Negotiating Merger Remedies

Statement of the Bureau of Competition of the Federal Trade Commission

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

The Federal Trade Commission's Bureau of Competition has drafted this Statement[1] to offer guidance in connection with negotiating a merger remedy.[2] The Bureau hopes that this guidance will answer some of the questions that arise during the course of negotiations and will expedite the process.[3] In addition, the Commission's web site now includes the Commission's complaints, orders, and related documents in each merger case; reviewing past cases may be instructive as to the types of order provisions the Commission may accept in the future.[4]

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[1] This Statement is intended to supplement available information, to serve as a practical guide to negotiations, and to answer many of the questions that come up repeatedly during the course of negotiations of and compliance with Commission orders. It is not intended to be an exhaustive exposition on the current state of merger remedies at the Commission, nor is it a statement of law. It is compiled by the staff and is intended to reflect the views of the staff and not of the Commission or of any individual Commissioner. It is intended to be illustrative only, and, as such, cannot be used to bind the staff, the Commission, or any individual Commissioner.

[2] As part of its continuing evaluation of the merger remedy process, the Bureau held two workshops (in June 2002 and October 2002) on merger remedies to discuss suggestions about alternative approaches that might reduce costs to all parties involved, while continuing to meet the agency's law enforcement objectives. The press releases describing the workshops, the transcripts of the workshops, and related submissions are posted on the Commission's website at http://www.ftc.gov/bc/bestpractices/index.htm. The participants in the workshops raised many interesting and thoughtful issues, some of which the Bureau has been attempting to address in speeches, articles, and the Frequently Asked Questions about Merger Consent Order Provisions. *See* http://www.ftc.gov/bc/mergerfaq.htm. Further background is available in the Bureau's Divestiture Study, posted on the Commission's website at http://www.ftc.gov/os/1999/9908/divestiture.pdf.

[3] The Commission's Rules of Practice and Procedure are available at 16 C.F.R. §§ 1.1 *et seq.*, and can be accessed through a link on our web site at http://www.ftc.gov/os/rules/index.htm. The Rules relating specifically to consent agreements in Part 2 (non-litigated) matters are contained in 16 C.F.R. § § 2.31 - 2.34 (2000): Part 2, Subpart C – Nonadjudicative Procedures, *as amended*, 64 Fed. Reg. 46,267 (August 25, 1999).

[4] The Commission's web site is www.ftc.gov. The web site includes an alphabetical listing of Commission cases [http://www.ftc.gov/bc/caselist/index.htm] as well as a chronological listing of press releases that cross reference particular cases [http://www.ftc.gov/opa/press2003.htm]. If you wish to look at only orders that require divestiture, you can use the "search" function at the bottom of the home page [http://www.ftc.gov/search], and search "divest" or similar words. One cautionary note, however: the staff and the Commission evaluate each merger based on the facts of the particular case. Thus, to argue that "the Commission has accepted [a particular provision] in the past" will not be

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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, (6) divestiture applications, and (7) timing.

Table of Contents

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[4](...continued)
persuasive without a showing based on the facts of the specific case. It is also important to note that the staff and the Commission are constantly learning from their experiences in each case. Thus, whether the staff is willing to recommend a particular provision in a proposed order or purchase agreement may be influenced by the staff's experience with similar provisions in previous, similar cases; if the staff is aware that a provision in a previous case was problematic, it will be reluctant to recommend accepting a similar provision in a subsequent case.

The Assets to be Divested

• **A proposal to divest a demonstrably autonomous, on-going business unit comprising the entire business of one of the parties to the merger will, in all likelihood, expedite the divestiture process.**

Each merger[5] remedy must be examined in the context of the underlying antitrust case. In the majority of horizontal merger cases, however, the Commission will require a divestiture to remedy the likely anticompetitive effects; there may be additional obligations imposed on the parties as the circumstances require. After the staff has identified likely anticompetitive effects from the merger, it will be prepared to discuss with the parties what it has learned and what it believes an acceptable divestiture must include. This discussion should involve on the Commission's side the investigating staff from the Bureau of Competition (including its Compliance Division) and the staff from the Bureau of Economics. The staff has found it productive at this point in the investigation to involve on the parties' side not only outside counsel (if the parties are so represented), but representatives from inside the firm as well, including individuals involved in operating the company.

The Commission's remedial objective – to prevent the anticompetitive effects likely to result from a merger that the Commission has determined is unlawful – provides the framework for the staff's analysis of the scope of a proposed divestiture. That framework is supported by the conclusions the staff has drawn about the relevant market, barriers to entry, competitive effects, and likely efficiencies.[6] If the Commission concludes that a proposed settlement will remedy the merger's anticompetitive effects in the relevant market, it will likely accept that settlement and not seek to prevent (or unwind) the merger.[7] In most situations, the staff is most likely to support the parties' offer to divest an autonomous, on-going business unit that comprises at least the entire business of one of the merging parties in the relevant market, attempting to recreate the premerger competitive environment; such a remedy requires the Commission and the Bureau to make the fewest assumptions and to draw the

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[5] For the sake of simplicity, the term "merger" includes an acquisition or any other transaction covered by the Clayton Act and/or the Federal Trade Commission Act.

