

Complaint

IN THE MATTER OF

**NOVARTIS AG, ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND  
SECTION 7 OF THE CLAYTON ACT*Docket C-3979; File No. 0010082**Complaint, November 1, 2000--Decision, December 15, 2000*

This consent order addresses Respondents Novartis AG and AstraZeneca PLC=s agreement to combine their crop protection and seed businesses. The complaint alleges that the proposed transaction, if consummated, would substantially lessen competition in the markets for corn herbicides and fungicides in the United States. The order requires Astra Zeneca to divest its acetochlor herbicide business to Dow AgroSciences including the intellectual property, know-how, registrations, trademarks, rights to technical assistance, and rights under the joint venture contracts with Monsanto that are necessary to the manufacture and sale of acetochlor-based corn herbicides. Respondent Novartis will divest its strobilurin fungicide business to Bayer AG including its trifloxystrobin production facilities in Muttenz, Switzerland, and intellectual property, know-how, and registrations, and trademarks necessary to manufacture the divested strobilurin fungicides.

*Participants*

For the Commission: *Frederick J. Horne, Richard Liebeskind, Morris A. Bloom, Daniel P. Ducore, Christopher T. Taylor, Louis Silvia, and Daniel O=Brien.*

For the Respondents: *Ronan P. Harty, Davis Polk & Wardwell and Kenneth S. Prince, Shearman & Sterling.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the ACommission@), having reason to believe that respondents Novartis AG (ANovartis@), a corporation, and AstraZeneca PLC (AZeneca@), a corporation, both subject to the jurisdiction of the

### Complaint

Commission, have agreed to combine Novartis= crop protection and seeds businesses with Zeneca=s crop protection business to form Syngenta AG (ASyngenta@), a corporation, in violation 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

### **I. RESPONDENTS**

1. Respondent Novartis AG is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland. Novartis owns a variety of subsidiaries, including Novartis US Co., Novartis Agribusiness Biotechnology Research, Inc., Novartis BCM North America, Inc., Novartis Crop Protection, Inc., Novartis Seeds, Inc., Novartis Specialty Crops, Inc., and Wilson Genetics, LLC, which engage in crop protection and seed businesses in the United States. Novartis is engaged in the discovery, development, manufacture and sale of crop protection chemicals, seeds, proprietary and generic pharmaceutical products, and human and animal health products.

2. Respondent AstraZeneca PLC is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom. AstraZeneca owns a variety of subsidiaries, including Zeneca Holdings, Inc., and Zeneca Ag Products, Inc., which engage in the crop protection business in the United States. Zeneca is engaged in the discovery, development, manufacture and sale of crop protection chemicals and proprietary and generic pharmaceutical products.

1120

FEDERAL TRADE COMMISSION DECISIONS  
VOLUME 130

Complaint

## Complaint

3. Respondent Syngenta AG will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.

**II. JURISDICTION**

4. Novartis and Zeneca, and/or their subsidiaries, are, and at all times relevant herein have been, engaged in commerce as Acommerce@ is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**III. THE PROPOSED MERGER**

5. On or about December 2, 1999, Novartis and Zeneca executed a Master Agreement pursuant to which Zeneca will contribute its agricultural chemicals business and Novartis will contribute its agricultural chemicals and seeds businesses to a newly formed Swiss company, Syngenta AG. Novartis shareholders will own 61 percent of Syngenta and Zeneca shareholders will own 39 percent of Syngenta. Syngenta will have annual sales of approximately \$8 billion.

**IV. THE RELEVANT MARKETS**

6. One relevant line of commerce in which to analyze the effects of the proposed transaction is the research, development, manufacture, and sale of herbicides applied prior to weed emergence for control of grassy weeds in corn. Such herbicides contain active chemical ingredients that inhibit the growth of grassy weeds. Preventing early competition between growing corn and grassy weeds is essential to economic production of

## Complaint

corn. There are no economic substitutes for pre-emergence grass herbicides for use on corn.

7. Other relevant lines of commerce in which to analyze the effects of the proposed merger are the research, development, manufacture, and sale of foliar fungicides for treatment of diseases in cereals, foliar fungicides for treatment of diseases in peanuts, foliar fungicides for treatment of diseases in potatoes, foliar fungicides for treatment of diseases in rice, foliar fungicides for treatment of diseases in turf, and foliar fungicides for treatment of diseases in vegetables. Foliar fungicides, which are applied predominantly to the foliage of plants, contain active chemical ingredients that kill or inhibit the growth of certain types of organisms that cause disease. Such fungicides are essential to economic production of crops and have no economic substitutes.

8. The United States is a relevant geographic area in which to analyze the effects of the merger. United States law requires that herbicides and fungicides undergo a rigorous registration process with the U.S. Environmental Protection Agency (EPA) before they may be used or sold in this country. Other countries have similar registration requirements. The patchwork of regulatory regimes creates national markets.

## V. STRUCTURE OF THE MARKETS

### Corn Herbicides

9. The market for pre-emergence grass herbicides for use on corn is highly concentrated, as measured by the Herfindahl-Hirschman Index (HHI) and other measures of concentration. United States sales of corn herbicides for pre-emergent control of grasses were more than \$770 million in 1999. Novartis is the leading developer, manufacturer and seller of corn herbicides for pre-emergent control of grasses in the United States with a share of about 50 percent of sales. Zeneca has approximately 15 percent of the market. The proposed merger would increase concentration, as measured by the HHI, by nearly 1400 points to over 4600.

Complaint

## Complaint

10. The pre-emergence grass herbicides used by growers of corn belong predominantly to a class of chemicals known as acetanilides. Herbicides based on one of three active ingredients from this group of chemicals, metolachlor, acetochlor, and dimethenamid, account for nearly all sales. Novartis= metolachlor herbicides, sold under the brands Dual and Bicep, are the leading products in the market.

11. Herbicides containing the active ingredient acetochlor are the second best selling products in the market, as well as the second choice for most growers who use Novartis= metolachlor herbicides. Zeneca and Monsanto Company (now known as Pharmacia Corporation) both sell acetochlor herbicides, with all of the active ingredient produced at a Monsanto facility in Muscatine, Iowa, pursuant to a production and registration joint venture between Zeneca and Monsanto. Zeneca=s acetochlor herbicides are sold under the brands Fultime, Surpass, Doubleplay, and TopNotch. Taken together, acetanilide herbicides sold by Novartis, Zeneca, and Monsanto account for nearly 90% of sales.

**Fungicides**

12. Novartis and Zeneca are the leading sellers of fungicides in the U.S. market, and account for a combined total of approximately 40% of yearly fungicide sales. Typically, for a given crop, there are only 2 or 3 significant sellers of fungicides. In cereals, peanuts, potatoes, rice, and turf, sales by the top 2 or 3 fungicide sellers range from nearly 70% to more than 90% of all sales. In vegetables, sales by the top 5 sellers account for approximately 70% of all sales.

13. Novartis= primary foliar fungicide products are based on the active ingredients propiconazole and trifloxystrobin. Novartis= propiconazole fungicides are sold under the brands Banner, Break, Orbit, and Tilt. Novartis obtained U.S. registration for its trifloxystrobin fungicides in 2000. They are sold under the brands Flint and Compass. In addition, a

## Complaint

combination product of propiconazole and trifloxystrobin is sold under the brand Stratego.

14. Zeneca=s primary foliar fungicide products are based on the active ingredients chlorothalonil and azoxystrobin. Zeneca=s chlorothalonil fungicides are sold under the brands Bravo and Daconil. Zeneca=s azoxystrobin fungicides, which were registered in the U.S. in 1997, are sold under the brands Abound, Heritage, and Quadris.

15. The most significant recent development in terms of foliar fungicides has been the introduction of a new class of fungicides known as strobilurins. Fungicides of this class are effective against a broad spectrum of diseases on a wide variety of crops and are more environmentally friendly than most traditional fungicides. The effectiveness and environmental profile of strobilurin fungicides have created strong demand for the products among growers. Strobilurins introduced to the market have quickly achieved significant market share and have taken sales away from traditional foliar fungicides. Zeneca=s azoxystrobin fungicides and Novartis= trifloxystrobin fungicides are both strobilurins.

16. Zeneca=s and Novartis= strobilurin fungicides are direct competitors. Zeneca and Novartis, along with BASF Corporation, are the only companies with strobilurin fungicides registered for sale in the United States. No company other than Zeneca, Novartis, or BASF is likely to introduce a new strobilurin fungicide into the U.S. market within the next 3 or 4 years.

## VI. ENTRY CONDITIONS

17. Entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. The need for extensive research and development and registration requirements

## Complaint

create long lead times for the introduction of new products. Additionally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

18. Developing a new herbicide or fungicide can take six to ten years from the time when a potentially attractive active ingredient is identified. Extensive testing in the field is necessary to evaluate efficacy and use requirements. In addition, several years of testing for negative environmental and toxicological impact is necessary to achieve registration.

**VII. EFFECTS OF THE PROPOSED MERGER**

19. The proposed transaction, if consummated, may substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45. Specifically the merger will:

**Corn Herbicides**

- a. eliminate Zeneca and Novartis as substantial, independent competitors;
- b. eliminate actual, direct, and substantial competition between Zeneca and Novartis;
- c. reduce innovation competition among researchers and developers of pre-emergence grass herbicides for use on corn, including the reduction in, delay of, or redirection of research and development projects;
- d. increase the level of concentration in the relevant market;
- e. increase barriers to entry into the relevant market;
- f. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in the market;

## Complaint

- g. increase the likelihood and degree of coordinated interaction between or among competitors in the market;

**Fungicides**

- h. eliminate Zeneca and Novartis as substantial, independent competitors;
- i. eliminate actual, direct, and substantial competition between Zeneca and Novartis;
- j. reduce innovation competition among researchers and developers of foliar fungicides, including the reduction in, delay of, or redirection of research and development projects;
- k. increase the level of concentration in the relevant markets;
- l. increase barriers to entry into the relevant markets;
- m. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in the markets; and
- n. increase the likelihood and degree of coordinated interaction between or among competitors in the markets.

**VIII. VIOLATIONS CHARGED**

20. The merger agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. ' 45.

## Order to Maintain Assets

21. The merger, if consummated, would constitute a violation of Section 5 of the FTC Act, 15 U.S.C. ' 45, and Section 7 of the Clayton Act, 15 U.S.C. ' 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of November, 2000, issues its complaint against said Respondents.

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed combination of Novartis AG=s (ANovartis@) crop protection and seeds businesses and AstraZeneca PLC=s (AZeneca@) crop protection business to form Syngenta AG (ASyngenta@), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition intended to present to the Commission for its consideration and which, if issued by the Commission, 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (AConsent Agreement@), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

## Order to Maintain Assets

The Commission having thereafter considered the matter and having 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, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order to Maintain Assets:

1. Novartis is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland.
2. Zeneca is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom.
3. Syngenta will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

**IT IS HEREBY ORDERED** that, as used in this Order to Maintain Assets, the following definitions shall apply:

## Order to Maintain Assets

- D. **AAceto chlor Acquirer@** means Dow or, in the event Dow is not approved as the Aceto chlor Acquirer or for any other reason does not acquire the Aceto chlor Assets, any other Person who acquires the Aceto chlor Assets, after approval by the Commission.
- E. **AAceto chlor Assets@** means all assets and rights owned or held by Zeneca and relating to and/or used in the operation of the Aceto chlor Business, including, without limitation, the assets listed below and including, without limitation, the assets specified in the Aceto chlor Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):
1. Zeneca=s rights under and title and interest in the Monsanto Contracts;
  2. Zeneca=s rights, title, and interest in all EPA, state, and foreign registrations and approvals relating to the manufacture or sale of all products of the Aceto chlor Business;
  3. Zeneca=s rights, title, and interest in all Aceto chlor Registration Data (except in the case of Safener 29148, which Zeneca shall exclusively license for uses relating to all products of the Aceto chlor Business), submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;
  4. Zeneca=s rights, title, and interest in all trademarks and trade names for all products of the Aceto chlor Business;
  5. Zeneca=s rights, title, and interest in the Aceto chlor Intellectual Property;

Order to Maintain Assets

6. exclusive, perpetual, royalty-free, and transferable licenses under the Zeneca Intellectual Property for uses relating to all products of the Acetochlor Business and copies of all research materials and know-how relating thereto;

## Order to Maintain Assets

7. an exclusive, perpetual, royalty-free, and transferable license for the Glutathione Transferase (GST27) resistance gene to produce plants which are labeled as acetochlor tolerant;
  8. Zeneca=s rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees other than multi-product contracts as defined in the Acetochlor Divestiture Agreement;
  9. all inventories of all products of the Acetochlor Business;
  10. all research materials and know-how of the Acetochlor Business;
  11. all Mesotrione rights as set forth in Section 5.04 of the Acetochlor Divestiture Agreement;
  12. the Mesotrione Supply Agreement as defined in the Acetochlor Divestiture Agreement; and
  13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Acetochlor Business.
- F. AAcetochlor Business@ means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by Zeneca of all unmixed and mixed acetochlor products, in any market anywhere in the world, except for the following mixtures: (1) Zeneca=s mixtures of acetochlor and EPTC, (2) Zeneca=s mixtures of acetochlor and

## Order to Maintain Assets

fluorochlorodone (including twin/co-packs of acetochlor and fluorochlorodone), and (3) Zeneca=s proposed mixtures of acetochlor and mesotrione.

