreement as well, and the staff will be available to review an agreement as soon as the parties have drafted one. Some previous monitor agreements are available on the Commission's web site and might guide the parties; however, as staff points out consistently: each case turns on its own facts, and therefore unique provisions in the applicable monitor's agreement may be required. The staff will ensure that the agreement gives the monitor all the authority necessary to satisfy his or her responsibilities and that the agreement does not limit the ability of the monitor to do so.

Order to Hold Separate or Maintain Assets

- **If there is concern about interim competitive harm or diminution in the competitive strength of the assets to be divested pending divestiture, staff will require an additional order that requires the parties to hold separate the assets to be divested. Even if an order to hold separate is not necessary, the parties will be required to maintain the assets to be divested pending divestiture.**

Some settlements raise the concern that competition may be harmed pending divestiture of the to-be-divested assets. In such cases, the staff and the Commission will usually require a separate order requiring the parties to hold separate at least those assets that the parties are required to divest. In some cases, the hold separate may cover assets beyond those required to be divested for viability or confidentiality purposes, or for other reasons. If the parties have provided and will continue to provide any necessary services to the held separate assets, the order to hold separate must address those services. The hold separate order also will impose obligations to protect the confidential information of the held separate assets.

Even if no hold separate order is required, staff will typically require an order to maintain the assets pending divestiture, to ensure no diminution in competitive strength of the to-be-divested assets pending divestiture. This may be true even if there is an up-front buyer, depending on the amount of time the parties will control the assets to be divested. If an order to hold separate is required, it will also include asset maintenance provisions.

The order to hold separate or maintain assets is not subject to a comment period and therefore becomes final upon service on the parties. If additional immediate obligations are necessary, the order to hold separate will include such obligations. For example, if the Commission seeks to impose obligations on the parties in connection with employees, the transfer of confidential information, or other similar conduct, the Commission will include these obligations in the order to hold separate or maintain assets. Because even the order to hold separate does not become final until some time period after the parties execute the agreement containing consent order, the agreement typically includes a paragraph in which the parties "agree to comply with the proposed Decision and Order and the Order to Hold Separate and Maintain Assets from the date they execute this Consent Agreement."

The order to hold separate or maintain assets may include benchmarks by which the parties' conduct can be measured. For example, the order to hold separate or maintain assets may require the parties to maintain certain levels of capital spending. The order will require that the parties submit (or identify previously submitted) plans that describe previously anticipated or planned levels of spending, benchmarks by which the Commission and the monitor can determine whether the parties are maintaining those levels. The staff prefers plans that the parties have previously prepared and approved in the ordinary course of business.

The order to hold separate or maintain assets may require that the parties offer incentives to employees to ensure that the employees (1) remain with the held separate business until it is divested and (2) accept offers of employment from the buyer if maintaining the workforce is important. The parties should be prepared to discuss with the staff the necessity of maintaining that particular workforce and what incentives will be required to maintain the workforce.

• **The order to hold separate or maintain assets will include the appointment of an independent third party to oversee the operations of the held separate business or monitor the parties' compliance with the order.**

An order to hold separate or maintain assets will also authorize the Commission to appoint an independent third party to oversee the held separate business or monitor the parties' compliance with the order. In an order to maintain assets, the independent third party will have functions similar to those of the monitor discussed above; he or she will be the "eyes and ears" of the Commission and its staff, raising issues with the staff as they arise. In an order to hold separate, the independent third party has somewhat more extensive obligations; he or she will monitor compliance, but will also oversee the operation of the held separate business. The staff has described the functions of that individual by analogizing to a chairman of the board.

The parties can expedite the matter if they anticipate this need and begin their own search for an appropriate monitor as early as possible. The staff will have to review the individual's qualifications and the agreement between the monitor and the parties, which may slow down the process. Acceptable monitors are those with substantive experience in the market and no financial or other ties to any of the parties involved. The Commission has appointed individuals with varied backgrounds to serve as monitors, including retired executives, consultants, and lawyers with particular regulatory experience. The staff will be available to discuss the characteristics of an acceptable monitor.

