

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Jon Leibowitz, Chairman**  
                                   **William E. Kovacic**  
                                   **J. Thomas Rosch**  
                                   **Edith Ramirez**  
                                   **Julie Brill**

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<b>In the Matter of</b>	)	
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<b>The Dow Chemical Company,</b>	)	<b>Docket No. C-4243</b>
<b>a corporation.</b>	)	
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**ORDER TO SHOW CAUSE  
AND  
ORDER MODIFYING ORDER**

On March 31, 2009, the Federal Trade Commission (“Commission”) issued a Decision and Order (“Order”) by consent in Docket No. C-4243 resolving claims contained in the Commission’s Complaint issued on January 23, 2009. The Complaint alleged, *inter alia*, that the acquisition of Rohm & Haas Company (“Rohm & Haas”) by The Dow Chemical Company (“Dow”) lessened competition in several relevant markets. One of the relevant markets was the market for hollow sphere particle products in North America. The Order requires Dow to divest, “absolutely and in good faith, and at no minimum price,” the Hollow Sphere Particle Business in a manner and to an acquirer approved by the Commission. See Order ¶ IV.A.<sup>1</sup> Pending divestiture, the Commission required Dow to maintain the Hollow Sphere Particle Business according to the terms of an Order to Hold Separate and Maintain Assets issued on January 23, 2009.

The definitions found in Paragraph I of the Order set out the parameters of the Hollow Sphere Particle Business that Dow is obligated to divest. The Hollow Sphere Particle Business is defined to include a collection of rights in both tangible and intangible assets relating to or used by the business. See generally, Order ¶ I.NN. Certain assets are explicitly excluded from Dow’s obligation to divest. Significantly, the excluded assets include Dow’s plant in Midland, MI, where hollow sphere particle products historically have been produced. Id. at proviso, paragraph 2. In addition to the hollow sphere particle products that it must divest, Dow produces a wide range of products in Midland that the Order permits Dow to retain.

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<sup>1</sup> The Order also requires Dow to divest assets related to the research, manufacture, and sale of acrylic acid monomers and acrylic latex traffic paint. See generally Order ¶ III.

The definitions in the Order also set out the intellectual property rights that Dow is required to divest and license as part of the Hollow Sphere Particle Business. The Divested Hollow Sphere Particle Business Intellectual Property is defined as, “all Intellectual Property that is primarily related to the research, development, production and manufacture in the United States and the marketing and sale” in the Western Hemisphere of hollow sphere particle products manufactured from an encapsulated ester core. Order ¶ I.FF. The Licensed Hollow Sphere Particle Business Intellectual Property is defined as, “all Intellectual Property used in or Necessary for the research, development, production and manufacture in the United States and the marketing and sale” in the Western Hemisphere of hollow sphere particle products. *Id.* at ¶ I.NNN. The assets of the Hollow Sphere Particle Business that Dow must divest include both the Divested Hollow Sphere Particle Business Intellectual Property and the Licensed Hollow Sphere Particle Business Intellectual Property. Read together and in substance, these provisions require Dow to divest outright all of the intellectual property “primarily related to” the divested business, but only to license intellectual property that is used in the hollow sphere business, but used even more in other businesses that the Order permits Dow to retain.

Paragraph IV.A. of the Order requires Dow to “divest, absolutely and in good faith, and at no minimum price, the Hollow Sphere Particle Business.” Consequently, the Order obligates Dow to divest absolutely and retain no interest in the Divested Hollow Sphere Particle Business Intellectual Property that is primarily related to hollow sphere particle products.

On September 24, 2009, Dow filed a petition seeking approval to divest its hollow sphere particle business to OMNOVA Solutions, Inc. (“OMNOVA”) in the manner contained in a number of agreements filed with the petition. Dow proposes to divest the Hollow Sphere Particle Business, as defined in Order ¶ I.NN., to OMNOVA according to the terms of 10 contracts and schedules. The most significant assets that Dow will divest are assignments and licenses to patents, patent applications, know-how, and other intellectual property that is used in or related to the divested business. Under the terms of the Asset Purchase Agreement and an Instrument of Assignment and Assumption, Dow proposes to assign to OMNOVA all of Dow’s interest in the intellectual property that primarily relates to the hollow sphere particle products, which intellectual property falls within the Order’s definition of Divested Hollow Sphere Particle Business Intellectual Property. In addition, Dow will license to OMNOVA other intellectual property that is used or necessary for the business, but also used by Dow for other products and businesses.