- G. AAcetochlor Divestiture Agreement@ means the Asset Purchase Agreement between Zeneca and Dow dated as of October 17, 2000, and its related agreements, schedules, exhibits and appendices.
- H. ACommission@ means the Federal Trade Commission.
- I. ADecision and Order@ means the Decision and Order incorporated with this Order to Maintain Assets into the Consent Agreement.
- J. ANovartis@ means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- K. APerson@ means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- L. ARespondents@ means Novartis, Zeneca, and Syngenta, respectively and collectively.
- M. AStrobilurin Acquirer@ means Bayer or, in the event Bayer is not approved as the Strobilurin Acquirer or for any other reason does not acquire the Strobilurin Assets, any other Person who acquires the Strobilurin Assets, after approval by the Commission.
- N. AStrobilurin Assets@ means all assets and rights owned or held by Novartis and relating to and/or used in the operation

## Order to Maintain Assets

of the Strobilurin Business, including, without limitation, the assets listed below and including, without limitation, those assets specified in the Strobilurin Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Novartis= rights, title, and interest in all machinery, furniture, fixtures, equipment, tools, and other tangible personal property at the Muttenz Production Facility used for or necessary for the manufacture of trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin;
2. all rights, licenses, permits, registrations, know-how, technical information, and other permissions or expertise necessary to manufacture trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin at the Muttenz Production Facility;
3. Novartis= lease with Clariant for the land and buildings of the Muttenz Plant, infrastructure and support services;
4. Novartis= rights, title, and interest in all United States Environmental Protection Agency, state, and foreign registrations and approvals relating to the manufacture or sale of strobilurin fungicides or compounds containing strobilurin fungicides;
5. Novartis= rights, title, and interest in all Strobilurin Registration Data, submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;
6. Novartis= rights, title, and interest in all trademarks and trade names for trifloxystrobin, any compound

## Order to Maintain Assets

containing trifloxystrobin, or any other strobilurin fungicide;

7. Novartis= rights, title, and interest in the Strobilurin Intellectual Property, *provided, however*, that Novartis may receive (i) an exclusive (except as to the Strobilurin Acquirer), perpetual, royalty-free, and transferable license back from the Strobilurin Acquirer to use the Strobilurin Intellectual Property identified in confidential Appendix 3 of the Decision and Order outside of the field of strobilurin fungicides, and (ii) a non-exclusive perpetual, royalty-free and transferable license from the Strobilurin Acquirer to use the Strobilurin Intellectual Property not identified in confidential Appendix 3 outside of the field of strobilurin fungicides;

8. exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

9. non-exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for non-fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;

10. Novartis= rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees related to and primarily used in the Strobilurin Business;

## Order to Maintain Assets

11. all inventories of trifloxystrobin and compounds containing trifloxystrobin;
12. all research materials and know-how of the Strobilurin Business; and

## Order to Maintain Assets

13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Strobilurin Business.

- O. AStrobilurin Business@ means the research, development, registration, manufacture, formulation, licensing, sale and distribution of the existing strobilurin fungicide products and product developments of Novartis, in any market anywhere in the world, including all existing straight products or combinations therewith.
- P. AStrobilurin Divestiture Agreement@ means the Asset Purchase Agreement between Novartis and Bayer dated as of September 7, 2000, and its related agreements, schedules, exhibits and appendices.
- Q. AZeneca@ means AstraZeneca PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Zeneca, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

*provided, however*, any term used in this Order to Maintain Assets that is not defined in this Paragraph I has the same meaning as defined in the Decision and Order.

**II.**

**IT IS FURTHER ORDERED** that:

## Order to Maintain Assets

- O. Between the date Respondents sign the Consent Agreement and the date the Acetochlor Assets are completely divested, Respondents shall:
1. Maintain the Acetochlor Assets in substantially the same condition (except for normal wear and tear and sales of inventory in the ordinary course) existing at the time respondent signs the Consent Agreement; preserve intact the Acetochlor Assets; keep available the services of the current officers, employees, and agents of such businesses; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with such businesses;
  2. Take such action that is consistent with the past practices of Respondents in connection with the Acetochlor Business and is taken in the ordinary course of the normal day-to-day operations of Respondents; and
  3. Not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Acetochlor Assets would be diminished.

P. The purpose of this Order to Maintain Assets is to: (i) preserve the Acetochlor Assets as a viable, competitive, and ongoing business and (ii) prevent interim harm to competition.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Between the date Respondents sign the Consent Agreement and the date the Strobilurin Assets are completely divested, Respondents shall:

## Order to Maintain Assets

1. Maintain the Strobilurin Assets in substantially the same condition (except for normal wear and tear and sales of inventory in the ordinary course) existing at the time respondent signs the Consent Agreement; preserve intact the Strobilurin Assets; keep available the services of the current officers, employees, and agents of such businesses; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with such businesses;
  2. Take such action that is consistent with the past practices of Respondents in connection with the Strobilurin Business and is taken in the ordinary course of the normal day-to-day operations of Respondents; and
  3. Not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Strobilurin Assets would be diminished.
- B. The purpose of this Order to Maintain Assets is to: (i) preserve the Strobilurin Assets as a viable, competitive, and ongoing business and (ii) prevent interim harm to competition.

**IV.****IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint one or more persons to serve as Monitor Trustee to ensure that Respondents expeditiously perform their obligations as required by this Order to Maintain Assets and the Decision and Order.
- B. If a Monitor Trustee is appointed pursuant this Paragraph, Respondents shall consent to the following terms and

## Order to Maintain Assets

conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. The Monitor Trustee shall have the power and authority to monitor Respondents= compliance with the terms of this Order to Maintain Assets and the terms of the Decision and Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of such orders and in consultation with the Commission.
3. Within ten (10) business days after appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents= compliance with the terms of this Order to Maintain Assets and the Decision and Order in a manner consistent with the purposes of such orders. Respondents may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
4. The Monitor Trustee shall serve until Respondents have completed all obligations under (a) this Order to Maintain Assets and (b) the initial term of any supply agreement

## Order to Maintain Assets

required by Paragraphs II and III of the Decision and Order (except for any supply agreement relating to Paragraph II.B.5. of the Decision and Order).

5. The Monitor Trustee shall have full and complete access to Respondents' books, records, documents, personnel, facilities and technical information relating to compliance with this Order to Maintain Assets and the Decision and Order, or to any other relevant information, as the Monitor Trustee may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents' compliance with this Order to Maintain Assets and the Decision and Order.
6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's 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,

## Order to Maintain Assets

damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.

8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph.
9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets and the Decision and Order.
10. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order to Maintain Assets and the Decision and Order (i) every sixty (60) days for a period of six months from the date Respondent signs the Consent Agreement and (ii) annually thereafter on the anniversary of the date this Order to Maintain Assets becomes final during the remainder of the Monitor Trustee's period of appointment.

**V.**

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

**VI.**

## Decision and Order

**IT IS FURTHER ORDERED** that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order to Maintain Assets; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

A. Three (3) 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 (3) business days after termination of the duties of the Monitor Trustee appointed pursuant to this Order to Maintain Assets.

By the Commission.

Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed combination of Novartis AG=s (ANovartis@) crop protection and seeds businesses and AstraZeneca PLC=s (AZeneca@) crop protection business to form Syngenta AG (ASyngenta@), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition intended to present to the Commission for its consideration and which, if issued by the Commission, 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (AConsent Agreement@), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

The Commission having thereafter considered the matter and having 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, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (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 hereby makes the following jurisdictional findings and issues the following Order:

## Decision and Order

1. Novartis is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Lichtstrasse 35, CH-4002, Basel, Switzerland.
2. Zeneca is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 15 Stanhope Gate, London W1K 1LN, United Kingdom.
3. Syngenta will be formed as a corporation organized, existing and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located in Basel, Switzerland.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

- A. **AAceto chlor Acquirer@** means Dow or, in the event Dow is not approved as the Aceto chlor Acquirer or for any other reason does not acquire the Aceto chlor Assets, any other Person who acquires the Aceto chlor Assets, after approval by the Commission.
- B. **AAceto chlor Assets@** means all assets and rights owned or held by Zeneca and relating to and/or used in the operation of the Aceto chlor Business, including, without limitation, the assets listed below and including, without limitation, the

## Decision and Order

assets specified in the Acetochlor Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):

1. Zeneca=s rights under and title and interest in the Monsanto Contracts;
2. Zeneca=s rights, title, and interest in all EPA, state, and foreign registrations and approvals relating to the manufacture or sale of all products of the Acetochlor Business;
3. Zeneca=s rights, title, and interest in all Acetochlor Registration Data (except in the case of Safener 29148, which Zeneca shall exclusively license for uses relating to all products of the Acetochlor Business), submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;
4. Zeneca=s rights, title, and interest in all trademarks and trade names for all products of the Acetochlor Business;
5. Zeneca=s rights, title, and interest in the Acetochlor Intellectual Property;
6. exclusive, perpetual, royalty-free, and transferable licenses under the Zeneca Intellectual Property for uses relating to all products of the Acetochlor Business and copies of all research materials and know-how relating thereto;
7. an exclusive, perpetual, royalty-free, and transferable license for the Glutathione Transferase (GST27) resistance gene to produce plants which are labeled as acetochlor tolerant;
8. Zeneca=s rights under and title and interest in all contracts or agreements with customers, suppliers, sales

## Decision and Order

representatives, distributors, agents, licensors, licensees, consignors, and consignees other than multi-product contracts as defined in the Acetochlor Divestiture Agreement;

9. all inventories of all products of the Acetochlor Business;
  10. all research materials and know-how of the Acetochlor Business;
  11. all Mesotrione rights as set forth in Section 5.04 of the Acetochlor Divestiture Agreement;
  12. the Mesotrione Supply Agreement as defined in the Acetochlor Divestiture Agreement; and
  13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Acetochlor Business.
- C. AAcetochlor Business@ means the research, development, registration, manufacture, formulation, licensing, sale, and distribution by Zeneca of all unmixed and mixed acetochlor products, in any market anywhere in the world, except for the following mixtures: (1) Zeneca=s mixtures of acetochlor and EPTC, (2) Zeneca=s mixtures of acetochlor and fluorochlorodone (including twin/co-packs of acetochlor and fluorochlorodone), and (3) Zeneca=s proposed mixtures of acetochlor and mesotrione.
- D. AAcetochlor Divestiture Agreement@ means the Asset Purchase Agreement between Zeneca and Dow dated as of

## Decision and Order

October 17, 2000, and its related agreements, schedules, exhibits and appendices.

