

September 2002

FEDERAL TRADE COMMISSION

Study Needed to Assess the Effects of Recent Divestitures on Competition in Retail Markets



G A O

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Abbreviations

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|------|--|
| DOJ | Department of Justice |
| ERS | Economic Research Service |
| FMI | Food Marketing Institute |
| FTC | Federal Trade Commission |
| NCPA | National Community Pharmacy Association |
| NFDA | National Funeral Directors Association |
| NFIB | National Federal of Independent Businesses |
| NGA | National Grocers Association |
| NSBU | National Small Business United |
| PBM | pharmacy benefit management |
| PMAA | Petroleum Marketers Association of America |
| SBA | Small Business Administration |
| USDA | U.S. Department of Agriculture |



United States General Accounting Office
Washington, D.C. 20548

September 25, 2002

The Honorable Christopher S. Bond
Ranking Minority Member
Committee on Small Business
and Entrepreneurship
United States Senate

The Honorable William J. Tauzin
Chairman
Committee on Energy and Commerce
House of Representatives

The Federal Trade Commission's (FTC) mission is, in part, to prevent business practices that are anticompetitive, deceptive, or unfair to consumers. Among its responsibilities, FTC analyzes mergers (both proposed and completed) for possible anticompetitive harm in the marketplace, such as price increases or reduced innovation. If FTC determines that a merger may result in anticompetitive harm, it may decide that no remedy short of blocking the merger will fully and effectively resolve its concerns. However, if FTC decides that the anticompetitive harm can be resolved without blocking the entire merger, its challenge is to select a remedy or remedies that address the anticompetitive problems it has identified, and, as closely as possible, maintain or restore competition to premerger levels without unnecessarily limiting the parties' lawful objectives, such as achieving efficiencies. FTC's preferred remedy is divestiture—the selling of a business or assets by one or both of the merging parties to maintain or restore competition where it might be harmed by the merger. When FTC staff determine that divestiture is the remedy to address the anticompetitive problem(s) that a merger presents, they usually draft a proposed agreement between FTC and the merging parties that contains an order requiring the divestiture needed to remedy the anticompetitive problem(s). If all parties agree, FTC issues a proposed order. This proposed consent order (1) is made available to the public for comment for 30 days and (2) in most cases, authorizes the parties to consummate the merger. From fiscal years 1990 through 2000, FTC announced for public comment 192 merger consent orders, of which 153 called for the divestiture of assets.

Recently, concerns have been raised that (1) certain FTC divestiture practices may hinder small businesses' opportunity to purchase divested assets, particularly divested retail assets such as grocery stores, and (2) FTC provides very limited public information on the rationale for the divestiture approaches used in its divestiture orders. This report responds to your request that we obtain information on FTC's use of (1) "clean sweep" divestitures, in which one of the merging parties divests all of its assets in the relevant product market(s), such as the retail sale of food and grocery products in supermarkets, within a single geographic market; (2) single buyers, who purchase all divested assets in a geographic market; and (3) up-front buyers, who are identified by the merging parties and, as agreed to by FTC, included in the proposed consent order as the buyers of the divested assets. As agreed with your offices, we focused on divestitures required by consent orders that FTC announced for public comment from fiscal years 1990 through 2000 for four industries—the grocery store, drug store, funeral services, and gas station industries—that sell products and/or services directly to consumers.¹ In particular, we are reporting on

- the history of FTC's clean sweep divestiture, single buyer, and up-front buyer practices within the context of FTC's overall merger remedies and the circumstances under which these practices have been used;
- the extent of FTC's use of these practices in the grocery store, drug store, funeral services, and gas station industries;
- the level of small business participation in purchasing divested assets in the four industries and the factors that may explain the level of small business participation; and
- FTC's effort to gauge the success or failure of these divestiture practices and the impact of these practices on the marketplace, especially small businesses.

We are also providing information on comments FTC received pertinent to these practices in the four industries as well as comments on how the

¹For this report, while FTC uses the term "supermarket," we use the term "grocery store" consistent with the Standard Industrial Classification description. Additionally, the Funeral Services industry is classified as a Personal Services Industry under the Standard Industrial Classification description. However, we treated the funeral services industry as a retail-related industry because it provides goods and services to an end-user.

practices impacted the ability of small businesses to purchase divested assets.

In performing our work, we obtained and analyzed data from and discussed divestiture practices with FTC staff responsible for reviewing proposed mergers and, when appropriate, recommending remedies; reviewed relevant public speeches and documents prepared by current and former FTC Commissioners and staff; reviewed and analyzed FTC consent orders to identify consent orders that required divestitures; and obtained and reviewed relevant documents prepared by and discussed FTC's divestiture practices with antitrust practitioners—attorneys and economists in private practice who specialize in antitrust issues—academicians, associations that represent small and independent businesses in the four industries included in our review, as well as officials with the Small Business Administration (SBA). We also collected and analyzed publicly available data on the revenue of buyers of divested assets for the four industries and, when public data were not available, directly from the buyers of divested assets. For this report, we focused on proposed consent orders that were announced for public comment during fiscal years 1990 through 2000, rather than consent orders made final during this period, because in most cases at the point that FTC accepts a proposed consent order for public comment,² the parties are allowed to consummate the merger.³ Also, unless otherwise noted, we use the term “divestiture order” to refer to any consent order that required a divestiture. Our work was limited to publicly available information because, according to FTC, under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) of 1976,⁴ FTC is prohibited from disclosing information provided by parties to merger transactions.

We performed our work in Washington, D.C., between April 2001 and August 2002 in accordance with generally accepted government auditing

²We used the date of FTC's press release announcing its acceptance of a proposed consent order as a proxy for the date that FTC entered into the proposed consent order with the merging parties because (1) many of the proposed consent orders posted on FTC's Web site did not contain a date and (2) according to FTC staff, FTC typically issues a press release announcing its acceptance of a proposed consent order within 1 or 2 days of the agreement.

³According to FTC staff, final consent orders issued by FTC rarely differ from the proposed consent orders. Additionally, at the time the transaction is consummated, it may not be a complete "merger" of the parties involved. For this report, we use the term merger generally to include both a complete merger of the parties involved, as well as certain acquisitions of stocks or assets that may not constitute such a complete merger of the parties.

⁴15 U.S.C. 18a.

standards. (Appendices I and II discuss our objectives, scope, and methodology in greater detail.)

Results in Brief

According to FTC staff, FTC decisions to use particular divestiture approaches are (1) based on the unique facts of each case and do not readily translate into written guidelines or systematic aggregation and (2) tied to proprietary company information that FTC is statutorily prohibited from disclosing to the public. Accordingly, FTC does not systematically compile and make publicly available data that show under what circumstances clean sweep divestitures,⁵ single buyers, and up-front buyers should be or have been used.⁶ However, available information from FTC staff, speeches, and other public documents shows that, during the mid-1990s, FTC became concerned about (1) assets targeted for divestiture, such as grocery stores, becoming less competitive as customers and sales declined during the time required to carry out divestitures, and (2) the ability of some buyers of divested assets to compete in the geographic and product markets in which the merging parties divested the assets. By 1996, FTC began to change its approach to divestitures to enhance the probability that buyers of divested assets could compete in the markets in which assets were divested. Within this context, FTC staff told us that the use of clean sweep divestitures, single buyers, and/or up-front buyers could increase the likelihood that competition could be maintained in the geographic and product markets in which FTC had determined that the merger would have an anticompetitive effect.

⁵FTC staff told us that there is not a single, uniform, or technical definition of the term “clean sweep.” They noted that FTC staff do not use the term clean sweep in their antitrust analysis.

⁶During our review, in March 2002, FTC posted on its Web site a document titled “Frequently Asked Questions About Merger Consent Order Provisions.” The March 2002 document provides guidance on FTC’s divestiture practices. Additionally, FTC’s 1999 Divestiture Study provides some general information on the agency’s divestiture practices. (See footnote 10.)

From fiscal years 1990 through 2000, FTC used clean sweep divestitures, single buyers, and/or up-front buyers in the 31 divestiture orders announced for public comment in the grocery store, drug store, funeral services, and gas station industries, although up-front buyers were not used at all in these industries prior to fiscal year 1996. One or more of the three approaches were used most frequently in the 16 divestiture orders in the grocery store industry, particularly in the 10 orders announced during fiscal years 1996 through 2000. These 10 orders required the divestiture of a total of 285 grocery stores in 122 geographic markets and were divested to 33 buyers. In these 10 orders, clean sweep divestitures were used in about 75 percent (89 of 119) of the geographic and product markets where divestitures occurred;⁷ single buyers were used in 72 percent (36 of 50) of the markets where more than one grocery store was divested; and up-front buyers comprised about 76 percent (25 of 33) of the buyers of divested assets. During the 11-year period, there was a wide variation in the use of these three divestiture approaches in the divestiture orders covering the remaining three industries. FTC staff said that the divestiture approaches used in each of the 31 divestiture orders were based on the unique facts of each case after determining the approach that would most likely remedy the effects of an otherwise anticompetitive merger.

⁷The relevant geographic and product markets are the starting point for antitrust analysis. The product market for retail mergers generally refers to the type of goods or services sold. The geographic market generally refers to the geographic area in which both parties operate in the relevant product market. According to FTC staff, the first step in antitrust analysis is defining the relevant geographic and product markets affected by the proposed merger. For example, they told us that in the case of grocery stores, staff determine the geographic market in part by examining how far consumers will drive to shop for groceries. (See the Horizontal Merger Guidelines at www.ftc.gov/bc/docs/horizmer.htm for more detailed information on the definitions of relevant geographic and product markets.)

While there were too few buyers to analyze the level of smaller business participation in purchasing divested drug store, funeral services, and gas station assets from fiscal years 1990 through 2000, our analysis of 41 buyers of grocery store assets indicated that after 1996 smaller buyers (as measured by revenue) were significantly less likely to purchase divested assets.⁸ In the absence of a generally accepted standard by which one could measure the relative size of grocery store businesses based on revenues, we used the medians of the buyers' average annual revenues to analyze the level of smaller business participation in purchasing divested grocery store assets. We performed our analysis for two periods—fiscal years 1990 through 1996 and fiscal years 1997 through 2000, with fiscal year 1997 being the first full fiscal year after FTC began altering its approach to divestitures. We found that the median of the average annual revenues of direct buyers (buyers that purchased the divested assets directly from the merging parties) for fiscal years 1990 through 1996 was about \$89 million, but for fiscal years 1997 through 2000, it increased significantly to about \$3.3 billion. Additionally, in some cases, grocery wholesalers⁹ purchased divested assets and, per the divestiture order, resold them to other businesses. When we included these indirect purchases by smaller businesses in our analysis, the extent of the decline in smaller business participation in purchasing divested assets was not as great as in the case of direct buyers, and the median of the average annual revenues of buyers declined in both periods—to about \$78 million in fiscal years 1990 through 1996 to about \$288 million in fiscal years 1997 through 2000. Our discussions with FTC staff and antitrust practitioners indicated that the decline in the level of smaller business participation in purchasing divested assets may have occurred for a variety of reasons, including FTC's divestiture practices and consolidation in the grocery store industry, specifically a significant difference in the type and size of mergers during the 1990s.

⁸The results of our analyses using the medians of the buyers' average annual revenues were statistically significant at the 95-percent confidence level.

⁹Grocery wholesalers are companies primarily engaged in the distribution and supply of food products to grocery stores, convenience stores, and other food retailers. Wholesalers may also provide administrative and technical support to their customers, such as accounting, inventory control, marketing, advertising, and store financing.