[6] Although the staff negotiates a proposed settlement with the parties, it is the Commission that ultimately determines whether the proposal is acceptable. A negotiated settlement is intended to remedy specific competitive problems while allowing the parties to proceed with the non-problematic portions of the merger.

[7] In determining whether to accept a proposed settlement, the Commission may consider additional factors in the exercise of its prosecutorial discretion.

fewest conclusions about the market and its participants and about the viability and competitiveness of the proposed package of assets.

The parties should be prepared to show that the business unit contains all components necessary to operate autonomously, that it has operated autonomously in the past, that it is segregable from the parent, and that the buyer of the business unit will be able to maintain or restore competition. The business people responsible for operating the business unit should be prepared to explain the independent business operations of the unit and to provide separate financial and business documents. As discussed below, a proposal short of that requires that the staff make additional assumptions and draw additional conclusions, requiring additional questions from and analysis by the staff.

- **If the proposed package of assets does not comprise a separate business unit that has operated autonomously in the past, the parties must show that the package includes all components of an autonomous business or that they are otherwise available before the staff will recommend that the Commission accept such a proposal.**

The staff will examine a proposed package of assets to be divested to determine whether it includes all components of the business or, if not included, whether they are otherwise economically available. Such components generally include manufacturing facilities, research and development capability, technology and other intellectual property, access to personnel, marketing and distribution capabilities, supply relationships, service relationships, customer relationships, capital resources, and anything else necessary to compete effectively in the relevant market. In fact, this may include business components relating to markets outside the relevant geographic or product market, if such components are necessary to assure that the buyer will maintain or restore competition. For example, when the product is marketed and distributed with other products, the package of assets to be divested may need to include assets relating to these other products as well. Similarly, if vertical integration is an important element of competitiveness in the market, it may be necessary to include assets at more than one level of the industry.

If the parties exclude any of these needed components, they should be prepared to explain why they are not included; that explanation should include how the buyer will fill in the gaps resulting from the exclusion of these components and how the buyer will be able to integrate the divested components into its own operations to establish competitively effective operations. Again, the business people involved in the parties' business 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 tell the staff where to obtain it.

A blanket assertion by the parties that, for example, the research and development unit is not necessary will generally not be persuasive. On the other hand, an explanation that any buyer acceptable to the Commission will have its own research and development unit may, if supported by evidence, be persuasive. In another example, it may not be necessary to divest manufacturing facilities

if third-party contract manufacturing is readily and competitively available in the industry. The parties must show that such arrangements are common in the industry, readily available to any likely buyer, and will not create cost disadvantages for the buyer. Providing evidence that competitors use such arrangements and evidence from the contract manufacturers that provide the service and the customers that may purchase the finished product may expedite the process.

When the parties propose to assemble all necessary components by combining assets that have never been combined in the past (*e.g.*, combining some assets of one party with some assets of the other, rather than including all assets of one party), the parties must show that the divestiture of the combined assets will enable the buyer to maintain or restore competition in the market. This might be done, for example, in the grocery retailing market by a detailed analysis of each supermarket that the parties propose to divest, in order to determine whether the proposed divestiture would maintain or restore competition in the market. If, however, the parties have selected lower performing, higher operating cost, older, less conveniently located supermarkets for inclusion in the package, they will have difficulty persuading the staff to accept such a package. The Bureau is willing to examine any proposal in the context of the particular facts of a particular case, but in all cases it needs sufficient evidence to conclude that the proposed divestiture will maintain or restore competition, along with the time to analyze the evidence. In general, a "mix and match" proposal tends to slow the process down, requiring more extensive negotiations and more detailed and time-consuming evaluation.

- **If the parties propose a divestiture primarily of intellectual property (or other limited categories of assets necessary to facilitate entry), they must show that an acceptable buyer exists and that divestiture to that buyer will achieve the remedial purposes of the Commission's order.**

When intellectual property (patents, know-how, technology, or the like) is the critical component for facilitating entry, the parties have sometimes proposed to divest just the intellectual property. Such a divestiture may be acceptable; however, the parties must persuade the staff that there exists a buyer that is capable of entering the market through the acquisition of the intellectual property, is willing to make the acquisition, and has the necessary incentives to compete in the market, and that divestiture to such a buyer will achieve the remedial purposes of the order. (As discussed below, the staff may be willing to recommend accepting such a proposal only with an up-front buyer.)

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 rights relating to that intellectual property, including rights of alienation. The parties should be prepared to convey all rights necessary to enable the buyer to use the intellectual property for the development, production, use, distribution, and sale of the relevant product in the relevant geographic market. (See discussion below relating to obtaining necessary third-party consents and approvals.) If immediate supply of the product by the buyer is necessary, the staff may require that the parties supply product to the buyer for some limited period of time. The parties should be prepared to enter into a supply agreement that will enable the

buyer to compete effectively in the market immediately. (See discussion below relating to such agreements.) The parties may be required to provide technical assistance to the buyer in, for example, cases in which manufacture of the product is highly sophisticated and/or complex.[8] On the other hand, technical assistance alone may not be sufficient in some cases, such as those in which access to key employees is critical to effective competition. In those cases, the parties should be prepared to take steps to assure the transfer of those key employees. (See discussion below relating to such steps.)

