PUBLIC VERSION

# A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS

***Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission***

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Director

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

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**Executive Summary**

This Report[1] discusses the Commission's on-going Divestiture Study. It evaluates the results of numerous interviews, conducted in a case-study format, for insights into the Commission's divestiture orders and divestiture process. It discusses the enforcement policies reflected in those orders and in the divestiture contracts undertaken between the respondents and proposed buyers. This description of divestiture policy and practice is intended to give persons inside and outside the Commission a common framework in which to discuss both general divestiture policies and their application to specific cases. That policy will continually evolve in response to the facts of specific cases and the Commission's conclusions about the effectiveness of its orders.

Since passage and implementation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act"), the Commission's on-going Divestiture Study is the first systematic review of orders requiring divestiture that seeks to determine how well buyers of divested assets have fared operating the assets they acquired as a result of the Commission's order. The Study was designed to investigate whether there were systemic reasons why some of the post-HSR divestitures failed to achieve the Commission's remedial objectives.

The Study includes the Commission's orders, issued from 1990 through 1994, that required divestiture to remedy anticompetitve effects resulting from a merger or acquisition. It focuses primarily on the buyers of divested assets, because divestiture orders are fundamentally different from both other orders imposed by the Commission and remedies commonly ordered by courts or other agencies. Typically an order requires the respondent or defendant to perform certain actions. Although a divestiture order mandates that the respondent perform an action (divestiture of identified assets), disposal of the assets is not sufficient by itself to accomplish the objectives of a Commission order. The divestiture must be to a suitable entity -- one that can replace the competition lost as a result of a merger -- and the Commission must be able to approve both the buyer and the manner of divestiture. This post-order approval process is required because maintaining or restoring competition is as much a function of who the buyer is and the circumstances under which it is acquiring the assets from the respondent as it is a function of what assets are divested. Consequently, insights from the on-going study (and the policies they have fostered) concern the effects on the buyer of provisions in divestiture orders and provisions in divestiture contracts, and the business plans of the buyers of divested assets.

The Study has suggested some rules of thumb about what kinds of divestiture orders are most likely to be successful. The Study also provides a picture of the dynamics of the divestiture process. The case studies describe an informational and bargaining imbalance between the

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[1] This Report is a public version of the report on the Divestiture Study submitted by staff to the Commission. The Commission determined to make the results of the Divestiture Study public and invite comments from the public to facilitate a discussion of the results. In order to maintain the confidentiality of the participants in the Study, the Report does not identify buyers of divested asset or respondents by name. Buyers are, instead, identified by a randomly assigned number and are referred to as "Firm [Number]."

respondents on the one hand and the staff and the buyers of divested assets on the other hand, particularly where the buyers have never operated in the industry and never operated the to-be-divested business. The buyer's disadvantage translates into an obstacle to creating effective remedies because the staff has relied to a large extent on buyers and potential buyers to inform itself about the adequacy of the assets that are included in the divestiture package. This imbalance is exemplified by the many buyers that told of similar mistakes, of difficulties with technology transfers, and of inadequate assistance from respondents. In addition, the interviews have produced examples of how buyers have overcome problems with their divestitures in unique ways.

The Report recommends that the Commission include a variety of order provisions and divestiture procedures to correct the informational and bargaining imbalance. Thus, negotiations between staff and respondents may focus more on the question of whether risks of a failed divestiture will be reduced than on whether a particular provision was included in a previously issued order. With this greater understanding of the incentives of respondents and buyers of divested assets, the discussion of order provisions and divestiture contracts can focus on the issues that are inherent in the divestiture process without impugning the integrity of any party.

Partly as a result of the Study, staff has begun recommending provisions that may provide greater assurances that the divested assets will be viable and that they will be able to compete in the market in which the Commission has found a competitive problem. In more recent orders, the Commission has, among other things:

- reduced the time it allows for respondents to complete their divestiture obligation;
- required the divestiture of related assets to ensure the viability of the divested business;
- limited the scope and duration of any on-going relationships between the buyer of the divested assets and the respondent;
- limited the rights of respondents to revoke rights granted under the divestiture contracts;
- relied less on the assessment of potential buyers about the viability of assets included in a divestiture order;
- required persons acquiring assets to submit an acceptable business plan for those assets;
- required that respondents facilitate the transfer of knowledgeable staff to the buyer;
- used auditor trustees to monitor the transfers of technology to the buyer and the technical assistance provided by the respondent;

- provided for the redivestiture of certain types of assets where the buyer fails to exploit them; and
- provided for the divestiture of additional assets by a divestiture trustee where the respondent has failed to fully divest assets within the time required by the order.

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## I. Divestitures Since the HSR Act

Prior to the passage of Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"),[2] the federal antitrust agencies were often unaware of corporate mergers before they occurred and were frequently unable to fully restore competition following anticompetitive mergers. Thus, despite the many litigated victories by the antitrust agencies following the passage of the Cellar-Kefauver Amendments to the Clayton Act in 1950, doubts were raised about the efficacy of the remedies obtained in these post-merger lawsuits.[3]

Congress sought to address the problem of failed divestitures through the premerger notification required by the HSR Act. This section of the Report begins with a description of the Congressional objectives that led to passage of the Act and is followed by a description of how the antitrust agencies developed remedial policies that are responsive to the various concerns outlined in the legislative history.

### A. Objectives of the HSR Act

The legislative history of the HSR Act identifies two types of problems that were addressed by the HSR Act: interim harm to competition and the inability to fully restore competition.[4] The first is the loss of competition that follows an unlawful merger. Elzinga and

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[2] The premerger notification program was established by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, section 7A of the Clayton Act, 15 U.S.C. § 18a. It is commonly known and referred to in this Report as the "HSR Act" or "Act." The regulations that implement the Act became effective on August 30, 1978.

[3] Elzinga's classic study showed that 35 of 39 pre-HSR orders, issued in cases involving mergers that occurred prior to 1960, did not establish an independent competitor in a timely fashion. Kenneth G. Elzinga, "The Antimerger Law: Pyrrhic Victories?" 12 J. LAW & ECON. 43 (1969). Rogowsky came to the same conclusion after examining 104 divestiture orders that were issued between 1969 and 1980. R. Rogowsky, *An Economic Study of Antimerger Remedies*, Dissertation Thesis, U. Va. (1982). He ranked over 80 percent of the orders as unsuccessful. Both studies found, on average, the divestitures occurred more than five years after the anticompetitive acquisition had been consummated.

[4] The Senate Report on the proposed legislation emphasized the need for a more effective antitrust remedy than post- acquisition divestitures in merger cases when it quoted then Assistant Attorney General Thomas Kauper:

> [D]ivestiture of stock or assets after an illegal merger is consummated is frequently an inadequate remedy for a variety of reasons:
>
> Assets may be scrambled, making re-creation of the acquired firm impossible. Key employees may be lost. The goodwill of the acquired firm may be dissipated, making it a weaker competitive force after divestiture.

(continued...)

Rogowsky's studies of merger orders issued prior to the HSR Act found that divestitures typically occurred more than five years after the anticompetitive merger transaction.[5] In such cases, a lawsuit successfully challenged the transaction and relief was ordered and obtained, but consumers and the market were damaged by the loss of competition until the remedy became fully effective. This interim competitive harm is likely to occur as a result of any unlawful transaction and therefore the public cannot be fully protected unless the transaction is prevented.

The legislative history also catalogs a second problem in its litany of difficulties in reestablishing competition after a merger of competing firms. Some mergers result in the destruction of productive resources: for example, a glass making furnace, if turned off because it was redundant in the merged entity, must be reconstructed before a divestiture remedy can be effective because the furnace immediately becomes inoperable as a result of cooling. Other mergers result in the firing of employees because their knowledge is duplicative. Once dispersed, these employees may be impossible to rehire, and important knowledge may be unavailable to any entity that buys the divested assets.

Even worse than the loss of particular elements of a business is the destruction of the organic nature of an ongoing business acquired in the merger. In some cases, this destruction can be readily identified as the loss of credentials as a "qualified" supplier to specific customers. In other cases, it is the loss that relates to the more general notion of customer acceptance and reputation or goodwill that is attached to an ongoing business. In still others, the terminated business may be impossible to reconstruct by a buyer of the divested assets if the business depended on complex operations that included evolved procedures that no one had specified. In such instances, even former employees may have failed to realize the significance of these procedures and could not help recreate them.[6]

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[4] (...continued)

> Moreover, divestiture is normally a painfully slow process, and in some cases might never occur. Locating an appropriate buyer willing to purchase at a reasonable price is frequently difficult. Firms under divestiture orders may deliberately delay to reap the benefits of the unlawful merger. During these delays, anticompetitive consequences grow.

Senate Report No. 94-803, 94th Cong., 2d Sess (1976), "The Antitrust Improvements Act of 1976," Report of the Committee on the Judiciary to Accompany S. 1284, Part 1 ("Senate Report") at 65.

[5] *See* note 3, *supra*.

[6] Even when all the employees remain on the job and the machinery is moved to a new location, firms sometimes find it very difficult to reestablish effective production. *See, e.g.,* the description of difficulties the Borden company faced when it transferred the manufacturing of Liedekrantz cheese in V. Marquis and P. Haskell, THE CHEESE BOOK 23 - 24 (1965); and the similar story when R. J. Reynolds attempted to expand its aluminum foil division by buying Archer Products, a gift wrapping firm, in R. Miles, COFFIN NAILS AND CORPORATE STRATEGIES (continued...)

The Congressional committees did not try to grapple with the difficulties posed by divestiture orders. Rather, their solution -- offered by the HSR Act -- was "to detect and prevent illegal mergers prior to consummation."[7] Thus, the Senate Report suggests that problems associated with divestiture -- interim competitive harm and reconstituting competition -- might disappear as a result of prior notice under the Act.

### B. Implementation of the HSR Act

The HSR Act did not end the use of divestitures as antitrust remedies in merger cases; to the contrary, divestitures have continued to be the most common remedy in merger orders. These orders, however, differ from pre-HSR orders in several respects. Unlike their predecessors, Commission orders arising out of a merger reported pursuant to the HSR Act are almost always negotiated and entered prior to consummation of the reported merger. The requirement of premerger notification enables the antitrust agencies to insist that parties agree to remedies, including divestitures, before they permit the parties to consummate their transactions. And the agencies insist that divestitures be subject to their prior approval. Thus, for the large class of mergers subject to the HSR premerger notification requirements, the Act largely reversed the unfortunate history of merger enforcement in which the agencies had been unable to prevent or remedy anticompetitive mergers.

Furthermore, with experience, the agencies improved techniques to prevent the commingling of business operations that made pre-HSR divestitures so difficult. As Congress had noted, commingling operations creates problems. It sometimes destroys the possibility of future competition based on trade secrets or it can establish a basis of coordinated marketing that might not necessarily disappear with divestiture. Requirements that respondents divest assets quickly, and that they maintain viability of or hold separate the to-be-divested business address some of the remedial difficulties identified in Congressional hearings.

However, passage of the HSR Act did not eliminate entirely problems associated with commingling in merger cases. Divestiture orders typically require the sale of only a portion of the acquired or acquiring firm to a third party. Separating that set of assets, or portion of a firm, may be like separating the commingled assets in pre-HSR divestitures if the to-be-divested assets were never operated as a stand-alone business. These problems can be exacerbated when the to-be-divested assets are units of the acquiring firm rather than parts of the acquired firm. It is likely that the acquiring firm will retain competitively important information about the unit as a result of having operated it. Separating out portions of companies for divestiture may destroy the organic integrity of competing businesses that Congress sought to preserve when it passed the HSR Act. For example, the transfer of less than the entire business may result in the buyer of the divested assets having to requalify as a supplier, or the buyer may obtain full production assets but lack the experienced work staff and thus not obtain the know-how to operate as efficiently as

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[6] (...continued)
132 (1982).

[7] Senate Report at 65.

the business eliminated by the merger. Accordingly, for these divestitures of less than an entire business, there is less assurance that the purchaser will acquire a viable business entity, much less one that will be able to maintain fully the competition that existed prior to the merger.

### 1. Early post-HSR divestiture policies at the FTC

In fiscal 1979, the Commission began the HSR Act era by requiring ten divestitures in eight orders. A review of these orders shows the following:

- All of the divestitures were subject to the prior approval of the Commission.
- The time permitted the respondent to divest varied from one year to two years from the date the order became final with an average time of more than 16 months from the date the order became final.
- Six of the ten divestitures expressly required the respondent to maintain the viability of the assets to be divested.
- Only one of the sets of assets to be divested was required to be held separate by the respondent pending the divestiture.
- None of the orders authorized the Commission to appoint a trustee to divest the assets if the respondent failed to divest within the period required by the Commission.
- None of the orders authorized the Commission to require the divestiture of additional (crown jewel)[8] assets if the respondent failed to divest within the period required by the Commission.

