

*“Be careful what you wish for”:  
U.S. government enforcement  
of merger consent decrees*

BY DAVID GELFAND\* AND ELAINE EWING\*\*

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The U.S. Federal Trade Commission and Department of Justice Antitrust Division have a number of formal and informal tools at their disposal to enforce merger consent decrees. This article reviews these tools, the frequency with which they are used, and the circumstances under which they are used, with a particular focus on instances in which the agencies have taken formal enforcement action. Because these obligations should be considered carefully during the negotiation process, the article concludes by offering practical advice for antitrust practitioners negotiating consent decrees.

KEY WORDS: *mergers, consent decrees, compliance, enforcement, FTC, DOJ*

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## I. CONSENT DECREE BASICS

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) have authority to review mergers and acquisitions to determine whether they violate section 7 of the Clayton Act, i.e., whether they may lead to a “substantial lessening of competition.”<sup>1</sup>

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\* Partner, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

\*\* Associate, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

<sup>1</sup> 15 U.S.C. § 18 (2012).

If the agency reviewing a transaction determines that it likely violates section 7, it can seek an injunction to block the transaction. Alternatively, if the parties are amenable and the agency believes that a divestiture or other remedy will address the potential competitive harm from the transaction, the agency can enter into a consent decree with the parties allowing the transaction to go forward subject to provisions that are designed to resolve the competitive concerns. The consent decree spells out the specific obligations of the parties and creates a binding obligation to abide by its terms.

Most commonly, consent decrees require that businesses or assets promptly be divested in a manner that will restore competition in an overlapping product market. Behavioral remedies are sometimes used, however, and became more common during the first term of the Obama administration.<sup>2</sup> The provisions of behavioral consent decrees can include observing informational firewalls (*Coca-Cola*),<sup>3</sup> nondiscrimination provisions (*Comcast/NBC*),<sup>4</sup> anti-retaliation provisions (*Ticketmaster/Live Nation*),<sup>5</sup> licensing provisions (*Google/ITA*),<sup>6</sup> and other requirements tailored to particular competitive issues. They are most commonly used to address vertical concerns; behavioral remedies are rarely used as the sole means of resolving horizontal competition concerns.

Depending upon the circumstances, the reviewing agency might require a “buyer up front” divestiture or a “post-order” divestiture. A consent decree providing for a buyer up front will specify the divesti-

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<sup>2</sup> See, e.g., Decision and Order, *Coca Cola, Inc.*, No. C-4305 (F.T.C. Nov. 5, 2010), available at [http://www.ftc.gov/os/caselist/1010107/101105\\_cocacolorado.pdf](http://www.ftc.gov/os/caselist/1010107/101105_cocacolorado.pdf); Decision and Order, *PepsiCo, Inc.*, No. C-4301 (F.T.C. Sept. 28, 2010), available at [http://www.ftc.gov/os/caselist/0910133/100928\\_pepscodo.pdf](http://www.ftc.gov/os/caselist/0910133/100928_pepscodo.pdf); Final Judgment, *United States v. Ticketmaster Entm't, Inc.*, No. 1:10-cv-00139-RMC (D.D.C. July 30, 2010), available at <http://www.justice.gov/atr/cases/f260900/260909.pdf>; Final Judgment, *United States v. Google, Inc.*, No. 1:11-cv-00688-RLW, (D.D.C. Oct. 5, 2011), available at <http://www.justice.gov/atr/cases/f275800/275897.pdf>; Final Judgment, *United States v. Comcast Corp.*, No. 1:11-cv-00106-RJL (D.D.C. June 29, 2011), available at <http://www.justice.gov/atr/cases/f272600/272610.pdf>.

<sup>3</sup> *Coca Cola, Inc.*, No. C-4305, at 6–10.

<sup>4</sup> *Comcast Corp.*, No. 1:11-cv-00106-RJL, at 19.

<sup>5</sup> *Ticketmaster*, No. 1:10-cv-00139-RMC, at 19–21.

<sup>6</sup> *Google, Inc.*, No. 1:11-cv-00688-RLW, at 13–21.

ture buyer, who will have been approved by the reviewing agency before the decree is signed, and will require that the divestiture be completed within a very short time, often as little as ten days after closing the main transaction.<sup>7</sup> In these situations, negotiation of the divestiture agreement occurs simultaneously with the negotiation of the consent decree. With post-order divestitures, the consent decree will allow the parties to close their transaction without having identified a divestiture buyer and will provide the parties with a specified amount of time (often 90 to 180 days) to find a buyer, obtain approval of the buyer from the reviewing agency, and close the divestiture transaction.<sup>8</sup> With either type of divestiture, the agency will reserve for itself the right to appoint a trustee to sell the divestiture business at no minimum price if the parties are unable to carry out the divestiture in accordance with the terms of the consent decree.

With a post-order divestiture, the parties are typically required to agree to a hold separate order in addition to the consent decree. The hold separate order is designed to ensure that competition is not harmed pending the divestiture and to preserve the competitiveness of the divestiture business. A monitor trustee, who works at the merged entity's expense but reports to the reviewing agency, is often required by the consent decree as a means of supplementing the reviewing agency's oversight of compliance with the decree.

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<sup>7</sup> U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 23–25 (June 2011), *available at* <http://www.justice.gov/atr/public/guidelines/272350.pdf>; *see also, e.g.*, Decision and Order, Watson Pharms., Inc., No. C-4374 (F.T.C. Dec. 13, 2012), *available at* <http://www.ftc.gov/os/caselist/1210132/121214watsonactavisdo.pdf>; Decision and Order, Koninklijke Ahold N.V., No. C-4367 (F.T.C. Aug. 16, 2012), *available at* <http://ftc.gov/os/caselist/1210055/120817konkinlijkedo.pdf>.