In addition, 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. To the extent the parties nonetheless seek to restrict the use of the intellectual property, they should be prepared to show that such restrictions will not adversely affect the ability of the buyer to compete effectively. Assertions that an unrestricted transfer of certain intellectual property may adversely affect the parties' ability to compete in other markets are not likely to be persuasive without adequate protections of the buyer's ability to compete in the relevant market.[9] The staff has found that access to patent lawyers and others knowledgeable about the transfer and use of intellectual property and access to the scientists or other professionals involved in the development and use of the intellectual property often expedite the process.

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[8] Supply agreements and technical assistance provisions are the type of obligations that may create what the staff refers to as "continuing entanglements" between the buyer and the parties. The staff seeks to avoid these because of the competitive issues they may raise and the complex monitoring they may require. In addition, the more a proposed buyer must rely on these types of provisions, the more difficult it may be to persuade the staff that such a divestiture would remedy the Commission's competitive concerns.

[9] In some cases, parties offer to license the use of necessary intellectual property rather than divesting the intellectual property, thereby retaining ownership of 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. Licensing rights to the intellectual property may not be sufficient, however, if to do so will not enable the buyer to maintain or restore competition in the relevant product market.

An Acceptable Buyer

• **To be acceptable, a buyer must be competitively and financially viable; proposing a buyer that does not satisfy these tests will be unacceptable and will slow down the process.**

Whether the buyer is post-order or up-front (which is discussed below), in either case the buyer must be one that can – with the package of assets to be divested – maintain or restore competition in the relevant market.[10] The staff will therefore evaluate a proposed buyer to determine whether it has (1) the financial capability and incentives to acquire and operate the package of assets, and (2) the competitive ability to maintain or restore competition in the market.[11]

The staff will be prepared to discuss with the parties the characteristics of an acceptable buyer. 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 obviously slow down the process.

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[10] An "up-front buyer" is one that has executed a final agreement with the parties before the Commission accepts the proposed order. The staff has carefully reviewed both the buyer and the agreement before the Commission considers the consent agreement. The buyer is named in the order; the agreement is attached to the order as a confidential exhibit and is incorporated into the order. An order that includes an up-front buyer typically requires that the parties divest to the up-front buyer within a very short time period 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 decision and order terminates. To assure that the Commission can reject the up-front buyer if it determines to do so after the public comment period, a rescission clause is typically required in the purchase agreement. (As of March 2003, the Commission has never required rescission under 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. 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.

[11] In evaluating the competitive ability of the proposed buyer, the staff and the Commission may consider such dimensions of competition as price, service, quality, and innovation.

Because the objective of a divestiture is to maintain or restore competition, 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 put the offer out for competitive bids. Some parties approach individual firms that they believe may be acceptable buyers. Another possibility is an auction process.[12] The staff is not opposed to the use of such a process as long as it can be completed within the time period required by the Commission. In the first instance, however, the parties select the search method. Should the parties have any questions about the method they intend to use, the staff is available for consultation.

The staff will evaluate a proposed buyer very carefully to determine whether the buyer is financially and competitively viable. Thus, the parties should evaluate and select a proposed buyer with these criteria in mind. Counsel for the parties (or some other third party)[13] should conduct a more thorough financial review of the proposed buyer than the parties would conduct of any buyer to which they were considering selling significant assets, because, in this case, it is important to 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.[14]

To the extent possible (and consistent with confidentiality concerns), counsel for the parties should review balance sheets and other financial data to determine whether the buyer has the necessary financial resources. The parties and the buyer should assess whether any financial information would be of concern to the Commission, for example, significant debt due soon, other recent acquisitions that may implicate the financial position of the buyer, or imminent adverse financial announcements. The parties should inform the buyer that the staff will be requesting financial information directly from the buyer; it is in the parties' interest to attempt to assure the cooperation of the buyer.

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[12] Certain auction processes have the advantage of excluding the parties from the pre-selection of the proposed bidders or buyer; on the other hand, there is no guarantee that the winning bidder in the auction will be acceptable to the Commission (the high bidder may be, *e.g.*, an incumbent that raises independent competitive concerns or a financial investor that lacks the expertise to succeed, notwithstanding its high bid). In the staff's experience, however, the parties have usually been reluctant to use auctions because of the delay they can create.

[13] To protect the confidentiality of the buyer's competitively sensitive information, the parties should have counsel or some other third party, rather than the business people, conduct the review.

[14] Although the order will typically require divestiture "at no minimum price," a proposed buyer's offer to pay a price that is less than the break-up value of the assets may give rise to concerns about the buyer's incentives to compete and its commitment to the market if, for example, the buyer intends to re-sell the assets for their break-up value.