FTC has not systematically measured the success or failure of the divestitures it has approved since it developed preferences for approaches like clean sweep and up-front buyers. In 1999, FTC reported the results of a study of divestiture orders made final during fiscal years 1990 through 1994.¹⁰ FTC staff said that this study confirmed the need to make the changes that FTC had made starting in the mid-1990s as a result of the preliminary findings of the divestiture study and, among other things, found that across all orders studied (1) FTC's divestiture orders had created viable competitors in the relevant markets and (2) smaller buyers succeeded at least at the same rate as larger buyers and, therefore, should not be presumed to be less competitive buyers than larger firms. Although antitrust practitioners viewed the study as a good first effort at understanding divestitures, they and members of the grocery store industry raised questions about the study's methodology. They also expressed concern that FTC did not go far enough in examining the economic effects of the divestitures on competition in the marketplace, such as changes in prices and/or innovation—key factors FTC uses to measure competition. FTC staff acknowledged that a more rigorous and comprehensive study might be beneficial because FTC has not studied the effect of its recent approaches on the viability of buyers of divested assets or on competition in the marketplace, but said that such a study could be labor-intensive and burdensome on businesses. Without current information on the economic impact of its divestiture practices on the marketplace, especially given the changes it has made since the period covered by its 1999 study, FTC cannot state that divestiture orders have, among other things, restored or maintained competition in the affected markets. FTC is also not in a position to show that smaller buyers continue to be as competitive as their larger counterparts in operating the divested assets.

We are recommending that FTC undertake a study to assess the effectiveness of its divestiture orders made final after fiscal year 1994 that require divestitures in industries in the retail sector.

¹⁰A Study of the Commission's Divestiture Process, Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, William J. Baer, Director, 1999.

In commenting on our report, FTC said that the report adds important information about the Commission’s role in enforcing antitrust laws related to mergers. Additionally, FTC said that our recommendation is consistent with the Commission’s own objectives and its most recent Government Performance and Results Act report,¹¹ which states that the Commission plans to “study and evaluate the remedies used in past antitrust cases, particularly divestiture orders used to resolve merger cases.”

Background

FTC is an independent agency headed by five Commissioners appointed by the President and confirmed by the Senate, each serving staggered 7-year terms. FTC’s mission is, in part, to prevent business practices that are anticompetitive, deceptive, or unfair to consumers. It acts to prevent business practices that restrain competition and attempts to ensure that the marketplace continues to provide a full range of product and service options among which consumers can choose. The Bureau of Competition is FTC’s antitrust arm. FTC’s Bureau of Competition and Bureau of Economics have the responsibility for merger review. The Bureau of Economics helps to ensure that FTC considers the economic impact of its actions. To achieve this, the Bureau of Economics provides economic analysis and support to the Bureau of Competition and the Commission in carrying out FTC’s antitrust responsibilities.¹²

¹¹The Government Performance and Results Act of 1993 requires federal departments and agencies to measure their performance against key outcomes and is intended to shift the focus of government decision making, management, and accountability from activities and processes to the results and outcomes achieved by federal programs.

¹²FTC also has a Bureau of Consumer Protection whose mandate is to protect consumers against unfair, deceptive, or fraudulent practices. The Bureau of Consumer Protection enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by FTC.

FTC generally shares responsibility for enforcing the federal antitrust laws with the Department of Justice's (DOJ) Antitrust Division.¹³ The federal antitrust statutes are the Sherman Act, as amended (15 U.S.C. 1-7); the Clayton Act, as amended (15 U.S.C. 12-27), which includes the Robinson-Patman Act; and the FTC Act, as amended (15 U.S.C. 41 et seq.). The acts' objectives are to prevent anticompetitive behavior and preserve and promote competition in the marketplace. FTC is solely responsible for enforcing the FTC Act, while DOJ is solely responsible for enforcing the Sherman Act.¹⁴ Both FTC and the Antitrust Division are responsible for enforcing Section 7 of the Clayton Act, which prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly in any market.¹⁵ FTC and the Antitrust Division have clearance procedures to determine which agency will investigate a potential antitrust violation. The agencies decide which one will conduct a particular investigation primarily by examining current agency expertise in the industries at issue.

¹³Section 4C of the Clayton Act (15 U.S.C. 15c) authorizes state attorneys general to bring civil actions in the name of a state on behalf of resident consumers who have been injured as a result of a Sherman or Clayton Act violation. These two acts also provide a private right of action.

¹⁴Section 5 of the FTC Act, 15 U.S.C. 45 embodies Sherman Act principles that are enforced by the FTC.

¹⁵15 U.S.C. 18.

The HSR Act, which added Section 7A to the Clayton Act, requires certain parties to provide premerger notification of proposed acquisitions and mergers prior to consummation to assist FTC and the Antitrust Division in investigating whether a proposed acquisition would violate Section 7 of the Clayton Act, in that the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. The premerger notification provisions of the HSR Act require companies exceeding certain thresholds of company size and value of the transaction to notify FTC and the Antitrust Division of the proposed merger transaction, submit documents and other information to the agencies concerning the transaction, and refrain from closing the transaction until a specific waiting period has expired, or their request for early termination of the waiting period has been granted.¹⁶ FTC and the Antitrust Division then have up to 30 days (15 days for cash tender offers and bankruptcy sales) from the time of the filing of the proposed merger to review the filing and determine whether to send the parties a request for additional information (a second request). A second request extends the waiting period to enable further review.¹⁷ If FTC or the Antitrust Division sends a second request to the parties, the parties have to wait 30 days (10 days for cash tender offers and bankruptcy sales) from the date the parties substantially complied with the request before consummating the acquisition to allow the agencies time to complete the investigation and to determine whether to take law enforcement action.¹⁸ If the reviewing agency does not send a second request, or the parties have substantially complied with a second request, and the waiting period has expired, or if the parties' request for early termination of the waiting period has been granted, the parties can consummate the merger or acquisition.

For merger investigations conducted by FTC, prior to the expiration of the waiting period, FTC staff are to seek to complete the analysis of likely

¹⁶16 C.F.R. Parts 801-803, 16 C.F.R. 803.11.

¹⁷FTC and the Antitrust Division review mergers and acquisitions to determine whether they are anticompetitive and should be challenged. Therefore, they do not "approve" a merger or acquisition, but rather decide not to challenge it. Moreover, FTC and the Antitrust Division are not precluded from pursuing enforcement actions, such as challenging the merger or acquisition through litigation or requiring divestitures, even after the transaction has closed.

¹⁸Under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2001 (P.L. 106-553, section 630), as of February 1, 2001, the waiting period was extended from 20 days to 30 days. The amendment did not change the 10-day period for cash tender offers and bankruptcy sales.

competitive effects of the transaction and prepare recommendations to the FTC Commissioners on whether enforcement action is warranted. If FTC staff determine that a merger is likely to be anticompetitive, FTC has wide discretion in choosing an effective remedy to provide relief that addresses the competitive problems it identified and maintains or restores competition, without unnecessarily limiting the parties' lawful objectives, such as achieving efficiencies. To meet this challenge, the agency can choose any number of possible actions, including blocking the entire transaction; requiring full or partial divestiture, either broadly or in specific geographic markets; requiring contractual arrangements; or requiring some form of behavioral relief, such as establishing firewalls in vertical transactions to prevent the sharing of competitive information.

In cases where FTC staff and the merging parties have negotiated a remedy and agreed upon a proposed settlement, staff recommend that the Commission accept the proposed order and place it on the public record to enable the public to comment. The public is given the opportunity to provide comments for the record about the proposed consent order. FTC staff are to analyze the public comments received and may recommend appropriate changes to the final complaint¹⁹ and order issued by FTC. FTC also may terminate the HSR waiting period and allow the merging parties to begin to consummate the transaction, including any divestitures, if the buyer is identified in the proposed order. However, for consent orders in which FTC has required a divestiture(s), and the buyer(s) of the divested asset(s) is not identified in the proposed order, the merging parties must subsequently submit an application to FTC requesting approval to divest the assets to a proposed buyer(s) and await FTC approval before consummating the divestiture. These applications also must be placed on the record for public comment generally for 30 days. The staff analyze the comments received and make recommendations to the Commission on whether it should approve the divestiture application. (Appendix IV provides additional information on the merger review process.)

The number of mergers reported annually to FTC and the Antitrust Division pursuant to the HSR Act more than doubled from 2,262 transactions in fiscal year 1990 to 4,926 transactions in fiscal year 2000. During this same

¹⁹A complaint sets forth allegations to be resolved by the proposed consent order. It includes, among other things, information on the violations charged; the merging parties; the acquisition; the relevant section(s) of the country (geographic markets) and the relevant line(s) of commerce (product market) in which to analyze the acquisition; the market structure; and the effect of the acquisition.

period, FTC announced 192 consent orders involving mergers, of which 153 (about 80 percent) were divestiture orders. (Appendix V provides information on the 153 divestiture orders FTC announced for public comment during fiscal years 1990 through 2000).

FTC Developed Preferences for Clean Sweep Divestitures, Single Buyers, and Up-Front Buyers During the Mid-1990s

According to FTC staff, FTC decisions to use particular divestiture approaches are (1) based on the unique facts of each case and do not readily translate into written guidelines or systematic aggregation and (2) tied to proprietary company information that FTC is statutorily prohibited from disclosing to the public. Accordingly, FTC does not systematically compile and make publicly available data that show under what circumstances clean sweep divestitures, single buyers, and up-front buyers should be or have been used.²⁰ However, available information from FTC staff, speeches, and other public documents reveal that during the mid-1990s, based on lessons learned from past divestitures, FTC began to develop preferences for divestiture approaches designed to restore competition more quickly and reduce the likelihood that assets would deteriorate while awaiting final action on the proposed merger. These preferences may include clean sweeps, single buyers and up-front buyers. However, according to FTC staff, it depends on the industry whether they are appropriate.

History of Divestiture Approaches Is Difficult to Chronicle

The history of FTC's clean sweep, single buyer, and up-front buyer divestiture approaches is difficult to chronicle because FTC does not have readily available public data that show under what circumstances they should be or have been used. Our review of divestiture orders and related public documents, such as FTC's analysis to aid public comment,²¹ revealed that FTC provides limited information on the rationale for the use of particular divestiture approaches. FTC staff told us that the staff who worked on the order can readily provide information on the basis for using the approaches based on their knowledge of the case and their personal case files. FTC staff acknowledged that public documents typically do not provide detailed, meaningful information on why a particular approach was

²⁰See footnote 6.

²¹The Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the proposed divestiture order and the terms of the proposed divestiture order that would settle the allegations.

used. However, they said that staff document information on the rationale for the approaches and provisions used in a divestiture order in internal, confidential documents, such as staff memorandums to the Bureau Directors and Commissioners. They also told us that because FTC's decisions are largely tied to companies' trade secret information, which FTC is statutorily prevented from disclosing to the public, FTC can provide to the public only limited information on the basis for its decisions.