<sup>8</sup> U.S. DEP'T OF JUSTICE, *supra* note 7, at 24; *see also, e.g.*, Proposed Final Judgment at 6, Star Atl. Waste Holdings, L.P., No. 1:12-cv-01847 (D.D.C. Nov. 15, 2012), *available at* <http://www.justice.gov/atr/cases/f288800/288822.pdf> (90 days); Decision and Order at 11, Air Prods. & Chems., Inc., No. C-4299 (F.T.C. Oct. 22, 2010), *available at* <http://www.ftc.gov/os/caselist/1010093/101022airproductsdo.pdf> (120 days); Proposed Final Judgment at 8, United States v. Exelon Corp., No. 1:06CV01138 (D.D.C. June 6, 2006), *available at* <http://www.justice.gov/atr/cases/f216700/216784.pdf> (150 days); Decision and Order at 7, Kinder Morgan, Inc., No. C-355 (F.T.C. May 1, 2012), *available at* <http://ftc.gov/os/caselist/1210014/120501kindermorgando.pdf> (180 days).

### A. *Negotiating and finalizing the consent decree*

Although the processes for negotiating and finalizing consent decrees with the FTC and the DOJ are broadly similar, there are some procedural differences, particularly in how the decrees are approved.

The FTC has a dedicated Compliance Division, a section of the Bureau of Competition charged with negotiating and enforcing orders in both merger and nonmerger cases. Consent decree negotiations are conducted with both the primary investigating staff lawyers and Compliance Division staff lawyers. Once a decree is negotiated, it is subject to approval by Bureau of Competition management and then is submitted to the five FTC commissioners for preliminary approval. If the commissioners preliminarily approve the decree, it is placed on the public record for a thirty-day public comment period.<sup>9</sup> Typically parties are allowed to close the transaction upon receiving preliminary approval. After the public comment period expires, the commissioners again vote on the decree; if they vote to approve it, the order becomes final.<sup>10</sup> Modifications are sometimes made to the decree as a result of comments received during the public comment period,<sup>11</sup> but outright rejection is very rare.<sup>12</sup>

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<sup>9</sup> FTC Rules of Practice, 16 C.F.R. § 2.34(c) (2013).

<sup>10</sup> See RICHARD FEINSTEIN, *NEGOTIATING MERGER REMEDIES: STATEMENT OF THE BUREAU OF COMPETITION OF THE FEDERAL TRADE COMMISSION* (2012), available at <http://www.ftc.gov/bc/bestpractices/merger-remediesstmt.pdf>, for an overview of the negotiation process.

<sup>11</sup> For an example of a modification, see Decision and Order, PepsiCo, Inc., No. C-4301 (F.T.C. Sept. 28, 2010), available at <http://www.ftc.gov/os/caselist/0910133/100928pepscodo.pdf>, in which the FTC approved a final order requiring PepsiCo to provide the FTC forty-five days' notice of proposed acquisitions of bottlers that distribute PepsiCo and Dr Pepper or Snapple brands that would not otherwise require premerger notification, a provision that had not been in the initial consent decree. See also Press Release, Fed. Trade Comm'n, *FTC Staff Expresses Support for Proposed Modification to New Jersey Gasoline Pricing Law; FTC Approves Modified Final Order Settling Charges that PepsiCo's Acquisition of Pepsi Bottling Group and PepsiAmericas was Anticompetitive* (Sept. 28, 2010), available at <http://www.ftc.gov/opa/2010/09/gasolinepepsi.shtm>.

<sup>12</sup> See, e.g., Press Release, Fed. Trade Comm'n, *FTC Closes Case in Nestle/Alpo Acquisition: Action Means Fort Dodge Plant Will Not Have To Be Sold* (June 7, 1995), available at <http://www.ftc.gov/opa/1995/06/nestle2.shtm>.

The DOJ does not have a dedicated compliance division, and thus responsibility for negotiations and overseeing compliance lies with the staff lawyers who have investigated the merits of the transaction.<sup>13</sup> Once negotiated with the staff, the consent order is approved by the Assistant Attorney General for Antitrust. The DOJ then files a complaint, Competitive Impact Statement, proposed hold separate stipulation and order, and proposed final judgment (i.e., the consent decree) with a U.S. district court for judicial approval.

The Tunney Act<sup>14</sup> requires the DOJ to provide the public with an opportunity to comment on a proposed settlement. In order to satisfy this requirement, the final judgment and Competitive Impact Statement are published in the *Federal Register*. For a sixty-day period, the DOJ must review and respond to any comments, and all comments and responses must be published in the *Federal Register* and filed with the court.<sup>15</sup> The parties may close their transaction, however, once the federal judge signs the hold separate stipulation and order, which typically occurs within a few days of the filing of the complaint and proposed consent decree. After the sixty-day comment period expires, the court can approve the order and issue a final judgment or reject the order and send the parties back to the negotiating table, although the latter is very rare.<sup>16</sup>

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<sup>13</sup> The Office of the General Counsel also consults with the Antitrust Division staff lawyers regarding the enforcement of consent decrees. See U.S. DEP'T OF JUSTICE, *supra* note 7, at 33.

<sup>14</sup> 15 U.S.C. § 16 (2012).

<sup>15</sup> 15 U.S.C. § 16(b)–(d) (2012); see also Plaintiff United States of America's Explanation of Consent Decree Procedures, *United States v. Okla. State Chiropractic Indep. Physicians Ass'n*, No. 13-CV-21-TCK-TLW (N.D. Okla. Jan. 10, 2013), available at <http://www.justice.gov/atr/cases/f291200/291223.pdf>.