The parties should ascertain whether the buyer will need and be able to obtain 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. A buyer that requires seller financing may not be financially sound. The Commission's orders require "absolute" divestitures; post-divestiture financial ties between the buyer and the parties are inconsistent with this requirement.[15] In addition, such a financial relationship between the buyer and the parties likely diminishes their incentives to compete. If the ability to obtain financing becomes an issue, decreasing the purchase price is an option; seller financing, in all likelihood, is not.

The buyer must have the experience, commitment, and incentives necessary to achieve the remedial purposes of the order. These attributes can be shown, for example, by reference to 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 competitor in the market, although a fringe competitor may be an acceptable buyer in some cases. If any components of an independent business have been omitted from the package of 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 for presentation 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 is aware of what is needed to compete in the market, and that it is committed to the market. The parties should assure that the buyer is aware of this obligation and is prepared to cooperate with the staff.

The staff will conduct its own independent evaluation of the proposed buyer, interviewing, as necessary, representatives of the proposed buyer, customers, suppliers, competitors, other possible buyers, and any other individuals that may provide relevant information. As indicated above, the staff will also request competitively relevant information, including financial information, from the buyer. The parties should assure that the proposed buyer will respond to the staff's inquiries and supply any information the staff requests.

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[15] In some cases in which obtaining financing is at issue, the parties agree to a limited, up-front payment followed by subsequent payments over time; however, the staff will not accept this arrangement if the subsequent payments are tied to the future performance of the divested assets, such as royalty payments or other performance-based payments. Such an arrangement will skew the incentives of the buyer and the parties to compete and will likely require the sharing of 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.

• **If parties seek to divest a package of assets comprising less than an autonomous, on-going business, the Bureau will usually require an up-front buyer.**

In many recent cases, the parties have urged the staff to accept a divestiture of less than an autonomous, on-going business or something resembling such a business. In some cases, the staff has recommended that the Commission accept such limited packages, but only if the parties finalize an acceptable purchase agreement with an acceptable buyer prior to the time the proposal is presented to the Commission for its consideration. By requiring an up-front buyer, the staff seeks to minimize the risks that there will not be an acceptable buyer for such a limited package of assets or that the buyer 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.

The staff's experience has shown that some industries, such as grocery retailing, appear to present consistently the high risk that assets will deteriorate pending the divestiture of the assets, which may make it more difficult for the buyer to maintain or restore competition. Accordingly, the Commission has required recently that the parties complete such divestitures up-front.[16] The staff remains willing, however, to consider on a case-by-case basis whether certain protections (such as orders to hold separate and/or maintain assets, crown jewels, and monitors, discussed below) can eliminate the need for an up-front buyer.

When the parties present an up-front buyer, the parties and the buyer must finalize and execute the purchase agreement and all ancillary agreements before the proposed order is forwarded to the Commission for its review. The parties should, thus, attempt to begin negotiations with the proposed buyer as soon as they understand the scope of the assets that they must divest. Involving the staff as early as possible may expedite the process, although the staff will not be directly involved in the actual negotiations. The staff will, however, provide guidance, suggestions, and requirements about the type of provisions that should or should not appear in the final purchase agreement. For example, the purchase agreement between the parties and the buyer should include a rescission clause that allows for the rescission of the transaction in the event that the Commission does not approve either the buyer or the purchase agreement.

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[16] In the Albertson's/American Stores order, *In the matter of Albertson's, Inc. and American Stores Company*, FTC Docket No. C-3986, the Commission ordered the parties to divest supermarkets and supermarket sites to five different up-front buyers, one of which was a wholesaler that intended to resell the supermarkets divested to it either to buyers pre-approved by the Commission in the order or, if to any other buyers, only to those subsequently approved by the Commission. Divesting to the wholesaler as quickly as possible – even though it intended to resell the assets – removed the assets from the control of the parties and thus ameliorated the concern about deterioration of the assets pending divestiture.

The parties will likely negotiate the terms of the proposed decision and order with the staff at the same time they are negotiating terms of the purchase agreement with the proposed up-front buyer. The staff will not disclose to the buyer the 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 scope of 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; to the extent the staff continues to learn about the market and competition as it questions the proposed buyer, competitors, customers, suppliers, and others, changes to the asset package, the proposed decision and order, or the purchase agreement may be required. Such changes may include adding assets to or deleting assets from the package of assets to be divested; adding obligations to or eliminating obligations from the decision and order, or otherwise altering or modifying the proposed divestiture agreement.

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

The Divestiture Agreement

- **Whether up-front or post-order, the staff will review the divestiture agreement[17] 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 remedial objectives of the order.**

The Bureau and the Commission will review and evaluate the entire divestiture agreement carefully whether the divestiture is required up-front or post-order.[18] The investigative staff and the Compliance Division staff are prepared to discuss term sheets early in this process, and the parties may

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[17] The term "divestiture agreement" refers to the purchase agreement, including all appendices, exhibits, and schedules, and all ancillary agreements entered into between the buyer and the parties to transfer all of the assets that the Commission's order requires divested and to effectuate any other obligations that the Commission's order requires.