Furthermore, FTC staff said that systematically tracking and reporting FTC's use of certain divestiture practices and the basis for those practices would not determine the outcome in a future merger. They emphasized that each divestiture order is based on the unique facts of the case. They told us that because each case is unique and fact-based they draw on their past experiences and advice from experienced senior staff, rather than developing written policies and procedures to guide staff in fashioning merger remedies. A May 2000 article by the then Directors of the FTC's Bureau of Competition and Office of Planning and Evaluation illustrates this point.²² The authors said that

“Our approach to remedies evolves, as does our approach to merger enforcement generally. We learn from each case what works and what doesn't work. Our past actions provide guidance, but there are no absolute rules. We evaluate remedies based on the facts in each individual case. We also go back and evaluate our remedy process...to see if expectations are borne out and the remedies are effective.”

Because FTC provides very limited public information on the rationale for the divestiture approaches used in a divestiture order, there have been some concerns raised by antitrust practitioners regarding the basis upon which FTC uses certain divestiture practices and the lack of transparency in FTC's merger remedy phase of its merger review process. Additionally, certain practices, particularly the up-front buyer practice, have been the subject of some debate and criticism in recent years. For example, in a March 2001 speech, the then Acting Director of the Bureau of Competition noted that FTC staff had begun to hear criticism that FTC had gone too far—“our policies are too inflexible, that they impose unnecessary burdens, and that it takes too long to reach a resolution.”²³ Furthermore, according

²²The Evolving Approach to Merger Remedies, Richard G. Parker and David A. Balto, Antitrust Report, May 2000.

²³Report from the Bureau of Competition, Molly S. Boast, Acting Director, Bureau of Competition, Federal Trade Commission, before the American Bar Association Antitrust Section, Spring Meeting 2001, Washington, D.C., March 29, 2001.

to the Acting Director, FTC's preference for up-front buyers, under certain circumstances, is particularly singled out for criticism. Our discussions with antitrust practitioners indicated that they had begun to perceive this preference as a requirement. (Appendix VI includes further information on comments from antitrust practitioners regarding FTC's divestiture practices.) However, FTC staff told us that more recently staff have been more flexible in structuring divestitures. They provided an example of a speech in which one of FTC's Commissioners, in discussing the need for FTC to evaluate its recent merger remedies, expressed a willingness to examine the need for an up-front buyer on a case-by-case basis. In that speech, the Commissioner said that

"One aspect of our merger relief that might bear scrutiny is the FTC's insistence in most of its divestiture orders that the merging firm locate an up-front buyer for the divested assets. I believe that this requirement has been warranted in a number of the orders that I've reviewed in more than three years at FTC, but I would be concerned if the agency became too rigid and unflinching in its insistence on this element of an order."²⁴

Speeches and Articles Provide Insights into Recent Changes to FTC's Approach to Divestitures

Although it is not always clear under what circumstances FTC has used one or a combination of divestiture approaches, recent speeches and articles and our discussions with FTC staff do provide some insight into the evolution of these approaches during the mid 1990s. Specifically, it appears that in 1996, based on lessons learned from past divestitures, FTC developed preferences for how to structure divestitures and began to modify its divestiture approaches.

²⁴Outline of Remarks by Commissioner Orson Swindle, Federal Trade Commission, before the 8th World Business Dialogue "Between Competition and Cooperation—Changing Business-to-Business Relations," April 4, 2001.

According to an April 1997 speech by the then Senior Deputy Director of the Bureau of Competition, FTC had not been satisfied with the effectiveness of past divestiture orders. He said that FTC began a retrospective study of nine divestiture orders selected to assess the effectiveness of particular types of divestiture orders, which showed the need for changes to the way FTC approached merger remedies. He further said that FTC staff had found that the divestiture process was less effective than they would have hoped and “came to appreciate better the difficulties in creating a viable divestiture package of assets that had not previously been a stand-alone business”²⁵—a business that contains all the assets needed to enable a buyer to be operational the day after purchasing the assets, selling to all the same customers.

By 1996, according to an October 1996 speech by the then Director of the Bureau of Competition, FTC had begun to take steps to shorten the time that it took to complete a divestiture because of FTC’s desire to fashion remedies that (1) restored competition more quickly and (2) reduced the likelihood that assets would deteriorate while awaiting final action on the proposed merger.²⁶ These steps included, among others, the identification of up-front buyers and the requirement for the divestiture of “broader asset packages” where assets are grouped into one divestiture package to ensure continued marketability, viability, and competitiveness following the merger. In an April 1997 speech, the then Senior Deputy Director of the Bureau of Competition noted that because of these and other steps, the average time between the date a divestiture order is provisionally approved and the ordered divestiture is approved dropped from 15 months in fiscal year 1995 to 7 months in fiscal year 1996.²⁷

²⁵*Merger Remedies*, George S. Cary, Senior Deputy Director, Bureau of Competition, Federal Trade Commission, before the American Bar Association, Antitrust Spring Meeting, Washington, D.C., April 10, 1997.

²⁶*Reflections of 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, William J. Baer, Director, Bureau of Competition, FTC, October 29, 1996.

²⁷Refer to April 10, 1997, speech noted in footnote 25.

FTC Developed Preferences for Clean Sweeps, Single Buyers, and Up-front Buyers in the Mid-1990s

FTC staff acknowledged that they have developed a preference for certain practices in negotiating some divestiture orders, particularly among retail industries, like grocery stores and gas stations. Regarding clean sweeps, single buyers, and up-front buyers, FTC staff said that all three approaches tend to provide them greater assurance that the divestitures will help restore or maintain competition at levels existing before the merger.

Regarding clean sweep divestitures, FTC staff told us that there is not a single, uniform, or technical definition of the term clean sweep. The staff agreed, however, that the term clean sweep often refers to a divestiture of all of one of the merging parties' assets in the relevant product market(s) within a single geographic market. For example, in the case of the Exxon/Mobil divestitures, in November 1999, the merging parties agreed to divest all of Exxon's gas stations in the northeastern U.S. market. Clean sweep, however, also has been used to describe a divestiture of a greater set of assets than those that participate in the overlapping markets where both parties have a substantial presence.²⁸ According to FTC staff, a clean sweep divestiture generally restores the status quo before the merger and, thus, provides FTC with greater confidence that the divested assets will restore or maintain competition than when the merging parties divest a combination of their assets, or only some of one of the merging party's assets, in the relevant geographic and product markets. FTC staff also told us that one advantage of a clean sweep divestiture is that it can be negotiated more quickly because FTC staff do not have to do an asset-by-asset analysis to examine the viability of the assets and determine asset-by-asset whether the merging parties may be attempting to divest their least profitable assets. In an April 2002 speech, a DOJ Deputy Assistant Attorney General noted similar advantages of clean sweeps, but also pointed out a disadvantage. The official also said that clean sweeps have been a "hot topic" in terms of merger remedies. Specifically, according to this official,

²⁸In a May 2000 article in the Antitrust Report, entitled "The Evolving Approach to Merger Remedies," Richard G. Parker and David A. Balto, the term clean sweep has been used to include the divestiture of ancillary assets. For example, in Exxon/Mobil, there was a direct overlap in California between the two firms in oil refining, but a far less significant overlap downstream (in gas stations). The FTC required divestiture not only of Exxon's refinery, but also of all of Exxon's downstream assets. FTC required a divestiture of all assets in order to assure the buyer had the same level of economies of scale and scope that Exxon possessed prior to the merger. According to the former FTC staff, in the context of the Exxon/Mobil case, a buyer that operates both refinery and marketing facilities (a vertically integrated refinery) would be a far more significant competitive force.

“Although the Division has not adopted this as a policy, we do consider clean sweep as an option when we look at a divestiture package. The obvious advantage to requiring a clean sweep is that the sale of an ongoing business, as opposed to various stand-alone assets pieced together, may provide greater assurance that the assets will be viable in the hands of a suitable purchaser. Such a policy also prevents the parties from choosing the least attractive assets from each company for divestiture...The potential disadvantage for requiring a clean sweep is that it prevents the parties from realizing possible efficiencies by integrating the different assets of both companies.”²⁹

Regarding single buyers, FTC staff said that the requirement that a single buyer acquire all of the assets to be divested in a single geographic market is especially helpful in the retail sector because of concerns that dividing up the assets among several buyers would not fully restore the competition that existed before the merger. They said that in the early years of retail divestitures, FTC staff believed that a greater number of buyers in a single geographic market might lead to greater competition in that market. However, FTC staff later learned that often a greater number of buyers led to fragmentation in a market and, potentially, reduced the ability of those divested assets to serve as a competitive force in the market, in part by eliminating economies of scale in advertising and distribution. According to FTC staff, FTC requires a single buyer in a retail merger when it appears that, based on the particular facts of a case, the divested assets must remain intact as a single business unit. In June 1998 testimony before the House Committee on the Judiciary, the then FTC Director of the Bureau of Competition reinforced this view when he said that:

"Designing divestitures in retail markets can be particularly difficult. It is often critical to require a divestiture of a sufficient set of retail locations to a single buyer. Divestiture to a single buyer is often preferable so that a firm can acquire the full range of distributional and advertising efficiencies."³⁰

Regarding up-front buyers, which FTC also refers to as buyers up-front, FTC staff said that they have made greater use of up-front buyers because the approach reduces the time for the divestiture(s) to take place and gives them the opportunity to evaluate the marketability of the assets to be divested with more concrete evidence. According to FTC staff, the up-front

²⁹*“Houston, We Have a Competitive Problem: How Can We Remedy It?”* Deborah Platt Majoras, Deputy Assistant Attorney General, DOJ Antitrust Division, before the Houston Bar Association Antitrust and Trade Regulation Section, April 17, 2002.

³⁰Statement of FTC Director, Bureau of Competition, William J. Baer, before the Committee on the Judiciary, House of Representatives, Concerning the Effects of Consolidation on the State of Competition in the Financial Services Industry, June 3, 1998.

buyer approach also enables staff to better determine whether, among other things, there is a viable buyer(s) for the proposed divestiture assets. Additionally, as pointed out in various speeches by FTC staff, the up-front buyer approach reduces the amount of time needed for the assets to be divested because a buyer can be identified before the merger transaction occurs—a factor in grocery store divestitures and those of other retail operations, where assets may quickly deteriorate during the search for a buyer. FTC staff also said that whether an up-front buyer will be required is dependent upon the circumstances of each individual case and generally not on the industry in which the merging parties operate.

Clean Sweep Divestitures, Single Buyers, and Up-Front Buyers Have Been Used Across Retail Industries, but Have Been Increasingly Used in Grocery Store Divestitures Since Fiscal Year 1996

During fiscal years 1990 through 2000, clean sweep divestitures, single buyers, and/or up-front buyers were used in the 31 divestiture orders in the four industries we reviewed—grocery stores, drug stores, funeral services, and gas stations—although up-front buyers were not used at all prior to fiscal year 1996. The three approaches were used most frequently in the 16 grocery store divestiture orders, particularly in 1996 or later. During the 11-year period, there was a wide variation in the use of these approaches in the 15 divestiture orders covering the other three industries. According to FTC staff, the remedies approved in each of the 31 divestitures were based on the unique facts of the case, with the goal of remedying an otherwise unlawful acquisition, and only after FTC determined the remedy would achieve that objective.

FTC Used Clean Sweeps, Single Buyers, and Up-Front Buyers in Grocery Store Divestitures with Greater Frequency Since Fiscal Year 1996

FTC used clean sweeps, single buyers, and/or up-front buyers to remedy anticompetitive concerns for 16 grocery store mergers throughout fiscal years 1990 through 2000, but used these approaches with increased frequency during the latter part of the period. We analyzed the use of clean sweeps, single buyers, and up-front buyers in grocery store divestitures over the 11-year period. Because FTC speeches about its merger remedies indicated that FTC began to make changes in its divestiture approaches during fiscal year 1996, we focused on two periods—the period from fiscal years 1990 through 1995, before FTC started to make these changes, and fiscal years 1996 through 2000, the period during which FTC staff announced that FTC had begun to make these changes.