Respondents successfully divested within the required time period in seven of the eight cases; however, in the two orders requiring two sets of assets to be divested, the respondent in each case failed to make a timely divestiture in one of the two. Thus, three of the ten divestitures were late.

In the following six years, fiscal year 1980 through fiscal year 1985, the Commission entered an additional 37 final orders in merger cases. Eleven of the ordered divestitures were completed after the time required in the Commission's orders. All of these divestitures eventually occurred, however, including one that was subject to lengthy litigation and the

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[8] Crown jewel provisions are provisions in an order that provide authority to divest additional assets if the defendant fails to divest within the time period required by the order. In general, the additional assets supplement those in the initial divestiture provision to ensure the saleability of the divestiture package by potentially enlarging the pool of acceptable buyers. For example, where only a product line is required to be divested, the crown jewel provision might require the divestiture of the entire division that makes that product and other products.

payment of a $4 million civil penalty.[9] Overall, this was a dramatic success when compared with the federal antitrust merger enforcement efforts prior to the passage of the HSR Act.[10]

### 2. Divestiture orders in the mid-1980s

In addition to the 47 final orders that the Commission entered between 1979 and 1985, it also authorized 17 preliminary injunction actions to prevent consummation of proposed mergers.[11] As early as 1980, the Commission included a crown jewel provision in an order that transferred to a Commission-appointed divestiture trustee the right to sell the assets and allowed the trustee to add assets to make the package more saleable. With more experience, the Commission required the respondent:[12]

- to maintain the assets to preserve the viability of the divestiture package pending completion of the divestiture;
- to hold assets separate and to refrain from exercising any control over the acquired entity until the divestiture was complete;

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9 *Louisiana Pacific Corp.,* FTC Docket No. C-2956, 93 F.T.C. 308 (1979) (Decision and Order), *enforced*, 554 F. Supp. 504 (D. Ore. 1982), *civil penalty award vacated*, 754 F.2d 1445 (9th Cir. 1985), *remanded,* 654 F. Supp. 962 (D. Ore. 1987) (Commission ordered to reopen order and consider modification), *appeal dismissed*, 846 F.2d 43 (9th Cir. 1988) (district court's order not appealable), *pet. to modify order denied*, 112 F.T.C. 547 (1989) *enforced*, 1990-2 Trade Cas. (CCH) ¶ 69,166 (D. Ore. 1990) ($4 million civil penalty reimposed), *civil penalty award affirmed*, 967 F.2d 1372 (9th Cir. 1992).

10 The total effect of the Commission's merger enforcement effort under the HSR Act was presumably much greater than is reflected in these numbers. In 1979, for example, 14 transactions were abandoned after the Commission issued a request for additional information pursuant to the HSR Act. Moreover, the requirement of premerger notification is likely to have deterred still other parties from undertaking mergers that would receive premerger scrutiny and would be likely to be blocked. *See also* W. Baer, "Reflections on Twenty Years of Merger Enforcement under the Hart-Scott-Rodino Act," 65 Antitrust Law Journal 825 (1997).

11 Some of these injunctions matters were ultimately resolved by final Commission orders requiring divestitures, others were either prohibited by the court or abandoned by the parties either before or after litigation of the preliminary injunction action.

12 *See, e.g.*, *Texaco, Inc.*, FTC Docket No. C-3137, 104 F.T.C. 241 (1984) (Decision and Order); *Chevron Corp., et al.*, FTC Docket No. C-3147, 104 F.T.C. 597 (1984) (Decision and Order), *modified*, 105 F.T.C. 228 (1985) ; *L'Air Liquide, SA*, FTC Docket No. C-3216, 110 F.T.C. 19 (1987) (Decision and Order), *modified*, 111 F.T.C. 135 (1988), *further modified*, 117 F.T.C. 473 (1994), *set aside*, 121 F.T.C. 95 (1996); *Supermarket Development Corp*., FTC Docket No. C-3224, 110 F.T.C. 369 (1988) (Decision and Order), *modified*, 117 F.T.C. 473 (1994), *further modified*, 130 F.T.C. 613 (1995).

- to agree to the appointment of a divestiture trustee if the respondent failed to divest within the time required by the order; and,

- to seek and obtain the prior approval of the Commission before acquiring other businesses within the complaint market. [13]

The structure of the Commission's orders in this period, however, exhibits a great deal of variety. In part, this was a consequence of the fact the Commission did not have the experience to determine which provisions, if any, should routinely be included. Also, the case specific negotiations provided parties a forum in which to argue that particular provisions should not be imposed in their case. If a transaction seemed to present a serious threat of competitive harm, but also included significant elements of litigation risk, and the divestiture appeared as if it could be readily accomplished, it may have been most effective to accept a consent order even if it did not contain the most desirable structure. The structure of orders during this period was made more difficult to understand when parties argued the precedential effect of inconsistent settlements. Some parties successfully resisted order provisions on the grounds that it was unfair to impose provisions on them when other orders did not uniformly contain such provisions.

#### 3. Licensing remedies

In the early 1990s, the Bureau of Competition began experimenting with a new type of remedy in merger orders that required the divestiture (or license) of intangible rights in order to facilitate entry by a new competitor. The so-called "licensing remedy" was a departure from existing policy in two ways. First, the effectiveness of the remedy depended largely on the resources, technology, and business ability of the licensee to exploit the intangible rights. Initially, at least, this remedy made no attempt to preserve the "organic integrity" of the business eliminated by the merger. Second, the remedy did not immediately establish a competitor with production capability, customers and market share; instead, it facilitated entry into the market.

### C. Authorization of the Divestiture Study

In 1995, the Bureau of Competition and the Bureau of Economics staff developed a project to analyze the efficacy of the Commission's existing divestiture orders. This project combined on-going research efforts by the Compliance Division of the Bureau of Competition and the Economic Policy and Analysis Division of the Bureau of Economics.[14] The limited data

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[13] *Murata Manufacturing Ltd.*, FTC Docket No. C-3053, 96 F.T.C. 116 (1980) (Decision and Order).

[14] Despite the success of the HSR merger enforcement program, at least a few orders had not resulted in effective relief. For example, in one case the buyer scrapped the divested assets and resold them for a profit rather than go into business. *Flowers*, FTC Docket No. 9148, 102 F.T.C. 1700 (1986) (Decision and Order), *modified*, 107 F.T.C. 403 (1986), *preliminary injunction granted*, 1988-1 Trade Cas. (CCH) ¶ 67,950 (M.D. Ga. 1988), *vacated & remanded*
(continued...)

previously available in the Commission's records have tracked divestitures only to the point that the Commission approved the contract and the assets were divested. There was no requirement that the person acquiring the assets report on its success with the assets, and there is little public data that allow calculating the impact of the divestitures on the markets affected by the mergers. As a result, most of the earliest efforts focused on identifying divestiture orders and the provisions included in those orders, and determining whether the divestitures occurred within the times required by the orders.

In 1995, the staff recommended that the Commission undertake a systematic study of the Commission's divestiture process that would expand the information obtained about Commission-ordered divestitures by, for the first time, questioning buyers of divested assets about the results of the divestiture process. The Study was undertaken in two parts: a pilot study undertaken to test the methodology, followed by an expanded study of divestitures from a selected time period.[15] The pilot study established that useful information could be obtained from a case study method, and the Commission then obtained authorization from the Office of Management and Budget to conduct the expanded study of divestitures.[16]

## II. Findings from the Divestiture Study

### A. Background of the Study

The Study covers divestiture orders entered from fiscal year 1990 through fiscal year 1994, and includes 35 orders in which the Commission required the divestiture of assets, including licensing of intellectual property. This time period was chosen because it is long

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[14] (...continued)
*for dismissal*, 849 F.2d 551 (11th Cir. 1988), *pet. for reh'g denied*, 858 F.2d 746 (11th Cir. 1988). In *Rhone-Poulenc S.A. et al.*, FTC Docket No. C-3287, 113 F.T.C. 329 (1990) (Decision and Order), Rhone-Poulenc was required to offer a license to any applicant, but no applicants came forward. In another case, the respondent failed to find an acceptable licensee as required by the order. *Institut Merieux S.A.*, FTC Docket No. C-3301, 113 F.T.C. 742 (1990) (Decision and Order), *modified*, 117 F.T.C. 473 (1994).

[15] Pursuant to the Paperwork Reduction Act, 44 U.S.C. § 3501 - 3520, the Commission could contact only nine participants before obtaining authority from the Office of Management and Budget to conduct a more extensive study. The pilot study was designed as a case history study, based primarily on open-ended telephone interviews with the buyers of divested assets in each of the nine cases selected for the study. The buyers were cooperative and forthcoming, providing helpful details about the divestiture process from their perspective. *See* W. Baer, "Report from the Bureau of Competition," American Bar Assn, Section of Antitrust Law, 1998, for a discussion of the results of the pilot study.

[16] The Commission published its request to conduct the expanded study in the Federal Register on October 31, 1996. In March 1997, OMB granted approval to conduct the study for an initial period through July 1998. In August 1998, OMB granted a renewal of that approval for a period ending on December 31, 1999.

enough ago for effects to have been felt in the market, but recent enough for memories to be fresh. The Study included the fifty buyers to whom respondents divested assets pursuant to these orders. Staff interviewed 37 out of the fifty buyers. Staff interviewed an additional eight respondents and two third parties. One additional buyer and one additional respondent declined a request for an interview. Staff was not able to schedule interviews with the remaining buyers and respondents.

The orders included in the Study represent a broad sampling of industries and asset packages, including retailing, services, end-use goods, and various inputs. The orders in the Study required divestiture of a variety of packages of assets, ranging from virtually autonomous subsidiaries to non-exclusive licenses to particular patents and know-how. In addition, the buyers appear to have been just as varied, running the gamut from large international, multi-divisional firms to individual entrepreneurs seeking new business opportunities. The price paid for the assets range from one dollar to more than a hundred million dollars. And the success that the buyers had after acquiring the assets to be divested also varied widely, from firms that had an almost immediate impact by growing share, introducing new products, and lowering prices to firms that were never able to sell the first widget.

### B. The Study supports the view that divestitures have been successful remedies for anticompetitive mergers

The Divestiture Study has produced three general findings: first, most divestitures appear to have created viable competitors in the market of concern to the Commission; second, respondents tend to look for marginally acceptable buyers and may engage in strategic conduct to impede the success of the buyer; and third, the Study has unexpectedly indicated that most buyers of divested assets do not have access to sufficient information to prevent mistakes in the course of their acquisitions. Evidence that most Commission-ordered divestitures have contributed to the maintenance or reestablishment of a competitor supports the usefulness of the Commission's divestiture remedies. Staff had assumed that respondents would seek marginal buyers and might engage in strategic conduct, but it had relied, in part, on the assistance of the buyers in defining the package of assets to be divested and the terms of the divestiture contract as a counterbalance to the respondents' conduct. Evidence of widespread mistakes by buyers of divested assets has, however, changed how the staff examines proposed divestiture orders and prospective buyers.

Even though the methodology of the Study is based on case studies, the interviews support some numerically based findings about divestitures. Those findings include: (1) three-quarters of the divestitures included in the Study succeeded to some degree; (2) divestitures involving on-going businesses tended to succeed more frequently than divestitures of selected assets; (3) continuing entanglements and relationships between buyer and respondent post-divestiture often presented unexpected problems for some buyers, increasing their vulnerability, but may have been critical to the success of other buyers; and (4) smaller firms succeed at least at the same rate as larger firms and, therefore, should not be presumed to be less competitive buyers than larger firms.

In addition to these numerically based findings, the case studies also illustrate why particular orders were or were not successful and what provisions in the orders or divestiture

agreements helped or hurt the particular buyers. The case studies allow the staff to refine its identification of order and contract terms and buyer characteristics so as to increase the likelihood that a divestiture remedy will succeed.

### 1. Almost all required divestitures occurred

Divestitures occurred in each of the 35 orders included in the Study. In some of the orders, multiple buyers were involved. For example, in cases where retail locations were ordered to be divested, there might have been a different buyer for each site. In a case where the assets to be divested included more than one product line, there might have been a different buyer for each line. As a result, in the 35 orders covered by the study, the Commission approved fifty divestitures.[17] As noted, we were able to study 37 of the fifty.

