

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

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

)	
In the Matter of)	
)	
Linde AG)	
a corporation,)	
)	Docket No. C-4660
Praxair, Inc.)	
a corporation, and)	
)	
Linde PLC)	
a corporation.)	
)	

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed merger of Linde AG and Praxair, Inc. to form Linde PLC (collectively “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the draft complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Hold Separate and Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings and issues the following Order to Hold Separate and Maintain Assets (“Order to Hold Separate”):

1. Respondent Linde AG is a corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Klosterhofstrasse 1, 80331 Munich, Germany. Linde AG’s United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Linde North America, Inc., 200 Somerset Corporate Boulevard, Bridgewater, New Jersey 08807 (attention: Greg Schuetz, Esq.).
2. Respondent Praxair, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 10 Riverview Drive, Danbury, Connecticut 06810.
3. Respondent Linde PLC is a corporation organized, existing, and doing business under and by virtue of the laws of Ireland with its executive office located at The Priestley Centre, 10 Priestley Road, The Surrey Research Park, Guildford, Surrey GU2 7XY, United Kingdom. Linde PLC’s United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Praxair, Inc., 10 Riverview Drive, Danbury, Connecticut 06810 (attention: Guillermo Bichara, Esq.).
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order to Hold Separate, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Hold Separate is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

- A. “Linde” means Linde AG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde AG (including Linde North America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “Praxair” means Praxair Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Praxair, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Linde PLC” means Linde PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde PLC (including Linde North America, Inc., after the Merger), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person that acquires any of the Gases Assets pursuant to the Decision and Order.
- F. “Active Employee” means any full-time, part-time, or contract individual employed by Linde, Praxair, or Linde PLC whose job responsibilities relate or related to any of part of the Gases Business, as of and after the date of the announcement of the Merger.
- G. “Confidential Information” means any and all of the following information:
1. all information that is a trade secret under applicable trade secret or other law;
 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;
 3. all information concerning the relevant business, including historical and current financial statements, financial projections and budgets, tax returns and accountants’ materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials; and
 4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of

this Order to Hold Separate; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

- H. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- I. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and
 - 2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.
- J. “Gases Assets” means the Helium Assets, HyCO Assets, and Industrial Gases Assets and, if applicable, any additional assets identified in Paragraphs I.G., I.H., and I.I. of the Decision and Order.
- K. “Gases Business” means the Helium Business, HyCO Business, and Industrial Gases Business.
- L. “Governmental Authorization” means any consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.
- M. “Including” means including without limiting the generality of any description preceding such term.
- N. “Merger” means the merger of Linde and Praxair described in the Business Combination Agreement by and among Linde Aktiengesellschaft, Praxair, Inc., Zamalight PLC, Zamalight Holdco LLC, and Zamalight Subco, Inc., dated as of June 1, 2017.
- O. “Merger Date” means the date the Merger closes.
- P. “Orders” means this Order to Hold Separate and the Decision and Order.
- Q. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

II.

IT IS FURTHER ORDERED that from the date this Order to Hold Separate is issued until the date that all of the Industrial Gases Assets and HyCO SMR Assets have been divested pursuant to the Decision and Order:

- A. Respondents shall continue to operate Linde and Praxair as independent, ongoing, economically viable, competitive businesses held separate, distinct, and apart from each other's operations.
- B. Respondents shall not coordinate any aspect of the operations of Linde and Praxair, including the marketing or sale of any products. Respondents shall take all steps necessary to ensure that:
 - 1. Neither Linde nor Praxair attempts to influence, direct, or control the management of the other with regard to any aspects of its operations; and
 - 2. The management of Linde and Praxair each shall act to maintain and increase their respective sales and income, and maintain operational, promotional, advertising, sales, technical, customer service, and marketing support at 2018 levels or previously approved levels for 2019, whichever are higher.
- C. Linde and Praxair shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, and income of each.

III.

IT IS FURTHER ORDERED that from the date this Order to Hold Separate is issued until the Gases Assets are divested, Respondents shall operate the Gases Assets and Gases Business in the ordinary course of business consistent with past practices, including:

- A. Maintaining the (i) Gases Assets and Gases Business in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, and (ii) relations and good will with employees, suppliers, customers, landlords, creditors, agents, and others having business relationships with the Gases Business and Gases Assets;
- B. Providing the Gases Business with sufficient financial and other resources to (i) operate the Gases Business and Gases Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the date the Merger was announced; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Gases Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as

are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and

- C. Preserving the Gases Business and Gases Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Gases Business and Gases Assets would be diminished.

IV.