Clean Sweep Divestitures

Clean sweep divestitures were used about three-fourths of the time in the latter period, compared with one-third of the time in the earlier period. We examined each of the 16 grocery store divestiture orders to determine how many geographic markets were covered under the order and determined that, in total, FTC had delineated 131 geographic³¹ and product markets.³² Because FTC's divestiture orders and related documents, such as the analysis to aid public comment, typically do not indicate whether a divestiture is a clean sweep, we asked FTC to designate which of the 131 markets involved clean sweep divestitures. FTC provided data on 128 markets that showed that the number of clean sweep divestitures involving grocery store mergers had become much more prevalent during fiscal years 1996 through 2000, the period in which FTC staff said that they had initiated reforms.³³ Whereas about 33 percent (3 of 9) of the markets defined in divestiture orders announced during fiscal years 1990 through 1995 involved clean sweep divestitures, about 75 percent (89 of 119) of the markets involved clean sweep divestitures during fiscal years 1996 through 2000.³⁴ Table 1 shows the extent to which clean sweeps were used for the 6 divestiture orders announced during fiscal years 1990 through 1995, the 10 divestiture orders announced during fiscal years 1996 through 2000, and for the entire period.

³¹There were three additional geographic markets for which FTC initially required divestitures, but subsequently modified the divestiture orders to eliminate the divestiture requirement in those markets.

³²The relevant product market in which FTC staff analyzed the potential anticompetitive effects of the merger for 15 of the 16 divestiture orders was the retail sale of food and grocery items or products in supermarkets. For the remaining order—Vons Companies, Inc., and Williams Bros. Markets, Inc.—FTC defined the relevant products market as the retail sale and distribution of food and grocery items in supermarkets.

³³For 3 of the 131 geographic markets for divestiture orders announced for public comment during fiscal years 1996 through 2000, current FTC staff were not able to determine from the available documents whether the divestitures were clean sweeps.

³⁴All 3 of the clean sweep markets for grocery store divestiture orders announced during fiscal years 1990 through 1995 had only one asset to be divested. Of the 89 clean sweep markets for grocery store divestiture orders announced during fiscal years 1996 through 2000, 61 (about 69 percent) had only one asset to be divested.

Table 1: Clean Sweep Divestiture Markets in the Grocery Store Industry for Divestiture Orders Announced for Public Comment in Fiscal Years 1990 through 2000

| Fiscal years | Number of divestiture orders | Number of markets | Number of markets with clean sweep divestitures | Percent of markets with clean sweep divestitures |
|-------------------|------------------------------|-------------------|---|--|
| 1990 through 1995 | 6 | 9 | 3 | 33 |
| 1996 through 2000 | 10 | 119 ^a | 89 | 75 |
| 1990 through 2000 | 16 | 128 ^a | 92 | 72 |

^aThere was a total of 122 geographic and product markets in which FTC required divestitures for grocery store divestiture orders announced during fiscal years 1996 through 2000 and 131 geographic and product markets for divestiture orders announced during fiscal years 1990 through 2000. Current FTC staff could not determine from available documents whether 3 of the markets were clean sweeps.

Source: GAO's analysis of 16 grocery store divestiture orders and data provided by FTC staff.

FTC staff said that the increased use of clean sweeps occurred because FTC's past experience with grocery store mergers and divestitures taught staff that individual stores might not be as competitive as chains and packages containing all of the assets of one of the merging parties are easier to sell. Additionally, they said that this type of divestiture gives FTC staff greater confidence that they are preserving competition in the affected geographic market.

Single Buyers

For the 16 grocery store divestiture orders, the use of single buyers more than tripled between the periods. As shown in table 2, single buyers were used in 20 percent (1 of 5) of the geographic markets with multiple divested assets during fiscal years 1990 through 1995, but in 72 percent (36 of 50) of the geographic markets in fiscal years 1996 through 2000.³⁵

³⁵We performed the single buyer analysis for markets in which there was more than one asset to be divested. We did not include markets where there was only one asset to be divested because the only possible outcome would be a single buyer. Not every divestiture to a single buyer is required by order.

Table 2: Single Buyers in Geographic Markets with Multiple Assets in the Grocery Store Industry for Divestiture Orders Announced for Public Comment in Fiscal Years 1990 through 2000

| Fiscal years | Number of divestiture orders | Number of multiple asset markets in which assets were divested | Number of multiple asset markets with assets divested to single buyers | Percent of multiple asset markets divested with assets to single buyers |
|-------------------|------------------------------|--|--|---|
| 1990 through 1995 | 6 | 5 | 1 | 20 |
| 1996 through 2000 | 10 | 50 | 36 | 72 |
| 1990 through 2000 | 16 | 55 | 37 | 67 |

Source: GAO's analysis of 16 FTC grocery store divestiture orders.

According to FTC staff, their preference for single buyers started when the nature of grocery store mergers began to change. They said that recent mergers include mergers of chains that are direct competitors in the same geographic market, whereas in past years, merging parties purchased certain stores from one another, not the entire chain. They added that because of chain-wide distribution efficiencies of divested stores, a single buyer can operate divested assets more efficiently and easily. FTC staff told us that if the stores of the merging parties were competing directly throughout the geographic market, a single buyer who can operate all the assets will give FTC greater confidence that competition will be replicated in the market.

Up-Front Buyers

Up-front buyers were not included in any of the six grocery store divestiture orders issued during fiscal years 1990 through 1995.³⁶ However, about 76 percent of the buyers for divestiture orders announced during fiscal years 1996 through 2000 were up-front buyers. Table 3 shows the extent to which up-front buyers were used in grocery store divestiture orders announced during fiscal years 1990 through 1995, fiscal years 1996 through 2000, and for the entire period.

³⁶FTC staff told us that the first grocery store divestiture order in which an up-front buyer was identified was the Ahold and Stop & Shop merger, which was announced for public comment in fiscal year 1996. However, there was no binding contract between the merging parties, and the buyer at the time the divestiture order was announced for public comment. FTC staff has said that a binding contract gives FTC greater confidence that the competitive problems will be remedied. The Jitney-Jungle and Delchamps divestiture order was the first divestiture order in the grocery store industry in which the merging parties had a buyer with a binding contract to purchase the divested assets at the time the proposed order was announced for public comment in fiscal year 1997.

Table 3: Up-Front Buyers in the Grocery Store Industry for Divestiture Orders Announced for Public Comment in Fiscal Years 1990 through 2000

| Fiscal years | Number of divestiture orders | Number of buyers of divested assets | Number of up-front buyers of divested assets | Percent of up-front buyers of divested assets |
|-------------------|------------------------------|-------------------------------------|--|---|
| 1990 through 1995 | 6 | 18 | 0 | 0 |
| 1996 through 2000 | 10 | 33 | 25 ^a | 76 |
| 1990 through 2000 | 16 | 51 | 25 | 49 |

^aSix of eight buyers that were not up-front buyers were from the Stop & Shop and Purity divestiture order, which was announced for public comment in November 1995.

Source: GAO's analysis of 16 FTC grocery store divestiture orders.

FTC staff told us that as FTC became more familiar with grocery store mergers and the potential effect of long divestiture periods on the viability of the grocery store assets to be divested, it became apparent that up-front buyers were a material factor in making divestitures successful. They said that, in the early to mid-1990s, merging parties were given up to 12 months, and sometimes longer, to find a buyer(s) for the divested assets after a divestiture order became final, regardless of the industry in which the merger was taking place. Additionally, in a March 2002 FTC document titled, *"Frequently Asked Questions About Merger Consent Order Provisions,"* FTC staff noted that "...supermarkets and other retail operations (e.g., retail pharmacies) are particularly vulnerable to having their assets deteriorate during the search for a post order buyer; this affects the ability of the assets to be operated in a manner that maintains or restores competition in the relevant market." FTC staff told us that once FTC determined with respect to grocery store mergers that, among other things, the longer the merging parties have control of the assets, the more likely it is that the assets will deteriorate, FTC established a preference for up-front buyers, particularly in the retail sector.

In our discussions with FTC staff about their use of clean sweeps, single buyers, and up-front buyers, they said that grocery store divestitures that were accepted by FTC 10 years ago had long divestiture periods and no up-front buyers, but these divestitures would not likely be accepted today. FTC staff told us that, in recent years, generally FTC's starting point for settlement discussions with the merging parties in a grocery store merger is a clean sweep divestiture with a single, up-front buyer. According to FTC staff, such a remedy ensures restoration of the status quo before the merger. Additionally, FTC staff told us that it would take additional time and considerable amount of evidence to convince FTC that competition

could be restored through selling a combination of the merging parties' assets to multiple buyers in a single geographic market. In such cases, FTC staff said they would have to analyze information on each individual store and its role in the merging parties' overall operations. FTC staff also noted that the grocery store mergers in more recent years tended to be much larger and involve more extensive geographic overlaps than previous mergers.

While FTC staff have said that FTC typically prefers up-front buyers in divestiture orders involving grocery stores and sometimes in other retail operations, they told us that they are willing to diverge from their preference for clean sweep divestitures and single buyers when the proposed divestiture will restore or maintain competition. A key example is the Albertson's, Inc., and American Stores Company divestiture order, which at the time it was announced for public comment in fiscal year 1999 was the largest retail divestiture ever required by FTC. The order differed from many recent divestiture orders in the grocery store industry in that many of the markets involved the divestiture of a combination of selected assets from both of the merging parties—a practice sometimes referred to as “mix and match”—versus clean sweeps, and there were several multiple buyer markets, that is markets in which several buyers were purchasing the assets FTC ordered to be divested. According to FTC staff, mix-and-match divestitures require a more careful analysis of each retail location than does the divestiture of only one of the merging parties stores because staff must examine more closely whether the mixed assets can compete effectively. FTC must determine, for example, whether the mixed assets will be capable of producing efficiencies and economies of scale and scope comparable to those existing in the market before the merger. FTC staff estimated that the Albertson's and American divestiture order took at least 6 additional months to negotiate with the merging parties because of the need to assess the mix and match approach and the geographic markets where assets were divested to multiple buyers as well as to the buyers purchasing assets in multiple geographic markets.

FTC's Use of Divestiture Practices Varied in Other Retail Industries

There was a wide variation in the use of clean sweeps, single buyers, and/or up-front buyers in the 15 divestiture orders FTC announced in the drug store, funeral services, and gas station industries during fiscal years 1990 through 2000.

Drug Store Divestitures

For the five drug store divestiture orders FTC announced during fiscal years 1990 through 2000, all of the divestitures were to single buyers, but the use of clean sweep divestitures and up-front buyers varied. Three of these orders involved 11 geographic markets between fiscal years 1990 through 1995 and two involved 7 geographic markets between fiscal years 1996 through 2000. In terms of clean sweep divestitures, single buyers, and up-front buyers:

- All of the 11 geographic markets in the three drug store divestiture orders announced during fiscal years 1990 through 1995 involved clean sweeps of drug store assets within those markets. By contrast, 4 of the 7 (57 percent) geographic markets in the two orders announced between fiscal years 1996 through 2000 involved clean sweeps of drug store assets.³⁷
- All five drug store divestiture orders involved the divestiture of a total of 294 assets from fiscal years 1990 through 2000, and all of the divestitures were to single buyers. For the two divestiture orders announced during fiscal years 1996 through 2000, FTC explicitly required single buyers in 4 of the 7 geographic markets to ensure that buyers were large enough and had the coverage to serve as an alternative anchor pharmacy chain for a pharmacy benefit management³⁸ firm's retail pharmacy network.
- While there were no up-front buyers designated among the 10 buyers of drug store assets in the three divestiture orders announced during the earlier period, 2 of the 3 buyers of drug store assets for the two divestiture orders announced from fiscal years 1996 through 2000 were up-front buyers.