### 2. Three-quarters of the divestitures studied appear to have been successful

The Study also examined whether, after acquiring the assets, the buyer was able to operate in the relevant market and what effect, if any, the buyer has had in that market. The Study was not designed to conduct a complete competitive analysis of the relevant markets or draw definitive conclusions about how any of these markets are performing. Instead, it attempted to draw conclusions about whether the buyer of the divested assets was able to enter the market and maintain operations.[18] As a result, the interviews focused on more immediate questions: how quickly was the buyer able to begin operations in the market, what was the sales volume of the buyer at the time of divestiture and afterwards, what prices was the buyer charging, has the buyer introduced new products, does the buyer believe that the respondent has reacted to the buyer's entry in the market, and does the buyer consider the divestiture successful. The Study

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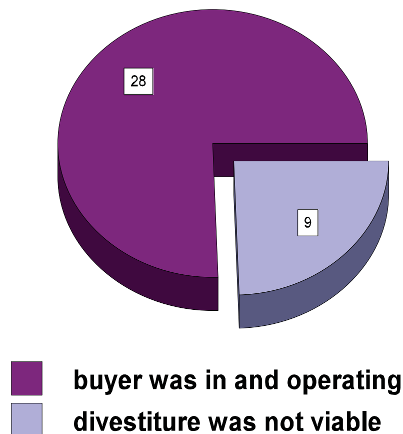
[17] In a few orders, there were additional divestitures required that never occurred. In *Promodes*, the order was reopened and modified to eliminate the requirement that the respondent divest five out of the six retail outlets identified in the order. *Promodes,* FTC Docket No. 9228, 113 F.T.C. 372 (1990) (Decision and Order) (modified May 21, 1993; January 28, 1994). The *S.C. Johnson* order was reopened and modified on November 8, 1993, to eliminate the requirement that respondent divest rights to the Renuzit air freshener business outside the United States. Dial, the buyer of the U.S. business, had no operations outside the United States and did not want or need the foreign assets. Following a showing that no other firm was interested in purchasing solely the foreign rights and in consideration of the complaint's allegation of a United States geographic market, the Commission relieved S.C. Johnson of its obligation to divest those foreign rights. *S.C. Johnson & Son, Inc.*, FTC Docket No. C-3418, 116 F.T.C. 184 (1993) (Decision and Order), *modified*, 116 F.T.C. 1290 (1993). But these are certainly exceptions, not the rule. Most required divestitures happened in the manner approved by the Commission.

[18] Staff has, however, been mindful of the fact that the success or lack of success of a particular divestiture may be attributable, at least in some part, to competitive conditions that existed at the time the relief was ordered.




sought to confirm the effect of the buyer's entry and the nature of the effect by interviewing the buyer and, where possible, the respondent. Where the buyer was able to begin operating in the relevant market relatively quickly and had the ability to compete effectively in that market, the operations were considered viable and the purposes of the divestiture were deemed to have been achieved.

Of the 37 divestitures that were studied, 28 appear to have resulted in viable operations in the relevant market. In each case, the approved buyer acquired the assets, began operations, and was operating in the relevant market within a reasonable period. In some of these cases, the buyer reported that it introduced new products, it is pricing below the respondent, or it is taking share from the respondent. In the remaining nine divestitures, the buyers are not operating viably in the relevant market. (In one of those nine, the buyer was operating viably, but not in the relevant market of concern to the Commission; in another, the buyer was operating viably but not independently of the respondent.). Approximately 75 percent of the divestitures were successful. This is comparable to the success rate reported for privately negotiated mergers and acquisitions.[19]

### 3. Divestitures of on-going businesses succeeded at a higher rate than divestitures of selected assets

The Study indicates that divestiture of an on-going business is more likely to result in a viable operation than is divestiture of assets selected to facilitate entry. The general notion that the sale of an on-going business is more likely to be successful in establishing a competitor than the sale of less than an entire business seems intuitively obvious and is consistent with the reasons for Congressional concern about a lack of organic integrity of divested businesses. It was important in the Study to attempt to examine how much of a disadvantage was posed by partial divestitures, because the Commission has approved in recent years an increasing number of partial divestitures that are designed to restore competition by facilitating entry rather than by maintaining a competitive entity.

The definitions of the assets to be divested in the orders studied fall along a continuum: on one end of the continuum is a package defined to include all the assets necessary to effect an

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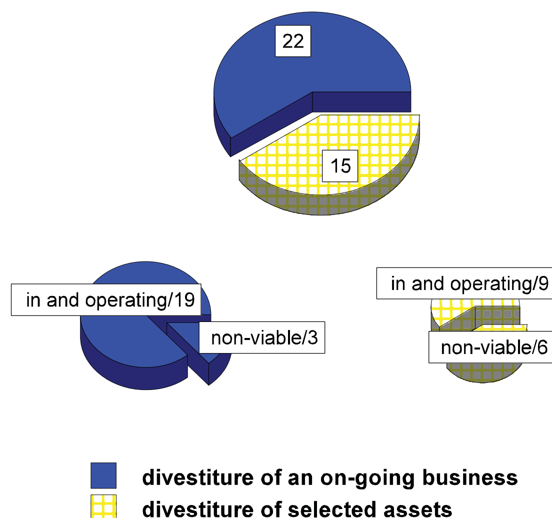
[19] Ravenscraft and Scherer, for example, suggest that "roughly a third" of their sample of private transactions were viewed as failures by the acquiring firms. D. Ravenscraft and F.M. Scherer, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY 192-93 (1987). Michael Porter's contemporaneous review of the acquisitions puts the failure rate much higher. He found "more than half" the acquisitions he studied were sold off because they did not meet the acquiring firm's expectations. Porter, "From Competitive Advantage to Corporate Strategy," HARV. BUS. REV. 45 (May-June 1987).

immediate and potentially long-term transfer of the market share attributable to those assets. On the other end of the continuum is a package defined by carving out only those assets identified as necessary to facilitate entry. In the first case, the assets include most typically an established customer base, a fully staffed facility of some sort (a manufacturing facility or a retail operation) or an otherwise self-contained business unit that may have product contract packed, a manufacturing and/or sales force, perhaps a research and development team, and other assets that are included in the business, including ancillary agreements and third-party contracts. This type of divestiture should result in the almost immediate transfer of market share from respondent to buyer. Most of the packages of assets labeled as "on-going businesses" had not, however, actually been operated as autonomous businesses before the divestiture; nevertheless, they were characterized this way because the market share attributed to the assets could be transferred immediately and potentially for the long-term. A buyer could buy and be operational the next day, selling to all of the same customers.

At the other end of the continuum, some divestiture packages contain a set of assets that are designed to facilitate entry (in the expectation that the competition lost by a merger will eventually be replaced by the buyer) rather than an on-going business. These assets are typically intellectual property, technology or know-how, brand names, research and development, and/or selected pieces of equipment. In these cases, there is no on-going business; thus, there will be no immediate transfer of market share. Instead, the Commission has required divestiture of those selected assets that a firm might need to overcome the existing impediments to entry. The buyer must bring with it whatever else is needed to complete the picture and enter the market. The buyer may be unable to produce the product itself immediately because it may have to modify its existing facility independently, qualify the product with customers, or obtain necessary governmental approvals. Because the buyer is not simply stepping into the shoes of an existing competitor operating an on-going business, entry may not be immediate and the effects not immediately known.




Of the 37 divestitures that were studied, 22 were of assets that comprised on-going businesses. Of those 22, 19 were viable in the relevant market virtually immediately after the divestiture. Of the three that were not: one involved divestiture of a business that was not viable at the time of the divestiture; one involved divestiture of a business that was not operated independent of respondent after the divestiture; and one involved a business that was not really operating in the relevant market at the time of divestiture, and the buyer of the business did not subsequently enter that market. Of the 15 divestitures of selected assets, nine resulted in viable firms; five were so problematic that the results were not viable,

and one was not operating independently of the respondent in the relevant market.

The Study thus suggests that divestiture of an on-going business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets and provides support for the common sense conclusion that the Commission should prefer the divestiture of an on-going business. The Study nevertheless indicates that divestitures of selected assets can succeed. Where the Commission determines that the divestiture of an on-going business is undesirable because it would destroy the efficiencies of a merger, the case studies indicate ways that the higher risks associated with a partial divestiture can be reduced. As is discussed in Section II.C. below, these risks can be reduced by affording greater protection to the buyer of the divested assets by including provisions requiring the use of auditor trustees, rights to hire employees, rights to technical assistance, and supply contracts.

#### 4. Continuing relationships with respondents post divestiture may increase the vulnerability of buyers of divested assets but may be critical to the success of some buyers

The case studies indicate that relationships between the buyer of divested assets and the respondent, which continue beyond the transfer of the divested assets, may increase the vulnerability of the buyers of the divested assets, particularly in those cases in which the divested assets comprise less than an on-going business. However, the continuing relationships between the buyer and respondent may often have been critical to the success of the buyer of the divested assets. These conflicting results emphasize the complexity of the issues surrounding these continuing relationships.

Nineteen of the 37 buyers that were interviewed maintained some sort of continuing relationship with the respondent after the divestiture was consummated.[20] Of the nineteen, in six cases the continuing relationship was so detrimental that it prevented the buyer from operating competitively in the market. In an additional seven cases, the continuing relationship was harmful to the buyer, but not so harmful as to prevent the buyer from operating in the market competitively. In the remaining six cases, continuing relationships such as supply contracts or technical assistance obligations were not only helpful to the buyer but were critical to the subsequent success of the buyer.

Based on the numbers alone, it appears that staff should be concerned about cases in which these relationships continue post-divestiture. But it is also clear from the interviews that in some cases continuing relationships are necessary to ensure the success of the buyer, particularly in those cases in which less than an on-going business is divested.[21] As described in

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[20] One additional buyer was entitled to technical assistance post-divestiture but chose not to use it, relying on its own know-how instead.

[21] Of course, those are the very cases in which these continuing relationships were most responsible for the inability of the buyer to compete viably in the market. In seven out of

(continued...)

Section II.C. below, the information obtained from the case studies allows for some understanding of which types of relationships can be productive and what protections can be written into the Commission's orders or required in the divestiture contracts to maximize the usefulness of the relationships.

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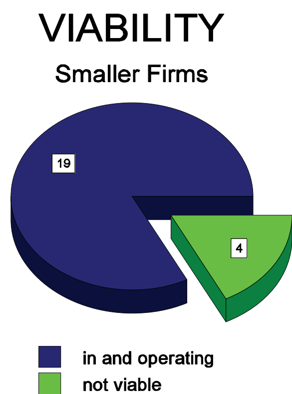
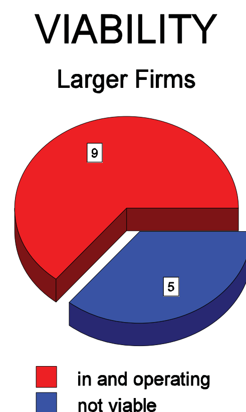
[21] (...continued)
the nine cases labeled "not viable," some sort of relationship between respondent and buyer survived post-divestiture and in some way contributed to the nonviability of the divested assets.

### 5. Smaller firms appear to succeed at least at the same rate as larger firms

The Study indicates two and perhaps three characteristics of buyers that increase the chances for success of the divested business: knowledge of and experience in the business; commitment to the business; and, for a combination of reasons, the size of the buyers.[22]




While a large majority of the divestitures to large and small firms were successful, the case studies indicate that smaller, more entrepreneurial firms have succeeded at least at the same as large, multi-divisional firms. Of 23 divestitures to smaller firms, three were found to be not viable.[23] Four of the 14 divestitures to larger firms were not viable.[24] The smaller firms' failure rate of 14 percent was less than the more than 30 percent failure rate of the larger firms. It, thus, seems important not to assume that smaller firms will be weaker competitors.




### 6. Summary

These general findings support useful rules-of-thumb for merger remedies. Divestitures can restore competition that would be lost as a result of a merger. Divestiture of an entire business is more likely to be successful than the divestiture of parts of a business. Buyers who must rely on respondents for continuing support to enter a business with the divested assets are more vulnerable than buyers who do not need that support. Small entrepreneurial firms have been at least as successful with divested assets as large corporations.

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[22] The factors that contribute to the success of any particular buyer – knowledge and experience, commitment, and size – are discussed in section II.C.

[23] An additional divestiture involved assets that the buyer was not operating independent of the respondent but which the buyer was operating profitably nonetheless. Thus, although the buyer was satisfied, the divestiture may not have fully restored competition to the market of concern to the Commission.

[24] An additional divestiture in this category involved divestiture of assets that were not in the relevant market at the time of the divestiture, and the buyer never entered the relevant market.

Although these general findings point toward types of divestitures that should be preferred, they do not provide specific guidance on how to formulate remedies in individual cases where more limited relief is pursued. Accordingly, the Study has examined the individual divestitures to assist in the staff's understanding of problems faced by the buyers of divested assets and how specific provisions of orders and divestiture contracts have helped or hurt the buyers.