- E. **AAceto chlor Intellectual Property@** means any form of intellectual property predominantly relating to the research, development, manufacture, sale, or use of any product of the Aceto chlor Business, owned, licensed or controlled by Zeneca, including, but not limited to, the patents and trademarks listed in or issuing on applications listed in confidential Appendix 1 hereto, trade secrets, research materials, technical information, inventions, test data, technological know-how, product efficacy data, safety data, production and formulation know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, quality control data, books, records, and files. Aceto chlor Intellectual Property does not include Zeneca Intellectual Property.
- F. **AAceto chlor Non-Public Information@** means any information disclosed by the Aceto chlor Acquirer to Respondents, or otherwise obtained by Respondents, in connection with any Aceto chlor Supply Agreement. Non-Public Information shall not include: (i) information in the public domain, (ii) information that subsequently falls within the public domain through no violation of this Order by Respondents, or (iii) information that subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement.
- G. **AAceto chlor Registration Data@** means all data relating to any product of the Aceto chlor Business, and all data relating to safeners used with such products, that has been, or will be, submitted to the United States Environmental Protection Agency or to any state or foreign regulatory agency for purposes of obtaining or maintaining any registration or authorization for any product of the Aceto chlor Business.

## Decision and Order

- H. **AAcetochlor Supply Agreement@** means any agreement describing the terms agreed to by Respondents and an Acetochlor Acquirer and approved by the Commission relating to the supply of any product required by Paragraph II.B. of this Order.
- I. **AAcetochlor Technical Services@** means (1) provision of expert advice, assistance and training in technical and regulatory areas relating to the Acetochlor Business, including, but not limited to, such services in (a) non-microencapsulated formulations, (b) Monsanto ARM arrangements, (c) the process for the manufacture of safeners, (d) micro-encapsulated formulations, (e) the transfer or licensing of product registration and regulatory data, (f) proprietary on-going studies, and (g) bulk sales and logistics in the United States, and (2) reasonable access to Zeneca=s manufacturing sites.
- J. **ABayer@** means Bayer AG, 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 Werk Leverkusen, S1368 Leverkusen, Germany.
- K. **AClariant@** means Clariant AG, a company organized, existing and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Rothausstrasse 61, CH-4132 Muttenz, Switzerland.
- L. **ACommission@** means the Federal Trade Commission.
- M. **ADow@** means Dow AgroSciences LLC, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located in Indianapolis, Indiana.

## Decision and Order

- N. AMonsanto Contracts@ means the contracts and agreements between Monsanto Company, Zeneca, and their predecessors or successors, relating to production and supply of acetochlor, listed in confidential Appendix 2 hereto.
- O. AMuttenz Production Facility@ means the facilities located in Muttenz, Switzerland, owned by Clariant, at which Novartis produces cyproconazole and trifloxystrobin.
- P. ANovartis@ means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

## Decision and Order

- Q. ANovartis Intellectual Property@ means any form of intellectual property relating to or used in the research, development, manufacture, sale, or use of trifloxystrobin, any compound containing trifloxystrobin, or any other compound consisting of or containing a strobilurin fungicide, licensed to, owned, or controlled by Novartis.
- R. APerson@ means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- S. ARespondents@ means Novartis, Zeneca, and Syngenta, respectively and collectively.
- T. AStrobilurin Acquirer@ means Bayer or, in the event Bayer is not approved as the Strobilurin Acquirer or for any other reason does not acquire the Strobilurin Assets, any other Person who acquires the Strobilurin Assets, after approval by the Commission.
- U. AStrobilurin Assets@ means all assets and rights owned or held by Novartis and relating to and/or used in the operation of the Strobilurin Business, including, without limitation, the assets listed below and including, without limitation, those assets specified in the Strobilurin Divestiture Agreement (which agreement shall not be construed to vary or contradict the terms of this Order):
1. Novartis= rights, title, and interest in all machinery, furniture, fixtures, equipment, tools, and other tangible personal property at the Muttenz Production Facility used for or necessary for the manufacture of trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin;

## Decision and Order

2. all rights, licenses, permits, registrations, know-how, technical information, and other permissions or expertise necessary to manufacture trifloxystrobin, trifloxystrobin intermediates, or compounds containing trifloxystrobin at the Muttentz Production Facility;
3. Novartis= lease with Clariant for the land and buildings of the Muttentz Plant, infrastructure and support services;
4. Novartis= rights, title, and interest in all United States Environmental Protection Agency, state, and foreign registrations and approvals relating to the manufacture or sale of strobilurin fungicides or compounds containing strobilurin fungicides;
5. Novartis= rights, title, and interest in all Strobilurin Registration Data, submissions and supporting data and documents, including, without limitation, all labels, label extensions, or planned or pending label extensions for any application;
6. Novartis= rights, title, and interest in all trademarks and trade names for trifloxystrobin, any compound containing trifloxystrobin, or any other strobilurin fungicide;
7. Novartis= rights, title, and interest in the Strobilurin Intellectual Property, *provided, however*, that Novartis may receive (i) an exclusive (except as to the Strobilurin Acquirer), perpetual, royalty-free, and transferable license back from the Strobilurin Acquirer to use the Strobilurin Intellectual Property identified in confidential Appendix 3 hereto outside of the field of strobilurin fungicides, and (ii) a non-exclusive perpetual, royalty-free and transferable license from the Strobilurin Acquirer to use the Strobilurin Intellectual Property not identified in confidential Appendix 3 outside of the field of strobilurin fungicides;

## Decision and Order

8. exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;
  9. non-exclusive, perpetual, royalty-free, and transferable licenses under the Novartis Intellectual Property for non-fungicidal uses relating to trifloxystrobin, compounds containing trifloxystrobin, or any other strobilurin fungicide of the Strobilurin Business, and copies of all research materials and know-how relating thereto;
  10. Novartis= rights under and title and interest in all contracts or agreements with customers, suppliers, sales representatives, distributors, agents, licensors, licensees, consignors, and consignees related to and primarily used in the Strobilurin Business;
  11. all inventories of trifloxystrobin and compounds containing trifloxystrobin;
  12. all research materials and know-how of the Strobilurin Business; and
  13. all books, records, and files, customer lists, customer records and files, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes, and quality control data related to and primarily used in the Strobilurin Business.
- V. AStrobilurin Business@ means the research, development, registration, manufacture, formulation, licensing, sale and

## Decision and Order

distribution of the existing strobilurin fungicide products and product developments of Novartis, in any market anywhere in the world, including all existing straight products or combinations therewith.

- W. *ASTrobilurin Divestiture Agreement* means the Asset Purchase Agreement between Novartis and Bayer dated as of September 7, 2000, and its related agreements, schedules, exhibits and appendices.
- X. *ASTrobilurin Intellectual Property* means any form of intellectual property relating predominantly to the research, development, manufacture, sale, or use of trifloxystrobin, any compound containing trifloxystrobin, or any other compound consisting of or containing a strobilurin fungicide, owned, licensed or controlled by Novartis, including, but not limited to, the patents and trademarks listed in or issuing on applications listed in confidential Appendix 4 hereto, trade secrets, research materials, technical information, inventions, test data, technological know-how, product efficacy data, safety data, production and formulation know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, quality control data, books, records, and files. *Strobilurin Intellectual Property* does not include *Novartis Intellectual Property*.
- Y. *ASTrobilurin Non-Public Information* means any information disclosed by the *Strobilurin Acquirer* to Respondents, or otherwise obtained by Respondents, in connection with any *Strobilurin Supply Agreement*. *Non-Public Information* shall not include: (i) information in the public domain, (ii) information that subsequently falls within the public domain through no violation of this Order by Respondents, or (iii) information that subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement.

## Decision and Order

- Z. **ASTrobilurin Registration Data@** means all data, owned or controlled by Novartis, relating to any compound consisting of or containing trifloxystrobin or any other strobilurin fungicide that has been, or will be, submitted to the United States Environmental Protection Agency or to any state or foreign regulatory agency for purposes of obtaining or maintaining any registration or authorization for any product consisting or containing trifloxystrobin or any other strobilurin fungicide.
- AA. **ASTrobilurin Supply Agreement@** means any agreement describing the terms agreed to by Respondents and a Strobilurin Acquirer and approved by the Commission relating to the supply of any product required by Paragraph III.B. of this Order.
- BB. **ASTrobilurin Technical Services@** means (1) provision of expert advice, assistance and training in technical and regulatory areas relating to the Strobilurin Business, including, but not limited to, such services in toxicology, environmental, ecotex, metabolism, residues, general matters, field biology, process development for Muttentz processes, quality control, analytical matters, and formulation technology, and (2) reasonable access to Respondents= manufacturing facilities used to produce the products to be supplied under Paragraph III.B.(1), (2), and (3) of this Order.
- CC. **ASyngenta@** means Syngenta AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Syngenta, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- DD. **ASyngenta Formation@** means the spin-off and merger of Novartis= crop protection and seeds businesses and Zeneca=s crop protection business to create a new company, Syngenta

## Decision and Order

AG, as described in the December 2, 1999, Master Agreement between Novartis and AstraZeneca.

- EE. AZeneca@ means AstraZeneca PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Zeneca, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- FF. AZeneca Intellectual Property@ means any form of intellectual property relating to or used in the research, development, manufacture, sale, or use of any product of the Acetochlor Business (*e.g.*, process technology, safener technology, microencapsulation technology), licensed to, owned, or controlled by Zeneca, listed in confidential Appendix 5 hereto.

**II.****IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Acetochlor Assets, absolutely and in good faith, at no minimum price to Dow pursuant to the Acetochlor Divestiture Agreement, no later than (i) ten business days after the Syngenta Formation or (ii) ten business days after receipt by Respondents of all necessary governmental approvals from Germany, and in any event, no later than six (6) months from the date the Commission places the Consent Agreement on the record for public comment; *provided, however*, that in the event Dow does not acquire the Acetochlor Assets because of Dow's breach of the Acetochlor Divestiture Agreement, Respondents shall divest the Acetochlor Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within six (6) months from the date the Commission places the Consent Agreement on the record for public comment; provided, further, that if at the time the Commission determines to make the Order final, the Commission notifies Respondents that Dow is not approved as the Acetochlor Acquirer or that the Acetochlor Divestiture

## Decision and Order

Agreement is not an acceptable manner of divestiture, Respondents shall divest the Acetochlor Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within five (5) months from the date this Order becomes final.

## Decision and Order

- B. Respondents shall supply to the Acetochlor Acquirer, in a timely manner and in quantities reasonably required to operate the Acetochlor Assets, the following products necessary to enable the Acetochlor Acquirer to conduct the Acetochlor Business in substantially the same manner as Respondents: (1) emulsifiable concentrate and granular formulations of acetochlor and acetochlor mixtures; (2) microencapsulated formulations of acetochlor and acetochlor mixtures; (3) Safener 29148, (4) Safener 25788, and (5) mesotrione. Respondents shall supply any product required by this Paragraph II.B. pursuant to an Acetochlor Supply Agreement.
- C. Respondents shall make representations and warranties that any products supplied under an Acetochlor Supply Agreement meet the product and quality specifications, and are contained, packaged and labeled in accordance with the specifications required by applicable governmental laws, rules, and regulations and agreed to between Respondents and the Acetochlor Acquirer.
- D. Except for events of force majeure, Respondents shall be liable for any damages to the Acetochlor Acquirer resulting from Respondents' breach of any obligation or warranty contained in any Acetochlor Supply Agreement, including liability for any indirect, consequential, special, or incidental damages; *provided, however*, that nothing in this Paragraph shall preclude Respondents from raising any applicable defenses.
- E. Respondents shall not terminate any Acetochlor Supply Agreement for any reason; *provided, however*, that Respondents may terminate an Acetochlor Supply Agreement due to an alleged material breach by the Acetochlor Acquirer, but only after Respondents (i) have provided the Acetochlor Acquirer with 60 days notice to cure the breach, (ii) have submitted their claim to arbitration, and (iii) the arbitrator has fully resolved the claim in Respondents' favor.

