A Guide for Respondents: What to Expect During the Divestiture Process

When appropriate, the Commission may accept a settlement that allows the merger to proceed but preserves competition through an asset divestiture. The assets divested typically include both tangible assets (e.g., manufacturing plants) and intangible assets (e.g., intellectual property). This guide will help you, as a merging party under investigation (referred to as a respondent in a Commission order), understand what to expect during the remedy process as the Commission evaluates proposed divestitures to resolve charges that the merger is likely anticompetitive. Note that the Commission will not accept a remedy unless it determines that the remedy addresses the competitive harm caused by the merger and serves the public interest.

Divesting an ongoing business usually expedites settlement.

The Commission prefers the divestiture of an ongoing business as the most effective means of maintaining the premerger state of competition. As a result, a proposal to divest one party's demonstrably autonomous, ongoing business unit will usually expedite the settlement process. To confirm that all aspects of an ongoing business are being divested, you should:

- explain how the proposed divestiture business contains all assets and capabilities needed for it to operate on its own;
- explain how a proposed buyer could acquire the ongoing business and begin competing right away; and
- be aware that staff will talk with potential buyers and other market participants.

Divesting less than an ongoing business adds scrutiny.

The Commission may accept a divestiture of less than an ongoing business only if you and the buyer are able to demonstrate that the more limited asset package divestiture will maintain or restore competition in the markets affected by the merger. For a selected asset divestiture, you should:

- explain why the divestiture of an ongoing business divestiture is inappropriate or infeasible;
- demonstrate how the selected assets could operate as a viable and competitive business in the relevant market;
- explain what aspects of an ongoing business are excluded from the package and, for each aspect that is excluded, how the proposed buyer would be able to address that gap, at what cost, and how quickly; and
- provide the buyer with adequate time and access to employees, facilities, and information to conduct due diligence.

To ensure that the buyer is able to compete with firms already in the market (including yo If the Commission determi
competition, it may consider a

- confirm to FTC staff that the buyer has taken advantage of due diligence opportunities;
- provide the buyer with direct access to key employees;
- in the case of an upfront buyer, provide direct access to the acquired firm's information, facilities, and employees; and
- in the case of a post-order buyer, provide the post-order buyer direct access to the hold separate business, including the hold separate monitor and the hold separate manager.

Be prepared for the challenges of transferring back-office functions.

The provision of back-office functions (including databases and other IT functions) that relate to the product(s) and the assets being divested is often more important and more complicated than expected. In certain unique situations (e.g., where these functions or databases are specialized and not readily available from third parties), you may be required to divest the assets relating to the provision of these functions. To help assess the scope of back-office functions that the buyer will need and to ensure that the buyer has these functions, you should:

- explain to staff and the buyer all back-office functions related to all relevant products, as well as all necessary personnel and documentation;
- ensure that the proposed buyer can conduct adequate due diligence to understand what back-office functions will be needed and the complexities involved in the transfer of such functions;
- make your information technology employees available to discuss and plan the transfer of the back-office functions with the buyer; and
- provide back-office functions to the buyer as needed on a transitional basis for a period sufficient to allow the buyer to transition all services, at no more than your cost.

Facilitate the transfer of customer and other third-party relationships.

Buyers may have difficulty attracting and retaining customers. You should take certain steps to facilitate the transition in these relationships, including:

- provide the buyer access to customers, and relevant third parties, early in the process;
- inform customers of the divestiture, of the buyer's identity, and, if applicable, of the customers' right to terminate their contracts (incorporate input from the buyer for such communications);
- when customer contracts are assignable, assign customer contracts to the buyer;
- when customer consent is requirhnt is when c wss

Prepare to provide transition assistance to the buyer.

You may be required to provide back-office and other support functions for a limited period until the buyer can provide them itself or otherwise operate the divested business on its own. These obligations are typically set out in an agreement between you and the buyer that the Commission will approve and monitor, possibly by appointing an individual (paid by you) to ensure compliance. Key provisions will require you to:

- provide transition services and assistance for a sufficient period until the buyer can perform these services or otherwise operate the divested business on its own, at no more than your costs, which you will be required to document;
- enable the buyer to extend any such agreement for a reasonable period, when appropriate; and
- enable the buyer to terminate any such agreement early, without financial penalty.

Short-term supply agreements may be key to a successful remedy.

Supply agreements can be critical, enabling buyers to enter the affected markets quickly. At the same time, the Commission seeks to minimize the length of time that buyers rely on respondents. To provide a buyer with supply of product or input for a sufficient period, but not so long as to diminish the buyer's competitive incentives, you may be required to provide supply for a term that extends at least for the length of the product qualification process or the time needed to enable the buyer to obtain the inputs and manufacture the product on its own. The products supplied must be sufficient in quality and quantity and comparable to the products available to the parties pre-divestiture. The supply agreement should allow for an extension when it is clear that the buyer needs additional supply on a transitional basis.

Monitors provide support for buyers and ensure compliance.

A monitor is an independent third party that the Commission appoints to ensure compliance with the order. The Commission typically requires a monitor in cases in which the order imposes obligations that result in a post-acquisition relationship between you and the buyer, such as technical assistance, back-office services, or a supply agreement. Monitors typically have industry experience and should have no financial or other ties with the parties or the buyer. You will pay the monitor's fees according to a schedule you negotiate with the monitor.

Additional Resources

- Negotiating Merger Remedies
- FAQs on Reme 33.07 0 Td .0 Td .0 Td .0 Td .0 Td .0 Td .0 Td .0 Td .0 T3b3.0 Td tAQs on R oij