³⁷Of the 11 clean sweep markets for drug store divestiture orders announced during fiscal years 1990 through 1995, 9 (about 82 percent) had only one asset to be divested. All 4 of the clean sweep markets for drug store divestiture orders announced during fiscal years 1996 through 2000 had more than one asset to be divested.

³⁸A pharmacy benefit management firm is an entity that operates pharmacy benefit plans. Pharmacy benefit management firms typically organize a network of participating pharmacies by contracting with chains and independent pharmacies. In effect, they buy retail distribution services from pharmacies and sell them to health insurance plans and employer groups. According to FTC staff, in order for pharmacy benefit management networks to be credible to their customers—the insurance plans and employer groups—they need to have widespread geographic coverage.

Funeral Services Divestitures

Our analysis of funeral services divestitures showed that the use of clean sweeps, single buyers, and up-front buyers remained relatively unchanged for the seven funeral services divestiture orders FTC announced during fiscal years 1990 through 2000. FTC announced four divestiture orders requiring the divestiture of funeral services assets in 8 geographic markets between fiscal years 1990 through 1995, and three requiring the divestiture of funeral services assets in 19 geographic markets between fiscal years 1996 through 2000. Specifically:

- The divestitures in 6 of the 8 (75 percent) geographic markets designated in the four funeral services divestiture orders announced during fiscal years 1990 through 1995 were clean sweep divestitures and 14 of the 19 (about 74 percent) geographic markets for the three funeral services divestiture orders announced during fiscal years 1996 through 2000 were clean sweep divestitures.³⁹
- In all cases, a single buyer purchased the assets in each of the multiple asset markets. Uniquely, in six of these seven divestiture orders, a single buyer (although not the same buyer in all six cases) purchased all of the divested assets in all of the geographic markets. For example, in the Service Corporation International and Equity divestiture order announced in fiscal year 1999, there were 14 geographic markets in which FTC ordered divestitures; a single buyer purchased all of the assets in all of the geographic markets.
- Over the 11-year period, only one of the eight buyers of funeral services assets was an up-front buyer—this occurred in a divestiture order announced in fiscal year 1999.

Gas Station Divestitures

For gas station divestiture orders, we could not analyze differences in the use of clean sweeps, single buyers, and up-front buyers between the two periods—fiscal years 1990 through 1995 and fiscal years 1996 through 2000—because there were no divestiture orders requiring the divestiture of gas stations announced in the first period. However, FTC announced three

³⁹Of the 6 clean sweep markets for funeral services divestiture orders announced for public comment during fiscal years 1990 through 1995, 5 (about 83 percent) had only one asset to be divested. Of the 14 clean sweep markets for funeral services divestiture orders announced for public comment during fiscal years 1996 through 2000, 10 (about 71 percent) had only one asset to be divested.

divestiture orders requiring the divestiture of gas stations during the latter period. In terms of the use of clean sweeps, single buyers, and up-front buyers in fiscal years 1996 through 2000, we found that:

- The three divestiture orders involved 14 geographic markets, and 13 of the 14 (about 93 percent) geographic markets had clean sweep divestitures.⁴⁰ Two of the divestiture orders involved clean sweep divestitures in all of the markets in which gas stations were divested.
- All three orders required single buyers to purchase the assets. (In total, approximately 980 assets were divested across the 14 geographic markets.⁴¹) According to FTC, the divestiture of large packages of retail gasoline assets should allow the buyer to efficiently advertise a brand, develop credit card and other marketing programs, persuade distributors to market the buyer's brand and otherwise compete in the sale of branded gasoline.
- Only one of seven buyers that purchased divested assets in the three divestiture orders was an up-front buyer.

FTC staff told us that the remedy approved in each of the divestitures covered in our review was based on the unique facts of that case—not on any formula. Instead, FTC staff said that they examined each market in order to determine how most effectively to remedy the anticompetitive effects of the particular merger. They said that in one case, FTC may have ordered divestiture of all of the assets of one of the merging parties relating to a particular product market in every affected geographic market because FTC determined that any buyer would need a minimum scale and/or scope of operations. In another case, FTC may have ordered divestiture of all of the assets of one of the merging parties relating to a particular product market in most, but not all, of the geographic markets because the buyer had demonstrated that the remaining assets of that merging party were not profitable and, therefore, were undesirable. They added that FTC may have ordered divestiture of carefully selected assets in each geographic market without regard for which of the merging parties owned the assets, but only after an extensive and time-consuming financial analysis of each asset.

⁴⁰All 13 of the clean sweep markets for gas station divestiture orders had more than one asset to be divested.

⁴¹The Exxon and Mobil divestiture order (C-3907) required the merging parties to assign supply agreements for approximately 1,640 additional gas stations.

According to FTC staff, in all cases, FTC's objective has been to remedy the anticompetitive effects that FTC concluded would result from an otherwise unlawful acquisition, and the remedy was accepted only after a demonstration that it would achieve that objective.

Smaller Businesses Were Significantly Less Likely To Purchase Divested Grocery Store Assets after Fiscal Year 1996

Although we did not have enough observations to analyze statistically the differences in the level of smaller business participation in purchasing divested drug store, funeral services, and gas station assets from fiscal years 1990 through 2000, our analysis of the buyers of divested grocery store assets showed that smaller buyers, including those that met SBA's definition of a small business, were significantly less likely to directly purchase divested grocery store assets after fiscal year 1996. However, when we account for divested assets that were initially purchased by grocery wholesalers then, per the divestiture order, sold to other businesses—which reflects the level of indirect participation—the decline in the level of smaller business participation between the two time periods is not as great. Our discussions with FTC staff and antitrust practitioners indicated that the decline in the level of smaller business participation in purchasing divested assets occurred for a variety of reasons, including FTC divestiture practices and consolidation in the grocery store industry, specifically a significant difference in the type and size of mergers during the 1990s.

Some Difficulties Arose Determining the Level of Small Business Participation

Because there were so few buyers of divested assets in the drug store, funeral services, and gas station industries during the period, we were unable to determine if there was a statistically significant difference in the level of smaller business participation in purchasing these assets. While there were sufficient numbers of buyers of divested assets in the grocery store industry to enable us to analyze changes in the profile of the buyers over the 11-year period, there appeared to be no generally accepted definition of a small grocery store business. FTC staff,⁴² grocery industry officials, and representatives of relevant small business associations, told us that there was not a generally accepted standard by which one could measure the relative size of businesses using revenues. They acknowledged that SBA's definition of a small business, which ranged from \$13.5 million to \$20 million in receipts from 1990 to 2000 for the grocery store industry, might be one indicator. However, industry members told us that SBA's threshold for a small grocery store business is too low given the relative size of grocery store businesses.

⁴²FTC staff told us that a company's size and amount of revenues are only relevant to antitrust analysis as an indication of possible market power, when examined in the context of the relative size of its competitors. They said that while FTC is aware of SBA's definition of a small business, it does not use SBA's definition to analyze mergers or divestitures. FTC staff noted that SBA's definitions are used for purposes other than antitrust analysis and are not appropriate for use in FTC's antitrust analysis because the SBA definitions do not take into account many variables, such as the relative size of a market or the businesses that comprise that market. However, FTC staff also noted that in the unlikely event that civil penalties would be assessed against an entity involved in a merger that meets the SBA definition for small business in a particular industry, the SBA definition would be considered in determining the penalties. [A provision of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121, (March 29, 1996), codified at 5 U.S.C. 601 note, requires that enforcement agencies consider the size of the law violator when assessing civil penalties.]

Because there appeared to be no generally accepted definition of a small grocery store business, we used two approaches to determine the level of smaller business participation in purchasing divested grocery store assets in fiscal years 1990 through 1996 and fiscal years 1997 through 2000.⁴³ First, we analyzed the median of the average annual revenues of the buyers. Specifically, we calculated the average annual revenues of each of the buyers of divested grocery store assets using the buyers' 3 years revenues prior to their purchase of the divested assets, when available, in constant 2000 dollars. The average annual revenues ranged from about \$5 million to about \$35 billion, with 9 of 41 direct buyers having average annual revenues greater than \$15 billion. We then computed the median of the average annual revenues for all the buyers for the two periods and for fiscal years 1990 through 2000. We used the overall median of the buyers' average annual revenues for fiscal years 1990 through 2000 as a benchmark and determined the number of buyers in each of the periods that were below the overall median. We considered buyers below the overall median to be "smaller."⁴⁴ Second, we used SBA's size standard for a small grocery store business.⁴⁵ However, we used the buyers' average annual revenues in constant 2000 dollars before they purchased the divested assets as a proxy for receipts, because we were unable to obtain data on the buyers' receipts. We also adjusted SBA's size standards to constant 2000 dollars. (Appendix II provides information on the adjusted SBA size standards.) We then determined the number of buyers in each of the periods that were below the adjusted SBA size standard. Additionally, to examine changes in the

⁴³We used these two time periods for our analyses of the level of smaller business participation in purchasing divested assets instead of the fiscal years 1990 to 1995 and fiscal years 1996 to 2000 time periods that we used in our analyses of FTC's divestiture practices, primarily because fiscal year 1997 is the first full fiscal year after FTC began altering its approach to divestitures. Additionally, there were too few observations in the fiscal years 1990 to 1995 period. Our analyses are based on the dates of the merging parties' divestiture applications or, in the case of up-front buyers, the dates of the proposed divestiture orders—generally the point at which FTC receives the revenue data for the proposed buyers to include in its review of the viability of the proposed buyers. As discussed previously, because FTC did not start to use up-front buyers in grocery store divestitures until fiscal year 1996, divestitures in the earlier period took much longer to occur. While there were 18 buyers of divested grocery stores for the six divestiture orders announced during fiscal years 1990 to 1995, the merging parties submitted divestiture applications for only 3 of the buyers during the same period. Of the remaining 15 buyers, the merging parties submitted 12 divestiture applications in fiscal year 1996, 1 in fiscal year 1997, and 2 in fiscal year 1998.

⁴⁴We discussed our approach with grocery industry officials who, in the absence of a generally accepted standard, did not suggest an alternative approach for measuring the size of a grocery store business using revenues.

size of the buyers, we compared the median of the average annual revenues of the buyers for the two periods. Regardless of the approach we used, the results were similar—there were fewer smaller buyers purchasing divested grocery store assets after fiscal year 1996.