[18] Whether the divestiture is up-front or post-order, the staff makes every effort to assure that the divestiture agreement transfers to the buyer all assets required to be divested and achieves the remedial objectives of the Commission's order; however, the parties remain responsible for assuring that they transfer to the buyer all assets required to be divested and otherwise comply with all obligations pursuant to the Commission's order.

expedite the process by giving the staff a draft divestiture agreement as soon as one has been negotiated. Whether up-front or post-order, the earlier the staff is able to begin its evaluation, the more quickly the process will be completed. If the staff has questions about the agreement, it will raise the questions with the appropriate party. In some instances, the staff will suggest revisions to the agreement.[19] Obviously, the more quickly the staff's concerns are resolved, the sooner the process will be completed. 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 people who will have to comply with the terms of the agreement, will also facilitate the process.[20]

The staff will review the divestiture agreement to ascertain whether the agreement transfers all assets required to be divested. Language mirroring the order language typically provides the necessary assurances that all assets required to be divested will be transferred. In some agreements, the parties intend to list all of the assets to be divested in a schedule attached to the agreement; some insist that they cannot prepare such a list until the moment prior to closing. But before it makes a recommendation that the Commission accept the proposal, the staff must be assured that all assets will be conveyed. A blank schedule does not provide those assurances. In some cases, the parties have agreed to provide transitional services to the buyer, but they intend to work out the details of those services after consummation. If the order requires the provision of 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. However, even if the order does not require the provision of such services, any agreement to do so may give rise to significant competitive concerns and, accordingly, the parties and the buyer must finalize the terms of such an agreement and the staff must review it before the staff can make a recommendation to the Commission. Similar concerns may arise with respect to 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.

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[19] In some cases, the parties appear to believe that by submitting only the final, executed agreement to the staff, the staff will be less likely to request changes than it will if the parties submit drafts of the agreements to the staff. The staff believes that this is not the case: 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. In fact, it is the staff's experience that submitting drafts (ready for execution, but before execution) to the staff for its review expedites the process.

[20] Occasionally, transaction attorneys observe that the staff is raising issues about provisions that, in the experience of the transaction attorneys, are "boilerplate." The competition goals of the Commission are different, however, from the goals of a typical transaction; therefore, otherwise routine provisions, such as non-compete clauses and performance-based payments (*e.g.*, royalties), may be unacceptable in a divestiture.

If the order imposes additional obligations on the parties, the staff will review the divestiture agreement to assure that all such additional obligations are satisfied. For example, if the order requires conveyance of an exclusive license, obviously the divestiture agreement should not convey a non-exclusive license. A provision in the divestiture agreement providing for a one-year supply agreement from one of the parties' plants would be inconsistent with a provision in the order requiring that the buyer be supplied from a different plant. If the parties are required to provide transitional services to the buyer, the provisions in the divestiture agreement that describe those services should also provide for "firewalls" to the extent that the provision of such services may result in the disclosure of competitively sensitive information.

The staff will also carefully review all provisions of the divestiture agreement to determine whether any are inconsistent with the terms or the remedial objectives of the order. In some instances, the staff will question suppliers, competitors, or customers about the operation, effectiveness, or necessity of certain provisions. For example, the staff will carefully evaluate any non-compete and non-solicitation clauses in the divestiture agreement to determine whether they are consistent with the objectives of the Commission's order to maintain or restore competition in the relevant market. A provision that establishes performance-based payments (*e.g.*, royalties) will be disfavored because such an arrangement tends to skew competitive incentives or results in the disclosure of competitively sensitive information. The staff evaluates all provisions mindful of the fact that this is an agreement between two firms who will be competitors after consummation of the transaction.[21]

- **In evaluating the terms of the divestiture agreement, the staff will rely, in large part, on 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 conduct a thorough review of the divestiture agreement; as part of that review, the staff will request information from, among others, the buyer and engage in discussions with, among others, representatives of the buyer, both legal and operational. The information the staff obtains from the buyer is important to the staff in its evaluation of the divestiture agreement and in the conclusions it draws. In some cases, however, the staff will raise concerns about certain provisions, notwithstanding that the buyer agreed to them. It is important that the buyer has reviewed the agreement and has agreed to purchase the assets, but the Commission cannot rely solely on the buyer's incentives to achieve the objectives of its order. The buyer's incentives may not necessarily coincide with the objectives of the Commission. Accordingly, it will not be dispositive that the parties have reached an agreement with a buyer; the staff must examine the competitive incentives being created.

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[21] The staff often reminds the parties that a Commission-ordered divestiture is not the same as a conventional transfer of assets. In the more typical, consensual, arm's-length transaction, the parties are neutral as to the buyer's success in the market; that may not be the case in a divestiture situation.