### C. The Study presents a new view of the dynamics of the divestiture process, identifying obstacles to effective divestitures as well as ways to overcome the obstacles

#### 1. A new view of the dynamics of the divestiture process

Prior to the Study, staff had assumed that a rough balance of information and bargaining power existed between respondents and the buyers of divested assets. The Study indicates, instead, that buyers appear to be at a substantial disadvantage. For example, buyers who have not operated in the industry are at a severe disadvantage in defining what assets they need and determining whether they are receiving all the assistance to which they are entitled. Especially in orders that require the divestiture of less than an entire business, the buyers lack important information about the business that is being divested. This lack, this industry ignorance, is not the result of carelessness, of a failure to perform due diligence, or of poor judgment; it is an inherent characteristic of entering a new business. That disadvantage, and others that are discussed below, can be mitigated by some changes in the divestiture process.

Staff started the Divestiture Study with the common sense assumption that respondents do not seek out their strongest rivals to become buyers of the to-be-divested assets but instead tend to choose the most marginally acceptable buyer. The interviews with buyers of divested assets support that assumption. Some buyers believe that they were chosen because the respondents expected them to be weak competitors. It appears that some respondents hope, or even expect, these weak competitors will fail to successfully exploit the assets. Staff also assumed that respondents may take actions intended to make the divested assets less competitive, either as a result of indifference or as part of a planned strategy. The study provides support for that assumption as well.

Staff further assumed that respondents conduct would be balanced by the self-interest of those buyers who have the advantage of bidding on a compulsory divestiture that must be accomplished within a stated period of time at no minimum price. In other words, staff expected that a buyer's bargaining power would not be significantly less than that of the respondent in negotiating the divestiture contract. Furthermore, staff has relied on the fact that buyers were willing to enter into divestiture contracts as evidence that the divested assets were valuable and adequate to establish the buyer as a viable competitor to the respondent.

Contrary to these expectations, it appears that buyers generally perceived that they had much less bargaining power than respondents. Indeed, it appears that buyers tended to handicap themselves as a result of two factors. First, some seemed to be willing to trade away the competitive strengths and protection the order was intended to give them because they assumed

the divested assets were a bargain and they were afraid some other buyer would be chosen by respondent if they haggled. Second, many buyers, including large, apparently sophisticated, multinational corporations, seemed to be unaware of major economic factors in the businesses they were buying. Accordingly, they sometimes agreed to pay too much for the assets that they were acquiring or did not insist upon the transfer of necessary additional assets.

The lessons learned from the Study about the dynamics of the divestiture process have led the staff to alter its role in the process. To a greater or lesser extent, it had assumed a balance of bargaining power and information existed between the respondents and the buyers of divested assets. That presumed balance provided the staff and the Commission with a justification for accepting respondent's proposal when they were accepted by buyers. If the buyers signed purchase agreements and did not complain about what they received, that was evidence that the orders were likely to achieve their intended results. To be sure, the proposed divestiture remedy, the buyer, and the divestiture contract were examined carefully, but the presumption was that the buyer was in a position to adequately defend its interests. The Study suggests that the staff must attempt to balance the bargaining power between the buyers and respondents in order to protect the remedies that the Commission orders.

### 2. Obstacles to effective divestitures

#### a. Respondents

Respondents generally did what was required of them by the orders and little more. The buyers, however, reported three kinds of activity that respondents engaged in that could lessen the competitiveness of divested assets in the hands of the buyers: (1) respondents urged the Commission to define too narrowly the package of assets to be divested; (2) respondents urged the Commission to divest the assets to weak buyers; and (3) respondents took actions that diminished the viability of the business acquired by the buyers.

##### (1) Respondents urge limited divestiture packages

The divestiture package in consent orders is initially defined in a negotiation between the Commission staff and the respondent. With the benefit of the hindsight offered by the Study, it appears that some of the divestiture packages were not adequate to fully achieve the remedial purpose of the Commission's orders.

- **Firm 5** [25] purchased the right to produce three products made by respondent and the equipment on which the products were made, as the order required. It objected, however, that the order should have included a fourth product, which would have given Firm 5 a full line. Firm 5 attempted to negotiate the purchase of the rights to the fourth line from respondent, but respondent refused because the order did not require it. Firm 5 contended

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[25] To maintain the confidentiality of the participants in the Divestiture Study, none is identified by name. Instead, each buyer is referred to by a randomly assigned number.

that the order's failure to assure that the buyer would have access to a full line of products made it more difficult for the buyer to compete.

- **Firm 14** acquired from the respondent the technological specifications to produce a product related to Firm 14's product. The order also required respondent to supply critical raw material to Firm 14, but only on a limited basis. Firm 14 stated that it was fatally disadvantaged by the order's limitation on respondent's supply obligations. The restricted supply of indispensable materials prevented the buyer from securing a customer base that might have made the business viable.

- **Firm 22** acquired the assets that respondent was required to divest. The divestiture package, however, primarily involved assets that operated in a market unrelated to the complaint market. Firm 22 pursued the unrelated market to the exclusion of the market the Commission was concerned about.

**(2) Respondents may propose weak buyers**

Respondents are responsible for finding and proposing an acceptable buyer of the to-be-divested assets and completing the divestiture by the order's deadline. They are not required to choose the person likely to be the strongest buyer, and many buyers reported they had the impression they were chosen because respondent did not expect them to be a strong competitor.[26]

- **Firm 9** acquired the rights to manufacture a product from respondent, but was unsuccessful in its efforts to compete in the sales of that product. Firm 9 believed that it was chosen in part because it was a start-up company with no operational experience. Respondent and Firm 9 made a successful divestiture proposal on the grounds that the president of Firm 9 had significant expertise in the technical aspects of the complex production process and had the business backing of a successful venture capital firm. While the fact that Firm 9 failed does not necessarily mean that the Commission should not have approved the divestiture application, it appears that a firm with more business experience and more funds could have coped better with the problems that caused Firm 9 to fail.

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[26] Of course, the Commission is not required to accept whatever buyer respondent proposes. In fact, the Commission may disapprove a marginally acceptable buyer if a better buyer might be available. For example, where a proposed divestiture to an incumbent in the market would reduce concentration some but not enough to remedy the loss of competition, the Commission has denied the application for divestiture. In reviewing the Commission's decision in *Internorth, Inc.*, 106 F.T.C. 312 (1985) to approve a proposed divestiture of a pipeline interest to Teco instead of Valero, the pipeline partner, the district court in *West Texas Transmission L.P. v. Enron Corp. et al.*, 1989-1 Trade Cases (CCH) ¶68,424 at 60,334 (W.D. Texas 1988), *aff'd on other grounds* 907 F.2d 1554 (5th Cir. 1990), *cert. denied* 499 U.S. 906 (1991), stated that "the FTC was entitled to consider which of the competing applications -- Teco's or Valero's would better serve the remedial purposes of the Consent Order." That is, the Commission could approve the better applicant.

### (3) Respondents may engage in strategic behavior to impede the success of the buyer

Buyers also reported that actions of respondents undermined the businesses that they acquired. Some buyers believe these included actions that were intended by respondents to undermine the buyers' efforts to establish their businesses.

- **Firm 9** acquired from respondent the rights to manufacture a particular product. Until it was able to manufacture the product itself, Firm 9 contracted with respondent to supply the product to Firm 9. Almost immediately after the divestiture, however, respondent's production line went down and respondent was unable to supply product to Firm 9 for a significant period of time. In retrospect, Firm 9 suspects that respondent's failure to deliver was intentional because respondents's production line had never previously been closed down for that length of time.

- **Firm 17** acquired the rights to produce a line of consumer goods from respondent. Firm 17 reported that, prior to the divestiture, respondent had access to confidential information about the product it was required to divest and that, after the divestiture, respondent used that information to undermine Firm 17's introduction of a new product by simultaneously introducing a similar product.

- **Firm 28**, which also acquired rights to produce a line of consumer goods, reported a similar experience to Firm 17. According to Firm 28, when Firm 28 introduced the newly acquired product in a regional market, the respondent timed its test marketing of a similar product so that it disrupted the introduction of Firm 28's product.

Many more buyers reported that they suffered from respondents' failures to fully provide required technical assistance.

- **Firm 5** acquired the rights to produce three lines of product from the respondent and the equipment on which the divested lines of products were made. Respondent was also required to provide technical assistance to Firm 5. To comply with the technical assistance provision, the respondent sent an employee who had no prior experience with the divested equipment.

The experience of Firm 5 seems typical. In many other divestitures where the respondent was also required to supply inputs or provide technical assistance, buyers reported having had problems; the supply was late, the quality poor, the technical assistance unhelpful.

### (4) Respondents have adverse incentives

The Study did not find conclusive evidence that respondents violated any of the orders in the Study. Nevertheless, it is clear that even where respondents take no actions to deliberately disrupt the buyers' businesses, the respondents have no natural incentive to help the buyers, and that lack of incentive may put the divested business at risk. Where the respondent's assistance is

critical, even indifference by the respondent to the buyer's success may make the divested business fail.

In contrast to a Commission-ordered divestiture, the buyer and the seller in a commercial sale of a business either have or can construct incentives that provide both with incentives for a successful transfer of the business. For example, where the owner of a business is licensing technology, it has a natural reason to help the buyer successfully enter the business and maximize its sales. The licensor normally benefits from higher sales of the buyer because the licensor will realize higher royalties. Even where the seller makes an outright sale of its interests, the buyer has many ways in which it can tie its payments to the success of the transfer of the business operations. The buyer can use milestone payments based on the successful transfer of technology or insist on loans from the seller that are secured solely by the acquired assets. Similarly, the seller can protect itself by a license termination provision if the buyer does not live up to its obligations.

Each of these devices creates an on-going and natural community of interest between the buyer and seller. That community of interest may be critical to the success of the transaction because it is often difficult to fully specify in a contract all of the kinds of assistance that may be needed to transfer a business operation, especially if the transfer involves a complex technology or a business operation that is not fully transferred.

- **Firm 14**'s experience illustrates this reliance on natural incentives. Firm 14 stated that, prior to signing the divestiture contract with the respondent, it rarely had entered into written contracts with its suppliers or customers. All its agreements had been oral. It assumed for most of its business relationships that the relationships would work only if the participants had an on-going community of interest.

Divestiture orders and the contracts that implement them, however, are designed to avoid continuing relationships between respondents and the buyers of the divested assets. Establishment of a cooperative relationship between the parties would be inconsistent with the objective of maintaining or restoring competition. Given that respondents will not benefit from the establishment of a successful competitor, respondents have an incentive to minimize the assets that they divest and the assistance that they give to the buyers of those assets.

Accordingly, the Commission's divestiture process must take into account the adverse incentives of the respondent. Unless respondents' incentives can be altered, it is likely that most respondents will do only what is necessary to achieve a consent order and avoid civil penalties. Given the level of support that is necessary for many orders, that minimal effort may not be sufficient to obtain the remedies ordered by the Commission. Fortunately, the Study found that some respondents made special efforts to fully execute their obligations. A later section discusses suggestions based on these successes and other insights that may create incentives for respondents to be more helpful during the transitional process.

#### b. Buyers

This section begins with an extended discussion of transactions in which the buyers' lack of information led them to make mistakes when they acquired the divested assets. As noted earlier, the case studies indicate that the buyers had access to less accurate information about the to-be-divested assets than staff had supposed, and the buyers' interests in the assets were not as fully aligned with the Commission as staff had supposed. This discussion is long because the tendency of buyers to make mistakes is so counterintuitive that it requires elaboration to understand the fundamental quality of the errors. The extended discussion of buyer's knowledge is also warranted because that lack of knowledge feeds into other problems faced by buyers and by the staff's reliance on buyers. Lack of knowledge explains, in part, the findings of the following two discussions: why buyers bid against their own interests in negotiating disadvantageous deals with respondents; and why buyers do not complain to the Commission or the staff about difficulties that they encountered. The final section discusses transactions that illustrate that buyers may have very different objectives in buying assets than the Commission has when it orders their divestiture.

**(1) Buyers lack information**

Buyers generally lack important information about the to-be-divested assets. Interviewees (primarily from large corporations) emphasized this fact by stating that one reason they sought to acquire the assets was to learn about the business; entering a new market with the assistance of the knowledgeable employees of an established business represented for them a lower risk strategy than *de novo* entry. Because buyers lacked information, they made mistakes in connection with acquiring on-going businesses, as well as transfers of selected assets and pure technology transfers. Mistakes were made by large diversified corporations that had prior experience in making acquisitions, and by small entrepreneurial companies that had never made an acquisition. Only a small minority of these mistakes were fatal, but many may have lessened the competitive abilities of the buyers. The following examples suggest the range of typical mistakes.