Divestiture Applications

• **In cases requiring a post-order divestiture, the respondent has the burden of showing that the proposed divestiture meets the order's specific requirements and satisfies the order's remedial purposes.**

In virtually all of the Commission's orders that require a post-order divestiture, the respondent is ordered to divest certain assets within a certain time period "to a buyer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission." The Commission must thus approve both the buyer of the assets and the manner of the proposed divestiture, *i.e.*, the purchase and sale contract and all related agreements. It is the respondent's burden to show that the proposed divestiture – both the buyer and the manner – meets the order's specific requirements and satisfies its remedial purposes.[8]

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[8] *See Dr Pepper/Seven-Up Companies Inc. v. FTC*, 991 F.2d 859, 863 (D.C. Cir. 1993) (in a proceeding in which a respondent sought prior approval of a proposed divestiture pursuant to Rule 2.41(f) of the Commission's rules, the court upheld the Commission's rejection of the proposed buyer, agreeing that respondent had the burden of proof to demonstrate that its request should be granted), published at:

(continued...)

- **The respondent must include in its application all information and documents sufficient to satisfy its burden and should ensure that the buyer will cooperate with the staff's requests for information and documents.**

To obtain the necessary approvals of a post-order buyer, the respondent must file an application with the Commission requesting approval of the proposed divestiture pursuant to Rule 2.41(f) of the Commission's Rules of Practice.[9] There is no required format for the application, but it must contain facts sufficient to satisfy the respondent's burden. The application should include a final purchase and sale agreement and all related agreements with full details concerning financing and security provisions, if any, and all related documents. Specifically, the application should, at a minimum, include:

(1) the buyer's name and address;
(2) a description of the buyer's business;
(3) its most recent annual report, Form 10-K, Form 10-Q, and financial statements (which should be submitted directly from the buyer to the Commission if it is not publicly available);
(4) the names of its officers and directors;
(5) an accounting of sales and other transactions, if any, during the previous year, between the proposed buyer and the respondent;
(6) all documents that discuss the divestiture;
(7) a business plan or other documentation (which should be submitted directly from the buyer to the Commission and not to the respondent) showing how the buyer will use the acquired assets and be an effective competitor; and
(8) a complete description of the proposed divestiture and an analysis of how the divestiture would maintain or restore competition in the relevant market and achieve the remedial purposes of the order.

To the extent the above information (in addition to the business plan) is confidential to the buyer, the respondent should arrange for the buyer to submit that information directly to the staff. Once filed, applications for divestiture are placed on the public record for a thirty-day public comment period, with the exception of information and documents (or parts thereof) for which the submitter has requested confidential treatment.

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[8](...continued)
http://openjurist.org/991/f2d/859/dr-pepperseven-up-companies-inc-v-federal-trade-commission

[9] 16 C.F.R. § 2.41(f). Regardless of the size of the required divestiture, it is exempt from the reporting and waiting requirements of the HSR Act, 16 C.F.R. § 802.70, *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=17a163536d70f643032f1c22c3266612&rgn=div5&view=text&node=16:1.0.1.8.85&idno=16#16:1.0.1.8.85.0.46.27.

The staff will usually need to obtain additional confidential information directly from the buyer. To facilitate the staff's review of its application, therefore, the respondent should include with the application the names of appropriate individuals to contact at the buyer for information relevant to the staff's analysis of the divestiture. The respondent should arrange for the proposed buyer to provide this information, and any further information required by the staff, as soon as possible.

- **The respondent's application should include a representation that the proposed divestiture conveys all assets required to be divested, including obtaining all necessary consents and approvals.**

To complete the application for approval of a proposed divestiture, the respondent should include a representation that the proposed divestiture agreement conveys all assets that the order requires to be divested and, to the extent third-party consents and approvals are required prior to conveying any of the assets, the application should include a representation that all have been obtained.