<sup>16</sup> Although unusual, delay in approving the final judgment is possible. In *United States v. SBC Communications, Inc.*, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia required additional materials from the parties and held three hearings on the matter before entering the final judgment, well over a year after DOJ first filed the proposed final judgment and the parties closed their transaction. Opinion, *United States v. SBC Commc'ns, Inc. & AT&T Corp.*, No. 05-2102 (EGS) (D.D.C. Mar. 29, 2007), available at <http://www.justice.gov/atr/cases/f222200/222298.htm>. See also *United*

Consent decrees negotiated with each agency are broadly similar, in each case spelling out the parties' obligations in detail, including the specific tangible and intangible assets that must be divested. The documents can be quite lengthy and each provision should be negotiated carefully.<sup>17</sup> The reviewing agency seeks to ensure that it has created a remedy that will address the perceived competitive harm, for example, that the divestiture package contains all the assets a buyer would need to compete effectively. The parties, on the other hand, want to limit their obligations to minimize disruption and loss of value from the transaction. Because the reviewing agency understands that the parties want to give as little as possible and because there is often information asymmetry, the agency will conduct a thorough investigation before agreeing to the terms of a decree, often taking sworn testimony from company employees, reviewing voluminous company documents, and conducting third-party interviews. The agency will also investigate the divestiture buyer to ensure that it is qualified, well financed, and likely to compete with the divested business in a manner that replicates premerger competition as closely as possible. The agency will not approve a buyer if it appears that the buyer's intention is merely to obtain a cash flow stream at a discount.

#### *B. Compliance obligations*

Once the consent decree is executed, the parties must of course comply with its terms. The parties must complete any required divestiture(s) within the specified time period and must comply with the hold separate provisions while the divestitures are pending. Most decrees have continuing obligations even after the divestiture is complete. For example, the parties may have ongoing obligations to preserve the confidentiality of information belonging to the divested business. Many consent decrees also provide for ongoing contractual

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*States v. Thomson Corp.*, 549 F. Supp. 907 (D.D.C. 1996) (denying motion for entry of proposed final judgment based on finding that one provision was not in the public interest).

<sup>17</sup> For an example of a particularly long and detailed decree, see Decision and Order, *Watson Pharms., Inc.*, No. C-4374 (F.T.C. Dec. 13, 2012), available at <http://www.ftc.gov/os/caselist/1210132/121214watsonactavisdo.pdf>, which numbers fifty-six pages.

relationships between the parties and the divestiture buyer, such as supply or service agreements.<sup>18</sup> If the merged entity and the divestiture buyer wish to amend these agreements or any other divestiture agreements, they typically must obtain agency approval first.<sup>19</sup> Parties often are required to submit periodic reports to the reviewing agency certifying their compliance with the decree.<sup>20</sup> Parties may also be required to provide advance notice before undertaking certain additional acquisitions or transactions.<sup>21</sup>

Behavioral consent decrees, by their nature, impose ongoing obligations on merger parties. The typical term of a consent decree is ten years, though some recent behavioral decrees have mandated a longer or shorter period—the *Coke* and *Pepsi* decrees each prescribed a

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<sup>18</sup> The agencies have expressed concern about “continuing entanglements” with divestiture buyers. See FEINSTEIN, *supra* note 10, at 9. However, these types of arrangements remain common. See, e.g., Decision and Order at 12, *W. Digital Corp.*, No. C-4350 (F.T.C. Mar. 5, 2012), available at <http://www.ftc.gov/os/caselist/1110122/120305westerndigitaldo.pdf> (requiring Western Digital to divest HGST’s desktop hard disk drive business to Toshiba and to supply certain components and contract manufacture certain products for Toshiba).

<sup>19</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL 144 (2012), available at <http://www.justice.gov/atr/public/divisionmanual/atrdvman.pdf>; FTC Rules of Practice, 16 C.F.R. §2.41(f) (2013).

<sup>20</sup> See, e.g., Decision and Order, *Hertz Global Holdings, Inc.*, No. 101-0137 (F.T.C. Nov. 15, 2012), available at <http://www.ftc.gov/os/caselist/1010137/121115hertzdo.pdf> (requiring compliance reports relating to the divestiture to be submitted every thirty days until the completion of the divestiture and requiring annual compliance reports for five years); Decision and Order, *Koninklijke Ahold N.V./Safeway Inc.*, No. 121-0055 (F.T.C. June 15, 2012), available at <http://ftc.gov/os/caselist/1210055/120615konkinlijkedo.pdf> (requiring periodic compliance reports related to the divestiture to be submitted every sixty days until the completion of the divestiture and requiring annual compliance reports for ten years).

<sup>21</sup> See, e.g., Decision and Order, *Deutsch Gelatine-Fabriken Stoess AG*, No. 011-0117 (F.T.C. March 7, 2002), available at <http://ftc.gov/os/2002/03/deutschedo.htm> (requiring the FTC’s advance approval of certain transactions for a five-year period); Final Judgment, *United States v. Chancellor Media Corp.*, No. 1:98-CV-02763 (D.D.C. Apr. 6, 1999), available at <http://www.justice.gov/atr/cases/f223300/223365.htm> (requiring advance notice for certain transactions that are not subject to premerger reporting requirements under the Hart-Scott-Rodino Act).



term of twenty years,<sup>22</sup> while the *NBC Universal/Comcast* decree will run for seven years and the *Google/ITA* decree will last for five years.<sup>23</sup>

## II. ENFORCEMENT IN CASES OF CONSENT DECREE VIOLATIONS

Both the DOJ and FTC emphasize the importance of bringing enforcement actions when consent decrees are violated. For example, the DOJ's Policy Guide to Merger Remedies advises that strict enforcement of merger remedies is essential because "[e]ven the most appropriately tailored remedy is of little value if it is not enforced."<sup>24</sup> Courts have expressed a similar view. In imposing a fine of \$7 million on Boston Scientific Corp., for example, the court noted that without strong enforcement, "parties to anticompetitive mergers will have every incentive to sign a consent decree to induce the FTC to withdraw its injunction, and then breach the promises made in the order."<sup>25</sup> Enforcement can take various forms depending upon the circumstances.