- **Firm 1** was a large, successful, technologically sophisticated, multi divisional manufacturing firm that had been considering entry into a product market related to its own but based on technology with which it was not familiar. The assets that the respondent was required to divest used similar technology to that of the product market Firm 1 sought to enter and therefore fit within the firm's long-range plan. The firm acquired the fully staffed production facility, negotiated the right to hire some higher management personnel, and obtained the right to technological assistance for a period of time. The firm considered its operation of the assets to have been successful. It quickly learned the new technology, introduced new products without seeking any technological assistance, and expanded its market share.

  Firm 1 also learned after the acquisition, however, that it had paid more than what it later determined was a reasonable price for the assets. Firm 1 also discovered it had insisted on signing an uneconomic contract with respondent, under which respondent agreed to buy some by-products produced at the plant. After taking control of the plant, Firm 1 realized that the price it would receive for the by-products was far below the market value. Finally, Firm 1 discovered after the

acquisition that respondent had encouraged customers to stockpile products in advance of the sale to Firm 1 so that for a period of time after the acquisition Firm 1 had no customers.

- **Firm 12**, like Firm 1, was a large, successful, technologically sophisticated, multi-divisional firm seeking to enter a new, but related market, by acquiring an on-going operation that used a technology that was unfamiliar to Firm 12. As the order required, it acquired a production facility from respondent, which was dependent on inputs from other firms, and had to share costs of other services with these other firms. It therefore entered into contracts to obtain the inputs and shared services. Firm 12 quickly learned the technology and maintained the market share of that facility, but Firm 12 was more equivocal about claims of overall success.

  After the divestiture, Firm 12 discovered that the supply contracts and shared services contracts it had entered into were so disadvantageous that it could not operate its facility at a profit. Firm 12 stated that it made mistakes in entering into these contracts because it was inexperienced in negotiating shared costs and did not realize the complexities that such arrangements presented. It maintained, nonetheless, that the acquisition may prove to be worthwhile even though this facility will never be profitable, because it is exploiting the technology at other facilities that it owns.

- **Firm 4** was a small but diversified manufacturer that viewed its acquisition of the to-be-divested assets as a good opportunity to enter a new product market with an on-going manufacturing facility. Firm 4 entered into an agreement with respondent to obtain a supply of a necessary part for the product at a price that was profitable to Firm 4. The supply agreement was to last for a specified time period, by the end of which Firm 4 expected to have qualified a replacement supplier that was not also a competitor.

  At the end of the time period, however, Firm 4 had no replacement supplier and was therefore required to negotiate a new supply agreement with respondent, which contained a less favorable price. This higher price made Firm 4's operations unprofitable.

- **Firm 7** was a large, successful, technologically sophisticated, diversified manufacturing company. It acquired a brand name, a product formula and a stockpile of a key ingredient from respondent. Firm 7 believed that the product and the brand name fit well with Firm 7's other products. Rather than acquire only the amount of key ingredient that the Commission required to be divested at a fixed price, Firm 7 instead negotiated with respondent the acquisition of a larger amount at a price to be determined annually.

  After acquiring the assets, Firm 7 discovered that the product contained ingredients banned by one state, a fact that required the cost and delay of reformulation. Even more serious, by not bargaining for a price on the entire amount of the key ingredient, Firm 7 found that respondent had control of its

manufacturing costs for the several years that would be required to develop an alternative supply.

- **Firm 8** was a large, successful, diversified company with little manufacturing experience. Because it was one of the likely buyers of the to-be-divested assets, Firm 8 played a role in defining the package of assets to be divested. Firm 8 and other potential buyers asserted that they would be satisfied if respondent were required to divest a key input in the production of the product of concern to the Commission rather than the entire firm respondent was acquiring. Firm 8, which distributed this product, argued that the production process itself was uncomplicated and that it would be better off buying its own production machinery.

  The order required respondent to divest inputs of the buyer's choosing. Firm 8 found that the inputs it selected from respondent's stockpile were defective. In addition, the production machinery it acquired (independent of the order) was inappropriate. As a consequence, it was unable to enter the market of concern to the Commission as quickly as it had intended.

- **Firm 14** was a successful, medium-sized firm that manufactured a single product. It acquired from the respondent technological specifications to manufacture a product related to its single product, machinery to produce the product, and limited rights to acquire amounts of one critical raw material needed to make that product.

  Firm 14 found that the machinery was incompatible with its production process and did not meet federal regulatory standards without certain modifications. Firm 14 was concerned that modifying the machinery would be uneconomic. It also discovered that it could not obtain the critical raw materials it needed for certain products. Respondent would not supply them because the order did not require it to do so. Without the ability to sell these other products, the business could not be profitable. Ultimately, the company abandoned the project entirely.

- **Firm 5,** like Firm 14, was a successful, medium sized, single product manufacturing firm. It acquired from respondent the exclusive right to produce a line of products, rights to acquire production machinery, and technical assistance to operate the machinery. Firm 5 had a choice of production machinery and chose a set that respondent offered at a lower price.

  Firm 5 found that the machinery it chose did not operate as efficiently as the machinery it did not select and that the technical assistance it received was not effective. Firm 5 was, however, able to overcome these problems and manufacture the line of products.

- **Firm 9** was a newly formed corporation headed by an individual with technical expertise in the product and funded by a venture capital company. It acquired from respondent the exclusive right to produce the product and entered into a supply contract with respondent that was to cover the period needed until Firm 9 could develop its own capacity.

Respondent did not deliver the finished product for over a month after the acquisition. Although some compensation was paid, Firm 9 never recovered and went out of business.

- **Firm 16** was a large, successful, technologically sophisticated, diversified manufacturing company. It acquired the rights to a product in development and a supply of the product. The product fit the marketing and sales portfolio of the company well.

  After it acquired the rights, Firm 16 found that it did not have the capability to produce the product. It had made the acquisition without consulting production personnel about the specialized technology needed to produce this product.

In some of these divestitures, the buyers might have avoided the mistakes they made by exercising more "due diligence" before committing themselves to the acquisition.

- **Firm 2**, also a large, sophisticated, diversified manufacturing firm, acquired rights and technology to produce a line of products from respondent. In contrast to the other firms, it consulted its research and manufacturing divisions and tested whether it could use the to-be-divested technology to produce the product. It, thus, determined that it could manufacture the line of products before it agreed to acquire the to-be-divested asset.

Other firms might have protected themselves with better contracts. Firm 12 stated that it has learned how to frame contracts that involve shared facilities as a result of this and another transaction. Firm 9 and Firm 14 had never previously made an acquisition and lacked the experience to anticipate any of problems they might face.

Because the mistakes are so pervasive in the experiences of both successful and unsuccessful buyers, staff is persuaded that mistakes by buyers are inherent in the acquisition process, particularly where buyers have no previous experience in the market. In general, it is not possible to anticipate fully how a firm will operate in advance of the acquisition because the nature of a business is too complex.

#### (2) Buyers perceive a lack of bargaining power

The case studies indicate that buyers have generally perceived themselves to be in weaker bargaining position than respondents.[27] Although respondents are required to divest within a specified time period at no minimum price, there are often multiple buyers interested in acquiring the assets or lone buyers that believe there are others interested in acquiring the assets. In these circumstances, the price and terms of the sale are dictated by what bidders are offering, not by the theoretical requirement that the assets be sold for no minimum price. Some buyers have represented to the staff that they did not need or want assets or divestiture terms that clearly

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[27] Not all buyers had this perception. Several demanded and received terms that they considered to be advantageous and were not explicitly required by the orders.

would be in their interest. The Study suggests that many of those buyers took those positions because they feared that if they insisted on more favorable terms the respondents would divest the assets to some other bidder.

The buyers of divested assets have been very frank about the mistakes that they have made, and none has even suggested that it knowingly misled the Commission. Nevertheless, it seems likely that buyers knew at the time of negotiations that some contract terms put them at a disadvantage. Presumably, they did not foresee the precise harm; rather, they assumed that they did not need the added protection. They traded away a potential advantage in return for a lower price, or for some other favorable term, or out of fear that some other bidder would be selected. Regardless of the reason, the result has been that some buyers have acquiesced to terms that increased the risks that the Commission's order sought to minimize, while insisting that those terms were not needed.

The insistence on terms that weakened the competitiveness of some buyers was not due to inadvertence; rather the buyers made considered decisions to take risks. It is clear that the buyers considered these issues, because the staff initially opposed specific terms that, in retrospect, could have been foreseen as possibly harmful to the buyers. Staff opposed the terms, not because it had greater knowledge about the businesses, but because of its remedial bias against continuing relationships between competitors. Only because the firms had convinced the staff that they would be good and effective buyers of the to-be-divested assets (a fact that appears to have been true in most cases) was the staff persuaded that the Commission should permit the departures from its institutional bias. The following are cases where divestiture provisions that normally have been opposed by the Commission were accepted at the buyers' urging:

- **Firm 1** and respondent negotiated a divestiture contract that included a provision requiring Firm 1 to sell by-products from the divested plant to the respondent. Staff initially opposed that provision, but Firm 1 argued that taking over the facility was complex, and it needed the assurance for its business plan that the by-products would be sold. Staff ultimately accepted this argument as reasonable, but, in retrospect, it might have been better had staff interpreted this as a sign that Firm 1 had not sufficiently studied the market.

- **Firm 4** negotiated a supply agreement with the respondent that included a limit on the time respondent would supply a necessary component to Firm 4. Staff initially opposed the time limit and argued for a longer supply contract with an option to terminate but Firm 4 argued that it would have an alternative supplier in time. Staff was concerned that the divestiture might fail if Firm 4, contrary to its expectations, was unable to qualify an alternative supplier within the time period. Because staff had no industry specific knowledge, it eventually agreed to support the divestiture contract with the limited supply agreement. Firm 4 suffered competitively when it found it had no replacement supplier at the end of the supply contract.

- **Firm 8** insisted that it could become a more effective competitor if respondent were required to spin off some of its stockpile of key inputs, rather than spin off the fledgling competitor that respondent was acquiring, which was the alternative staff was

considering. Firm 8 also insisted that it did not need to have a transfer of manufacturing technology. Firm 8's subsequent problems in selecting from the stockpile of inputs and its difficulty in acquiring appropriate production machinery both reflect problems that would not have existed if the respondent had divested the company it was acquiring.

There is no reason to doubt that all three firms discussed above believed that the overall terms of the divestiture were in their interests. Firm 1 believed it would receive a fair price for the by-products. Firm 4 believed it would have a replacement supplier before the supply agreement with the respondent terminated. Firm 8 believed that it did not need technological assistance to select and operate the production machinery efficiently. In retrospect, though each firm was wrong.

In contrast to Firm 4 and Firm 8, only Firm 1 could have been harmed by resisting the terms suggested by respondent and accepting the position urged by the Commission staff. Had there been no market for the by-products, Firm 1 would have lost revenue absent the contract with respondent. However, the apparent protection that Firm 1 received from the contract mistakenly relied on its ability to bargain effectively with respondent.

The mistakes made by Firms 4 and 8 appear to have been accepting respondents' terms because the terms were clearly contrary to the interests of the buyers. Why should Firm 4 have insisted it did not need more time to find a replacement supplier? Why should Firm 8 have insisted that it did not need to examine the manner in which the respondent operated its productions machinery? It appears that buyers accepted disadvantageous terms, in part, because they overestimated the value of assets they were acquiring. They assumed that the order's requirement of a forced sale of assets at no minimum price gave them a significant chance to buy the business at a bargain price. Thus, it appears that buyers are likely to underrate the harm that adding risks will cause. As noted in the previous section, buyers do not have very good information about the operation or value of the divested assets; consequently, their assumption that they are acquiring a bargain predisposes them to accept contract terms that reduce the value of the divestiture transaction.

The Study suggests that buyers sometimes propose the terms that reduce the value of the transaction because they want to be chosen by the respondent as the buyer. Most buyers told staff that they either knew or assumed that they were not the only business that was interested in acquiring the to-be-divested assets. Consequently, few of the buyers felt that they had any leverage in negotiating with the respondents, and many indicated that their offer would have a greater chance of success if they minimized the contractual burden on the respondent. Accordingly, buyers repeatedly bid against their own interests as a future competitor in hopes that they would be selected as the buyer of the assets in the required divestiture. Their assumption seems to have been that, given a bargain price, they would be able to succeed with even a somewhat diminished asset package.

These assumptions may have undermined orders that were designed to aid the buyers to become strong competitors. Certainly, staff must be careful when evaluating on-going relations between respondents and buyers in proposed divestiture contracts.

#### (3) Buyers do not often communicate with the Commission regarding difficulties in their dealings with respondents

The Study also revealed that buyers rarely alerted the Commission or Commission staff about their difficulties in dealing with respondents at the time the difficulties occurred. The most significant factor contributing to the firms' reluctance to raise these issues with the Commission was a fear that, if the buyer complained to the Commission, the respondent would provide worse service.[28]

- **Firm 9**, which received no deliveries of finished product in the first month it was in business, did not alert the staff. It received some compensation from the respondent, who later began deliveries. Firm 9 was concerned that its complaints might have soured continuing relations with the respondent and revealed only an accidental production failure that respondent claimed was responsible for the disruption.