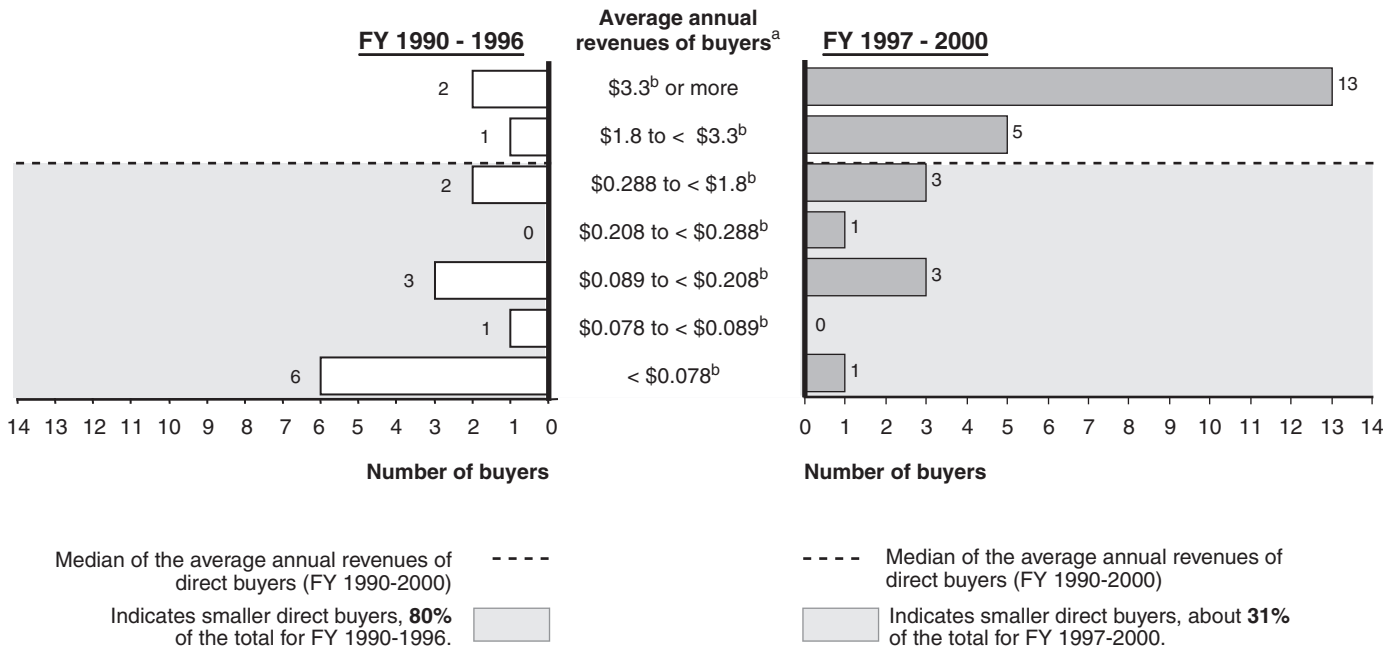
Smaller Businesses Were Significantly Less Likely to Directly Purchase Divested Grocery Store Assets after Fiscal Year 1996

Our analysis showed that significantly fewer smaller businesses directly purchased divested assets after fiscal year 1996,⁴⁶ the first full fiscal year after which FTC began showing preferences for certain divestiture approaches, such as up-front buyers, in the grocery store industry. (Appendix II shows the results of our statistical test for the grocery store industry.) We calculated that the median of the average annual revenue of 41 direct buyers of divested grocery store assets, using constant 2000 dollars, was about \$1.8 billion. Figure 1 shows that using less than \$1.8 billion as a benchmark for a smaller business, 80 percent (12 of 15) of the buyers of the divested grocery store assets during fiscal years 1990 through 1996 were smaller, compared with about 31 percent (8 of 26) in the latter period.

⁴⁵SBA defines small business according to small business size standards. SBA's size standards vary by standard industrial classification code industry and are almost always based on a company's average annual receipts or number of employees. The small business size standard for the grocery store industry has been modified for the effect of inflation once during the 11-year period covered in our review from \$13.5 million effective December 21, 1989, to \$20 million effective April 7, 1994. The standard remained at \$20 million until February 22, 2002, when SBA increased it to \$23 million. According to an SBA official, even though technically there are slight differences between revenues and receipts, for most small businesses, those two values are synonymous.

⁴⁶Unless otherwise noted, all statistical results are statistically significant at the 95-percent confidence level.

Figure 1: Profile of Revenues of Direct Buyers of Divested Grocery Store Assets, Fiscal Years 1990 through 1996 and Fiscal Years 1997 through 2000



Note: There was a total of 51 buyers that purchased divested assets over the 11-year period. Seven of the buyers in the fiscal years 1990 to 1996 period were newly formed at the time they purchased the divested assets. Therefore, the buyers did not have prior-year revenues. We could not obtain the revenue data for three buyers, of which two were in the earlier period and one in the latter.

^aRevenues are in constant 2000 dollars. The revenue ranges represent the median of the average annual revenues of the direct buyers. We calculated average annual revenues based on the best available data for those buyers. For 1 of the 41 buyers for which we were able to obtain revenue data, the data were available for only 1 year. For another buyer, we used the average annual revenues over 2 years because the buyer was only in business 2 years prior to purchasing the divested assets. For the remaining 39 buyers, we used the average annual revenues over 3 years.

^bDollars are in billions.

Source: GAO's analysis of revenue data from public sources and direct buyers of divested assets.

We also looked at the level of smaller business participation in directly purchasing divested grocery store assets from another perspective—small businesses as defined by SBA—and found that, when comparing the two periods, there was a significant decline in the number of smaller businesses that purchased divested grocery store assets. We used buyers' revenues before they purchased the divested assets as a proxy for receipts and determined the extent to which buyers in both periods did or did not meet SBA's thresholds (in 2000 constant dollars). Our analysis showed that, using SBA's definition of a small grocery store business, smaller business participation in purchasing divested grocery store assets declined significantly from about 27 percent (4 of 15) in the period from fiscal years 1990 through 1996 to about 4 percent (1 of 26) in the latter period.⁴⁷

Not only did the percentage of smaller businesses purchasing divested grocery store assets decline, but the size of businesses that purchased divested grocery store assets grew significantly over time as well as, according to FTC staff, the size of the parties to the acquisition and the acquisition value. We calculated the median of the average annual revenues of the buyers in each period and found that the typical buyers in the latter period were significantly larger than buyers in the earlier period. Specifically, the median of the average annual revenues of the buyers in the earlier period was about \$89 million. By contrast, the median of the average annual revenues of the buyers in the latter period was about \$3.3 billion.

Wholesalers Were a Key Factor in Enabling Smaller Businesses To Purchase Divested Grocery Store Assets after Fiscal Year 1996

In recent years, grocery wholesalers have been a key factor in enabling smaller businesses to purchase divested assets in the grocery store industry—75 percent of the smaller buyers after 1996 purchased the divested assets from wholesalers. Under this practice, some grocery wholesalers, per the divestiture agreement reached with FTC, have purchased divested grocery store assets directly from the merging parties and under the order provision, in turn, sold them to grocery store operators. Thus, a direct buyer (the wholesaler) sells the asset(s) to indirect buyers (the grocery store operators). According to grocery wholesalers we interviewed, this practice has occurred in part because

⁴⁷If we assume that all of the newly formed businesses are small, our results are unchanged—fewer smaller businesses purchased divested grocery store assets after fiscal year 1996.

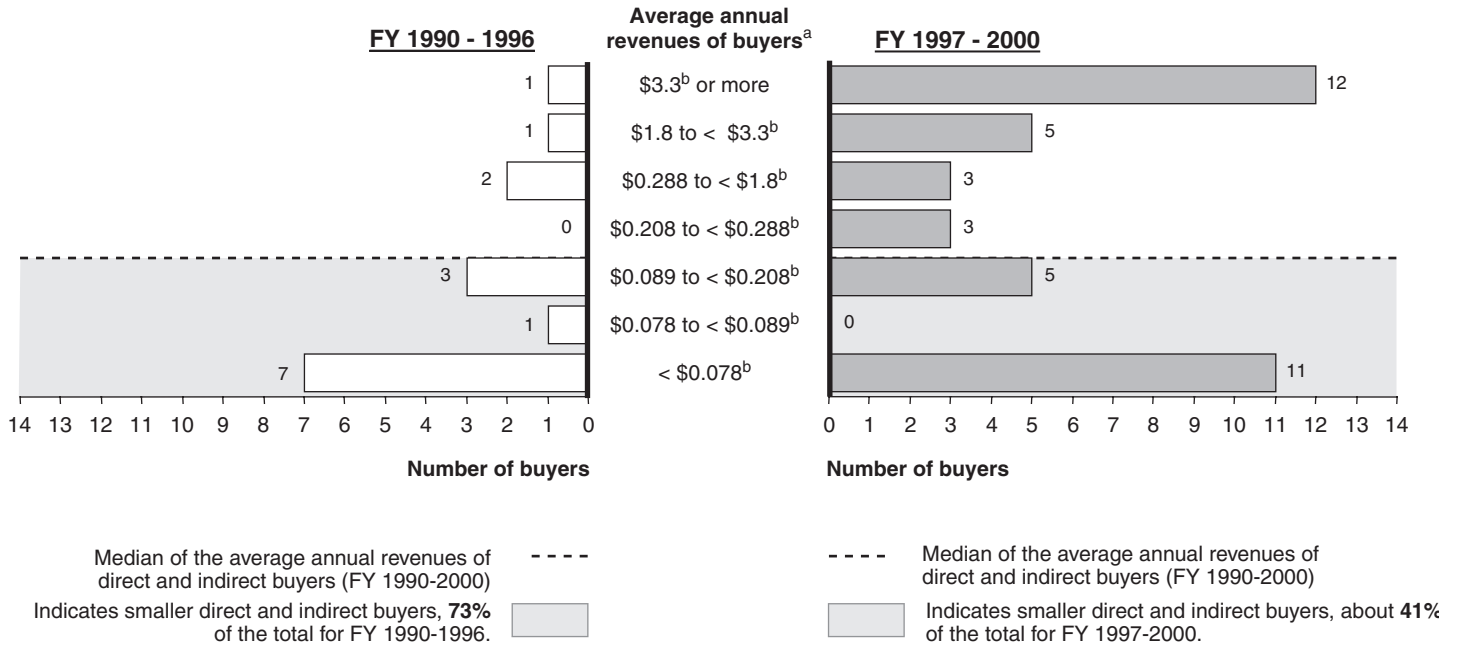
wholesalers were losing market share due to increasing consolidation in the grocery store industry.

To determine if reselling the assets had an effect on the extent to which smaller businesses participated in purchasing divested grocery store assets, we performed a separate analysis. Whereas in the analysis of direct buyers, we considered the wholesalers as the buyers of divested assets, in our analyses that included indirect buyers, we replaced the revenues of the wholesalers with those of the buyers to which they resold the assets.⁴⁸ When we accounted for the effect of indirect buyers, there was still a significant decline in smaller businesses participation in purchasing divested assets after fiscal year 1996; however, the extent of the decline was not as great. Specifically, when the buyers who purchased the divested assets indirectly from wholesalers were included in our analysis, the overall median of the average annual revenues of 54 buyers of divested grocery store assets for the fiscal years 1990 to 2000 time period was about \$208 million—about 88 percent less than the overall median (about \$1.8 billion) for direct buyers. Figure 2 shows that using less than \$208 million as a benchmark for a smaller business, about 73 percent (11 of 15) of the buyers of the divested grocery store assets during fiscal years 1990 through 1996 were smaller buyers, compared with 41 percent (16 of 39) during fiscal years 1997 through 2000.⁴⁹

⁴⁸If we consider the impact of reselling assets on our analysis of single buyer markets discussed previously, then the percent of single buyer markets in the grocery store industry declined from 20 percent to none in the earlier period—the period before which FTC said that it began making changes to its divestiture practices—and from 72 percent to 66 percent in the latter period. This practice had no impact on our up-front buyer analysis. Similar to our analysis of the up-front direct buyers, there were no up-front indirect buyers in the earlier period, and in the latter period, the percent of up-front buyers remained the same (76 percent). Our clean sweep analysis was not affected because clean sweeps are based on the assets divested in geographic and product markets, not the buyers of the assets.