Compliance with the terms of a consent decree is required whether or not a violation raises substantive antitrust issues. Even where circumstances have changed such that there is no competitive concern, or where a violation is purely technical, absent modification to the decree the reviewing agency will enforce its terms and investigate violations.

### A. Enforcement mechanisms in consent decree provisions

The typical consent decree includes various monitoring and enforcement provisions. Common provisions provide for the appoint-

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<sup>22</sup> See Decision and Order at 16, *Coca Cola, Inc.*, No. C-4305 (F.T.C. Nov. 5, 2010), available at [http://www.ftc.gov/os/caselist/1010107/101105\\_cocacolorado.pdf](http://www.ftc.gov/os/caselist/1010107/101105_cocacolorado.pdf); Decision and Order at 15, *PepsiCo, Inc.*, No. C-4301 (F.T.C. Sept. 28, 2010), available at [http://www.ftc.gov/os/caselist/0910133/100928\\_pepscode.pdf](http://www.ftc.gov/os/caselist/0910133/100928_pepscode.pdf).

<sup>23</sup> See Final Judgment at 31, *United States v. Comcast Corp.*, No. 1:11-cv-00106-RJL (D.D.C. June 29, 2011), available at <http://www.justice.gov/atr/cases/f272600/272610.pdf>; Final Judgment at 33, *United States v. Google, Inc.*, No. 1:11-cv-00688-RLW, (D.D.C. Oct. 5, 2011), available at <http://www.justice.gov/atr/cases/f275800/275897.pdf>.

<sup>24</sup> U.S. DEP'T OF JUSTICE, *supra* note 7, at 33.

<sup>25</sup> *United States v. Bos. Scientific Corp.*, 253 F. Supp. 2d 85, 101 (D. Mass. 2003).



ment of a monitor trustee or interim monitor, the possibility of appointing a divestiture trustee, and, occasionally, so-called crown jewel provisions. In practice, these mechanisms are the primary means by which the agencies monitor, investigate, and ensure parties' compliance.

In some decrees, the agency names and appoints a monitor charged with ensuring the company's compliance with its obligations.<sup>26</sup> In others, the agency does not designate a specific monitor at the time the consent decree is entered, but reserves the right to appoint a monitor in the future.<sup>27</sup> In either case, monitor provisions typically grant the monitor, who serves at the merged company's expense, authority to access the company's personnel, books, documents, records, facilities, and other relevant information. The monitor is also required to provide periodic reports to the agency. An informal review of the consent decrees issued since 2010 demonstrates that monitors are used much more frequently by the FTC, which has appointed monitors in more than half of the consent decrees it has issued since 2010, than by the DOJ. The reasons why the FTC appoints monitors more often are not entirely clear and may be a result of different historical approaches. As noted above, the FTC has a dedicated Compliance Division, which often appoints a monitor to aid in its review of parties' compliance. In contrast, the DOJ historically has disfavored monitors, stating in its now-superseded 2004 DOJ Merger Policy Guide that "appointment of a monitoring trustee should be reserved for relatively rare situations where a monitoring trustee with technical expertise unavailable to the Division could perform a valuable role."<sup>28</sup>

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<sup>26</sup> See, e.g., Decision and Order at 11, Robert Bosch GmbH, No. C-4377 (F.T.C. Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf>.

<sup>27</sup> See, e.g., Decision and Order at 5, Corning Inc., No. C-4380 (F.T.C. Dec. 20, 2012), available at <http://ftc.gov/os/caselist/1210133/121221corning-bectondo.pdf>; Proposed Final Judgment at 34, United States v. United Techs. Corp., No. 1:12-cv-01230-RC (D.D.C. July 26, 2012), <http://www.justice.gov/atr/cases/f285400/285422.pdf>.

<sup>28</sup> U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ARCHIVED: POLICY GUIDE TO MERGER REMEDIES (2004), available at <http://www.justice.gov/atr/public/guidelines/205108.htm>.

In consent decrees with a divestiture requirement, both agencies reserve the right to appoint a divestiture trustee to sell the assets to be divested if the merged entity fails to do so. In contrast to a compliance monitor, who is essentially an observer charged with observing and reporting on the company's compliance with the consent decree, the divestiture trustee actively manages the sale of the divestiture assets when the parties are unable to do so. Similar to a compliance monitor, the divestiture trustee serves at the company's expense, has access to the company's information, and must submit periodic reports to the agency outlining the efforts taken to accomplish the divestiture. Divestiture trustee provisions are invoked infrequently, but are used when divestitures are not completed on time and no substantial progress toward divestiture has been made by the deadline. For example, in *Tops Markets*, the FTC appointed a divestiture trustee after the company failed to sell four of the seven supermarkets that it was required to divest.<sup>29</sup> Other recent cases in which divestiture trustees were appointed include *Whole Foods* (FTC),<sup>30</sup> *Mittal* (DOJ),<sup>31</sup> and *Grupo Bimbo* (DOJ).<sup>32</sup>

Crown jewel provisions are triggered if a divestiture is not completed and permit the agency to require the sale of certain identified assets—beyond what was included in the original divestiture package—in order to complete the divestiture.<sup>33</sup> At both agencies, crown

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<sup>29</sup> Press Release, Fed. Trade Comm'n, FTC Approves Tops Markets' Application to Divest Three Former Penn Traffic Supermarkets in New York and Pennsylvania, Finalizes Modified Settlement Order (July 5, 2011), available at <http://www.ftc.gov/opa/2011/07/topspenn.shtm>; Decision and Order at 11, *Tops Markets LLC*, No. C-4295 (F.T.C. July 5, 2010), available at <http://www.ftc.gov/os/caselist/1010074/110705topspenndo.pdf>.

<sup>30</sup> Press Release, Fed. Trade Comm'n, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats was Anticompetitive (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/wholefoods.shtm>.

<sup>31</sup> Proposed Order, *United States v. Mittal Steel Co.*, No. 1:06-CV-01360-ESH (D.D.C. Aug. 6, 2007), available at <http://www.justice.gov/atr/cases/f225100/225105.pdf>.