- **Firm 14** did not alert staff even though it ultimately discontinued efforts to get into production. In its interview, it stressed that it felt that respondent had acted in bad faith and that it could not do business with a firm without trust. Firm 14 generally operated without written contracts with its suppliers and customers. It accepted that the divestiture contract may have been inadequate to guarantee its rights, because it had never drafted a contract for that purpose. For the same reasons, Firm 14 did not think the Commission could have forced an effective divestiture.

#### (4) Buyers' interests are different from the FTC's

The Study suggests that interests of buyers may diverge from those of the Commission.

- When **Firm 27** took over part of the operations of the respondent, it continued to operate at the same location. It had a transitional arrangement that allowed it to sell products under the respondent's marketing umbrella while at that location, and it decided to maintain that arrangement after the transitional period. Because the respondent also received some advantage from the arrangement, the arrangement has endured and the result is an implicit partnership, rather than competition, between the firms.

- **Firm 22** acquired a facility from respondent that primarily produced one product that did not compete with respondent but also produced another product that did compete with respondent. Firm 22 put most of its efforts into developing the product that did not compete with respondent. It used respondent's network to sell the product that did compete with respondent. It, thus, guaranteed that it had little effect on the respondent's

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[28] Other buyers in the Study have, however, sought Commission assistance. Firm 4 complained when it had no replacement supplier at the end of the period specified in the divestiture contract. Firm 5 complained that it should have had the right to acquire an associated product to complete its product line. In these two cases, the buyers' complaints were clearly beyond the scope of the applicable order.

business. Although its business was profitable, the divestiture to Firm 22 did not accomplish the remedial purposes of the order.

- **Firm 13** also had a different objective from the Commission's. It acquired the divested assets as part of a multi-year plan to create a business that it would be profitable to resell. It placed few demands on its managers, and thus the assets had little competitive vigor.

- **Firm 7's** acquisition of divested assets should have created a strong competitor. In its interview, Firm 7 described the problems it had encountered in the course of the divestiture, including the realization that it had lost the opportunity to compete on price as a result of failing to stockpile raw materials. Nevertheless, the manager of Firm 7 indicated that the firm's major objective of the transaction had been achieved: Firm 7 now has a complete line so it can compete more effectively on selling its other products. The fact that Firm 7 could not directly challenge respondent for the market in the divested product was of less interest to Firm 7.

The divestiture process should be designed in a way that makes it more likely that the buyer will compete, rather than cooperate, with the respondent after the divestiture is complete. Methods must continue to be developed for reviewing divestitures to distinguish those buyers who are likely to compete from those who are likely either to cooperate or to use the assets for other purposes.

#### c. Complexities of technology transfers

It is almost always difficult to transfer a business technology unless the individuals who implement the technology also transfer to work for the buyer.

- **Firm 8**, having had no previous manufacturing experience, assumed that with the aid of consultants it could assemble a plant to manufacture the divested product; it thus supported a divestiture of raw material by respondent and opposed what it considered as an inferior option to divest an operating plant that had developed its own source of raw materials. With hindsight, Firm 8's assumption that it could choose the proper raw materials from respondent's stockpile, choose the right production machinery, and properly operate the machinery, was wrong.

- As **Firm 5** discovered, it is difficult to learn how to operate production machinery even if it has been used for that purpose by the respondent and even if someone is reading the instructions from a manual.

The substantial literature about the industrial learning curve[29] suggests that refinements in manufacturing procedures are the source of great productivity gains. The learning curve is applicable to almost every aspect of a business, and the difficulty of transferring knowledge is

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[29] *See, e.g.,* D. Abell and J. Hammond, STRATEGIC MARKET PLANNING 103-133 (1979).

one reason why divestitures of on-going businesses succeeded more often than divestitures of selected assets. Where an entire business is divested with the personnel who operate it, the knowledge will pass as part of the transaction. Finding ways to make successful and effective transfers of trade secrets and technology is a major task in formulating effective remedies.

#### d. Difficulties in defining viability

The problems that arose in particular divestitures were sometimes the result of an incomplete understanding of the needs of a viable business. The cases discussed below show that even when the Commission properly identified the markets in which the transactions were likely to create competitive harm, the package of assets to be divested may have been drawn too narrowly to create a viable business.

- **Firm 5** was harmed competitively because the order defined the assets-to-be-divested too narrowly. Firm 5 complained at the time it acquired the assets that it needed the right to produce an additional product to be an effective competitor. Respondent refused to include rights to that product because the order did not require it. As Firm 5 feared, some customers refused to allow it to undergo the customers' quality testing program because it was not a full line producer.

- The rights acquired by **Firm 14** to purchase raw materials from respondent were limited to raw materials that Firm 14 would use to manufacture products for customers who were in the market defined in the Commission's complaint. This definition narrowed the potential market for the buyer to the point where Firm 14 decided it was not worthwhile to enter the business.

Establishing a viable competitor requires a thorough understanding of the operations of the business. The order must ensure that the buyer has access to the necessary technology, suppliers, distribution channels and other essential business elements. As noted above, Firm 8's problems in selecting appropriate raw materials from respondent's stockpile and acquiring appropriate manufacturing equipment in the open market illustrate how difficult it can be for a new entrant to understand the range of elements required to operate a business. That kind of difficulty is transmitted to the Commission where, as here, the staff was persuaded by Firm 8 and other potential buyers to recommend that the order require respondent to divest a supply of respondent's own raw materials rather than divest the acquired business which had its own supply of raw materials.

The order in *Promodes*[30] illustrates a related difficulty in framing effective divestitures of less than an entire business. The order was modified to eliminate five of the six required grocery store divestitures when neither the respondent nor the Commission-appointed trustee could locate buyers for the five stores. Their lack of viability may have been related to scale economies in purchasing or advertising. It may be that the stores were subsidized by their chain and were viable only because they established a convenient presence that maintained customer loyalty.

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[30] *See Promodes*, note 17, *supra*.

The absence of any buyers for the to-be-divested stores, when they were offered at no minimum price, may also suggest that these stores were never competitively significant.[31] In order to have a basis for recommending the divestiture of individual stores, the staff needs to know details about individual stores and their role in the overall business.

### 3. Recommendations to increase the effectiveness of divestiture remedies

The following section discusses some ways divestiture remedies can be made more effective, based, in part, on information obtained from the cases studies.

#### a. Increase respondents' incentives to achieve an effective divestiture

A number of approaches have the potential to increase respondents' incentives to achieve effective divestitures.[32] The case studies, as well as more recent cases, suggest ways to cope with respondents' incentives to advocate ineffective orders, weak buyers, and disadvantageous divestiture contracts.[33]

##### (1) Appoint auditor trustees

The appointment of an auditor trustee may facilitate the effectiveness of the on-going relationships, some of which are critical to the success of the divestiture. In addition, the reluctance of buyers to alert the staff to difficulties they encountered in dealing with respondents can be mitigated by the appointment of an auditor trustee. The auditor trustee has unrestricted

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[31] Where stores have become unviable because of actions by the respondent, the Commission has obtained civil penalties or additional divestitures, or both. *See, e.g., FTC v. Schnuck Markets, Inc*., Civ. No. 4:97CV01830CEJ (E.D. Mo. 1997) (consent judgment).

[32] The threat of civil penalties for noncompliance with its obligations under the order may provide some incentive for respondents to comply with the order. The Commission has sought and obtained civil penalties in cases where the respondent has failed to divest in a timely fashion *(see Louisiana Pacific,* note 9, *supra; FTC v. Rite Aid Corp.*, Civ. No. 98CV00484 (D.D.C. 1998)), where respondent has allowed assets to deteriorate before the divestiture is accomplished *(*see *Schnuck,* note 31, *supra*; *FTC v. Rubus Development Corp. et al.,* Civ. No. 94CV0041 (D.D.C. 1994)), and where the means by which respondent has divested assets has adversely affected the viability of the assets *(FTC v. CVS Corp.*, Civ. No. 98CV00775 (D.D.C. 1998)).

[33] The Commission has begun requiring representations from the respondents that all assets used in the divested business or necessary for its operations are included in the divestiture contract. The greater understanding of the imbalance of knowledge has demonstrated that the staff should not fully rely on buyers to define the elements that should be included in the divestiture package. Respondents generally have the greater knowledge and can reasonably be required to take responsibility for the adequacy of the assets divested. Such representations can be made so that if later it appears that some additional asset should have been included, there is a basis for adding it.

access to the facilities of both the respondent and the buyer and no concerns about informing the Commission. This is particularly true in cases involving supply agreements in which the respondent agrees to supply in-puts or finished product to the buyer and in cases involving the transfer of complex technology.[34] Recently, the Commission has appointed individuals with technical knowledge of the industry to perform those functions that cannot be accomplished by either the parties individually or the Commission. With the combination of their technical knowledge and their unrestricted access, they can resolve disagreements between the respondent and the buyer and determine whether the respondent is performing its obligations, a matter which may be unclear to the buyer.

This independent observer has generally had a beneficial effect by his or her presence. The auditor trustee creates a basis for trust between parties that do not naturally have a community of interest. Also because of their technical backgrounds, the auditors have sometimes found ways to implement the obligations that the parties themselves had not thought of.

The respondent and the buyer know that the auditor has no reason not to inform the Commission if the auditor believes that the obligations are not being fulfilled. The respondent cannot retaliate against the auditor for filing a truthful report with the Commission. The auditor is also well positioned to report to the Commission if the buyer is failing to follow the business plan submitted to the Commission or otherwise is failing to comply with any conditions of the divestiture.

**(2) Require divestiture of a crown jewel if respondent fails to divest during the divestiture period**

The case studies suggest that the inclusion of a crown jewel provision may have an impact on the incentives of respondents.[35] To avoid divestiture of the crown jewel, the respondent has an incentive to propose initially a package of assets that is adequate to create a viable competitor and for which an acceptable buyer will be found.

There are several grounds for including a crown jewel. The crown jewel gives the Commission the assurance that should no acceptable buyer be found for the to-be-divested assets, there is a larger, more saleable, package for which an acceptable buyer can be found. In addition, by maintaining the possibility that the respondent may have to divest the crown jewel

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[34] The Commission has also used auditor trustees to monitor hold separate agreements, which are designed both to create an entity that actually competes with the respondent before the divestiture occurs and to create a firewall to prevent the respondent from learning about the operations of the held-separate entity. When properly framed, hold separate agreements can reduce both pre- and post- divestiture competitive harm.

[35] An appropriate crown jewel provision requires divestiture of a freestanding business with a customer base. No respondent subject to a crown jewel provision has ever failed to divest within the time required by the order.

and retain instead the original divestiture assets, the provision provides an additional reason for the respondent to maintain the strength and viability of the to-be-divested assets.

A crown jewel is not designed as a punishment for failure to divest,[36] but it is clear that respondents may see its imposition as a threat to the value of their acquisitions and therefore institute procedures to ensure there will be no occasion to activate the larger divestiture. The respondent that divested assets to Firm 30 appears to have been much more rigorous in its adherence to the terms of the hold separate agreement than the respondents that divested to Firm 17 and Firm 28. One reason may have been that respondent that divested to Firm 30 was subject to a crown jewel and the respondents that divested to Firm 28 and Firm 17 were not. The first respondent stated directly that the most difficult part of persuading its board to accept the consent order with the Commission was the crown jewel provision. The board was not satisfied with assurances that the language was standard and had never been invoked, but insisted that management set up procedures to ensure that it would not be invoked against them.

It appears that Firm 30, and probably many others, benefitted from the existence of a crown jewel provision. It created an incentive within the respondent to make the order work in the way intended by the Commission. Rather than the indifference or hostility that is exhibited by some respondents, this respondent had an internal reason to see the divestiture succeed.

#### (3) Require consequential damages for failure to deliver supplies

Interim supply contracts by respondents may be critical to the survival of new operations. The terms of supply contracts created difficulties for Firms 4, 7, 8, and 12. The failure to deliver timely supplies had a terminal effect on Firm 9. Although Firm 9 recovered some damages for non-delivery, supply contracts generally do not provide for any damages, and contract law normally will not compensate the buyer for loss of profits or goodwill. Normally the lack of such remedies does not pose a problem because the interests of the supplier and its customer are aligned; however, respondents are competitors of the buyer of divested business and therefore the respondent does not automatically have an interest in the success of the buyer. As a result of the vulnerability of the buyer, the Commission staff has required that supply contracts specify that buyers will be entitled to damages equal to the loss of business plus the amount necessary to restore the buyer's business for failure to provide timely supplies. Because respondents then share in the economic risk, they have strong incentives to prevent supply failures.