- **Failure to consummate the required divestiture within the time limit set forth in the Commission's order violates the Commission's order.**

If the respondent is required to divest assets within a specified time period, it must complete the transaction within that time period. Filing for approval within that time period will not satisfy the parties' obligation; the divestiture must be consummated in time. Failure to complete the divestiture within the time period is a violation of the Commission's order. The failure to comply is a continuing violation, cured only by complete divestiture. Failure to comply thus exposes the respondent to the possibility of civil penalties of up to $16,000 per day, until the respondent effectuates the required divestiture, as well as other relief.[10]

In most of the Commission's orders requiring divestiture, the Commission is authorized to appoint a trustee to divest the assets required to be divested if the respondent fails to divest within the time period required. If the staff has concerns about the respondent's ability to divest

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[10] *See* Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), and the parallel provision in the Clayton Act, 15 U.S.C. § 21(l). *See United States v. Papercraft Corp.*, 540 F.2d 131 (3d Cir. 1976); *United States v. Beatrice Foods Co.*, 344 F. Supp. 104 (D. Minn. 1972); *see, e.g., FTC v. Red Apple Companies, Inc., et al.*, No. 97 Civ 0157 (S.D.N.Y. Jan. 23, 1997) (consent judgment ordering $600,000 civil penalty for failure to timely divest); *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504 (D. Or. 1982) ($4 million civil penalty for failure to divest), *rev'd on other grounds,* 754 F.2d 1445 (9th Cir. 1985), *penalty reinstated,* 1990-2 Trade Cas. (CCH) ¶ 69,166 (D. Or. 1990), *aff'd,* 967 F.2d 1372 (9th Cir. 1992); *United States v. Boston Scientific Corp.*, 253 F. Supp. 2d 85, 98 (D. Mass. 2003) (Commission awarded over $7 million for Boston Scientific's violations); *In re* Aspen Technology, Inc., Docket No. D-9310 (August 2009)(Commission settlement included re-opening original Order and adding further obligations to remedy the effects of Aspen Technology's violation).

the assets on time and there will not be an up-front buyer, the staff may recommend that the Commission accept the proposed package but require divestiture, by a trustee, of alternative assets, referred to as the "crown jewel," if the respondent fails to comply with the original divestiture in a timely manner. A crown jewel may include assets in addition to the ones included in the original divestiture or it may be different assets such as the assets of the other party to the merger. In any case, it comprises assets that the staff has concluded will be more readily divested because, for example, the pool of acceptable buyers is larger. Appointing a trustee is within the discretion of the Commission. For example, if the respondent has not divested the required assets in a timely manner but is close to completing negotiations, the Commission may delay appointing a trustee to allow the respondent time to complete the negotiations. Whether or not the Commission appoints a trustee does not alter the fact that the respondent's failure to divest in a timely manner violates the order, and in either case the Commission may seek civil penalties and other relief.

Timing

- **The parties should raise any concerns or complexities as early as possible and consider alternatives that may expedite the matter.**

The staff is unable to predict how long any particular negotiation will take; however, in the staff's experience, the time involved to negotiate a particular consent agreement is directly related to the proposed remedy's scope and complexity. Analyzing a proposal to divest an autonomous, on-going business unit to a viable and competitive buyer will, in most instances, be relatively simple, and in all likelihood the process will be completed quickly. As the assets that the parties offer to divest become more limited or more complex, the staff will need more time to evaluate the proposal, and the parties will need more time to finalize an up-front transaction, if required. The more issues that arise with the proposed buyer, the more time the staff will need to evaluate the buyer. As the parties present additional and different proposals that the staff must analyze, the staff will need more time to complete the additional analyses. Thus, if time is of the essence, the parties should consider an offer to divest more or different assets to facilitate the staff's analysis and possibly to eliminate the need for an up-front buyer.

If an up-front buyer is required, the more quickly the parties and an acceptable buyer complete negotiations, the faster the case will be resolved. The parties may expedite the investigation if they make business executives available early (and perhaps often), respond fully and expeditiously to the staff's information requests, submit possible monitors' names as soon as possible, begin obtaining third-party approvals as soon as possible, and prepare to implement an order to hold separate or maintain assets as soon as possible. Attending to even seemingly small details, such as having the appropriate executive available to execute the required agreement, will expedite the process.

Parties often have timing concerns. Varied factors – some under the parties' control and some not – may affect timing. Sometimes, financing arrangements may terminate at a specific point. Other times, the target company may have the right to terminate the agreement unilaterally if certain timing requirements are not satisfied. The passage of time alone often affects the value of the transaction. The staff understands these possibilities and is prepared to consider them if at all possible. The time needed to complete the negotiations, however, primarily depends on the proposed divestiture's scope and complexity; thus, if timing is an issue, the parties may have to balance their timing needs against their desire to structure the divestiture in a particular way.