<sup>32</sup> Motion of the United States to Appoint Divestiture Trustee, *United States v. Grupo Bimbo, S.A.B. de C.V.*, No. 1:11-cv-01857-EGS (D.D.C. Feb. 28, 2012), available at <http://www.justice.gov/atr/cases/f280600/280635.pdf>.

<sup>33</sup> U.S. DEP'T OF JUSTICE, *supra* note 7, at 24–25; Fed. Trade Comm'n, Frequently Asked Questions About Merger Consent Order Provisions, Q.

jewel provisions are used in order to maximize the possibility of successful divestiture and particularly to help identify a willing and qualified divestiture buyer.<sup>34</sup>

One recent example is the DOJ consent decree related to Monsanto's acquisition of Delta and Pine Land Co. (DPL), which included a particularly severe crown jewel provision. If Monsanto did not divest certain agreed assets (primarily its legacy business that overlapped with DPL) within ninety calendar days of the filing of DOJ's complaint in federal court, it would have been obligated to divest DPL in its entirety, that is, it would have been obligated to divest the entire company it had just bought.<sup>35</sup>

Crown jewel provisions are only rarely included in consent decrees by either agency and, even when they are included, they are almost never invoked. The FTC has enforced a crown jewel provision only once, in 2002, when Aventis failed to meet its divestiture deadline.<sup>36</sup> In 2007, the

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24, [http://www.ftc.gov/bc/mergerfaq.shtm#Crown Jewels](http://www.ftc.gov/bc/mergerfaq.shtm#Crown%20Jewels) (last updated Sept. 7, 2010).

<sup>34</sup> The FTC prescribes crown jewel provisions "where there is a risk that, if the respondent fails to divest the original divestiture package on time (including to an up front buyer) or if the original divestiture falls through for some reason, a divestiture trustee may need an expanded or alternative package of assets to accomplish the divestiture remedy." Fed. Trade Comm'n, Frequently Asked Questions About Merger Consent Order Provisions, Q. 26, [http://www.ftc.gov/bc/mergerfaq.shtm#Crown Jewels](http://www.ftc.gov/bc/mergerfaq.shtm#Crown%20Jewels) (last updated Sept. 7, 2010). The DOJ uses crown jewel provisions to increase the likelihood that an appropriate purchaser will emerge and "to ensure that the package results in a buyer that will preserve competition in the market." U.S. DEP'T OF JUSTICE, *supra* note 7, at 9, 24.

<sup>35</sup> Final Judgment at 10-16, *United States v. Monsanto Co.*, No. 1:07-CV-00992, (D.D.C. Nov. 6, 2008), *available at* <http://www.justice.gov/atr/cases/f239400/239476.pdf> ("If Defendants have not divested the Enhanced Stoneville Assets by the end of the time period permitted by this Final Judgment, Defendants shall notify Plaintiff of that fact in writing. Defendant Monsanto shall then divest DPL within sixty (60) days.").

<sup>36</sup> Order Reopening and Modifying Order, *Hoechst AG*, No. C-3919 (F.T.C. Dec. 3, 2002), *available at* <http://www.ftc.gov/os/2002/03/aventisormo.pdf>.

DOJ enforced a similar provision in *Mittal* when the company was unable to sell certain divestiture assets.<sup>37</sup>

A few consent decrees include provisions short of a true crown jewel that allow for the substitution of assets, for example, because of issues related to securing permits. In *AMC Entertainment Holdings*, if AMC were unable to secure landlord consent to transfer one or more movie theatres, the DOJ could require that AMC “divest alternative theatre assets that compete effectively with the theatres for which the Landlord Consent was not obtained.”<sup>38</sup> The DOJ retained complete authority (after consultation with certain state authorities) to determine whether the new divestiture assets satisfied the requirement.<sup>39</sup> Similarly, the FTC decree in *Hertz* provided that if Hertz were not able to obtain all necessary airport authority approvals at certain of the airports where rental car locations were to be divested, the FTC could, in its sole discretion, require Hertz to instead divest substitute airport concessions.<sup>40</sup>

In addition to crown jewel provisions, the FTC typically includes a catch-all provision in its consent decrees along the following lines: “The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.”<sup>41</sup> It does not, however, appear that the FTC has ever relied on this provision to insist on a material enhancement to a remedy.

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<sup>37</sup> Press Release, U.S. Dep’t of Justice, Justice Department Requires Mittal Steel to Divest Sparrows Point Steel Mill (Feb. 20, 2007), *available at* [http://www.justice.gov/atr/public/press\\_releases/2007/221503.pdf](http://www.justice.gov/atr/public/press_releases/2007/221503.pdf).

<sup>38</sup> Final Judgment at 11, *United States v. AMC Entertainment Holdings, Inc.*, No. 10-CV-00846 (D.D.C. Aug. 9, 2010), *available at* <http://www.justice.gov/atr/cases/f261300/261397.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> Decision and Order at 15, *Hertz Global Holdings, Inc.*, No. 101-0137 (F.T.C. Nov. 15, 2012), *available at* <http://www.ftc.gov/os/caselist/1010137/121115hertzdo.pdf>.

<sup>41</sup> *Id.* at 24.

### B. Investigation

If the FTC or DOJ suspects that a company has violated its consent decree, the agency may conduct a formal or informal investigation into the company's conduct. The agencies are vigilant in investigating perceived violations.

The agencies' first investigative tool is the decree itself. Consent decrees at both agencies generally include provisions permitting the FTC or DOJ to inspect books and records and interview officers and directors in order to investigate compliance and possible consent decree violations.<sup>42</sup>

In addition to relying on consent decree provisions, the agencies can take more formal investigative steps. The DOJ can issue civil investigative demands (CIDs) to collect documentary material, written interrogatory responses, and oral testimony.<sup>43</sup> Section 9 of the Federal Trade Commission Act (the FTC Act) similarly allows the FTC to issue CIDs requiring the production of documents, information, and witnesses.<sup>44</sup>

Because investigations into potential consent decree violations are nonpublic, it is difficult to gauge the frequency with which these provisions are invoked. Requests from the agencies for the production of information or documents are quite common, although it is somewhat rare for formal process to be invoked.