### b. Facilitate the success of the buyer

The Study suggests that buyers may be more successful if staff assures that buyers have access to needed information and carefully analyzes proposed buyers in order to recommend appropriate ones.

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[36] The Commission's cease and desist orders may not be punitive. *American Medical International, Inc., et al.*, FTC Docket No. 9158, 104 F.T.C. 1, 223 (1984) (Decision and Order), *citing United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326 (1961).

### (1) Assure that the buyer has access to accurate information

The case studies illustrate that the inherent complexity of a business prevents buyers from fully understanding a business before taking over its operation and frequently even after taking it over. However, some of the buyers could have obtained much better information through more thorough due diligence. Had Firm 16 consulted with its production personnel, it would have discovered that it could not produce the product. Firm 7 should have known that the product it was buying had been banned by one state and would require reformulation before it could be sold. In contrast, as noted above, Firm 2 actually tested its capacity to manufacture the product during the due diligence period. Firm 23 went even further and required respondent to make significant modifications to restore the to-be-divested business before it would sign a contract to buy the assets. It is important, therefore, that proposed buyers be given adequate time and an opportunity to conduct full due diligence, because the information buyers gain can greatly improve the likelihood that the divestitures will succeed.

Given that many buyers appear to bid against themselves (probably for fear that respondent may select another bidder), it is not sufficient that buyers merely be given an opportunity to conduct due diligence. Buyers may be reluctant to take full advantage of the opportunity. This perceived inequality in bargaining power may be reconciled in appropriate cases by taking one or more of the following steps:

1. Require the buyer, as a condition of Commission approval, to submit an acceptable business plan for the assets. Developing a persuasive business plan requires a proposed buyer to consider the full operation of the divested business. The business plan also provides a framework for the staff to consider whether the proposed buyer has fully considered the operation of the business. For example, the production people in Firm 16 would have had to be consulted to develop cost projections and presumably would have indicated they could not manufacture the product.

2. Require the buyer, as a condition of Commission approval, to have final and executed contracts with third parties who will supply any necessary inputs or provide services that the proposed buyer does not intend to undertake itself. The case studies indicate some tension concerning the circumstances in which this requirement is suitable. On the one hand, where the buyer is inexperienced and needs the capacities of a knowledgeable manufacturer or distributor, the staff needs assurance that the buyer will have access to such capabilities. On the other hand, buyers frequently lack essential knowledge before they buy. That is how Firm 1 ended up in an unfavorable contract under which it was bound to sell by-products for less than market value. That is also how Firm 9 ended up with the same distributor as the respondent. That distributor decided that since it had a monopoly it could make more money from Firm 9's product by price discriminating and selling it only to the smaller group of customers who could use only Firm 9's product.

The staff must scrutinize third party contracts with great care. In both of the above cases, there were signs of potential problems. Giving monopoly power to Firm 9's distributor invited abuse. Permitting sales of a significant portion of output to respondent should be discouraged unless there is clear proof that it is necessary or harmless. Respondents, too, will take advantage of their greater knowledge of the economics of the transaction. Moreover, as previously noted, buyers may be willing to give back to the respondent some of the benefits of the divestiture package because they assume they will still be getting a bargain. The Commission should therefore reject suspect contracts and insist on divestitures that establish a more independent business operation.

3. Assure that the buyer fully understands the requirements of the Order. The case studies and the experience of the Bureau of Competition have shown that some respondents have proposed deals to the buyers that transfer less than is required by the order and that buyers have not all been aware that their divestiture contract provided them with less than they were entitled to. Informing the buyer of the terms of the order is both more difficult and more important when orders require "up front" buyers: more difficult because the order is being drafted at the same time respondent is negotiating with a buyer; more important because the buyer's input can be critical to assuring that all necessary assets are divested.

By insisting that the buyer understand the terms of the order, that the buyer submit an acceptable business plan, and that the buyer execute all necessary third party contracts, the staff can assure that the buyer has an opportunity to become as fully informed as possible. The better informed buyer will, in turn, be able to provide better information to the staff.

**(2) Select appropriate buyers**

Ultimately, the success of a divestiture depends on transferring the business to an appropriate buyer.[37] The Commission generally allows the respondent the first opportunity to market the assets (although it must do so within a specified period of time). This, however, gives the respondent an opportunity to seek weak buyers. As a consequence, the Commission needs to be able to identify which buyers are likely to succeed and which are not. The decision is always fact specific, but the case studies offer some helpful rules of thumb.

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[37] The insight about the critical role of the buyer is not new in the Divestiture Study. It was, for example, one of the major points in Elzinga's 1969 article. *See* note 3, *supra,* at 61-66.

#### *(a)* The knowledge and experience of the buyer makes a difference

As noted above, the weakness of some of the buyers appears to have resulted from their lack of knowledge. Some paid too much. Some were dependent for assistance on the respondent. Many made other mistakes. The most successful buyers appear to be the ones that know the most about what they were buying.

Frequently, the most knowledgeable and best buyer was the fringe competitor or an entrant extending geographically. Firm 25, for example, who bought a stand alone production facility, already owned another facility in a different geographic market. It took over the new facility, expanded its capacity, and aggressively captured market share without any transitional problems. Firm 32 did essentially the same in a different, but related industry. It installed new operating policies and almost immediately began increasing market share.

In other cases, suppliers or distributors knew enough to be very good buyers. In one case in the study, the order provided an opportunity for the buyer to learn about the industry before it was required to invest in a plant to use the technology it was licensing. The buyer obtained a license to technology from respondent and then was given a number of years in which to build the plant; in the meantime it was supplied with product by respondent. Over that time, it was able to understand the market and did not have to rely on new technology that it did not fully understand.

#### *(b)* The degree of the buyer's commitment to the market may make a difference

The staff has insisted on a demonstration of commitment by would-be buyers.[38] Consider the history of Firm 19, which acquired the right to sell a branded product and entered into a supply contract with respondent for a period of time in which the buyer was to develop its own production. Staff discouraged a proposal that would have allowed the buyer to borrow the money from respondent. Had that loan been allowed, the buyer might have made profits during the period of the supply contract and then walked away from the deal with a net profit when the supply arrangement ended. Instead, staff recommended the divestiture contract only after the owner of Firm 19 personally guaranteed the financing. With such a commitment, the only way the buyer could expect to recoup his investment was to plan to operate the business for a period that was longer than the supply contract. Only when the business became no longer dependent on the respondent, could the buyer either continue to operate it or to sell it. Until then, the business had no value because the buyer was entirely dependent on the respondent. The buyer quickly expanded market share and chose to establish its own production facility.

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[38] The term "commitment" is used in the sense that it is used in game theory: an action taken by a party that makes it difficult for that party to alter its position later. *See, e.g.,* M. Porter, COMPETITIVE STRATEGY 102 - 105 (1980).

Similarly, Firm 24, which paid a substantial amount to acquire a brand name and technology, had no possibility of recouping its investment unless it built a manufacturing plant. Firm 24 was a start up company managed by executives from the firm that respondent acquired and financed by a venture capital company. This industry did not have contract manufacturers; thus the buyer had to make the product for itself. As a result, it became less and less able to walk away from the business without losing its payment to respondent and its investments in new production facilities. It also succeeded quickly in establishing a profitable firm.

It is difficult to insist on equivalent ways to commit large firms. The acquisition price for a divestiture is rarely so large that a multi-divisional firm would not walk away from its investment in divested assets if the business did not meet its internal rate of return criteria. For this reason, staff examines the business plan of large firms with special reference to their own criteria, seeking to understand how the acquisition is justified internally. For these firms, the internal bureaucratic approval systems may represent a commitment sufficient to support the divestiture.

#### *(c)* The size of the buyer may make a difference, such that smaller buyers should not be presumed to be less competitive buyers

In the Study, small buyers were successful more often with divested assets than large multidivisional firms. Of 23 divestitures to smaller firms, only three made mistakes serious enough to put them out of business. In contrast, of the 14 divestitures to large firms, four of them made serious mistakes that destroyed their profitability permanently or for a significant period of time.[39] Partly, the better record of smaller firms appears to be due to commitment. The owners had risked their own money and were therefore more determined to succeed. They examined the acquisition more carefully and planned more carefully. Also, they appear to have been more opportunistic. Because they had fewer levels of review and fewer issues to focus on, they were more able to adapt quickly to changing competitive conditions. As a result, staff should not presume that a smaller firm may necessarily be a less competitive buyer than a larger firm.

On the other hand, larger buyers have deep resources that may substitute for commitment. Large buyers, unlike small ones, can absorb the consequences of gross financial mistakes and ignore historical costs. Firm 1, for example, despite being locked into losses in its initial years as a result of paying too much and entering an unfavorable contract with respondent, approached the market aggressively and expanded its market share with innovative products. While some large firms made fatal errors, such as the mistake of Firm 16, which could not manufacture the product it acquired, large firms can often afford to ignore the fact that they paid too much. Furthermore,

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[39] This represents only seven out of the nine divestitures that did not satisfy the remedial purposes of the order. The remaining two, which are discussed in section II.A., above, included a divestiture of assets that did not operate in the complaint market at the time of the divestiture and whose buyer never entered the complaint market and a divestiture of assets that never operated independently of the respondent. These two divestitures, while not effective remedies for the Commission, were profitable ventures for the buyers.

they more often have technical expertise that can make them less dependent on assistance from the respondent.

### c. Facilitate the transfer of business information

Transferring confidential business information can be the most difficult aspect of a divestiture. The case studies illustrate that it is extraordinarily difficult to obtain good information about a newly acquired business. Indeed, even for those who operate the business, there is likely to be no one person who fully understands all aspects of the business. Businesses are organic units, and when parts are split off, some knowledge is bound to be lost.[40] Nevertheless, the Commission has ordered divestitures of licenses or licenses with selected assets that do not constitute an operating unit. In order to make these transfers more effective, recent orders or divestiture contracts have included some or all of the following requirements:

- Respondent must grant the buyer rights to all related technology.

This is a factor that relates especially to the transfer of intangible rights, patents and the like. It is essential that the buyer obtain the full set of rights associated with transferred technology. The respondent must not be allowed any right to terminate licenses to buyers. Otherwise even if the transfer is successful, the buyer is likely to find that its product cannot be improved or expanded because the buyer lacks the full rights to the manufacturing process. Unlike the firm acquired by the respondent, the buyer will not be able to modify and improve the process if the rights that it has received are more limited. Limitations on technology uses will reduce the incentives to invest in further research, because the use of such research will also be limited.

- Respondent must grant the buyer a right to technical assistance.

This has been the traditional manner of dealing with the problem. As noted earlier, however, the case studies suggest that technical assistance is inadequate by itself. The principal problem was identified by Firm 5: Respondents fail to provide competent assistance, and buyers really cannot tell how good the assistance is that they are getting. That may be why a number of buyers simply declined to seek any of the assistance to which they had rights. Rather, they relied on their own internal technical capacities. Similarly, Firm 6 used its own resources to produce its own product, rather than rely on assistance from respondent to replicate respondent's product. Firm 3, when it found it could not get assistance from the respondent, sought and obtained assistance directly from the manufacturer of the machines. Other firms have not been so fortunate; consequently, technical assistance generally must be supplemented with some or all of the order provisions discussed below.

- Respondent must grant the buyer a right to inspect the respondent's facilities in operation.

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[40] That is why, for example, crown jewels typically require the inclusion in the divestiture of a full operating unit.

The case studies indicate the buyer may not know what questions it should ask when it is seeking technical assistance. Firm 8, for example, did not know how to pick the right production machinery or raw materials. Firm 5 and Firm 14 each made mistakes when they had choices on which machines to buy. One way to cure the problem of not knowing what questions to ask is to view the equipment in operation. This has the advantage of communicating all of the procedures that are not covered in the manual and provides a benchmark against which to check how well the buyer's machine is working. Again, it is a method of redressing the imbalance of information that favors the respondent and disfavors the buyer.

- Respondent must grant the buyer the right to seek to hire selected people from the merged firm who have important knowledge.

Sometimes there is no fully adequate substitute for experienced personnel. It is the essence of why the transfer of on-going businesses has such a high success rate even though the buyers of those operations also made frequent serious mistakes in their divestiture contracts. The knowledge of individuals can be equally important in technology transfer divestitures. Firm 24's experience provides a small but illustrative example. Firm 24 included a number of former managers of the firm that respondent had acquired. Respondent delivered a set of technical drawings for the product. Because of their previous experience, the former managers knew that some sets of drawings were missing despite protestations that all had been handed over. Firm 15 showed that simply having the right to hire could have the desired effect. It found by interviewing the sales personnel it was entitled to hire that it learned enough about how the operation had been conducted that it did not need to hire any additional employees.