The Commission's objective is to remedy the likely anticompetitive effects of the proposed merger, 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 with the parties, that create perverse competitive incentives. In addition, if the purchase price is low enough, a buyer might obtain an adequate return on its investment without a long-term commitment to the business; such a divestiture would not adequately maintain or restore competition. The parties will facilitate the process if they understand that the fact that the buyer agreed to a certain provision may not be sufficient justification for the provision without additional evidence.[22]

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

Of considerable importance in many cases is the need for the parties to obtain all necessary third-party consents and approvals before the staff recommends that the Commission accept the proposal. 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 prior to the time the staff recommends 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 Commission will approve the proposed divestiture. Transfer of licensed intellectual property often requires the consent of the original licensor. 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.

If the parties wait until the last minute to begin obtaining these consents and approvals, those negotiations can add a significant amount of time to the process.[23] On the other hand, beginning earlier

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[22] In addition, the staff has learned through experience that some buyers may agree to certain undesirable provisions. For that reason as well, if the staff finds a provision objectionable, the fact that the buyer has agreed to it will not be sufficient justification for the provision without further evidence.

[23] In addition, some have raised the possibility that the third parties may require compensation before granting the necessary approvals and consents. Third parties often have their own interests, which are not necessarily unreasonable for them to assert. For example, a customer may not want its contract with the parties transferred to a buyer with whom the customer has had no dealings in the past. That customer's insistence on some protection (in the form of money or otherwise) may not be unreasonable. The staff recognizes that pre-existing leases, licenses, and the like, can, in the context of a pending merger and divestiture negotiation, transform reasonable approval rights of third parties into strong tools for extracting arguably excessive concessions. The staff will work with the parties,

(continued...)

in the process can expedite the process and clarify any impediments to obtaining the necessary approvals. To the extent that obtaining approvals and consents becomes problematic, the earlier the staff is made aware of those facts, the sooner all can work to resolve the problems. For example, the Commission has included provisions in orders that require transfer of certain assets, but allow for the substitution of equivalent assets, subject to the approval of the Commission. The parties must show that those particular assets are not critical to the success of the business, 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, therefore, raise these concerns and issues as early in the process as possible. After the order becomes final, the parties must divest the assets as described in the order unless the order is modified pursuant to the Commission's Rules of Practice. If the parties raise these concerns after the Commission's order becomes final, the Commission will be unable to consider alternatives without instituting formal procedures to modify the order. If the parties fail to complete the required divestiture by the deadline in the order because the parties have not obtained necessary third-party consents, the parties will be in violation of the order. The Commission can then appoint a divestiture trustee to divest the assets, making all arrangements necessary to do so.[24]

Additional Order Provisions

• **In some cases, the buyer may need additional, short-term assistance from the parties, particularly in those cases in which 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 in the relevant market that is comparable to the competitor that would have been (or was) lost as a result of 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, transitional assistance (in most cases of a short-term nature) from the parties to the buyer may be required to temporarily fill in these gaps.

For example, when the staff agrees that the parties need not divest manufacturing or production capability, the parties may be required to perform some form of interim services, such as supplying

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[23](...continued)
whenever possible, to explore how these forces may be diminished consistent with the need to obtain an effective remedy.

[24] The Commission may also seek civil penalties and other relief for a failure to divest on time. 15 U.S.C §45(l).

product to the buyer until such time as the buyer can manufacture or produce the product on its own. The parties can offer to supply the product themselves, but the staff will examine the offer to assure that it is of a short-term nature and that the buyer is not at a competitive disadvantage. Before the staff can make its recommendation to the Commission, the parties and the buyer must finalize the supply agreement so that the staff has an opportunity to review the agreement as well, to assure that adequate safeguards are in place. The parties may have to sell the product to the buyer at some measure of variable cost with no profit to the parties. The parties must be prepared to provide safeguards for the buyer in the event of a production slow-down or stoppage. Competitive safeguards must be put in place to assure 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 understands the use of 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 assure that the buyer has access to the key employees. If reputation is a critical component of effective competition (which cannot be transferred), the parties must assure 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 during which time the buyer will be able to establish its reputation.[25]

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

As discussed above, in many of the cases in which the parties have proposed divestiture of less than an autonomous, on-going business, the parties may need additional assistance. If that assistance results in a continuing relationship between the parties and the buyer, or imposes obligations of a complex or technical nature, the staff will recommend that the Commission appoint an independent third party to monitor compliance with the terms of the Commission's order. These monitors are typically from the industry or have consulted to the industry, 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, but with the appropriate experience and know-how. The obligation of the monitor is to the Commission; however, the parties will be responsible for compensating the monitor.

In many of the cases in which the Commission has appointed a monitor (and the same is true for the category of monitor referred to as "hold separate trustee," see discussion below), the monitor was recommended by the parties. The most effective monitors have been those who established a positive

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[25] The parties must also demonstrate that the proposed buyer is one that is likely to be able to establish its own reputation in the market.

working relationship with the parties (as well as with the buyer). For that reason, the first candidates that the staff considers typically are suggested by the parties. The parties can facilitate the process if – in those cases in which it appears that appointment of a monitor is likely – they have investigated possibilities early in the process and have provided names to the staff. The staff has rejected candidates suggested by the parties in situations where 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's recommendation is forwarded to the Commission. Ideally, the parties and the monitor will have finalized and executed an agreement at that time. 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.[26] The staff will assure that the agreement gives the monitor all the authority necessary to satisfy his or her responsibilities and that the agreement places no limitations on the ability of the monitor to do so.