As required by the Order, the Asset Purchase Agreement and Instrument of Assignment and Assumption effect an absolute divestiture of Dow’s interest in the Divested Hollow Sphere Particle Business Intellectual Property. However, Dow has agreed with OMNOVA to receive a license to use outside of the relevant market (hereinafter, “Grant Back License”) all of the intellectual property that primarily relates to the divested business. Consequently, the divestiture agreements collectively do not comply with the Order as written because Dow will retain a license to use the Divested Hollow Sphere Particle Business Intellectual Property outside of the relevant market.

Dow has supported its petition for divestiture approval with an explanation why the Grant Back License is both necessary to Dow and appropriate. For the reasons below, the Commission has determined that it is in the public interest to modify the Order, to allow for the Grant Back License. Separately, the Commission has also determined to approve Dow's petition.

The Commission may propose to reopen and modify a final Commission order on its own initiative under rule 3.72(b).<sup>2</sup> In this instance, the affidavits and other materials and information submitted by Dow to justify the Grant Back License and to support its divestiture petition provide a basis for the Commission to act on its own to relieve Dow of an Order obligation that may harm competition and impose costs on Dow without promoting achievement of the Order's purposes. Further, because the Commission has also determined to approve the divestiture itself, following a period of public comment, the Commission has obtained the benefit of any public information that might be submitted.

Orders to show cause under Rule 3.72(b) are not common. In recent years, however, the Commission has found sufficient public interest to support reopening an order to correct inaccuracies in a confidential exhibit providing the amounts of refunds owed by the respondent to customers. See, for example, MSC.Software (Docket No. 9299), Order to Show Cause and Order Modifying Order (issued May 23, 2003). They have also been used when the Commission determined to modify an order, but in a manner different from that requested in a petition filed under Rule 2.51(c). See, Interco, Inc., C-2929, 110 F.T.C. 153, at 156 (1988).

The materials in Dow's divestiture petition explain that the Order's requirement to divest "absolutely" all intellectual property that "primarily relates to" the hollow sphere particle business prevents Dow from receiving a Grant Back License of this intellectual property that is necessary to remove a cloud of uncertainty over Dow's continued right to manufacture and sell products outside of the Complaint market using existing processes. This uncertainty impairs Dow's ability to compete, and harms competition, in certain markets outside of the hollow sphere market identified in the Complaint.<sup>3</sup>

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<sup>2</sup> The Commission may issue an order to show cause under Rule 3.72(b) of the Rules of Practice when warranted by changed conditions of fact or law, or by the public interest. The public interest standard that applies to orders to show cause is the same as the public interest standard that must be met in order to issue a complaint. 6-45 *Federal Antitrust Law (Kintner)* § 45.106, citing *Royal Baking Powder Co. v. FTC*, 32 F.2d 966, 967 (D.C. Cir.), cert. denied, 280 U.S. 572, 50 S. Ct. 28, 74 L. Ed. 624 (1929). Rule 3.72(b)(2) provides for an evidentiary hearing, pursuant to the Commission's adjudicatory rules, if a respondent objects to an order to show cause and puts fact into dispute. If the respondent does not oppose the Commission's proposed action, the proposed modifications become final.

<sup>3</sup> Dow fears intellectual property disputes with OMNOVA arising from Dow's manufacture and sale of products outside of the Complaint market if Dow doesn't receive the grant back. See Aff. of of Paul Hayhurst ¶ 4. If it were subsequently determined that Dow had assigned to OMNOVA Dow's right to use intellectual property necessary to make SB Latexes,

Dow faces an increased risk of intellectual property disputes with OMNOVA if there is no Grant Back License. Allowing the Grant Back License, however, would not affect in any way OMNOVA's rights to use the intellectual property, in any markets. Therefore, there is no identifiable harm to competition in the Complaint market or to achieving the Order's purposes by allowing Dow to receive the Grant Back License for use outside the Complaint market. Under these circumstances, where the modification would not affect competition in any market covered by the Commission's remedy, but would free Dow from potential constraints on its ability to compete in other, non-Complaint, markets, it is in the public interest to modify the Order to permit the Grant Back License outside of the Complaint market. This can be accomplished by modifying the definition of Divested Hollow Sphere Particle Business Intellectual Property to permit the grant back license.<sup>4</sup>

In this very unusual case it is in the public interest to reopen and modify a final Commission Order to prevent potential competitive harm outside of a Complaint market because there appears to be no risk that relieving Dow of the costs associated with uncertainty over its right to use intellectual property outside of the Complaint market will hinder or frustrate the restoration of competition in the Complaint market that is the Order's purpose.<sup>5</sup> Accordingly, the Order should be modified to permit Dow to receive a grant back of rights outside of the Complaint market to use Hollow Sphere Particle Business Intellectual Property.

