A Guide for Potential Buyers: What to Expect During the Divestiture Process

Even if you are a seasoned buyer or seller of business assets, a Commission-ordered divestiture differs from a typical, privately negotiated transaction. Importantly, you are acquiring assets from a seller who will become your competitor. This guide will help you understand what to expect from a Commission-ordered divestiture so that you can navigate the buying process successfully.

Communicate with FTC staff at every stage of the process.

From negotiating the acquisition agreement to performing due diligence to post-divestiture integration, FTC staff is available to discuss your concerns. Inform staff (or the monitor, if one is assigned) of any issues or concerns as soon as they arise. Be aware that FTC staff will interview market participants and your financing entities before recommending that the Commission approve you as the buyer of the divested assets. Once approved, staff will remain in contact with you as the assets transfer, and will be available if issues come up.

Take full advantage of the due diligence process.

Based on the Commission's experience with many divestitures, there can be lasting consequences if you do not conduct thorough due diligence. To avoid implementation issues down the road, you should expect to:

- provide Compliance staff with the steps taken and concerns about any aspect of the diligence process;
- contact lawyers for the acquired firm to obtain direct access to its information, facilities, and employees; and
- in the case of a post-order divestiture, obtain direct access to the hold separate business, the hold separate monitor and the hold separate manager.

Be prepared to demonstrate financial and competitive ability.

As part of its review, FTC staff will evaluate whether you have the financial capability to acquire and operate the divestiture assets, as well as your ability to compete in the relevant markets with the assets. As a buyer, you should be prepared to:

- explain the structure of the funding for the investment, including any limitations of the funds;
- provide all sources of financing for the acquisition of the divested assets, including private equity or other investors, and explain the criteria used for evaluating such sources;
- explain how you and the financial entities reviewed and evaluated the transaction and formed the basis for authorizing the purchase;
- make representatives from the financing entities available for discussions with staff;
- provide detailed financial and business plans, with supporting documentation;
- explain the underlying assumptions of the financial and business plans, including contingency plans if sales and other financials do not meet projections; and
- make your management, sales and marketing representatives, and accounting and other personnel available for discussions with FTC staff.

A Guide for Potential Buyers: What to Expect During the Divestiture Process

Buying less than an ongoing business adds scrutiny.

The Commission prefers the divestiture of an ongoing business because such a divestiture presents less risk of failure. But if you are considering buying only selected assets, be aware that there will be additional scrutiny of the asset package and your business plans. Be prepared to:

- explain how you plan to maintain or restore competition with a selected asset package;
- identify any additional assets and services you will need to operate as a viable and competitive business in the relevant market;
- explain and document how you will obtain these additional assets and services, at what cost, and how quickly.

Pay particular attention to back-office functions.

Provision of back-office functions (corporate, information technology, and personnel functions, among others) is often essential for a divestiture buyer to compete in the affected market. You should work with staff to assess what back-office functions you will need to support the asset package, and determine where to get them and what they might cost. If you lack these functions, or don't have the ability to obtain them immediately, you may obtain them from the respondent on a transitional basis. Also consider your options if the transition takes longer than expected.

Cultivate customer and other third-party relationships.

Attracting and retaining customers or stepping into complicated third-party relationships can be difficult. As a buyer, you should:

- take steps to ensure you have access to customers, suppliers, landlords, and others;
- thoroughly review and understand customer and other third-party relationships, including buying patterns, brand and product loyalty, and switching costs; and
- if the order allows customers to terminate their contracts with the respondent, provide input into the respondent's communications with the customers that informs customers of such right.

Turn to the monitor when issues come up.

A monitor is an independent third party that the Commission may appoint to help oversee compliance with the order, especially when the respondent is providing post-order services, such as technical assistance, back-office services, or a supply of finished products. Monitors typically have industry experience and their fees are paid by the respondent. Make contact with the monitor early on, and if any issue arises, reach out to the monitor as soon possible.

Additional Resources

- Negotiating Merger Remedies
- FAQs on Remedies
- Remedy Study (2017) and Divestiture Study (1999)