

ANALYSIS OF PROPOSED CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted agreements to proposed consent orders from FMC Corporation ("FMC") and from Asahi Chemical Industry Co. Ltd. ("Asahi Chemical"). FMC has its principal place of business in Chicago, Illinois. Asahi Chemical has its principal place of business in Tokyo, Japan.

The proposed consent orders have been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreements and the comments received, and decide whether it should withdraw from the agreements or make final the agreements' proposed orders.

The Commission's multi-count complaint charges that FMC and Asahi Chemical (collectively referred to as "respondents") have violated Section 5 of the Federal Trade Commission Act by conspiring to monopolize the world market for microcrystalline cellulose, and by agreeing to divide territories for the sale of microcrystalline cellulose. In addition, FMC is charged with attempting to monopolize the relevant market and with inviting a competitor to collude.

According to the complaint, microcrystalline cellulose ("MCC") is derived from purified wood cellulose and is used primarily as a binder in the manufacture of pharmaceutical tablets. MCC is a component of nearly all pharmaceutical tablets sold in the United States today. During the term of the conspiracy, FMC was the largest manufacturer and seller of MCC in the world. Asahi Chemical was the second largest seller of MCC in the world, and the dominant supplier of MCC in Japan.

The complaint alleges that, for over a decade, FMC engaged in a course of conduct designed to neutralize or eliminate competing sellers of MCC and to secure monopoly power. In or about 1984, FMC entered into a conspiracy with Asahi Chemical to divide territories. FMC agreed that it would not sell any MCC product to customers located in Japan or East Asia without the consent of Asahi Chemical. In return, Asahi Chemical agreed that it would not sell any MCC product to customers located in North America or Europe without the consent of FMC.

In addition, the complaint alleges that FMC invited three smaller producers of MCC to join with FMC in collusive and anticompetitive conduct. The three firms solicited by FMC were Ming Tai Chemical Co., Ltd. ("Ming Tai"), Wei Ming Pharmaceutical Mfg. Co., Ltd. ("Wei Ming"), and the Mendell division of Penwest, Ltd. ("Mendell").

According to the complaint, in 1994 Ming Tai and Wei Ming emerged as significant suppliers of MCC to portions of the Asian MCC market. FMC was concerned that these Taiwan-based manufacturers would next compete for FMC's MCC accounts in North America and Europe. In or about January 1995, FMC proposed to Ming Tai that it grant FMC the exclusive right to distribute all MCC exported from Taiwan by Ming Tai. Also in or about January 1995, FMC proposed to Wei Ming that it sell MCC to FMC on an exclusive basis. In seeking these arrangements, FMC's intent was to exclude competition from the Taiwanese manufacturers and thereby secure monopoly power. Neither Ming Tai nor Wei Ming accepted FMC's invitation.

The complaint further alleges that, in 1995, Mendell posed a competitive threat to FMC's position as the dominant seller of MCC to pharmaceutical manufacturers in North America and Europe. Mendell had recently opened an MCC manufacturing facility in

the United States, and was actively seeking to expand its sales. In April 1995, FMC proposed to Mendell that the two firms enter into a market division agreement. Mendell did not accept FMC's invitation.⁽¹⁾

Finally, the complaint alleges that the conduct engaged in by FMC and Asahi Chemical had the purpose and effect, or the tendency and capacity, to restrain competition in the manufacture and sale of MCC and to injure consumers in the United States and worldwide.

FMC and Asahi Chemical have signed consent agreements containing the proposed consent orders. The proposed consent orders would prohibit FMC and Asahi Chemical from:

- (i) agreeing with competitors to divide or allocate markets, customers, contracts, or geographic territories in connection with the sale of MCC, or
- (ii) agreeing with competitors to refrain in whole or in part from producing, selling, or marketing MCC. The respondents would also be barred from inviting or soliciting such agreements not to compete.

Further, in order to eradicate the anticompetitive effects of the alleged conspiracy, FMC is barred from serving as the U.S. distributor for any competing manufacturer of MCC (including Asahi Chemical) for a period of ten years. Further, for a period of five years, FMC may not distribute in the United States any other excipient manufactured by Asahi Chemical.⁽²⁾

The proposed consent orders contain several limited exemptions to the above-described provisions intended to permit FMC and Asahi Chemical to engage in certain lawful and pro-competitive conduct. For example, notwithstanding the broad prohibition on agreeing to divide markets, each respondent would be permitted to enter into exclusive trademark license agreements, to enforce its intellectual property rights, and to abide by reasonable restraints ancillary to lawful joint venture agreements. In any action by the Commission alleging violations of the consent order, each respondent would bear the burden of proof in demonstrating that its conduct satisfied the conditions of the exemption.

The proposed consent orders contain provisions to assist the Commission in monitoring the respondents' compliance with the orders. FMC would be required to retain copies of written communications with competing MCC manufacturers, and upon request, to make such documents available to the Commission. Asahi Chemical would be required to produce to the Commission all documents reasonably necessary for the purpose of determining or securing compliance with the consent order, without regard to whether the documents are located in the United States or in another jurisdiction.

The purpose of this analysis is to facilitate public comment on the proposed orders, and it is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Endnotes:

1. FMC's efforts to recruit Ming Tai, Wei Ming, and Mendell to enter into anticompetitive arrangements, as alleged in the complaint, support the attempted monopolization claim. *See* Complaint ¶ 22. FMC's invitation to Mendell was the most patently anticompetitive of the three, and is the basis for an independent cause of action. *See* Complaint ¶ 23.

2. An excipient is an inactive ingredient used in the manufacture of pharmaceutical products.