

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 you), a proposal to divest selected assets may need to include assets that are used to compete in other product or geographic markets not directly affected by the merger, such as: assets relating to complementary products; manufacturing facilities, even if the facilities also manufacture other products; or use of applicable brands or trade names. The Commission may also require you to affirmatively help the buyer become an effective competitor, including, for example, by facilitating the transfer of customers. If the Commission determines that a proposed asset package is inadequate to restore or maintain competition, it may consider alternative settlement proposals or seek to block or undo the merger.

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Post-order divestitures also require additional scrutiny.

In certain limited circumstances, the Commission may accept a settlement that allows you to close the underlying merger and then propose a buyer for the divestiture (known as a post-order divestiture). These divestitures typically involve the sale of an ongoing business, which is held separate after closing and operated by an independent manager (the hold-separate manager or monitor) until the assets are divested. For a post-order divestiture, you should expect to show:

- the assets to be divested are an ongoing, standalone business unit;
- the risk of lost business opportunities during the post-order/pre-divestiture period is low, for example, because of long-term contracts that can be transferred to the buyer;
- the risk of the business deteriorating is low;
- the business does not rely on significant support from the merged firm to remain operational and viable; and
- there are multiple approvable buyers that will likely bid for the assets.

Select a buyer the Commission can approve.

It is the responsibility of the merging parties to propose an acceptable buyer, one with the experience, commitment, and incentives necessary to be an effective competitor. These attributes can be shown in different ways, for example, by participating in related product markets or adjacent geographic markets, operating in up-stream or down-stream markets, past attempts at entering the market (depending on why those attempts were unsuccessful), or previously expressing interest in the market. A buyer should not already be a significant market participant or already pursuing significant entry on its own. Proposing an unacceptable buyer will delay the settlement process.

Staff will evaluate a proposed buyer to determine whether it has (1) the financial capability and incentives to acquire and operate the assets, and (2) the competitive ability to maintain or restore competition in the market. When proposing a buyer to staff, you should:

- share with staff any offering memoranda or other documents you intend to provide to potential buyers, prior to distribution;
- explain to staff how you selected the proposed buyer; and
- be aware that staff will talk to potential buyers as well as other market participants about the proposed divestiture.

Allow the buyer to conduct due diligence.

Based on the Commission's experience with many divestitures, there can be lasting consequences if the buyer is unable to conduct thorough due diligence. To avoid concerns about your compliance with the Commission's order down the road, you should expect to:

- provide access to information, facilities, and employees to the extent you would in a typical arm's length transaction;
- provide sufficient time for the buyer to conduct due diligence;

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- 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 required to assign contracts, take steps to encourage customers to consent and secure consents, where possible; and identify in advance customers who may be unlikely to give such consents;
- when required, waive contract restrictions that prevent customers from switching to the buyer and allow customers to terminate their contracts early and without penalty; and
- assist the buyer in obtaining any necessary governmental and other regulatory approvals.

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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 Remedies](#)
- [Remedy Study \(2017\) and Divestiture Study \(1999\)](#)