Order to Hold Separate and/or Maintain Assets

• **If there is concern about interim competitive harm and/or diminution in the competitive strength of the assets to be divested, the Bureau will insist on an order to hold separate and/or maintain assets.**

Some settlements have raised the concern that competition may be harmed pending divestiture of the to-be-divested assets. In such cases, the Bureau will require an order to hold separate.[27] Such an order will require the parties to maintain an independent entity, comprising at least all of the assets to be divested. If the parties have provided and will continue to provide any necessary services to the held separate business, the order to hold separate must address those services. The hold separate

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[26] The staff may be able to share redacted versions of previous such agreements, to give guidance to the parties.

[27] Until 1999, all orders that the Commission issued were first accepted by the Commission subject to a public comment period (now thirty days). An order was not made final until after the Commission had the opportunity to receive and review the comments. The Commission modified its procedures in 1999 to allow for the final issuance of an ancillary order to hold separate or maintain assets without first subjecting it to a public comment period; thus an ancillary order to hold separate now becomes final upon service on the parties, several days after acceptance by the Commission and several weeks before the related decision and order becomes final. *See* Rule 2.34(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.34(b), available at http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_16/16cfrv1_00.html.

order will put in place the provisions necessary to protect the confidential information of the held separate assets.

In the majority of cases requiring a divestiture (including those in which there is little concern about interim competitive harm), the Bureau will require an order to maintain the assets pending divestiture, to assure 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 assets to be divested will be in the hands of the parties. If an order to hold separate is required, it will also include asset maintenance provisions.

If the order imposes obligations that must be effective immediately, the ancillary order 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 and/or maintain assets.[28] The obligations may be repeated in the decision and order if they need to survive the order to hold separate and/or maintain assets, which may terminate after the divestiture is completed.

The order to hold separate and/or maintain assets may include benchmarks by which the parties' conduct can be measured. For example, the order to hold separate and/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 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 prepared and approved in the ordinary course of business.

The order to hold separate and/or maintain assets may require that the parties offer incentives to employees to assure 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 level of incentive will be required to maintain the workforce.

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

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[28] 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."

An order to hold separate and/or maintain assets will also authorize the Commission to appoint an independent third party to oversee the operations of the held separate business and/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 greatly facilitate the process if they anticipate this need and begin their own search for an appropriate monitor early in the process. The staff will have to review the qualifications of the individual and the agreement between the monitor and the parties, another aspect of the investigation that 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 a number of monitors, including retired executives, consultants, and lawyers with particular regulatory experience. The staff, in particular the Compliance Division staff, will be available to discuss the characteristics of an acceptable monitor.

Divestiture Applications

- **In cases requiring a post-order divestiture, the parties have the burden of showing that the divestiture they propose meets the specific requirements of the Commission's order and satisfies the order's remedial purposes.**

In virtually all of the Commission's orders that require a post-order divestiture, the parties are 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 parties' burden to prove that the proposed divestiture – both the buyer and the manner – meets the specific requirements of the Commission's order and satisfies its remedial purposes.[29]

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

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[29] *See Dr Pepper/Seven-Up Companies Inc. v. FTC*, 991 F.2d 859, 863 (D.C. Cir. 1993) (in proceeding for FTC approval pursuant to Rule 2.41(f), the burden of proof is on the party seeking approval to demonstrate that it should be granted).

To obtain the necessary approvals, the parties 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, 16 C.F.R. § 2.41(f). There is no required format for the application. The application must, however, contain facts sufficient to satisfy the parties' burden. The application should include a final divestiture 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 (or for several years, if appropriate); (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 parties; (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 parties) 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 parties 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 and obtained confidential treatment.

The staff will usually need to obtain additional confidential information directly from the buyer. To facilitate the review of their application, therefore, the parties 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 parties should arrange for the proposed buyer to provide this information, and any further information required by the staff, as soon as possible.

- **The parties should include in their application 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 parties 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 parties are required to divest assets within a specified time period, they must complete the transaction within that time period. Filing for approval within that time period will not satisfy the parties' obligation if the divestiture is not 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 parties to the possibility of civil penalties of up to $11,000 per day, until the parties effectuate the required divestiture, as well as other relief.[30]

In the majority 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 parties fail to divest within the time period required.[31] The appointment of a trustee is discretionary on the part of the Commission; the Commission can choose not to appoint a trustee if it concludes that the circumstances do not warrant it. For example, if the parties have not divested the required assets in a timely manner but are close to completing negotiations for the divestiture of the required assets, the Commission may delay appointment of a trustee to allow the parties time to complete the negotiations. The appointment of a trustee to divest – or the decision not to appoint a trustee – does not alter the fact that the parties' failure to divest in a timely manner is a violation of the order, and the Commission may seek civil penalties and other relief whether or not it appoints a trustee.

Timing

- **If time is of the essence, the parties should raise those concerns as early in the process as possible and consider alternatives that may expedite the process.**

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[30] *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).