### C. Enforcement proceedings

DOJ can file civil and criminal contempt actions in federal district court to enforce its consent decrees and to seek monetary penalties,

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<sup>42</sup> See U.S. DEP'T OF JUSTICE, *supra* note 7, at 34. See also, e.g., Proposed Final Judgment at 14–15, *Star Atl. Waste Holdings, L.P.*, No. 1:12-cv-01847 (D.D.C. Nov. 15, 2012), available at <http://www.justice.gov/atr/cases/f288800/288822.pdf> (authorizing DOJ to inspect the company's books and records and to interview employees in connection with the consent decree); Decision and Order at 6, *Corning Inc.*, No. C-4380 (F.T.C. Dec. 20, 2012), available at <http://ftc.gov/os/caselist/1210133/121221corningbectondo.pdf> (requiring Corning to provide FTC access to books, records, and employees).

<sup>43</sup> 15 U.S.C. §§ 1311(c), 1312(a) (2012).

<sup>44</sup> 15 U.S.C. § 57b-1 (2012).

injunctive relief, or both.<sup>45</sup> Civil contempt proceedings serve “a remedial purpose—compelling compliance with the court’s order or compensating the complainant for losses sustained” while the goal of a criminal contempt action is to “to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future.”<sup>46</sup>

Section 5(1) of the FTC Act grants the Commission the ability to seek civil penalties of \$16,000 for each violation of a final Commission order.<sup>47</sup> “[I]n a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission,” each day is considered a separate violation, that is, a company can be fined \$16,000 a day for a continuing consent decree violation.<sup>48</sup> Section 5(1) also provides that federal district courts enforcing Commission orders can grant “mandatory injunctions and such other and further equitable relief as they deem appropriate.”<sup>49</sup> Although the FTC is authorized to bring an action in federal court to enforce its consent decrees, if it decides to bring an enforcement action, it must first give the DOJ forty-five days’ notice of its intention to bring the action in case the DOJ wants to bring the action itself.<sup>50</sup> In competition matters, however, the DOJ typically permits the FTC to initiate the action.<sup>51</sup>

Formal enforcement actions generally are initiated only when there is a serious violation of the terms of a consent order, such as repeated violations of the agreement or blatant violations of certain

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<sup>45</sup> U.S. DEP’T OF JUSTICE, *supra* note 7, at 34–35.

<sup>46</sup> *Id.*

<sup>47</sup> 15 U.S.C. § 45(1) (2012). The original amount in the statute, \$10,000, has been increased as prescribed by the Federal Civil Penalties Inflation Adjustment Act of 1990. See Press Release, Fed. Trade Comm’n, Commission Approves Federal Register Notice Adjusting Civil Penalty Amounts (Dec. 23, 2008), available at <http://www.ftc.gov/opa/2008/12/civilpenalty.shtm>.

<sup>48</sup> 15 U.S.C. § 45(1) (2012).

<sup>49</sup> *Id.*

<sup>50</sup> FED. TRADE COMM’N, FTC OPERATING MANUAL § 12.5.1 (1998), available at <http://www.ftc.gov/foia/ch12compliance.pdf>.

<sup>51</sup> *Id.*

restrictions on the company's behavior. There are only a handful of recent cases in which formal enforcement action was taken, and examining these cases highlights the fact that violations formally enforced by the agencies usually are flagrant or cause harm to competition or consumers.

#### D. Smith/Schlumberger

In 1999, the DOJ brought civil and criminal contempt actions against Smith International Inc. and Schlumberger Ltd. when the companies formed a joint venture in the drilling fluids industry in violation of a 1994 consent decree. The consent decree prohibited Smith, then the divestiture buyer, "from selling the divested drilling fluid business to, or combining that business with, the drilling fluid operations of certain companies, including Schlumberger."<sup>52</sup> Several years later, Smith and Schlumberger formed a joint venture that combined their drilling fluids businesses, and the DOJ brought civil and criminal contempt actions against both parties.<sup>53</sup> The companies were found guilty of criminal contempt and each was required to pay a \$750,000 criminal fine and was subject to five years' probation. In convicting the companies, the U.S. District Court for the District of Columbia stressed that "consent decrees issued by the Antitrust Division and signed by the courts, must be followed," and if a party wants a variance from the terms of a consent decree, it must rely on formal modification procedures, such as petitioning the Antitrust

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<sup>52</sup> Press Release, U.S. Dep't of Justice, Court Finds Smith International and Schlumberger Ltd. Guilty of Criminal Contempt for Violating Consent Decree (Dec. 9, 1999), *available at* [http://www.justice.gov/atr/public/press\\_releases/1999/3948.pdf](http://www.justice.gov/atr/public/press_releases/1999/3948.pdf).

<sup>53</sup> Interestingly, neither company was a party to the original consent decree. In DOJ's view, Smith had effectively conceded it was bound by the consent decree by earlier seeking to modify it, and the civil and criminal contempt charges brought against Schlumberger were proper because Schlumberger had aided and abetted Smith in its violation of the decree. *See Memorandum of the United States in Support of Petition for an Order to Show Cause Why Respondents Smith International, Inc. and Schlumberger Ltd. Should Not Be Found in Criminal Contempt, United States v. Smith Int'l, Inc.*, No. 93-2621-SS (D.D.C. July 27, 1999), *available at* <http://www.justice.gov/atr/cases/f2500/2598.pdf>.



Division or pursuing an action in the court.<sup>54</sup> The companies also settled the civil contempt charge for \$13.1 million, which represented a disgorgement of the profits earned from the joint venture.<sup>55</sup> The companies were not, however, required to rescind the joint venture.