## Decision and Order

- F. Respondents shall provide the Acetochlor Acquirer an opportunity to:
1. Enter into employment contracts with any individual identified in confidential Appendix 6 of this Order, or any other individuals subsequently identified by agreement between Respondents and an Acetochlor Acquirer; and
  2. Inspect the personnel files and other documentation relating to the individuals identified in Paragraph II.F.1. of this Order, to the extent permissible under applicable laws, no later than twenty (20) days from the date Respondents sign the Consent Agreement, or no later than the date on which an Acetochlor Acquirer other than Dow signs an agreement to acquire the Acetochlor Assets.
- G. From the date Respondents sign the Consent Agreement until the divestiture required by Paragraph II.A. is completed, Respondents shall take steps, including implementation of appropriate incentive plans (such as payment of all current and accrued benefits and pensions, to which the employees are entitled) and appropriate bonuses, to cause the individuals identified in Paragraph II.F.1. of this Order to accept offers of employment from the Acetochlor Acquirer.
- H. Respondents shall not interfere with the employment by the Acetochlor Acquirer of the individuals identified in Paragraph II.F.1. of this Order; shall not offer any incentive to such individuals to decline employment with the Acetochlor Acquirer to accept other employment with Respondents; and shall remove any contractual impediments with Respondents that may deter such individuals from accepting employment with the Acetochlor Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acetochlor Acquirer.



## Decision and Order

- I. Respondents shall not make employment offers to any individual identified in Paragraph II.F.1. of this Order for a period of one (1) year from the date this Order becomes final if such individual has accepted an employment offer from the Acetochlor Acquirer, unless such individual has been involuntarily separated from employment by such Acetochlor Acquirer.
- J. For a period up to twelve (12) months from the date the Acetochlor Assets are divested, at the request of the Acetochlor Acquirer at any time during the twelve (12) month period, Respondents shall provide Acetochlor Technical Services to enable the Acetochlor Acquirer to conduct the Acetochlor Business in substantially the same manner as Respondents.
- K. Respondents shall use their reasonable best efforts to transfer to the Acetochlor Acquirer, or assist the Acetochlor Acquirer in obtaining, any approval, consent, ratification, waiver, or other authorization (including governmental) that is or will become necessary to complete the divestitures required by Paragraph II.A. of this Order.
- L. The Acetochlor Divestiture Agreement, or any other asset purchase agreement approved by the Commission, shall be incorporated into this Order and made a part hereof. Any failure to comply with the terms of the Acetochlor Divestiture Agreement or such other asset purchase agreement shall constitute a violation of this Order.
- M. The purpose of the divestiture required by this Paragraph II is to ensure the continued use of the Acetochlor Assets in the same business in which such assets are engaged at the time of the proposed merger between Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

## Decision and Order

**III.****IT IS FURTHER ORDERED** that:

A. Respondents shall divest the Strobilurin Assets, absolutely and in good faith, at no minimum price to Bayer pursuant to the Strobilurin Divestiture Agreement, no later than (i) ten business days after the Syngenta Formation or (ii) ten business days after receipt by Respondents of all necessary governmental approvals from the United Kingdom and Germany, and in any event, no later than six (6) months from the date the Commission places the Consent Agreement on the record for public comment; *provided, however,* that in the event Bayer does not acquire the Strobilurin Assets because of Bayer=s breach of the Strobilurin Divestiture Agreement, Respondents shall divest the Strobilurin Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within six (6) months from the date the Commission places the Consent Agreement on the record for public comment; provided, further, that if at the time the Commission determines to make the Order final, the Commission notifies Respondents that Bayer is not approved as the Strobilurin Acquirer or that the Strobilurin Divestiture Agreement is not an acceptable manner of divestiture, Respondents shall divest the Strobilurin Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within five (5) months from the date this Order becomes final.

B. Respondents shall supply to the Strobilurin Acquirer, in a timely manner and in quantities reasonably required to operate the Strobilurin Business, the following products necessary to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents: (1) Intermediate step 1, (2) Intermediate step 2, (3) formulations of the products described in confidential Appendix 7 of this Order, and (4) propiconazole for use in mixtures with trifloxystrobin. Respondents shall supply any product required by this Paragraph III.B. pursuant to a Strobilurin Supply Agreement.

## Decision and Order

C. Respondents shall make representations and warranties that any products supplied under a Strobilurin Supply Agreement meet the product and quality specifications, and are contained, packaged and labeled in accordance with the specifications required by applicable governmental laws, rules, and regulations and agreed to between Respondents and the Strobilurin Acquirer.

D. Except for events of force majeure, Respondents shall be liable for all damages to the Strobilurin Acquirer resulting from Respondents' breach of any obligation or warranty contained in any Strobilurin Supply Agreement, including liability for any indirect, consequential, special, or incidental damages; *provided, however,* that nothing in this Paragraph shall preclude Respondents from raising any applicable defenses.

E. Respondents shall not terminate any Strobilurin Supply Agreement, during its initial term, for any reason; *provided, however,* that Respondents may terminate a Strobilurin Supply Agreement during its initial term due to an alleged material breach by the Strobilurin Acquirer, but only after Respondents have (i) provided the Strobilurin Acquirer with 60 days notice to cure the breach, (ii) have submitted their claim to arbitration, and (iii) the arbitrator has fully resolved the claim in Respondents' favor.

F. Respondents shall provide the Strobilurin Acquirer an opportunity to:

1. Enter into employment contracts with any individual identified in confidential Appendix 8 of this Order, or any other individuals subsequently identified by agreement between Respondents and a Strobilurin Acquirer, in the event the Strobilurin Acquirer is a Person other than Bayer; and

## Decision and Order

2. Inspect the personnel files and other documentation relating to the individuals identified in Paragraph III.F.1. of this Order, to the extent permissible under applicable laws, no later than twenty (20) days from the date Respondents sign the Consent Agreement, or no later than the date on which a Strobilurin Acquirer other than Bayer signs an agreement to acquire the Strobilurin Assets.
- G. From the date Respondents sign the Consent Agreement until the divestiture required by Paragraph III.A. is completed, Respondents shall take steps, including implementation of appropriate incentive plans (such as payment of all current and accrued benefits and pensions, to which the employees are entitled) and appropriate bonuses, to cause the individuals identified in Paragraph III.F.1. of this Order to accept offers of employment from the Strobilurin Acquirer.
- H. Respondents shall not interfere with the employment by the Strobilurin Acquirer of the individuals identified in Paragraph III.F.1. of this Order; shall not offer any incentive to such individuals to decline employment with the Strobilurin Acquirer or to accept other employment with Respondents; and shall remove any contractual impediments with Respondents that may deter such individuals from accepting employment with the Strobilurin Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Strobilurin Acquirer.
- I. Respondents shall not make employment offers to any individual identified in Paragraph III.F.1. of this Order for a period of one (1) year from the date this Order becomes final if such individual has accepted an employment offer from the Strobilurin Acquirer, unless such individual has been

## Decision and Order

involuntarily separated from employment by such Strobilurin Acquirer.

- J. For a period up to twelve (12) months from the date the Strobilurin Assets are divested, at the request of the Strobilurin Acquirer at any time during the twelve (12) month period, Respondents shall provide Strobilurin Technical Services to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents.
- K. For a period up to six (6) months from the date the Strobilurin Assets are divested, at the request of the Strobilurin Acquirer at any time during the six (6) month period, Respondents shall provide payroll administration services and pension administration services to enable the Strobilurin Acquirer to conduct the Strobilurin Business in substantially the same manner as Respondents.
- L. Respondents shall use their reasonable best efforts to transfer to the Strobilurin Acquirer, or to assist the Strobilurin Acquirer in obtaining, any approval, consent, ratification, waiver, or other authorization (including governmental) that are or will become necessary to complete the divestitures required by Paragraph III.A. of this Order.
- M. The Strobilurin Divestiture Agreement, or any other asset purchase agreement approved by the Commission, shall be incorporated into this Order and made a part hereof. Any failure to comply with the terms of the Strobilurin Divestiture Agreement or such other asset purchase agreement shall constitute a violation of this Order.
- N. The purpose of the divestiture required by this Paragraph III is to ensure the continued use of the Strobilurin Assets in the same business in which such assets are engaged at the time of the proposed merger between Respondents and to remedy the

## Decision and Order

lessening of competition alleged in the Commission's complaint.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Absent the prior written consent of the proprietor of any Acetochlor Non-Public Information or any Strobilurin Non-Public Information, Respondents shall hold and safeguard Acetochlor Non-Public Information and Strobilurin Non-Public Information apart from all other information held by Respondents.
- B. Absent the prior written consent of the proprietor of any Acetochlor Non-Public Information, Respondents shall:
  1. Subject to Paragraph IV.B.2., not provide, disclose or otherwise make available any Acetochlor Non-Public Information to any of Respondents' businesses relating to the research, development, registration, manufacture, formulation, licensing, distribution, use or sale of any herbicide products; and
  2. Use any Acetochlor Non-Public Information solely in activities necessary for Respondents to perform their obligations pursuant to any Acetochlor Supply Agreement.
- C. Absent the prior written consent of the proprietor of any Strobilurin Non-Public Information, Respondents shall:
  1. Subject to Paragraph IV.C.2., not provide, disclose or otherwise make available any Strobilurin Non-Public Information to any of Respondents' businesses relating to the research, development, registration, manufacture, formulation, licensing, distribution, use or sale of any fungicide products; and

## Decision and Order

2. Use any Strobilurin Non-Public Information solely in activities necessary for Respondents to perform their obligations pursuant to any Strobilurin Supply Agreement.
- D. Respondents shall make available Acetochlor Non-Public Information and Strobilurin Non-Public Information only to those persons employed by Respondent having a need to know and who agree in writing to be bound by the terms of this Paragraph IV.
- E. Upon the written request of any proprietor of Acetochlor Non-Public Information or Strobilurin Non-Public Information, Respondents shall return to such proprietor, within fifteen (15) days from the date the request is received, all copies, in any form whatsoever, of such information provided to Respondents.
- F. Respondents shall, within thirty (30) days from the date this Order becomes final:
1. Develop and/or maintain policies and procedures necessary to implement the requirements of this Paragraph IV and incorporate such policies and procedures into Respondents= policy and operations manuals;
  2. Conduct training for all persons employed by Respondents relating to the requirements of this Paragraph IV; and
  3. Develop and/or maintain disciplinary policies in the event any person employed by Respondents fails to comply with any of the policies relating to this Paragraph IV.

## V.

**IT IS FURTHER ORDERED** that Respondents shall provide a copy of this Order to each of Respondents= officers,

## Decision and Order

employees, or agents having managerial responsibility for any activity related to Respondents= obligations under Paragraphs II through IV of this Order.

**VI.****IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith the Acetochlor Assets or the Strobilurin Assets within the time and manner required by Paragraphs II and III of this Order, the Commission may at any time appoint a Divestiture Trustee to divest such assets. Such trustee may be the same person appointed by the Commission to serve as Monitor Trustee under Paragraph IV of the Order to Maintain Assets.
- B. In the event that the Commission or the Attorney General brings an action pursuant to ' 5(l) of the Federal Trade Commission Act, 15 U.S.C. ' 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to ' 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
  1. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and

## Decision and Order

divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effect the divestiture for which he or she has been appointed.
3. Within ten (10) business days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the trustee to effect the divestiture for which he or she has been appointed.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph VI.C. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend this period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to assets to be divested, or to any other relevant

## Decision and Order

information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished only in a manner that receives the prior approval of the Commission; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five (5) business days of receiving written notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After

## Decision and Order

approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets.

8. Respondents shall indemnify the Divestiture Trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this Paragraph VI.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The Divestiture Trustee shall report in writing to Respondents and the Commission every sixty (60) days

## Decision and Order

concerning the trustee's efforts to accomplish the divestiture.

**VII.**

**IT IS FURTHER ORDERED** that within sixty (60) days after the date this Order becomes final and annually thereafter, on the anniversary of the date this Order becomes final, until the Order terminates, and at other times as the Commission may require, Syngenta (or Novartis and Zeneca prior to the Syngenta Formation) shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Order to Maintain Assets. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order and the Order to Maintain Assets.

**VIII.**

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

**IX.**

**IT IS FURTHER ORDERED** that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and

## Analysis to Aid Public Comment

copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order; and

- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on December 15, 2010.