⁴⁹The divestitures stemming from one divestiture order (Albertson's, Inc., and American Stores Company) accounted for 75 percent of the indirect smaller buyers and about 56 percent of all smaller buyers in the fiscal years 1997 through 2000 period. At the time the Albertson's and American Stores divestiture order was announced in fiscal year 1999, it was the largest retail divestiture in FTC's history. The final order required the merging parties to divest 148 assets in 56 geographic markets and approved a wholesaler to purchase 31 of these assets. In the divestiture order, FTC pre-approved 12 of 15 buyers to which the wholesaler sold the divested assets. The divestiture order also required the wholesaler to divest at least 20 of the stores to buyers who received prior approval from FTC within 3 months from the date the wholesaler acquired the assets (or 3 months after the date the order became final, whichever was later) and to seek prior approval from FTC to divest, within 3 years of the final order, any grocery stores to any firms not pre-approved in the divestiture order.

Figure 2: Profile of Revenues of Direct and Indirect Buyers of Divested Grocery Store Assets, Fiscal Years 1990 through 1996 and Fiscal Years 1997 through 2000



Note: There was a total of 70 buyers that purchased divested assets over the 11-year period. Six of the buyers in the fiscal years 1990 to 1996 period and 5 of the buyers in the fiscal years 1997 to 2000 period were newly formed at the time they purchased the divested assets. Therefore, the buyers did not have prior-year revenues. We could not obtain the revenue data for 5 buyers, of which 2 were in the earlier period and 3 in the latter.

^aRevenues are in constant 2000 dollars. The revenue ranges represent the median of the average annual revenues of the direct and indirect buyers. We calculated average annual revenues based on the best available data for those buyers. For 2 of the 54 buyers for which we were able to obtain revenue data, the data were available for only 1 year. Because 3 of the buyers were not in business for the entire 3 years before they purchased the divested assets, we used the average annual revenues over 2 years for 1 of the buyers and the revenues for 1 year for 2 of the buyers. For the remaining 49 buyers, we used the average annual revenues over 3 years.

^bDollars are in billions.

Source: GAO's analysis of data from public sources and direct and indirect buyers of divested assets.

We also examined the level of smaller business participation in indirectly purchasing divested grocery store assets using SBA's definition of a small grocery store business. Again, we found that even though there continued to be a decline in the extent to which smaller businesses purchased these assets, the decline was not as great when we included indirect buyers in the analysis.⁵⁰ Specifically, using SBA's definition, as in our earlier analysis, we found that about 27 percent (4 of 15) of the businesses that purchased divested grocery store assets during fiscal years 1990 through 1996 (including indirect buyers) were smaller businesses. By contrast, about 15 percent (6 of 39) of the buyers of divested assets during fiscal years 1997 through 2000 were smaller businesses.⁵¹

As in the case of the direct buyers, we found that in addition to the percentage of smaller businesses purchasing divested grocery store assets declining between the two periods, the size of the businesses that purchased the assets grew significantly over time. However, the median size of the buyers in the latter period was substantially less than that of the direct buyers. The median of the average annual revenues of the buyers in the earlier period was about \$78 million, compared with about \$288 million in the latter period—about 91 percent below the approximately \$3.3 billion median for the direct buyers in the latter period.

Several Factors May Have Contributed to the Decline in the Level of Smaller Business Participation as Direct Buyers of Divested Grocery Store Assets in the Latter 1990s

Through interviews with FTC staff, antitrust practitioners, and smaller buyers of divested grocery stores, we identified factors that may have contributed to the decline in the level of smaller business participation in purchasing divested assets in the grocery store industry. First, FTC's clean sweep, single buyer, and up-front buyer divestiture practices and the merging parties' desire to close the deal quickly may have impacted the ability of smaller businesses to purchase divested assets. However, FTC staff told us that FTC's role is to protect competition and consumers, not particular competitors or businesses, whether large or small. Second, growing consolidation in the grocery store industry has resulted in fewer

⁵⁰The difference in the proportions of small buyers between the two periods is statistically significant at the 90-percent confidence level.

⁵¹The Albertson's and American divestitures previously mentioned accounted for 80 percent of the indirect smaller buyers, and about 67 percent of all buyers in fiscal years 1997 through 2000 that met SBA's criteria for a small grocery store business. Additionally, if we assume that all the newly-formed businesses are small, our results are unchanged—fewer smaller businesses purchased divested grocery store assets after fiscal year 1996.

smaller businesses because many have either been acquired by larger companies or have gone out of business.

FTC's Divestiture Practices and Desire of Merging Parties to Consummate the Merger Quickly

According to FTC staff and antitrust practitioners, FTC's divestiture practices and the desire of the merging parties to consummate the merger quickly may impact the ability of smaller buyers to purchase divested assets. Regarding FTC's divestiture practices, FTC staff told us that FTC's preference in retail industries for clean sweep divestitures combined with its preference for single buyers could impact the ability of smaller businesses to purchase divested assets, particularly in larger markets where there may be a greater number of assets to be divested, especially where economies of scale exist. FTC staff also said that it is easier and quicker for the merging parties to convince FTC that a clean sweep divestiture to a single buyer will be successful than a clean sweep divestiture to multiple buyers within a geographic market. They acknowledged that a larger package of divestiture assets may make it difficult for smaller buyers to purchase the divested assets because they might not have the financial strength to purchase all of the assets that have to be divested in a geographic market.

FTC staff and antitrust practitioners also told us that negotiating a divestiture order is generally easier and quicker with a single, well-established chain as the buyer because FTC has to analyze the financial, managerial, and operational strength of only one buyer, and the merging parties have to negotiate with only one buyer. Similarly, antitrust practitioners said that FTC's up-front buyer preference may create a bias against smaller businesses because the merging parties cannot consummate the merger until a viable buyer(s) has been identified, reviewed, and provisionally approved by FTC. Antitrust practitioners told us that because the merging parties want to consummate the merger quickly and it may take longer to (1) convince FTC that a smaller business is a viable buyer and (2) negotiate with a smaller business, the merging parties generally would prefer larger, well-established buyers. Additionally, the practitioners said that for these reasons they are likely to advise their clients to select a strong, well-established buyer that would clearly be acceptable to FTC. They added that the cost of delaying a merger while the merging parties are waiting for FTC to approve a buyer can be very expensive to the merging parties because of the delay in achieving the potential efficiencies they sought through the merger.

FTC staff and antitrust practitioners also told us that factors other than clean sweeps, single buyers, and up-front buyers may impact the ability of smaller buyers to purchase divested assets. For example, antitrust practitioners said that FTC's preference for buyers that do not already have a presence in the geographic market as well as FTC's definition of the product and geographic markets may also impact the ability of smaller businesses to purchase divested assets. They told us that smaller businesses interested in purchasing divested assets may be more likely to be located in the geographic market where the assets are being divested. According to FTC staff, if any business, large or small, interested in purchasing the divested assets already has a significant presence in the geographic market where the assets are being divested, it reduces the chances of FTC approval because divesting to a market incumbent does not replace the acquired firm and thus reduces the competitive effectiveness of the divestiture. Thus, according to FTC staff, FTC may not approve proposed buyers that already have a significant presence in the geographic market because this raises concerns about the anticompetitive effects of the divestiture transaction, including an increase in concentration and failure to maintain the number of market participants. For example, in fiscal year 1996, FTC did not approve a proposed buyer for a grocery store in the Stop and Shop and Purity Supreme merger, because the proposed buyer already had two stores relatively close to the store being divested. However, FTC staff said that in certain instances smaller businesses operating within the same geographic and product markets have been found to be acceptable buyers. Additionally, FTC staff and antitrust practitioners told us that the size of the divestiture package and FTC staff's definition of the geographic and product markets may affect the opportunity for smaller businesses to purchase divested assets. They said that the larger the geographic market, as defined by FTC, the less opportunity there may be for smaller businesses to purchase the divested assets.⁵²

⁵²FTC staff told us that the market definitions are factual and are predicated on how the competitors operate in the product and geographic markets.

The Food Marketing Institute (FMI) and the National Grocers Association (NGA)—the two largest associations that represent grocers—have submitted comments to FTC stating that FTC’s clean sweep, single buyer, and up-front buyer divestiture practices have hindered the ability of small businesses to purchase divested assets.⁵³ Additionally, they said that FTC’s strong preference for buyers located outside the geographic market in which the assets are to be divested have disadvantaged small businesses, which are struggling to expand and keep pace with large corporations. Several smaller buyers of divested grocery store assets also told us that other factors, such as the merging parties’ bidding process, create additional challenges for smaller businesses in purchasing and maintaining the viability of divested assets. (Appendix VII provides information on the public comments that FTC received regarding all 31 divestiture orders included in our review as well as the results of our discussions with several smaller buyers of divested grocery store assets, selected associations that represent smaller businesses, and SBA officials.)

FTC staff told us that the antitrust statutes are designed to protect competition and consumers, not particular competitors or businesses, whether large or small.⁵⁴ They also said that in several public statements, FTC staff have noted that FTC does not have a preference in favor of large-chain buyers, or a preference against small chains, independents, or wholesalers that will eventually spin off stores to other buyers. For example, in a March 2001 speech before the American Bar Association, the then Acting Director of FTC’s Bureau of Competition said that FTC neither favors nor disfavors any particular category of purchaser. According to the speech, “...the Commission’s approach to supermarket divestitures has not precluded smaller or local grocery stores from participating as buyers because it believes that effective competitors come in all shapes and sizes.”⁵⁵ Additionally, the then Acting Director said that FTC is sensitive to the fact that small supermarket chains often offer greater product variety and choice than other supermarkets. However, FTC staff told us that the size of a possible buyer is a factor in determining the acceptability of that

⁵³The Food Marketing Institute is the largest association that represents grocers. Its membership ranges from large chains to grocers with individual stores. The National Grocers Association represents small and independent grocers.

⁵⁴According to FTC staff, of the antitrust statutes, only the Robinson-Patman Act was specifically intended to protect small businesses from larger businesses.

⁵⁵Report from the Bureau of Competition, Prepared Remarks of Molly S. Boast, March 29, 2001.

buyer, but only to the extent that size affects the buyer's financial viability and ability to operate the divested assets competitively.

Some antitrust practitioners we interviewed also told us that they do not perceive FTC as having a role in protecting small businesses. Like FTC, they said FTC's mandate is to protect and preserve competition and consumers, not to protect or promote small businesses. They told us that protecting competition and promoting small businesses are not always completely consistent goals.