#### E. Morton Plant

In 2000, the DOJ brought a civil enforcement action against Morton Plant Hospital Association and the Trustees of Mease Hospital for “repeated violations” of a 1994 consent decree. The 1994 consent decree allowed the companies to create a partnership in connection with certain outpatient and administrative services, but explicitly prohibited them from: (1) jointly selling services; (2) jointly contracting with third parties; and (3) sharing information.<sup>56</sup> The companies settled with DOJ, acknowledged violations of these provisions by “coordinating managed care contracting, jointly selling services, and sharing competitive information,” and agreed to pay a \$300,000 fine and to cease the prohibited conduct.<sup>57</sup>

#### F. Boston Scientific Corp.

In 2003, Boston Scientific Corp. (BSC) was ordered to pay more than \$7 million in civil penalties for its failure to comply with licensing provisions in a 1995 FTC consent decree.<sup>58</sup> The consent decree required BSC to share catheter technology with HP such that HP could enter the relevant market as a competitor.<sup>59</sup> BSC did provide some information

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<sup>54</sup> Bench Decision, *United States v. Smith Int'l, Inc.*, No. 93-2621-SS (D.D.C. Dec. 9, 1999), available at <http://www.justice.gov/atr/cases/f218400/218412.htm>.

<sup>55</sup> *Id.*

<sup>56</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Hospitals to Enter into Enforcement Order to Remedy Consent Decree Violations (July 12, 2000), available at <http://www.justice.gov/opa/pr/2000/July/396at.htm>.

<sup>57</sup> *Id.*

<sup>58</sup> *United States v. Bos. Scientific Corp.*, 253 F. Supp. 2d 85, 102 (D. Mass. 2003).

<sup>59</sup> *Id.* at 91–92.

and products to HP, but withheld certain intellectual property when there was a dispute between the parties and a discrepancy between the consent decree and the divestiture agreement.<sup>60</sup> The federal district court held that BSC's withholding of this intellectual property was in bad faith, which contributed to its issuance of a \$7 million fine.<sup>61</sup>

In considering the appropriate penalty for BSC, the court considered six factors that have been examined by courts in other transactions, which may serve more generally as guidance regarding how courts and agencies will examine violations of consent decrees: "(1) harm to the public; (2) benefit to the violator; (3) good or bad faith of the violator; (4) the violator's ability to pay; (5) deterrence of future violations by this violator and others; (6) vindication of the FTC's authority."<sup>62</sup>

The court emphasized that BSC's actions caused harm to the public by: (1) contributing to HP's decision to withdraw from the relevant market; and (2) leading to a decline in innovation in the relevant market.<sup>63</sup> The court also determined that BSC acted in bad faith because it failed to consult with the FTC regarding the scope of the consent decree when there was an ambiguity as to its terms. Specifically, the court explained: "The failure to seek an FTC advisory opinion regarding potentially violative conduct is evidence of bad faith . . . . If BSC was uncertain of the reach of the Order, it had an obligation to do more than see how close to the sun it could fly with impunity . . . . Finally, and most significantly, BSC chose to take the risk of ignoring the FTC's staff interpretation once it took a position . . . . At that point, an advisory opinion certainly should have been sought."<sup>64</sup> The court also held that "there is a compelling interest in vindicating the authority of the FTC in enforcing its consent decrees, and in deterring parties from flouting the terms of consent decrees."<sup>65</sup>

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<sup>60</sup> *Id.* at 92–93.

<sup>61</sup> *Id.* at 100–01.

<sup>62</sup> *Id.* at 98.

<sup>63</sup> *Id.* at 98–100.

<sup>64</sup> *Id.* at 100 (citations omitted).

<sup>65</sup> *Id.* at 101.

### G. AT&T

In 2009, the DOJ settled a civil action against AT&T Inc. alleging that AT&T had violated several provisions related to the required divestiture of its mobile wireless telecommunications business in three rural service areas.<sup>66</sup> The DOJ alleged that AT&T violated a preservation order entered at the same time as the final judgment.<sup>67</sup> The preservation order was designed to protect the assets to be divested pending their divestiture and appointed a management trustee to oversee those assets.<sup>68</sup> Under the preservation order, AT&T was obligated to keep confidential information related to those assets separate and was not to exert management influence over the assets.<sup>69</sup> The DOJ alleged that AT&T had not taken appropriate steps to segregate this confidential information and, in some cases, had used this information to win customers from the divested assets.<sup>70</sup> AT&T agreed to pay a fine of \$2,050,000 to settle the matter.<sup>71</sup>

### H. Exelon

In 2012, Exelon Corporation was ordered to pay \$400,000 in civil penalties for failing to comply with a hold separate agreement signed the previous year in connection with its acquisition of Constellation Energy and filed with the court along with the complaint and final

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<sup>66</sup> Press Release, U.S. Dep't of Justice, Justice Department Settles Civil Contempt Claim Against AT&T Inc. (Jan. 14, 2009), *available at* <http://www.justice.gov/opa/pr/2009/January/09-at-033.html>.

<sup>67</sup> See Plaintiff United States' Petition for an Order to Show Cause Why Defendant AT&T Inc. Should Not Be Found in Civil Contempt at 1, *United States v. AT&T Inc.*, No. 1:07-cv-1952 (ESH) (D.D.C. Jan. 14, 2009), *available at* <http://www.justice.gov/atr/cases/f241400/241459.pdf>.

<sup>68</sup> *See id.* at 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 5.