By the Commission.

**CONFIDENTIAL APPENDICES I-VIII**

**[Redacted from Public Record Version]**

**Analysis of the Complaint and Proposed Consent Order to Aid Public Comment****I. Introduction**

The Federal Trade Commission (ACommission@) has accepted for public comment an Agreement Containing Consent

## Analysis to Aid Public Comment

Order (Aproposed order@) with Novartis AG (ANovartis@) and AstraZeneca PLC (AZeneca@). The proposed order seeks to remedy the anticompetitive effects of the combination of Novartis=s and Zeneca=s agricultural chemical businesses. The proposed order requires Novartis to divest its worldwide fungicide business based on the strobilurin chemical class to Bayer AG and requires Zeneca to divest its worldwide corn herbicide business based on the active chemical ingredient acetochlor to Dow Agrosiences LLC.

**II. Description of the Parties and the Proposed Merger**

Novartis, a Swiss company, is engaged in the discovery, development, manufacture and sale of crop protection chemicals, seeds, proprietary and generic pharmaceutical products, and human and animal health products. Novartis operates its crop protection and seed businesses in the United States through a variety of subsidiaries, including Novartis US Co., Novartis Agribusiness Biotechnology Research, Inc., Novartis BCM North America, Inc., Novartis Crop Protection, Inc., Novartis Seeds, Inc., Novartis Specialty Crops, Inc., and Wilson Genetics, LLC.

Zeneca is headquartered in the United Kingdom and is also engaged in the discovery, development, manufacture and sale of crop protection chemicals and proprietary and generic pharmaceutical products. Zeneca operates its crop protection business in the United States through several subsidiaries, including Zeneca Holdings, Inc., and Zeneca Ag Products, Inc.

Pursuant to an agreement, Novartis will contribute its agricultural chemical and seed businesses and Zeneca will contribute its agricultural chemical business to a newly-formed Swiss company, Syngenta AG. The merger of these businesses will result in Syngenta having approximately \$8 billion in worldwide sales. Novartis=s shareholders will own 61 percent of Syngenta and Zeneca=s shareholders will own 39 percent. Syngenta will be organized and will do business under the laws of Switzerland.

Analysis to Aid Public Comment

Analysis to Aid Public Comment

### III. The Proposed Complaint

The proposed complaint alleges that there are several relevant lines of commerce (i.e., product markets) in which to analyze this transaction: 1) the research, development, manufacture, and sale of herbicides applied before weed emergence (pre-emergent herbicides) for control of grassy weeds in corn; and 2) the research, development, manufacture, and sale of foliar fungicides for the treatment of diseases in cereal, citrus, cotton, peanuts, potatoes, rice, vegetables, and turf. The proposed complaint alleges that the United States is the appropriate geographic market to analyze the effects of the combination of Zeneca and Novartis agricultural chemical businesses. United States law requires that herbicides and fungicides undergo a rigorous registration process with the U.S. Environmental Protection Agency (EPA) before they may be used or sold in this country.

#### Corn Herbicides

Most pre-emergent herbicides used by corn growers to control grassy weeds belong to a class of chemicals known as acetanilides. The major active ingredients within this class are metolachlor, acetochlor, and dimethenamid. These products are used by growers because preventing early competition between the growing corn and grassy weeds for water and nutrients is essential to the economic production of corn. Failure to reduce weeds can significantly reduce the volume of corn produced per acre (yield) and farmers have no economic substitutes for acetanilide herbicides.

Novartis's metolachlor-based herbicides are sold under the brand names Dual and Bicep. Zeneca sells an acetochlor-based herbicide under the brand names Fultime, Surpass, Doubleplay, and TopNotch. Zeneca obtains its acetochlor for these products from a Monsanto facility in Muscatine, Iowa, pursuant to a production and registration joint venture between Zeneca and Monsanto.

## Analysis to Aid Public Comment

Novartis is the leading developer, manufacturer, and seller of corn herbicides for pre-emergent control of grasses in the United States. Novartis has a market share of about 50 percent. Zeneca has approximately 15 percent of sales in this market. The proposed merger would increase concentration, as measured by the HHI, by nearly 1400 points to over 4600.

Fungicides

Foliar fungicides, which are applied predominantly to the foliage of plants, contain active chemical ingredients that kill or inhibit the growth of organisms that cause disease. Each crop has an EPA approved fungicide and label restrictions on the fungicide for one crop prohibit its use on another. Therefore, a grower with a disease problem on rice cannot turn to a fungicide labeled only for use on peanuts.

The most significant recent development in foliar fungicides has been the introduction of a new class of fungicides known as strobilurins. Fungicides of this class are effective against a broad spectrum of diseases on a wide variety of crops and are more environmentally friendly than most traditional fungicides. The effectiveness and environmental profile of strobilurin fungicides have created strong demand for the products among growers. Strobilurins introduced to the market have quickly achieved significant market share and have taken sales away from traditional foliar fungicides. Zeneca=s azoxystrobin fungicides and Novartis=s trifloxystrobin fungicides are both strobilurins and are in direct competition.

Novartis obtained U.S. registration for its trifloxystrobin fungicides in 2000. They are sold under the brands Flint and Compass. In addition, Novartis sells a combination product of propiconazole and trifloxystrobin under the brand Stratego. Zeneca=s azoxystrobin fungicides, which were registered in the

## Analysis to Aid Public Comment

U.S. in 1997, are sold under the brands Abound, Heritage, and Quadris.

Zeneca and Novartis, along with BASF Corporation, are the only companies with strobilurin fungicides registered for sale in the United States. No company other than Zeneca, Novartis, or BASF is likely to introduce a new strobilurin fungicide into the U.S. market within the next three or four years.

Novartis and Zeneca are the leading sellers of foliar fungicides in the U.S. market, and account for a combined total of approximately 40% of yearly sales. Typically, for a given plant, there are only two or three significant sellers of these fungicides. In cereals, peanuts, potatoes, rice, and turf, sales by the top two or three fungicide sellers range from nearly 70% to more than 90% of all sales. In vegetables, the top five account for 70%.

According to the Commission's complaint, entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects of the merger. The need for extensive research and development and registration requirements create long lead times for the introduction of new products. Developing a new herbicide or fungicide can take six to ten years from the time when a potentially attractive active ingredient is identified. Extensive testing in the field is necessary to evaluate efficacy and use requirements. In addition, several years of testing for negative environmental and toxicological impact is necessary to achieve registration. Finally, patents and other intellectual property create large and potentially insurmountable barriers to entry.

The complaint alleges that if the proposed transaction were consummated, it may substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45. Specifically the merger will in both relevant markets:

## Analysis to Aid Public Comment

- a. eliminate Zeneca and Novartis as substantial, independent competitors;
- b. eliminate actual, direct, and substantial competition between Zeneca and Novartis;
- c. reduce innovation competition among researchers and developers of herbicides and fungicides, including the reduction in, delay of, or redirection of research and development projects;
- d. increase the level of concentration in the relevant markets;
- e. increase barriers to entry into the relevant markets;
- f. increase the merged firm=s ability to exercise market power unilaterally by combining two of the three closest substitutes in each of the markets; and
- g. increase the likelihood and degree of coordinated interaction between or among competitors in the markets.

**IV. Terms of the Agreement Containing Consent Order**

The proposed order is designed to remedy the alleged anticompetitive effects of the proposed merger. Under the terms of the proposed order, Proposed Respondent Zeneca will divest its worldwide acetochlor herbicide business to Dow AgroSciences LLC, a wholly-owned subsidiary of Dow Chemical Company. Specifically, Zeneca will divest to Dow Agro the intellectual property, know-how, registrations, trademarks, rights to technical assistance, and rights under the joint venture contracts with Monsanto that are necessary to the manufacture and sale of acetochlor-based corn herbicides. Zeneca is also required to provide certain services and inputs on a transitional basis.

## Analysis to Aid Public Comment

Dow Agro is a Delaware corporation with its principal place of business in Indianapolis, Indiana. Dow Agro provides pest management, agricultural, and biotechnology products worldwide and had 1999 sales of more than \$2 billion. Dow Agro sells numerous herbicides, but it does not produce a product with acetochlor as an active ingredient.

Proposed Respondent Novartis will divest its worldwide strobilurin fungicide business to Bayer AG. Specifically, Novartis will divest its trifloxystrobin production facilities in Muttenz, Switzerland, and intellectual property, know-how, and registrations, and trademarks necessary to manufacture the divested strobilurin fungicides. Novartis is required to provide certain services and inputs on a transitional basis.

Bayer is organized and based in Germany. Bayer is a global company that operates in four business segments: healthcare, agriculture, polymers, and chemicals. In 1999, it had sales of over \$20 billion. Bayer does not sell or produce a strobilurin fungicide approved by the EPA.

The order requires both Zeneca and Novartis to provide opportunities for Dow Agro and Bayer to enter into employment contracts with the individuals that are key to the operation of the divested businesses and must remove any contractual limits to deter these individuals from accepting employment with Bayer or Dow Agro. Zeneca and Novartis are also prohibited from making employment offers to these employees for a period of one year.

Proposed Respondents must divest the assets no later than ten business days after the formation of Syngenta or ten days after gaining necessary foreign governmental approvals for the transfer of the divested assets. The order requires, however, that the divestitures must be made within six months from the date the Commission places the proposed order on the public record for comment. The Commission has issued an Order to Maintain Assets that requires Zeneca, Novartis, and Syngenta to preserve the assets as an ongoing business pending the divestitures.

#### Analysis to Aid Public Comment

To ensure that Proposed Respondents expeditiously and completely divest their respective businesses to Dow Agro and Bayer and maintain the assets pending divestiture, the Commission is allowed to appoint a trustee. The trustee will report to the Commission on Proposed Respondents' compliance with their obligations under the Order and the Order to Maintain Assets every sixty days for a period of six months from the date Respondents sign the consent agreement and annually until expiration of the initial term for the supply agreements.

Proposed Respondents must provide the Commission with a report of compliance with the proposed order within sixty days after the proposed order becomes final and every ninety days thereafter until they have complied with their divestiture obligations. Respondents are also required to provide annual reports during the term of the proposed order.

In the event that Proposed Respondents fail to divest the assets within the time allotted, the proposed order enables the Commission to appoint a trustee to divest any assets necessary to satisfy the requirements of the proposed order. Appointment of a trustee is in addition to civil penalties and other relief available from Proposed Respondents for non-compliance with any provision of the proposed order.

#### **V. Opportunity for Public Comment**

The proposed order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed order and the comments received and will decide whether it should withdraw from the proposed order or make it final. By accepting the proposed order subject to final approval, the Commission anticipates that the competitive problems alleged in the proposed complaint will be resolved. The purpose of this analysis is to invite public comment on the

*Analysis to Aid Public Comment*

proposed order, including the proposed divestitures, to aid the Commission in its determination of whether to make the proposed order final. This analysis is not intended to constitute an official interpretation of the proposed order, nor is it intended to modify the terms of the proposed order in any way.

## Complaint

## IN THE MATTER OF

**THE BOEING COMPANY**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND  
SECTION 7 OF THE CLAYTON ACT*Docket C-3992; File No. 0010092**Complaint, December 29, 2000--Decision, December 29, 2000*

This consent order addresses the \$3.75 billion acquisition by The Boeing Company of Hughes Space and Communications from General Motors Corporation. The complaint alleges that the transaction, if consummated, would give Boeing anticompetitive advantages in the markets for satellites and satellite technologies and systems engineering and technical assistance ("SETA") services to the United States Department of Defense. The order prohibits respondent from performing certain SETA services for the classified program in the future. To prevent the exchange of anticompetitive information the order also requires respondent to use non-public SETA services information only its capacity as provider of technical assistance to DoD, or for the provision of SETA services not prohibited by the Order and erect a firewall between its SETA services division and Boeing's satellite division. In addition, respondent is required to assist DoD in transferring the SETA services to one of its own research and development centers by providing technical assistance, at the request of DoD, for a period not to exceed one year and providing to DoD all documents relating to certain SETA services that Boeing has received in its role as SETA contractor. The order also prohibits Respondent's satellite business from providing any non-public launch information to Respondent's launch vehicle business, and likewise providing and non-public information from its launch vehicle business to its satellite business. The order requires that for any satellite manufactured by Boeing/Hughes prior to the date the agreement becomes final, Boeing must provide satellite interface information, to any launch vehicle supplier within thirty days from the date Boeing receives a request for such information and provide satellite interface information relating to any of its satellite buses, models, or product lines manufactured after the date this agreement becomes final, to any launch vehicle supplier that requests such information or to whom Boeing previously supplied satellite interface information. For each satellite manufactured for the United States Government, Boeing shall only be required to provide satellite interface information to any launch vehicle supplier specified by the United States Government. In addition, the order requires Boeing/Hughes to provide satellite interface information to any launch vehicle supplier specified by any satellite

## Complaint

customer no later than Boeing provides such information to its own launch vehicle businesses.