While neither the order nor the contract can require a person to accept work with the buyer, terms in the order or the contract may make it more likely that such persons will accept work with the buyer by waiving nondisclosure or noncompetition agreements and by offering incentives in the form of vesting pension rights and paying bonuses. The order or the contract may also include provisions that effectively preclude the respondent from continuing to employ the individuals and/or rehiring them for a period of time.[41]

#### d. Summary

Many of the recommendations derived from the Divestiture Study for formulating better divestitures are discussed above, but some topics warrant further iteration here:

1. The order, the divestiture contract, the buyer, and the buyer's business plan should be evaluated in terms of whether the divestiture will restore competition in the complaint market. This means the divested entity must have the same potential and incentives to expand and innovate as the firm that disappeared. It should not

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[41] Precluding a person from continuing to work for the respondent is based on the same principle as the noncompetition clause, that is, that the individual's knowledge was gained in association with the intangible property that is being sold and that the value of that property is diminished if the employee is allowed to work for a person who is not the holder of the property.

be a firm that has continuing dependency on the respondent or that is frozen in a static product or locked in a narrow competitive niche.

2. The divestiture package must take into account the fact that the respondent almost always has greater information about the to-be-divested business than either the buyer or the staff. The divestiture must reduce or eliminate this information imbalance and protect the viability of the divested business before and during the divestiture. Growing experience with hold separate agreements, crown jewels, rights to visit respondents' facilities, rights to hire employees, and auditor trustees, indicates these are important tools to redress some of the imbalance and facilitate transfers.

3. The most effective divestitures have been those of on-going businesses. Divestitures of narrow asset packages, even with some of the protections discussed above, create a greater risk that competition will not be restored, and thus must be carefully examined before they are accepted.

4. The overall design of a divestiture should result in as complete separation of the buyer and the respondent as possible even if transitional arrangements require supply contracts, technical assistance agreements and other continuing relationships. It does not fully reestablish competition if after the divestiture is complete, the two are natural economic allies as suppliers, customers, or competitors.

5. The most successful buyers are the most knowledgeable. Buyers who are making geographic extension mergers of ongoing businesses are the most successful. They are the most likely to know how to operate the business and determine if necessary elements are missing. They are also most likely to know how to put together a full business from elements designed to facilitate entry. For the same reason, vertically related suppliers or customers may have crucial knowledge that decreases the likelihood of serious mistakes and increases the likelihood of success. Similarly, producers or marketers of products in adjacent markets are more likely to be successful.

## III. Innovations in More Recent Orders

### A. Shortening the divestiture period

In order to eliminate competitive harm, the Commission has greatly shortened the period by which a required divestiture must be completed in more recent orders.[42] The working rule now is that the divestiture must be accomplished within six months after the consent agreement is signed. Earlier orders typically gave the respondent 12 months or more from the date the order became final to divest.[43] To further reduce or eliminate interim harm by obtaining quicker divestitures, recent orders have required "up-front" divestitures. The up-front divestiture not only reduces the opportunity for interim competitive harm by expediting the divestiture process, but it assures at the outset that there will be an acceptable buyer for the to-be-divested assets.

The up-front divestiture policy shifts the costs of delaying the divestiture from the public to respondents. Typically, a respondent consummates its acquisition as soon as the Commission accepts an order for public comment. The respondent, thus, realizes the benefits of the merger immediately, while the to-be-divested assets tend to be less vigorously operated at least until the new owner takes over. Consequently, the respondent has little incentive to complete the divestiture before the end of the period allowed in the order.[44] Where the order includes an up-front divestiture, however, the respondent is prevented from consummating its proposed merger until an acceptable buyer for the to-be-divested assets is found, the buyer conducts an adequate due diligence, and the buyer prepares and submits its business plan to the Commission. Consequently, respondent has an economic incentive to find an acceptable buyer and divest the business as soon as possible.

As a result of these two changes, the average time for a divestiture to be accomplished has fallen dramatically from an average 15 months after the order became final in fiscal year

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[42] Some of the buyers in the Study discussed with staff their concerns in connection with the amount of time that elapsed between the time they signed an agreement with respondent and the time the agreement was finally approved by the Commission. One interviewee specifically discussed the problems associated with the deterioration of the to-be-divested assets that occurred before an acceptable buyer was approved.

[43] The 12 months from the time the order became final often became 15 months from the time the respondent negotiated the terms of the order and executed the Agreement Containing Consent Order. Commission rules require that a proposed order be placed on the public record for a sixty-day comment period before it considers making the order final. The period in between the end of the comment period and the time the Commission makes its final determination could be at least another month. Thus, the 12-month divestiture period grows to an actual 15-month period.

[44] The shorter divestiture periods that the Commission is including in more recent orders will minimize to some extent the interim competitive harm.

1995, to six months after the order became final in fiscal year 1996, and three months after the order became final in fiscal years 1997 and 1998.[45]

### B. Orders in pharmaceutical cases

Contemporaneously with the Divestiture Study, the Commission entered a series of orders against pharmaceutical and health product companies.[46] These orders included new provisions, such as the auditor trustee and the redivestiture requirement (if the buyer fails to gain FDA approval to produce the divested product, the product reverts to respondent and respondent must redivest). The new provisions in these pharmaceutical orders suggested solutions for more widespread problems identified in the Divestiture Study. At the same time, the case studies helped to develop remedial ideas for the pharmaceutical orders.

The pharmaceutical orders played an important role in the development of the divestiture remedies because they posed, in a more obvious form, some of the difficulties found in the Study. The pharmaceutical mergers proposed to combine very large companies that operated in many markets but posed serious antitrust concerns in only one or two markets. Generally there were no manufacturing assets or employees that were dedicated to the products that were to be divested because the products were manufactured in plant that produced many products. Consequently, it was impossible to divest an ongoing business if the divestiture was to be limited to the products that created competitive concerns. Even more troublesome was the fact that the Commission could not be assured that the buyer would be able to produce the product until the buyer received FDA approval, an approval process that might take years. Consistent with the Commission's efforts to allow firms to realize efficiencies through mergers, staff explored ways of protecting competition while permitting the mergers.[47]

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[45] *See* W. Baer, "Report from the Bureau of Competition," American Bar Assn, Section of Antitrust Law, 1998.

[46] *Roche Holdings, Ltd*., FTC Docket No. C-3809, (May 22, 1998) (Decision and Order); *American Home Products*, FTC Docket No. C-3740, 123 F.T.C. 1279 (1997) (Decision and Order); *Ciba-Geigy Ltd. et al.*, C-3725 (Mar. 24, 1997) (Decision and Order); and *Glaxo plc*, FTC Docket No. C-3586, 119 F.T.C. 815 (1995) (Decision and Order).

[47] The acceptance of licensing remedies in these cases is part of a broader Commission policy to support innovation and efficiencies through its merger enforcement program. The 1997 revisions to 1992 Horizontal Merger Guidelines further explained circumstances in which a demonstration of merger specific efficiencies could overcome a presumption that a proposed merger was unlawful. These revisions were based in part on the earlier Commission report on "Competition Policy in the New High-Tech, Global Marketplace." One of its major conclusions was that including efficiencies in its analysis of mergers was appropriate under the antitrust laws and was beneficial for the economy. The greater sensitivity to efficiencies has supported the growth of licensing remedies and other partial divestitures that facilitate new entry in a market while also permitting merging parties to seek the benefits from mergers. The Divestiture Study has provided some insights into why some of these orders have

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Securing effective relief in these orders has posed a series of special problems. Foremost among them is the fact that divestiture is not possible unless the Food and Drug Administration authorizes the buyer to produce the drug or health product. Until approval is obtained, the most that the buyer could expect to do under FDA rules is to market and distribute the products made by the respondent. In the meantime, the buyer would be required to build and replicate exactly the respondent's production facilities. The orders had to reflect these realities through provisions requiring interim supply agreements and technical assistance for a substantial period of time.

Given the possibility that the divestiture might never occur if regulatory approval were not granted, the staff had to consider that possibility. Allowing the rights to languish or revert to the respondent would be inconsistent with the objective of the orders. Two complementary approaches were developed to deal with this contingency. One approach was to terminate the rights of the buyer who fails to obtain FDA approval and require redivestiture to a new buyer. The other was to add a crown jewel that would be triggered by the failure of the divestiture to the first buyer. Frequently, the crown jewel is the production facility that is already authorized to produce the drug or medical device. It is easier to obtain quick approval by the FDA of a change of management than it is to get a new facility approved. To make the production facility viable, the crown jewel may also require the transfer of other drugs as well.

The delay required by regulatory restrictions coupled with the possibility of redivestitures made clear the necessity for ongoing monitoring of these technology transfers. Recognition of the vulnerability of these assets during the long transitional period led to the first use of the monitor or auditor trustees. Even without the examples from the Divestiture Study, it was clear that deterioration of these regulated assets could jeopardize their regulatory approval and ruin their competitive viability. An after-the-fact remedy providing for civil penalties would be inadequate relief. In contrast, an auditor trustee who has understanding of both the technology and the FDA process could provide the Commission and staff with timely information to forestall harm to the product and ensure effective transfer of the technology and approval by the FDA. Accordingly, these were the first orders to require that parties that wanted to consummate problematic mergers would have to assume the costs of disentangling the overlapping products, including the cost of an auditor trustee.

The pharmaceutical divestitures established a precedent that complex technology divestitures could be acceptable remedies for large mergers. Resolution of the difficult issues concerning these orders and divestitures allowed respondents to merge without fundamentally undermining the hoped-for efficiencies. Respondents in other industries have pressed for the applicability of these precedents to the orders in their cases. They sometimes urged successfully that the special protections required by the regulatory process were not necessary to make their divestitures successful; thus these orders more typically required neither a monitor trustee nor a crown jewel.

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[47] (...continued)
been more effective than others.

These non-pharmaceutical orders and the lessons of the Divestiture Study have clarified that the protective provisions initiated in the pharmaceutical orders are generally necessary for technology transfers. The case studies and experience with more recent orders that lack auditor trustees indicate the inherent problems with technology transfers. They arise from information disparities between the buyer and seller, from indifference (and hostility) on the part of respondents to buyers, and from the complexity of business operations. These problems may be exacerbated in the case of divestitures that require regulatory approval, but they are not fundamentally different.

## IV. Conclusions

The Divestiture Study has provided a framework in which to understand the difficulties posed by divestitures and the means to overcome those difficulties. This understanding makes it more possible to use the premerger notification procedures to obtain effective relief in mergers while still allowing merging firms to seek efficiencies through integration.

Many of the problems cited in the legislative history of the HSR Act can be mitigated or avoided entirely by designing relief before a merger is consummated. Moreover, many of the remaining problems in formulating effective relief through divestitures are now specifically addressed in the Commission's orders and the divestiture contracts approved by the Commission. The orders address the Congressional concerns that "key employees [will be] lost" and that "goodwill of the acquired firm be dissipated." Asset maintenance provisions and hold separate agreements both recognize that the organic nature of a business can be destroyed before an antitrust remedy is put into place. These general approaches have been refined to require that respondents provide incentives for specific groups of employees to stay with the business until the transfer, to remove contractual barriers so the members of the group can transfer to the owner of the divested assets, and to provide incentives to transfer employment to the new entity. The package of divested assets has been defined to include rights that will allow the divested business to innovate, and thereby not be locked into replicating the product made at the time of the merger. All of these remedial devices, which take advantage of premerger notification under the HSR Act, are ordered routinely to preserve the continuity of the competing entity throughout the divestiture period.

The problems of interim harm are being further reduced by policies insisting on buyers-up-front. At least where the divested business is part of the acquired entity, the buyer-up-front avoids the problems of commingling. In addition it implements the HSR Act objective of preventing (rather than remedying) competitive harm. And, insistence on up-front buyers changes the dynamics by shifting the costs of delay to the respondent who cannot merge until a buyer is found and approved by the Commission.

The Divestiture Study provides support for preferring the divestiture of an on-going business with a customer base over the divestiture of assets that facilitate entry. For those cases in which the Commission is persuaded to accept the divestiture of technology without an existing customer base, the case studies have provided a framework in which to evaluate the adequacy of a divestiture remedy that requires divestiture of less than an on-going business.

The search for solutions that permit companies to seek synergies and other efficiencies from mergers and also prevent competitive harms will continue on a case-by-case basis. In each industry, the adequacy of a proposed divestitures will be measured by the risks associated with the transfer of a competitively viable business. This cannot result in a fully uniform set of orders because the risks and burdens of the orders will vary with the facts of particular transactions. Only the objective remains the same: to maintain the competition that otherwise would be eliminated by the merger. The case studies provide insights into how divestitures can maintain or create viable and competitive entities that meet that objective.