The new definition adds a proviso that explicitly permits Dow to receive a license back from the acquirer of the Hollow Sphere Particle Business in a field of use that excludes Hollow Sphere Particle Products in the Complaint market. This will relieve Dow of any uncertainty concerning its rights to use the intellectual property primarily relating to the divested hollow sphere particle business to develop, manufacture and sell products to that the Order permits Dow to retain. It is important to emphasize that the proposed modification does not allow Dow to use

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Dow would be "severely prejudiced," and its affected businesses "would be less efficient and would have higher costs, which Dow would seek to recover, potentially leading to higher prices." *Id.* at ¶¶ 6-7; see also Aff. of Hayhurst ¶ 3. Dow represents that it is the largest North American SB Latex producer, and that OMNOVA is Dow's largest competitor. See Aff. of Hayhurst ¶ 3. Dow asserts that an intellectual property dispute with OMNOVA "could seriously harm competition," and that prices could rise and SB Latex purchasers might lose the option to purchase from Dow if Dow's right to use the assigned intellectual property were restricted. *Id.* at ¶¶ 3-4. Dow posits that a grant back license permitting Dow to retain the right to use this intellectual property would ameliorate the potential harm to competition in these other markets.

<sup>4</sup> Under the terms of the Grant Back License, Dow's field of use excludes both the Complaint market and substantial adjacent product space.

<sup>5</sup> The revised definition of Divested Hollow Sphere Particle Business Intellectual Property to permit a grant back license in a field of use outside of the Complaint market will conform that definition to those of Divested Acrylic Acid Business Intellectual Property and Divested Latex Polymers Business Intellectual Property, which similarly include grant back licenses.

any of the Divested Hollow Sphere Particle Business Intellectual Property to research, develop, manufacture, produce, market or sell any Hollow Sphere Particle Products.

In view of the foregoing, the Commission has determined to reopen the Order issued on March 31, 2009, pursuant to Section 3.72 (b) of the Commission's Rules of Practice, 16 CFR § 3.72(b) and to modify the Order issued on March 31, 2009, by deleting the definition of Divested Hollow Sphere Particle Business Intellectual Property found at Order ¶ I.FF., and substituting the new definition below.

Dow has consented to this modification, and waives any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 CFR § 3.72(b). Accordingly,

**IT IS ORDERED THAT** this matter be, and it hereby is, reopened pursuant to Rule 3.72(b) of the Commission's Rules of Practice; and,

**IT IS FURTHER ORDERED THAT** the Order in Docket C-4243 be, and it hereby is, modified to delete the definition of Divested Hollow Sphere Particle Intellectual Property in Paragraph I.FF. of the Order as issued on March 31, 2009, and to substitute the following new language to Paragraph I.FF., which shall read as follows:

“Divested Hollow Sphere Particle Business Intellectual Property” means Intellectual Property that is primarily related to the research, development, production, and manufacture in the United States and the marketing and sale in the United States, Puerto Rico, Mexico and Canada of Hollow Sphere Particle Products manufactured or produced from an encapsulated ester core. Divested Hollow Sphere Particle Business Intellectual Property includes all rights to obtain and file for Patents and registrations thereto in the United States, Mexico, and Canada; *provided, however*, at the option of Respondent, the Hollow Sphere Particle Divestiture Agreement shall grant to Respondent a non-exclusive, irrevocable, royalty-free, fully paid-up license to use the Divested Hollow Sphere Particle Business Intellectual Property, including Respondent's future developments and improvements thereto, to make, have made, use, sell, and/or offer to sell anywhere in the world any products other than Hollow Sphere Particle Products.

For the avoidance of doubt, Divested Hollow Sphere Particle Business Intellectual Property does not include (i) Licensed Hollow Sphere Product Intellectual Property; (ii) Divested Latex Polymers Business Intellectual Property; or (iii) any Intellectual Property used in the manufacture of Respondent's Seed Latex.

By the Commission, Commissioner Ramirez not participating.

Issued and Effective: May 13, 2010

Donald S. Clark  
Secretary