*Participants*

For the Commission: *Norman A. Armstrong, Jr., Rodney B. Choo, Tamara L. Bond.*

For the Respondents: *Benjamin S. Sharp and Thomas L. Boeder, Perkins Coie, Peter D. Standish, Alan R. Kusnitz, and Fiona A. Schaeffer, Weil, Gotshal & Manges, Raymond A. Jacobsen and Jon B. Dubrow, McDermott, Will & Emery, and Douglas F. Broeder and Kevin M. King, Coudert Brothers.*

**COMPLAINT**

The Federal Trade Commission (ACommission@), having reason to believe that Respondent The Boeing Company (ABoeing@), a corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of General Motors Corporation, a company subject to the jurisdiction of the Commission, in violation 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. DEFINITIONS**

1. ASETA Services@ means systems engineering, technical assistance and support services relating to a certain classified contract between the United States Department of Defense and Boeing identified for purposes of this Complaint as Contract 4208.

2. ASatellite@ means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back

## Complaint

to Earth and is designed either to orbit the Earth or to travel away from the Earth.

3. ACommercial Low Earth Orbit Satellite@ means a Satellite that is designed to orbit at approximately 100 miles to 300 miles above the Earth=s surface in low earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

4. ACommercial Medium Earth Orbit Satellite@ means a Satellite that is designed to orbit approximately 10,000 miles above the Earth=s surface in medium earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

5. ACommercial Geosynchronous Earth Orbit Satellite@ means a Satellite that is designed to orbit approximately 22,300 miles above the Earth=s surface in geosynchronous earth orbit for the purpose of transmitting data back to Earth, which is sold to any customer other than the U.S. government.

6. AGovernment Satellite@ means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and is designed either to orbit the Earth or to travel away from the Earth and is sold to the U.S. government.

7. ALaunch Vehicle@ means any vehicle designed to launch one or more Satellites from the Earth=s surface into space.

8. ARespondent@ means Boeing.

9. AHughes" means Hughes Space and Communications Company, Hughes Space and Communications International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes

## Complaint

Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company.

**II. RESPONDENT**

10. Respondent Boeing 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 7755 E. Marginal Way South, Seattle, Washington 98108. Respondent Boeing is engaged in, among other things, the research, development, manufacture and sale of: Satellites, including Commercial Low Earth Orbit Satellites and Government Satellites, and Launch Vehicles.

11. Respondent is, and at all times relevant herein has been, engaged in commerce as Acommerce@ is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. ' 12, and is a corporation whose business is in or affecting commerce as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

**III. ACQUIRED COMPANY**

12. General Motors 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 100 Renaissance Center, P.O. Box 100, Detroit, Michigan 48265-1000. General Motors, through its subsidiary Hughes, is engaged in, among other things, the research, development, manufacture, and sale of Satellites, including Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, and Government Satellites.

13. General Motors is, and all times herein has been, engaged in commerce as Acommerce@ is defined in Section 1 of the

## Complaint

Clayton Act, as amended, 15 U.S.C. ' 12, and is a corporation whose business is in or affecting commerce as Acommerce@ is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. ' 44.

**IV. THE ACQUISITION**

14. On January 13, 2000, Boeing and General Motors Corporation subsidiaries, Hughes Electronics Corporation and Hughes Telecommunications and Space Company, entered into a Stock Purchase Agreement under which Boeing is to acquire certain assets of General Motors Corporation, including Hughes, for approximately \$3.75 billion (AAcquisition@).

**V. THE RELEVANT MARKETS**

15. For purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

- a. the provision of SETA Services;
- b. a certain classified program for which Respondent is providing SETA Services;
- c. the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites;
- d. the research, development, manufacture and sale of Commercial Medium Earth Orbit Satellites;
- e. the research, development, manufacture and sale of Commercial Low Earth Orbit Satellites;
- f. the research, development, manufacture and sale of Government Satellites; and

## Complaint

g. the research, development, manufacture and sale of Launch Vehicles.

16. For purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition on the provision of SETA Services and a certain classified program for which Respondent is providing SETA Services.

17. For purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, and Commercial Low Earth Orbit Satellites.

18. For purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Government Satellites.

19. For purposes of this Complaint, the United States or the world is the relevant geographic area in which to analyze the effects of the Acquisition on the research, development, manufacture and sale of Launch Vehicles, depending on the customer.

## VI. STRUCTURE OF THE MARKETS

20. The market for the provision of SETA Services is highly concentrated as measured by the Herfindahl-Hirschman Index (HHI). Respondent has been the only provider of SETA Services.

21. Respondent, through the Acquisition, would be engaged in the provision of SETA Services, while at the same time would be a competing bidder, for a certain classified program.

## Complaint

22. The research, development, manufacture and sale of Satellites, including Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, Commercial Low Earth Orbit Satellites, and Government Satellites, are all highly concentrated markets as measured by the HHI.

23. The market for Launch Vehicles is highly concentrated as measured by the HHI.

24. Respondent, through the Acquisition, would be engaged in the research, development, manufacture and sale of Launch Vehicles and a wide range of Satellites, which are launched from the Earth=s surface by Launch Vehicles.

**VII. BARRIERS TO ENTRY**

25. Entry into the market for the provision of SETA Services would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time required to develop the experience and expertise necessary to effectively provide these services.

26. Entry into the markets for the research, development, manufacture and sale of Commercial Geosynchronous Earth Orbit Satellites, Commercial Medium Earth Orbit Satellites, Commercial Low Earth Orbit Satellites, and Government Satellites, is difficult, unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time and expense required to research and develop a competitive product, acquire the necessary manufacturing equipment and facilities, and establish a reputation for high quality products among customers in these markets.

27. Entry into the market for the research, development, manufacture and sale of Launch Vehicles is difficult, unlikely and

## Complaint

would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28 because of, among other things, the time and expense required to research and develop a competitive product, acquire the necessary manufacturing equipment and facilities, and establish a reputation for high quality products among customers in these markets.

**VIII. EFFECTS OF THE ACQUISITION**

28. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45, in the following ways, among others:

(a) Respondent, as a supplier of SETA Services, may be in a position to disadvantage or raise the costs of other competitors for a certain classified program, whereby actual competition between Respondent and other competitors for that program would be reduced;

(b) Respondent may gain access to competitively sensitive non-public information concerning other Satellite suppliers, whereby:

(1) actual competition between Respondent and Satellite suppliers would be reduced; and

(2) the research, development, innovation and quality of Satellites may be reduced;

(c) Respondent may gain access to competitively sensitive non-public information concerning other Launch Vehicle suppliers, whereby:

(1) actual competition between Respondent and Launch Vehicle suppliers would be reduced; and

## Decision and Order

(2) the research, development, innovation and quality of Launch Vehicles may be reduced; and

(d) Respondent, as a supplier of Satellites and Launch Vehicles, may be in a position to disadvantage or raise the costs of other Launch Vehicle suppliers by withholding Satellite information necessary to make a Satellite compatible with a Launch Vehicle.

**IX. VIOLATIONS CHARGED**

29. The Acquisition agreement described in Paragraph 14 constitutes a violation of Section 5 of the FTC Act, as amended 15 U.S.C. ' 45.

30. The Acquisition described in Paragraph 14, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of December, 2000, issues its Complaint against said Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission (ACommission@), having initiated an investigation of the proposed acquisition by Respondent The Boeing Company (ABoeing@) of certain assets of

## Decision and Order

General Motors Corporation, and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent 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; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (AConsent Agreement@), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission=s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. ' 2.34, and having determined to modify the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. ' 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (AOrder@):

1. Respondent Boeing 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

Decision and Order

business located at 7755 E. Marginal Way South, Seattle, Washington 98108.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

## Decision and Order

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

- A. ARespondent@ or ABoeing@ means The Boeing Company, its directors, officers, employees, agents, representatives, predecessors, successors and assigns; its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures controlled by Boeing, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- B. AHughes" means Hughes Space and Communications Company, Hughes Space and Communications International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company.
- C. AAcquisition@ means the proposed acquisition of Hughes by Boeing pursuant to the Stock Purchase Agreement dated January 13, 2000.
- D. ACommission@ means the Federal Trade Commission.
- E. ASatellite Interface Information@ means any information necessary for a Launch Vehicle Supplier to research, develop, manufacture or modify any Launch Vehicle for use with Respondent=s Satellites.
- F. Launch Vehicle" means any vehicle with the lift capability to launch any Satellite manufactured by Respondent.

## Decision and Order

- G. ALaunch Vehicle Supplier@ means any entity engaged in the research, development, manufacture or sale of Launch Vehicles, including any Boeing Launch Vehicle Business or Sea Launch.
- H. "Satellite" means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or to travel away from the Earth. The term Satellite does not include missiles and unmanned aerial vehicles.
- I. ASatellite Manufacturer@ means any entity engaged in the research, development, manufacture or sale of Satellites.
- J. ASea Launch@ means the Launch Vehicle company jointly owned by Boeing, Kvaerner Maritime A.S., RSC Energia, and KB Yuzhnoye/PO Yuzmash, which is headquartered at Sea Launch Home Port, 2700 Nimitz Road, Long Beach, California 90802-1047.
- K. "Boeing Launch Vehicle Business" means any Boeing entity engaged in the research, development, manufacture or sale of Launch Vehicles.
- L. "Boeing Satellite Business" means any Boeing entity engaged in the research, development, manufacture or sale of Satellites.
- M. "Non-Public Launch Vehicle Information" means any information disclosed by any Launch Vehicle Supplier to any Boeing Satellite Business. Non-Public Launch Vehicle Information shall not include: (1) information already within the public domain; (2) information that falls within the public domain through no violation of this Order by Respondent; (3) information disclosed by any

## Decision and Order

Boeing Launch Vehicle Business; (4) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; and (5) information after six (6) years from the date of disclosure of such Non-Public Launch Vehicle Information to Boeing=s Satellite Business, or such other period as agreed to in writing by Respondent and a provider of the information.

- N. "Non-Public Satellite Information" means any information disclosed by any Satellite Manufacturer or owner to Boeing=s Launch Vehicle Business or Sea Launch. Non-Public Satellite Information shall not include: (1) information already within the public domain; (2) information that falls within the public domain through no violation of this Order by Respondent; (3) information disclosed by any Boeing Satellite Business; (4) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; and (5) information after six (6) years from the date of disclosure of such Non-Public Satellite Information to any Boeing Launch Vehicle Business or Sea Launch, or such other period as agreed to in writing by Respondent and a provider of the information.
- O. ASETA Services@ means systems engineering, technical assistance, and support services relating to a certain classified contract between the United States Department of Defense and Boeing identified for purposes of this Order as Contract 4208.
- P. ANon-Public SETA Services Information@ means any information not in the public domain disclosed by the United States Department of Defense or any company, other than Hughes, to Respondent in its capacity as the provider of SETA Services.