- A. Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer any of the Gases Assets no later than the date that such assets are divested; *provided, however*, that in the event that Respondents are unable to obtain any:
 - 1. Governmental Authorization, Respondents shall provide such assistance as an Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
 - 2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- B. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of any of the Gases Assets and Gases Business, including providing access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- C. From the time Respondents engage in negotiations with any Acquirer until 6 months after the divestiture of any of the Gases Assets to that Acquirer, Respondents shall cooperate and assist the Acquirer to identify and hire any Active Employee whose responsibilities relate in any way to the Gases Assets to be divested to the Acquirer:
 - 1. No later than 10 days after the request of an Acquirer, Respondents shall provide all information of any relevant Active Employee, including providing access to personnel Records (to the extent permissible under applicable laws) and allowing Acquirer to privately interview such Active Employee;
 - 2. Respondents shall (i) not solicit the continued employment of any Active Employee (unless Acquirer has informed Respondents that a particular Active Employee will not receive an employment offer from Acquirer) and (ii) not otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Active Employee by an Acquirer;

3. Respondents shall provide reasonable financial incentives as necessary to any Active Employee to accept an offer of employment from an Acquirer, which may include providing a retention bonus for continuing employment in connection with any Gases Assets to be divested; and
4. All Active Employees hired by an Acquirer who are participants in Respondents' retirement and savings plans (i) shall retain their accrued benefits under such plans as of the date the Gases Assets are divested and Respondents shall be liable for payment of the benefits when employees become eligible for them and (ii) shall become fully vested in their accrued benefits as of the date the Gases Assets are divested.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Gases Assets, Gases Business, and the post-divestiture Gases Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
 1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or
 2. Complying with financial, regulatory, or other reporting or legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Gases Assets or Gases Business or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph V.A. of this Order to Hold Separate, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph V. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph V., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI.

IT IS FURTHER ORDERED that:

- A. Grant Thornton LLP (“Monitor”) shall serve to monitor Respondent’s compliance with all of its obligations and responsibilities as required by this Order to Hold Separate, Decision and Order, and any Divestiture Agreement.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order to Hold Separate and in consultation with the Commission:
 - 1. The Monitor shall (i) monitor Respondent’s compliance with the obligations set forth in this Order to Hold Separate and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission;
 - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents’ personnel, books, records, documents, and facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;
 - 3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor’s duties and responsibilities;
 - 4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor’s gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every 30 days after the Merger Date and (ii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with the Orders.
- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate when this Order to Hold Separate terminates at which time the Monitor's power and duties shall continue as set forth under the Decision and Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Hold Separate on the same terms and conditions as provided in this Paragraph VI.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

VII.

IT IS FURTHER ORDERED that:

- A. Respondent shall:
1. No later than 5 days after the Merger Date, notify the Commission via email at bccompliance@ftc.gov of the Merger Date; and
 2. No later than 10 days after the divestiture of any of the Gases Assets has been completed, (a) notify the Commission of the date such divestiture closed and (b) submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.
- B. Respondent shall submit verified written reports (“Compliance Reports”) in accordance with the following:
1. Respondent shall submit interim Compliance Reports 30 days from the date Respondent signs the Consent Agreement (as set forth in the Consent Agreement) and every 30 days thereafter until this Order to Hold Separate terminates; and
 2. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order (conclusory statements that Respondents have complied with their obligations under the Order are insufficient);
 3. Respondents shall include in their Compliance Reports a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted; and
 4. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under this Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.
- C. Respondent shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondent shall submit an original and two copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each Compliance Report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that after the Decision and Order in this matter is issued, the compliance reports required by this Paragraph VII. may be consolidated with and submitted to the Commission on the same timing as the compliance reports required by the Decision and Order.

VIII.

IT IS FURTHER ORDERED that the purpose of this Order to Hold Separate is (i) to hold the operations of Linde and Praxair separate and apart and to preserve the Gases Assets and Gases Business as a viable, competitive, and ongoing business until the divestitures required by the Decision and Order are achieved; (ii) prevent interim harm to competition pending the divestitures and other relief; and (iii) help remedy any anticompetitive effects of the proposed Merger as alleged in the Commission's Complaint.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of Linde PLC;
- B. Any proposed acquisition, merger, or consolidation of Linde PLC; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Hold Separate.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Hold Separate, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order to Hold Separate, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order to Hold Separate, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order to Hold Separate shall terminate:

- A. Three business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. Three business days after the date that Respondents complete the divestitures required by Paragraph II. of the Decision and Order; *provided, however*, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Hold Separate shall terminate three business days after the Decision and Order becomes final.

By the Commission, Commissioner Chopra dissenting.

Donald S. Clark
Secretary

SEAL:
ISSUED: October 19, 2018