<sup>71</sup> Order on Petition by Plaintiff United States for an Order to Show Cause Why Defendant AT&T Inc. Should Not Be Found in Civil Contempt at 3, *United States v. AT&T Inc.*, No. 1:07-cv-1952 (ESH) (D.D.C. Jan. 14, 2009), *available at* <http://www.justice.gov/atr/cases/f241400/241462.pdf>.

judgment.<sup>72</sup> Under the terms of the hold separate agreement, during the period while the divestiture of three power plants was pending, Exelon was required to bid certain of its electricity generating plants at or below cost in order to ensure that Exelon could not raise the market price.<sup>73</sup> For a period of time after closing the primary transaction but before closing the divestiture transaction, Exelon did not follow this directive, a violation that it brought to the DOJ's attention nearly immediately.<sup>74</sup> The DOJ and Exelon settled the matter for \$400,000, which the DOJ reported represented disgorgement of the excess profits Exelon made as a result of its violation plus reimbursement of the DOJ's costs to investigate the matter.<sup>75</sup> Significantly, the DOJ sought this penalty even though Exelon brought the violation to the DOJ's attention and the DOJ did not dispute Exelon's claim that the violations were inadvertent.<sup>76</sup>

Considering these enforcement actions together, it becomes clear that the agencies are not looking to take formal action for every consent decree violation. Companies who file a late compliance report, miss a divestiture deadline, or inadvertently breach a well-designed firewall are not being hauled into federal court on a regular basis. Formal enforcement actions were brought when the parties had not only violated the consent decree or hold separate order, but did so in a way that significantly undermined the very purpose of the decree or order. The Exelon case stands out because the violation appears to have

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<sup>72</sup> Settlement Agreement and Order at 2, *United States v. Exelon Corp.*, No. 1:11-cv-02276 (D.D.C. Nov. 21, 2012), available at <http://www.justice.gov/atr/cases/f291700/291722.pdf>.

<sup>73</sup> Petition by the United States for an Order to Show Cause Why Respondent Exelon Corp. Should Not Be Found in Civil Contempt at 4, *United States v. Exelon Corp.*, No. 1:11-cv-02276 (D.D.C. Nov. 14, 2012), available at <http://www.justice.gov/atr/cases/f288800/288815.pdf>.

<sup>74</sup> The violation occurred from March 12 until March 28, 2012. On March 27, 2012, Exelon alerted the DOJ of violations that it had discovered by that date. *Id.*

<sup>75</sup> Press Release, U.S. Dep't of Justice, Justice Department Settles Civil Contempt Claim Against Exelon Corporation (Nov. 15, 2012), available at <http://www.justice.gov/opa/pr/2012/November/12-at-1362.html>.

<sup>76</sup> *Id.*

been inadvertent. It was, however, an inadvertent violation that generated a substantial gain for the company.

At the same time, it would be an error to assume that the agencies are not concerned with minor violations. They are very much addressing these issues—but are doing so by reviewing compliance reports and ordinary course of business documents, coordinating with monitors, and negotiating appropriate remedial steps with parties and their counsel. This process in itself can be costly and time-consuming.

### **III. CONCLUSION: WHAT ARE THE KEY LESSONS FOR PRACTITIONERS?**

The most important lesson may be the most basic—recognize that divestiture obligations do not end when the divestiture closes, and consider compliance issues when negotiating a consent decree. Work closely with your client to make certain that your client understands and can comply with the terms of the decree. Closing the main transaction as quickly as possible is usually the parties' chief goal, and there is rarely an appetite to delay closing in order to negotiate a marginally more favorable consent decree, but some of the obligations can be more onerous than clients appreciate. Alerting clients to this can be critical and help avoid surprises later.

As a practical matter, what may be most important is for counsel to ensure that the client understands the requirements it will face as a party to a consent decree, particularly those that are not readily apparent. A company should understand that it will be obligated to seek agency approval if it wants to amend agreements with the buyer, even over minor issues without competitive significance, and that it may need to hold compliance training for employees regarding the confidential information of the now-divested business. Ensuring this knowledge and understanding minimizes the chances of a violation down the road.

In addition to discussions with your client, discussions with the agency must be handled carefully, both during the initial negotiation process and during the compliance phase. For both the parties and counsel, credibility is critical. During the negotiation phase, if the staff

suspects the parties are not giving the agency the complete picture regarding the business to be divested, the staff's investigation will be even more in-depth, adding potentially substantial delay to the process and possibly even expanding the scope of the divestiture.

Continuing an open dialogue and maintaining credibility is important post-divestiture as well. The *Boston Scientific* case illustrates this importance well. Two of the facts that contributed to the fine imposed on *Boston Scientific* were "BSC's recalcitrance in not consulting with the FTC because of an apparent concern that the FTC staff would make things worse"<sup>77</sup> and the fact that BSC's "compliance report did not fully describe all substantive contact's [sic] regarding licensing issues between BSC and HP, as required by the Order," which the court took as evidence of bad faith.<sup>78</sup>

*Boston Scientific* and the other examples of formal enforcement action through the courts illustrate the importance of complying with consent decrees, but the relatively small number of such actions cannot be taken to mean that consent decree enforcement is uncommon. Instead, the bulk of enforcement occurs throughout the administrative process, where it is largely invisible to the public but is highly visible to the companies that spend significant time and resources on extensive monitoring and on responding to administrative investigations that can last for months or even years. In order to limit surprises, antitrust lawyers should ensure that clients considering entering into a consent decree understand in advance the significance of these informal enforcement mechanisms.

Finally, although this article focuses on consent decree enforcement by the U.S. agencies, we note that remedies may well be required and subsequently enforced by foreign antitrust authorities. Jurisdictions such as the European Commission and Canada have long imposed remedies in cases that present competitive issues and are often willing to coordinate closely with the United States. Moreover, as merger control becomes increasingly global and countries such as Brazil, India, and China—each of which has put in place a

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<sup>77</sup> *United States v. Bos. Scientific Corp.*, 253 F. Supp. 2d 85, 100 (D. Mass. 2003).

<sup>78</sup> *Id.*

new merger control regime within the last five years—become even more critical, companies increasingly will need to think about the remedies these countries may impose and the new challenges those will raise.