## Decision and Order

**II.****IT IS FURTHER ORDERED** that:

- A. Respondent shall provide no further SETA Services on classified programs identified in Section 3.2 of a modification dated August 1, 2000, to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208.
- B. Upon reasonable notice from the United States Department of Defense, Respondent shall provide such training and assistance to the United States Department of Defense as is reasonably necessary to enable the United States Department of Defense to provide SETA Services in substantially the same manner and quality as provided by Respondent prior to the Acquisition. Such assistance shall include reasonable consultation with knowledgeable employees and training at a facility designated by the United States Department of Defense for a period of time sufficient to satisfy the United States Department of Defense that its personnel are appropriately trained in the skills necessary to perform SETA Services in substantially the same manner and quality provided by Respondent prior to the Acquisition. However, Respondent shall not be required to continue providing such technical assistance for more than one (1) year from the date the Respondent signs the Consent Agreement. Respondent shall charge the United States Department of Defense at a rate no more than its own costs for providing such technical assistance.
- C. Respondent shall use any Non-Public SETA Services Information only in Respondent's capacity as provider of technical assistance to the United States Department of Defense, pursuant to Paragraph II.B. of this Order, or SETA work authorized by the August 1, 2000,

## Decision and Order

modification to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208.

- D. Respondent shall not provide, disclose, or otherwise make available Non-Public SETA Services Information to any Boeing Satellite Business.
- E. Within ten (10) days of the date the Commission accepts the Consent Agreement for public comment, Respondent shall return or submit to the United States Department of Defense all documents, including all copies, in the possession of Respondent that were received or created by Respondent in its capacity as a provider of the SETA Services identified in Section 3.2 of a modification dated August 1, 2000, to a certain classified contract between the United States Department of Defense and Respondent, identified for purposes of this Order as Contract 4208, except for documents necessary to provide the technical assistance identified in Paragraph II.B.

**III.****IT IS FURTHER ORDERED** that:

- A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Satellite Information, provide, disclose or otherwise make available to any Boeing Satellite Business any Non-Public Satellite Information.
- B. Respondent shall use any Non-Public Satellite Information only in Respondent's capacity as a Launch Vehicle Supplier, absent the prior written consent of the proprietor of Non-Public Satellite Information.

## Decision and Order

**IV.****IT IS FURTHER ORDERED** that:

- A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Launch Vehicle Information, provide, disclose or otherwise make available to any Boeing Launch Vehicle Business or Sea Launch any Non-Public Launch Vehicle Information.
- B. Respondent shall use any Non-Public Launch Vehicle Information only in Respondent=s capacity as a Satellite Manufacturer, absent the prior written consent of the proprietor of Non-Public Launch Vehicle Information.

**V.**

**IT IS FURTHER ORDERED** that within thirty (30) days from the date on which the Respondent signs the Consent Agreement, Respondent shall take steps to ensure that all employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business comply with Paragraphs II., III. and IV. of this Order. Such steps shall include without limitation: (1) distribution of this Order to Sea Launch, and to the directors, officers, and employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business; (2) development of procedures, policies, and practices relating to the receipt, identification, custody, use, and disposal of any Non-Public Satellite Information, Non-Public Launch Vehicle Information, and Non-Public SETA Services Information; (3) incorporation of such procedures, policies, and practices into Respondent=s operations manuals or other systems used for disseminating such procedures, policies, and practices; (4) in-person training of the employees of any Boeing Launch Vehicle Business and any Boeing Satellite Business; and (5) development of new procedures or incorporation into existing procedures measures to

## Decision and Order

be used in the event an employee of any Boeing Launch Vehicle Business or any Boeing Satellite Business fails to comply with such procedures, policies, and practices.

**VI.****IT IS FURTHER ORDERED** that:

- A. Respondent shall notify all Launch Vehicle Suppliers, in writing, that Satellite Interface Information relating to any Respondent Satellite bus, model, or product line is available upon request for any Respondent Satellite; *provided, however,* Respondent shall not provide such notification for any United States Government Satellite. Respondent shall make such notification:
1. Within thirty (30) days from the date this Order becomes final for each Satellite manufactured prior to the date this Order becomes final; and
  2. No later than thirty (30) days before the date Respondent provides any Satellite Interface Information to any Boeing Launch Vehicle Business or to Sea Launch for any Respondent Satellite bus, model, or product line manufactured after the date this Order becomes final.
- B. Respondent shall furnish each Launch Vehicle Supplier with instructions for requesting Satellite Interface Information relating to any Respondent Satellite bus, model or product line at the same time Respondent notifies the Launch Vehicle Supplier pursuant to Paragraph VI.A.
- C. Respondent shall provide all Satellite Interface Information relating to any Respondent Satellite bus, model, or product line to any Launch Vehicle Supplier:
1. For any Satellite manufactured prior to the date this Order becomes final, within thirty (30) days from the date Respondent receives a request from such Launch

## Decision and Order

Vehicle Supplier; ***provided, however,*** that Respondent shall not be required by this Paragraph VI.C.1 to provide Satellite Interface Information for any Satellite manufactured for the United States Government prior to the date this Order becomes final.

2. For any Satellite manufactured after the date this Order becomes final, (i) who requests such information, or (ii) to whom Respondent has previously supplied such information, at a time no later than Respondent provides any Satellite Interface Information to any Boeing Launch Vehicle Business or to Sea Launch; ***provided, however,*** that if Respondent receives a request for Satellite Interface Information after it has provided such information to any Boeing Launch Vehicle Business or Sea Launch pursuant to the requirements of this Paragraph, Respondent shall provide the Satellite Interface Information within twenty (20) days after receiving the request; ***provided, further,*** that for each Satellite manufactured for the United States Government, Respondent shall only be required to provide Satellite Interface Information to any Launch Vehicle Suppliers specified by the United States Government.

- D. Respondent shall provide to any Launch Vehicle Supplier to whom Satellite Interface Information relating to any Respondent Satellite bus, model, or product line has been previously supplied any revisions to such Satellite Interface Information at a time no later than it provides such revisions to any Boeing Launch Vehicle Business or Sea Launch.
- E. Respondent shall provide Satellite Interface Information to any Launch Vehicle Supplier specified by any Satellite customer at a time no later than Respondent provides such

## Decision and Order

information to any Boeing Launch Vehicle Business or to Sea Launch.

- F. All obligations of this Paragraph shall be subject to Respondent=s compliance with the export licensing laws, rules and regulations of the United States that may be applicable to Respondent=s export of Satellite Interface Information. Respondent shall use its best efforts to obtain permission pursuant to such export licensing laws, rules and regulations relating to the export of Satellite Interface Information required by this Paragraph.
- G. Respondent may make the receipt of Satellite Interface Information subject to a Launch Vehicle Supplier=s prior execution of a confidentiality agreement comparable to industry standards of confidentiality.
- H. Respondent shall create and maintain records sufficient to identify: (1) the contents of any Satellite Interface Information provided to each Launch Vehicle Supplier for each of Respondent=s Satellites, and (2) all Launch Vehicle Suppliers to whom Respondent has provided Satellite Interface Information or notification pursuant to this Paragraph. Such Launch Vehicle Supplier records shall include the name of the Launch Vehicle Supplier, its address, the name and telephone number of the contact person, and the date on which Respondent provided Satellite Interface Information.
- I. Nothing in this Paragraph shall preclude Respondent from entering into any agreement for the purpose of facilitating integration between any Respondent Satellite and any Launch Vehicle.

**VII.**

**IT IS FURTHER ORDERED that:**

## Decision and Order

- A. Sheila Widnall is hereby appointed to serve as Monitor Trustee to assure that Respondent fully performs its responsibilities in a timely manner as required by this Order.
- B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:
  1. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
  2. Within twenty (20) days after it signs the Consent Agreement, Respondent shall execute a trust agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondent's compliance with the terms of this Order in a manner consistent with the purposes of this Order. The Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
  3. The Monitor Trustee shall serve for ten (10) years from the date the trust agreement is approved by the Commission.
  4. The Monitor Trustee shall have full and complete access to Respondent's personnel, books, records,

## Decision and Order

documents, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor Trustee may reasonably request, to the extent permissible under applicable governmental security procedures. Respondent shall cooperate with any reasonable request of the Monitor Trustee, including any request for assistance to obtain any necessary security clearances. Respondent shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with this Order.

5. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
6. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
7. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act

## Decision and Order

diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee. The Commission shall select a substitute Monitor Trustee subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the trust agreement required by Paragraph VII.B.2 of this Order within ten (10) days after the Commission appoints a substitute Monitor Trustee. The substitute Monitor Trustee shall serve according to the terms and conditions of this Paragraph VII.

8. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
9. The Monitor Trustee shall report in writing to the Commission concerning Respondent's compliance with this Order:
  - a. Every sixty (60) days for a period of six months from the date Respondent signs the Consent Agreement; and
  - b. Annually thereafter on the anniversary of the date this Order becomes final during the remainder of

## Decision and Order

the Monitor Trustee=s period of appointment pursuant to this Order.

**VIII.**

**IT IS FURTHER ORDERED** that:

- A. Respondent shall deliver a copy of this Order to any Launch Vehicle Supplier prior to obtaining from the Launch Vehicle Supplier any Non-Public Launch Vehicle Information relating to that Launch Vehicle Supplier=s Launch Vehicles. Within ten (10) days of the date the Commission accepts the Consent Agreement for public comment, Respondent shall deliver a copy of this Order to any Launch Vehicle Supplier that has previously supplied Non-Public Launch Vehicle Information to Hughes.
- B. Respondent shall deliver a copy of this Order to any Satellite Manufacturer prior to obtaining from the Satellite Manufacturer any Non-Public Satellite Information relating to that Satellite Manufacturer=s Satellites.

**IX.**

**IT IS FURTHER ORDERED** that within sixty (60) days after the date this Order becomes final and annually for the next ten (10) years on the anniversary of the date this Order becomes final, and at such times as the Commission may require, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. through VIII. of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through VIII. of this Order.

**X.**

## Analysis to Aid Public Comment

**IT IS FURTHER ORDERED THAT RESPONDENT** shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance arising out of this Order.

**XI.**

**IT IS FURTHER ORDERED** that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to its principal United States office, Respondent shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**XII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on December 29, 2020.

## Analysis to Aid Public Comment

**Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission (ACommission@) has accepted, subject to final approval, an Agreement Containing Consent Order (AConsent Agreement@) from The Boeing Company (ABoeing@) designed to remedy the anticompetitive effects resulting from Boeing=s acquisition of certain assets of General Motors Corporation. The proposed Consent Agreement prohibits Boeing from providing systems engineering and technical assistance (ASET@) services to the United States Department of Defense (ADoD@) for a certain classified program. The proposed Consent Agreement also prohibits Boeing=s launch vehicle division from gaining access to any non-public information that Boeing=s satellite division receives from competing launch vehicle suppliers when those competing suppliers launch Boeing=s satellites. Similarly, the proposed Consent Agreement prohibits Boeing=s satellite division from gaining access to any non-public information that Boeing=s launch vehicle business receives from competing satellite suppliers. In addition, the proposed Consent Agreement requires Boeing to make available all necessary satellite interface information, which is used to make a satellite compatible with a launch vehicle, to all launch vehicle suppliers.

The proposed Consent Agreement has 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 proposed Consent Agreement and any comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the proposed Decision & Order.

Pursuant to a Stock Purchase Agreement entered into on January 13, 2000, Boeing agreed to acquire certain assets of General Motors Corporation, including Hughes Space and Communications Company, Hughes Space and Communications

## Analysis to Aid Public Comment

International, Hughes Space and Communications International Service Company, Spectrolab, Inc., Hughes Electron Dynamics, Hughes Telecommunications and Space Company=s 2.69% interest in ICO Global Communications Ltd., and Hughes Telecommunications and Space Company=s 2% interest in Thuraya Satellite Telecommunications Private Joint Stock Company, for approximately \$3.75 billion. The Commission=s Complaint alleges that the transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. ' 45, and Section 5 of the FTC Act, as amended, 15 U.S.C. ' 18, in the following markets:

- (1) a certain classified program for which Boeing is providing SETA services;<sup>1</sup>
- (2) the research, development, manufacture, and sale of commercial geosynchronous earth orbit satellites;
- (3) the research, development, manufacture, and sale of commercial medium earth orbit satellites;
- (4) the research, development, manufacture, and sale of commercial low earth orbit satellites;
- (5) the research, development, manufacture, and sale of government satellites; and

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<sup>1</sup> The complaint includes an additional line of commerce, the provision of SETA Services, in which to analyze the effects of the transaction. This line of commerce is included in the complaint because the proposed merger results in the integration of Boeing into two non-horizontal markets: (1) the provision of SETA Services; and (2) a competitor for a certain classified program for which Boeing is providing SETA services. It is necessary to analyze the competitive conditions in the market for the provision of SETA Services in order to determine whether there would be anticompetitive effects in the related market for a certain classified program for which Boeing is providing SETA services.