[31] If the staff has concerns about the parties' ability to divest the original package of assets defined in the decision and order on time, the staff may nonetheless accept the proposed package but require divestiture, by a trustee, of an alternative package of assets referred to as the "crown jewel" if the parties fail to comply with the original divestiture in a timely manner. A crown jewel may be a package of assets that includes assets in addition to the ones included in the original divestiture or it may be a different package of assets such as the assets of the other party to the merger. In any case, it is a package of assets that the staff has concluded will be more readily divested because, for example, the pool of acceptable buyers is larger.

The staff is unable to predict how long any particular negotiation will take; however, in the staff's experience, the time involved in negotiating a particular consent agreement is directly related to the scope and the complexity of the remedy that the parties propose. Analysis of a proposal that includes divestiture of an autonomous, on-going business unit to a viable and competitive buyer will, in most instances, be relatively simple; in all likelihood, the process will be completed quickly. As the package of assets that the parties offer to divest becomes more limited and/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 in connection with the proposed buyer, the more time the staff will need to evaluate the buyer. As the parties present additional and different proposals to the staff for its analysis, 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 a larger (or different) package of assets to facilitate the staff's analysis and possibly to eliminate the need for an up-front buyer.[32]

In almost every case, the parties have timing concerns. Any number of factors – some under the control of the parties and some not – may affect timing. In some cases, financing arrangements may terminate after a certain time. In other cases, the target company may have the right to terminate the agreement unilaterally if certain timing requirements are not satisfied. In many cases, the passage of time affects the value of the transaction. The staff is mindful of such considerations and is prepared to take them into account if at all possible.[33] The length of negotiations, however, is primarily a function of the scope and complexity of the divestiture that the parties propose; 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.

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[32] If an up-front buyer is required, the quicker the parties complete negotiations with an acceptable buyer, the faster the process will be completed. The parties may expedite the process if they make business executives available early in the process (and perhaps often in the process), respond fully and expeditiously to the staff's requests for information, submit names for possible monitors early in the process, begin obtaining third-party approvals as soon in the process as possible, and begin preparations to implement an order to hold separate and/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.

[33] The parties should remember that the staff's primary objective is to remedy the anticompetitive effects likely to result from the merger and to minimize interim competitive effects. The staff will attempt to take the parties' timing considerations into account to the extent it can do so without jeopardizing its ability to satisfy this objective. The staff will work as quickly as it can; however, the parties must understand that the staff cannot shortcut the process if to do so impairs the result. To assure that the staff is in a position to work the parties' timing considerations into the schedule of the staff and the Commission, the parties must convey those considerations to the staff as early in the process as possible and with as much factual support as is available.

The parties should be aware of the Commission's internal procedures and schedules when they consider possible timing concerns. When the negotiations are completed and all terms of all required orders have been agreed to, the parties will execute what is referred to as the "agreement containing consent order(s)," which will include all the terms required by Rule 2.32 of the Commission's Rules of Practice, 16 C.F.R. § 2.32 and will include the agreed-to decision and order. The staff will finalize its recommendation memorandum to the Commission and forward the complete package to the management of each Bureau for review. After approval by Bureau management, the package will then be forwarded to the Commission for its review. The Commission generally reserves two weeks to make its decision, although it may require additional time depending on the complexity or other circumstances of the case, and can 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. If the Commission votes to accept the proposal, the Commission will issue a press release and place the documents on the public record.[34] The documents include the agreement containing consent order(s), the draft complaint, the proposed decision and order, the order to hold separate and/or maintain assets if required, and the analysis to aid public comment.

If the consent package includes an order to hold separate and/or maintain assets, which the Commission accepts, those orders will be served immediately on the parties, along with the complaint, and they will become final upon service. Rule 2.34(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.34(b). Acceptance of the proposed consent does 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." Rule 2.34(a) of the Commission's Rules of Practice, 16 C.F.R. § 2.34(a).

Subject to the provisions of the Hart-Scott-Rodino Act, 15 U.S.C. §18a, the parties may generally consummate the underlying merger when the Commission accepts the consent agreement and places it on the public record. The decision and order, however, will not become final until expiration of the thirty-day comment period. If the Commission receives no comments, it will usually approve the order in a matter of days; 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, or determine not to make the order final and to close the underlying investigation. Once the order becomes final, it may be modified only according to the Commission's Rules of Practice.

The timing requirements involved in an application for approval of a post-order divestiture are similar to those described above. Once the parties file their application, it must be placed on the public

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[34] If the Commission does not accept the proposal, it may instruct the staff to obtain additional relief, it may vote to authorize the staff to file an action in federal court to enjoin the transaction, or it may take no action and allow the merger to proceed.

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 expiration of the comment period. If the Commission receives no comments and the staff has obtained the information it needs, the staff will forward its recommendation to its management fairly 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.

The staff is willing to work with the parties with respect to their timing needs; however, the parties must raise these needs as early in the process as possible and with as much factual support as possible. The parties must also remember that the objective of the staff 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.