The parties should understand the Commission's internal procedures and schedules as they plan. When the negotiations are completed and all terms have been agreed to, the parties will execute an "agreement containing consent order(s)," which will include all the terms required by the Commission's rules,[11] and other necessary representations; it will also include the agreed-to decision and order (and order to hold separate or maintain assets, if required) and a draft of the proposed complaint. If a corporate respondent, the Commission requires the president or chief executive officer to sign the agreement containing consent order on behalf of the corporation. After the negotiations are complete and the agreement containing consent order executed, the staff will complete its recommendation memorandum to the Commission and forward the entire package to management of the Bureau of Competition and the Bureau of Economics for review.

After approval by management, the package will then be forwarded to the Commission for its review. The Commission generally reserves two weeks to decide the matter, although it may require additional time depending on the case's complexity or other circumstances, and it can sometimes act more quickly if circumstances require. The Commission may request additional information from the staff; if responses from the parties are necessary, the staff will inform the parties. The Commission decides the matter by majority vote. If the Commission votes to accept the proposal, the Commission will issue a press release and place the documents on the public record for a thirty-day comment period. The documents include the agreement containing consent order(s), the draft complaint, the proposed decision and order, the order to hold separate or maintain assets if required, and the analysis to aid public comment. If the Commission does not accept the proposal, it may instruct the staff to obtain additional relief, it may vote to challenge the transaction, or it may take no action and close the investigation.

If the consent package includes an order to hold separate or maintain assets that the Commission accepts, those orders will be served immediately on the parties, along with the complaint, and they will become final upon service.[12] Acceptance of the proposed consent does

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[11] Rule 2.32 of the Commission's Rules of Practice, 16 C.F.R. § 2.32.

[12] Rule 2.34(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.34(b).

not constitute final approval of the decision and order, "but it serves as the basis for further actions leading to final disposition of the matter."[13]

The parties may generally consummate the underlying merger when the Commission accepts the consent agreement and places it on the public record; if subject to the provisions of the Hart-Scott-Rodino Act,[14] early termination is then granted with respect to any then-existing waiting periods. The decision and order, however, will not become final until after expiration of the thirty-day comment period. If the Commission receives no comments, it will usually approve the order quickly; the order will become final upon service on the parties. If the Commission receives comments, the staff will evaluate them and make any appropriate recommendations. In all cases, the Commission may determine to make the order final as first accepted, renegotiate its terms with the parties and take such action as may be appropriate, determine not to make the order final and to close the underlying investigation, or reject settlement and challenge the merger.[15] Once the order becomes final, it may be modified only according to the Commission's Rules of Practice.

The timing requirements for approval of a post-order divestiture are similar to those described above. The parties file an application for approval as required by the Commission's Rules of Practice.[16] Once the parties file their application, it is placed on the public record for a thirty-day comment period. During the comment period, the staff will review the materials filed and evaluate the buyer and the divestiture agreement. It will arrange to interview any third parties from whom information is required. It will not, however, complete its recommendation until the comment period expires and all issues have been resolved. If the Commission receives no comments and the staff has obtained the information it needs and has resolved its issues, the staff will forward its recommendation to its management quickly. If the Commission receives comments, the staff will review them and prepare the appropriate recommendation. Following management review, the recommendations will be forwarded to the Commission. The Commission usually reserves two weeks to make its decision. If the Commission approves the proposed divestiture, it will notify the parties and the buyer, which can then consummate the divestiture. The parties may not consummate the divestiture without the Commission's approval.

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[13] Rule 2.34(a) of the Commission's Rules of Practice, 16 C.F.R. § 2.34(a).

[14] 15 U.S.C. §18a.

[15] The great majority of proposed settlements have become final orders without any modification. We are not aware of any instance in which the Commission has rejected a settlement after the comment period and then brought a challenge.

[16] Rule 2.41(f) of the Commission's Rule of Practice, 16 C.F.R. § 2.41(f).

The staff is willing to work with the parties with respect to their timing needs; however, the parties must raise these needs as early as possible and with as much factual support as possible. The parties must also remember that the staff's objective is to recommend to the Commission a proposed settlement that, if accepted, will maintain or restore competition in the relevant market; it will take into account the timing considerations of the parties to the extent it can do so without compromising those objectives.