## Analysis to Aid Public Comment

- (6) the research, development, manufacture, and sale of launch vehicles.

The proposed Consent Agreement remedies the alleged violations in each market. First, Boeing is the sole supplier of SETA services to DoD for a certain classified program. Boeing provides these services to DoD under a classified contract identified for purposes of the Complaint as Contract 4208. Hughes is one of two competing contractors for the classified program for which Boeing is providing SETA services. Thus, as a result of the proposed acquisition, Boeing would be both the provider of SETA services and a competing contractor for this classified program.

As a SETA contractor, Boeing must receive a great deal of competitively sensitive information, including detailed cost and bidding data, from contractors competing for the classified program. With access to such information, Boeing may be able to raise prices for the classified program by bidding less aggressively than it otherwise would. In addition, Boeing's position as SETA contractor could enable it anticompetitively to favor itself and/or disfavor its competitors in a number of ways, such as submitting unfair evaluations of its competitors' proposals.

The proposed Consent Agreement remedies the proposed acquisition's potential anticompetitive effects in this classified program by prohibiting Boeing from performing certain SETA services for this classified program in the future. To prevent the anticompetitive exchange of information, the Consent Agreement requires Boeing to: (1) use non-public SETA services information only its capacity as provider of technical assistance to DoD, or for the provision of SETA services not prohibited by the Order; and (2) erect a firewall between its SETA services division and Boeing's satellite division. In addition, to assist DoD in the transition of these SETA services responsibilities to one of its own research and development centers, the Consent Agreement further requires Boeing to: (1) provide technical

## Analysis to Aid Public Comment

assistance, at the request of DoD, for a period not to exceed one year; and (2) provide to DoD all documents relating to certain SETA services that Boeing has received in its role as SETA contractor.

Second, Hughes is a significant supplier of satellites and Boeing is a significant supplier of launch vehicles, which are used to launch satellites from the Earth=s surface into space. In order for a launch vehicle to launch a satellite, launch vehicle suppliers and satellite suppliers must work closely together and share a substantial amount of proprietary and competitively sensitive information to integrate the two products. Thus, as a significant supplier of launch vehicles, Boeing/Hughes would have access to competitively sensitive information of competing satellite manufacturers which it could share with its satellite divisions. If Boeing=s satellite divisions gained access to this information, Boeing would be able to determine the cost and technology involved in its competitors= satellite proposals. This could have immediate anticompetitive consequences on upcoming satellite procurements by allowing Boeing to bid less aggressively than it otherwise would. In addition, the incentives of other satellite suppliers to invest in future technological advancements could be reduced due to concerns that Boeing would be able to Afree-ride@ off its competitors= technological innovations. As a significant supplier of satellites, Boeing/Hughes likewise would have access to sensitive information of competing launch vehicle providers. If Boeing=s launch vehicle division were to gain access to this information, it could allow Boeing to bid less aggressively in upcoming launch vehicle procurements and reduce incentives of competitors to invest in technological innovation.

The proposed Consent Agreement is designed to protect the proprietary and competitively sensitive information of launch vehicle and satellite suppliers. Specifically, the Consent Agreement prohibits Boeing=s satellite business from making any non-public launch vehicle information obtained from any launch

## Analysis to Aid Public Comment

vehicle provider available to Boeing=s launch vehicle business. Under the proposed Consent Agreement, Boeing may only use such information as a provider of satellites. Similarly, the proposed Consent Agreement prohibits Boeing=s launch vehicle business from making any non-public satellite information obtained from any satellite supplier available to Boeing=s satellite business. Under the terms of the Consent Agreement, Boeing may only use such information in its capacity as a launch vehicle provider. The Commission has issued similar orders limiting potentially anticompetitive information transfers following mergers or acquisitions, including: Lockheed Martin, (C-3685) (September 20, 1996); Raytheon Company, (C-3681) (September 10, 1996); Lockheed Corporation/Martin Marietta Corporation, (C-3576) (May 9, 1995); Alliant Techsystems Inc., (C-3567) (April 7, 1995); Martin Marietta, (C-3500) (June 28, 1994).

Third, the proposed acquisition raises concern that Boeing could withhold satellite interface information, which is necessary to integrate a satellite with a launch vehicle, from its launch vehicle competitors. If Boeing were to withhold such satellite interface information, it could potentially disadvantage or raise the costs of other launch vehicle suppliers that are competing to launch Boeing=s satellites, and ultimately to customers. The proposed Consent Agreement remedies this concern by requiring that for any satellite manufactured by Boeing/Hughes prior to the date the Consent Agreement becomes final, Boeing must provide satellite interface information, as that term is defined in the Consent Agreement, to any launch vehicle supplier within thirty (30) days from the date Boeing receives a request for such information. The Order also requires Boeing to notify all launch vehicle suppliers, in writing, that satellite interface information relating to any Boeing/Hughes satellite bus, model, or product line is available upon request. Boeing/Hughes is also required to provide each launch vehicle supplier with instructions on how to request such information. The Consent Agreement further requires Boeing to provide satellite interface information relating to any of its satellite buses, models, or product lines manufactured after the date this Consent Agreement becomes final, to any

*Analysis to Aid Public Comment*

launch vehicle supplier that requests such information or to whom Boeing previously supplied satellite interface information. However, for each satellite manufactured for the United States Government, Boeing shall only be required to provide satellite interface information to any launch vehicle supplier specified by the United States Government. In addition, the Consent Agreement requires Boeing/Hughes to provide satellite interface information to any launch vehicle supplier specified by any satellite customer no later than Boeing provides such information to its own launch vehicle businesses.

Fourth, the Commission has appointed Sheila Widnall as a monitor trustee pursuant to the proposed Consent Agreement to ensure that Boeing complies with the provisions of the Order. The monitor trustee will, among other things, assist the Commission in monitoring Boeing's compliance with the firewall requirements of the Order and Boeing's efforts to provide satellite interface information to other launch vehicle competitors. Because satellite interface information often involves technical information, the monitor trustee will aid in evaluating the contents of the satellite interface information that is to be distributed. Under the provisions of the Consent Agreement, the monitor trustee will serve for a period of ten (10) years and provide, among other things, written reports sixty (60) days after she is appointed detailing Boeing's compliance with the proposed Consent Agreement and annually thereafter for the next ten (10) on the anniversary of the date the Decision and Order becomes final.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and Decision & Order, and it is not intended to constitute an official interpretation of the Consent Agreement and Decision & Order or to modify their terms in any way.

# INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

## ALLIANT TECHSYSTEMS INC.

*Docket No. 9254. Order, October 2, 2000*

Order reopening and modifying order.

### ORDER REOPENING AND MODIFYING ORDER

On June 13, 2000, Alliant Techsystems Inc. (“Alliant”) filed its *Petition of Alliant Techsystems Inc. to Reopen and Modify Final Order* (“Petition”) requesting that the Federal Trade Commission (“Commission”) reopen the order in Docket No. 9254 (“Order”) and replace the prior approval requirement with a prior notice requirement to be in effect until the Order is scheduled to terminate.<sup>1</sup> Alliant made its Petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), Section 2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.51, and the *FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions*, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) (“*Prior Approval Policy Statement*” or “*Policy Statement*”). The Petition was on the public record for thirty days. No comments were received.

The Commission, in its *Prior Approval Policy Statement*, “concluded that a general policy of requiring prior approval is no longer needed,” citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (“HSR”) Act, 15 U.S.C. § 18a, to protect the public interest in

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<sup>1</sup> The Order was issued on March 16, 1993, and became final on March 25, 1993, the date on which the Order was served on Alliant. Accordingly, the prior notification provisions will terminate on March 25, 2003.

## Interlocutory Orders, etc.

effective merger law enforcement. *Prior Approval Policy Statement* at 2. The Commission announced that it will “henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger.” As a general matter, “Commission orders in such cases will not include prior approval or prior notification requirements.” Id.

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its *Prior Approval Policy Statement* that “a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger.” The Commission also said that “a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger.” Id. at 3. As explained in the *Prior Approval Policy Statement*, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission in its *Prior Approval Policy Statement* announced its intention “to initiate a process for reviewing the retention or modification of these existing requirements” and invited respondents subject to such requirements “to submit a request to reopen the order.” Id. at 4. The Commission determined that, “when a petition is filed to reopen and modify an order pursuant to . . . [the *Prior Approval Policy Statement*], the Commission will apply a rebuttable presumption that the public

Interlocutory Orders, etc.

interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the *Policy Statement*. Id.

Consistent with the Commission's *Prior Approval Policy Statement*, the presumption is that the prior approval requirement in this Order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the Order in Docket No. 9254 to set aside the prior approval requirement.

The record in this case shows a credible risk that the respondent could engage in transactions that might be anticompetitive, but not reportable under the HSR Act. In addition, Alliant's Petition specifically seeks a modification that substitutes a prior notice provision for prior approval. Accordingly, pursuant to the *Prior Approval Policy Statement*, the Commission has determined to reopen the proceeding in Docket No. 9254 and modify the Order to delete the prior approval requirements of Paragraphs II and 111 and substitute prior notification provisions.

**ACCORDINGLY, IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that Paragraphs II and III of the Order in Docket No. 9254, be and hereby are modified, as of the effective date of this order to read as follows:

## II.

**IT IS FURTHER ORDERED**, that for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries or otherwise, acquire: (1) any interest in the whole or any part of the stock, share capital, or equity of any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition; or (2) any assets of a systems contractor for 30mm

Interlocutory Orders, etc.

lightweight ammunition or 120mm tank ammunition. **Provided however**, that this paragraph II shall not apply to the sale of products or services in the ordinary course of business.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Alliant and not of any other party to the transaction. Alliant shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Alliant shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. **Provided, however**, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

### III.

**IT IS FURTHER ORDERED** that, for a period commencing on the date this order becomes final and continuing for ten (10) years, Alliant shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries or otherwise, sell or otherwise transfer to any systems contractor for 30mm lightweight ammunition or 120mm tank ammunition: (1) any interest in or any part of the stock, share

## Interlocutory Orders, etc.

capital, or equity of Alliant, or (2) any assets used for or previously used for (and still suitable for use for) systems contracting of 30mm lightweight ammunition or 120 mm tank ammunition. ***Provided however***, that this paragraph III shall not apply to the sale of products or services in the ordinary course of business.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required **only** of Alliant and not of any other party to the transaction. Alliant shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Alliant shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. ***Provided, however***, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

By the Commission.

Interlocutory Orders, etc.

IN THE MATTER OF

**HOECHST MARION ROUSSEL, INC., ET AL.**

*Docket No. 9293      Order, November 28, 2000*

On November 27, 2000, Complaint Counsel and Counsel for Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation filed a joint motion to withdraw this matter from adjudication for the purpose of allowing the Commission to consider a consent agreement in disposition of this matter.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION**

This matter is before the Commission upon the joint motion filed by Complaint Counsel and Counsel for Respondents that this matter be withdrawn from adjudication -- pursuant to Sections 3.25 (b) and (c) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(b),(c) (2000) -- for the purpose of considering a proposed consent agreement executed by Complaint Counsel and Counsel for Respondents. Counsel represent that in their views the agreement is appropriate to settle the issues in this proceeding and that it conforms to the requirements of Rule 2.32 of the Commission Rules of Practice.

**IT IS ORDERED** that the aforesaid motion to withdraw this matter from adjudication be, and it hereby is, granted.

By the Commission.