Growing Consolidation in the Grocery Store Industry

Growing consolidation in the grocery store industry has resulted in fewer smaller businesses because many have either been acquired by larger companies or have gone out of business. An article by the U.S. Department of Agriculture's (USDA) Economic Research Service⁵⁶ states that in recent years, the U.S. food retailing industry has undergone unprecedented consolidation and structural change through mergers, acquisitions, divestitures, internal growth, and new competition. Widespread consolidation in the grocery store industry, driven by expected efficiency gains from economies of size, has had a significant effect on the share of total grocery stores sales accounted for by the largest food retailers. The concentration levels of the industry have also increased. According to a August 1999 American Antitrust Institute (AAI) article,⁵⁷ in 1992, the top five supermarket chains had 19 percent of the national market. In 1999, that share had increased to at least 33 percent. According to FMI data, the number of chain supermarkets increased from 17,460 in 1990 to 20,825 in 2000. Over the same period, the number of independent supermarkets declined from 13,290 to 11,005.⁵⁸ The Progressive Grocer 2001 annual report,⁵⁹ reports that market share continues to be consolidated among a handful of traditional players, including Kroger Company; Safeway, Inc.; Albertson's, Inc.; and Royal Ahold. According to the report, larger chains will acquire smaller and mid-size independents to solidify their market

⁵⁶Economic Research Service/USDA, Agriculture Outlook, August 2000, Consolidation in Food Retailing: Prospects for Consumers & Grocery Suppliers.

⁵⁷*Food Retailing: The Two Faces of Supermarket Mergers*, American Antitrust Institute, August 26, 1999.

⁵⁸According to the Food Marketing Institute, an independent grocer operates up to 10 retail stores.

⁵⁹Progressive Grocer, 68th Annual Report of the Grocery Industry, April 2001.

share and increase their buyer power. However, the report also notes that the closings of grocery stores resulting from larger chains that are rejecting leases on older, smaller stores when they come up for renewal will afford independents and smaller chains the chance to expand by acquiring those stores.

FTC Has Not Measured the Impact of Its Divestiture Practices Since Announcing Changes in the Mid-1990s

FTC has not systematically measured the success or failure of the divestitures it has approved since it developed preferences for approaches like clean sweep and up-front buyers. In 1999, FTC reported the results of the Bureau of Competition staff's study of divestiture orders made final during fiscal years 1990 through 1994 that, according to FTC staff, confirmed the need to make the changes that FTC had made starting in the mid-1990s. The report was drafted by FTC's Bureau of Competition.⁶⁰ Although the study had some methodological limitations, it appears to have been instrumental in helping FTC staff better understand the divestiture process. Nonetheless, antitrust practitioners and representatives of the grocery store industry have questioned key aspects of FTC's study, including whether the approach used supported the conclusions drawn and whether the study went far enough in measuring the impact of its divestiture practices on buyers of divested assets and the markets in which they operate.

⁶⁰The report on the study was drafted by FTC's Bureau of Competition. The cover of the study notes that "The views expressed herein are those of the Staff of the Bureau of Competition and do not necessarily reflect the views of the Commission or of any individual Commissioner."

FTC Staff's Divestiture Study Was Based on Divestitures that Were Finalized in the Early 1990s and Had Some Methodological Limitations

To perform its study, FTC staff examined 35 divestiture orders made final during fiscal years 1990 through 1994 to identify problems with the divestiture process and determine whether buyers of divested assets were able to begin operating in the relevant market relatively quickly and maintain operations.⁶¹ The study found that the acquirers of divested assets generally were viable competitors in the markets of concern and found, among other things, that across all orders studied

- divestitures of ongoing businesses succeeded at a higher rate than divestitures of selected assets;
- parties to a potential merger that were required to divest assets sometimes looked for buyers who were not the strongest competitors and sometimes engaged in strategic conduct to impede the success of the buyer;
- many buyers of divested assets did not have sufficient information to prevent mistakes in the course of their negotiations and subsequent acquisitions, particularly where the buyers had never operated in the industry or the to-be-divested business; and
- smaller buyers succeeded at least at the same rate as larger buyers and, therefore, should not be presumed to be less competitive buyers than larger firms.

The study confirmed much of what FTC staff had suspected and discussed in earlier speeches and recommended a number of consent provisions and approaches designed to mitigate some of the problems FTC staff identified.⁶² According to FTC staff, the recommendations were designed

⁶¹The study was performed in two parts. In 1995, the staff undertook a pilot study of nine consent orders to test the case study methodology. In accordance with the Paperwork Reduction Act, 44 U.S.C. Section 3501-3520, FTC could contact only nine participants before obtaining authority from the Office of Management and Budget to conduct a more extensive study. According to FTC staff, once FTC established through the pilot study that useful information could be collected from a case study methodology, FTC sought and received authorization from the Office of Management and Budget in March 1997 to conduct an expanded study of divestitures.

⁶² Many of the findings and recommendations were consistent with the preliminary findings and recommendations of the pilot study phase of the divestiture study

to correct the informational and bargaining imbalance that had occurred in previous divestitures.

We were unable to fully assess the divestiture study because, according to FTC, the nonpublic version of the study contained proprietary financial information about the merging parties and the buyers of the divested assets.⁶³ However, our analysis of the public version of the study showed that it had some key limitations. For example,

- The study discussed the advantages of up-front buyers, and in speeches, FTC staff used the study as a basis for articulating FTC's preference for up-front buyers. However, the study did not provide information on the number of up-front buyers it examined, nor does it discuss what factors made those buyers successful.
- A finding in the report is that smaller firms across all orders studied succeeded at least at the same rate as larger firms and, therefore, should not be presumed to be less competitive buyers than larger firms. The study does not define "smaller" nor does it provide information on the industries in which the smaller businesses operated. FTC staff told us that the divestiture study did not use quantitative criteria for categorizing firms as smaller or larger. Instead, FTC staff looked at (1) the size of buyers on a continuum of smaller revenues to larger revenues for the sample of businesses surveyed and/or (2) whether the firm was a single product firm, often a newly formed company, operating in a fairly localized area, as opposed to an established, multiproduct, highly capitalized, multinational company. FTC staff told us that it was clear to them which buyers were smaller and which were larger.
- The study covered divestitures to 50 buyers that were approved by FTC, but FTC staff were only able to interview 37 of the buyers, and the study does not provide information on the distribution of the 13 buyers (26 percent) that did not participate in the study. If these buyers are mostly smaller or larger, or fall into the same industry, the results could potentially be skewed.

⁶³According to FTC staff, there were two versions of the study, one that was publicly available and the other that was not because it contained the names of and financial information about the merging parties and the buyers of the divested assets. We were only able to obtain and review the publicly available version of the study.

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- The methodology for the study published in the *Federal Register* stated that FTC would interview 147 third parties, such as customers, suppliers, and trustees. However, the final report only reports on interviews with two third parties, both of which were trustees. According to FTC staff, due to resource constraints, they were limited in the number of interviews they could complete. They told us that the study focused on the buyers and the merging parties, and although it would have been useful to obtain information from third parties, it would have been costly, and would have diverted Commission resources from pressing merger enforcement activities. Nonetheless, FTC staff told us that in reviewing a proposed merger, they rely heavily on information provided by third parties to determine whether a merger is likely to result in price increases or reduction in quality or output.

FTC staff told us that they recognize that the divestiture study had limitations. Nevertheless, they said that the study provided them sufficient information to adjust their approaches to working on divestiture orders. For example, FTC staff said that they learned that buyers of divested assets often did not know all of the assets they needed to effectively operate a business. As a result, FTC staff stopped relying as heavily on buyers of divested assets to inform them of the assets that should be included in the divestiture packages. FTC staff said that while the divestiture study is not the ultimate competitive analysis, it is an important step in determining whether the divestiture orders are satisfying FTC's mission.⁶⁴

⁶⁴According to FTC's public report, the divestiture study was not designed to be a complete competitive analysis of the relevant markets so that one could draw definitive conclusions about how any of the markets were performing. Rather, it attempted to draw conclusions about whether the buyer of the divested assets was able to enter the market and maintain operations.

Antitrust Practitioners and Representatives of the Grocery Store Industry Have Questioned Various Aspects of the Study

Antitrust practitioners have praised FTC for taking the initiative to do the divestiture study, but have also questioned key aspects of the study, including its design and methodology.⁶⁵ For example, some antitrust practitioners we spoke with said that FTC should be commended for undertaking the study, but questioned whether the methodology employed was sufficient for drawing conclusions. They suggested that the study should have been designed in a way to enable FTC to reach conclusions about how the divestiture(s) impacted the availability, quality, and price of products because these are the market factors that ultimately affect the consumer.

Antitrust practitioners have questioned FTC's approach publicly, in reports, studies, and articles. For example, in 2001, the Task Force on Federal Antitrust Agencies of the Section of Antitrust Law, American Bar Association, issued a report on the state of federal enforcement of the antitrust laws.⁶⁶ Among other things, the report states that it is unclear under what circumstances FTC requires an up-front buyer and questioned whether the divestiture study effectively demonstrated that FTC's approach to up-front buyers was needed, given the substantial and "unnecessary" cost imposed on the parties. The task force also noted that

"...the Divestiture Study has taken on a significance, in terms of justification of Commission policies, that was not foreseen at the time it was issued, especially since it was never formally adopted by the Commission. In addition, it is not clear from the description of the Study whether the authors, in evaluating the apparent failure of a remedy, considered whether this was consistent with the lack of a need for a remedy in the first place."

The task force went on to state that

"Studies such as this would be more useful contributions to the dialogue between the agencies and the private bar if their methodology was fully discussed and disclosed prior to the study, and the study included the participation (with appropriate confidentiality constraints) of outside academics and practitioners."

⁶⁵In the October 31, 1996, *Federal Register* notice of the proposed divestiture study, FTC requested comments on its proposed methodology for the divestiture study. FTC stated that it was especially interested in the comments to, among other things, "enhance the quality, utility, and clarity of the information to be collected." In addition, in its August 6, 1999, news release announcing the release of the report on the divestiture study, FTC requested comments on the report.

⁶⁶*The State of Federal Antitrust Enforcement – 2001*, Report of the Task Force on Federal Antitrust Agencies – 2001, American Bar Association Section of Antitrust Law.

Likewise, a June 2002 FMI report raises several concerns about the methodology of the Divestiture Study and FTC's use of the study to justify certain divestiture practices.⁶⁷ The report stated that

"The results of the Divestiture Study have been over-extrapolated. The sample size was small, and the staff apparently limited the interviews to buyers, who could be expected to complain about the purported information disadvantages and lack of negotiating leverage. Moreover, while the Divestiture Study was never intended to be a surrogate rulemaking record, it took on that character for some members of the staff."

Similar to the American Bar Association Task Force report, the FMI report also noted that the "hardening" of FTC's up-front buyer policy coincided with the divestiture study. The report further stated that

"Notwithstanding the Divestiture Study's generally positive assessment of divestitures during the period studied, even before it was published the Divestiture Study was being cited by the staff as justification for an increasingly rigid set of policies, especially for supermarket mergers."

Finally, in a recent article entitled "Toward Guidelines for Merger Remedies," the President of the AAI, called for, among other things, greater transparency in the merger remedy process.⁶⁸ The author pointed out that FTC's divestiture study was a commendable start in providing more and better analysis of past restructurings, but went on to state that the study

"...insufficiently framed the core question under review 'whether the buyer of the divested assets was able to enter the market and maintain operations.' The broader and more critical questions for future study are how well the divested assets performed and whether the buyer supplied real competition or merely cooperated in coordinated interaction or sat under the price-setting umbrella of the merged firm? Did the divested enterprise earn operating profits? Did it gain or lose market share? Did it constrain the merged firm's pricing, and did it contribute to innovation activity in the market generally? What is the realistic prognosis for sales and earnings in the years ahead?"

Given questions that have been raised about FTC's divestiture study, we spoke with FTC staff about the benefits and cost of an updated, more comprehensive study. They acknowledged that another study might be beneficial because FTC has not studied the effect of its recent approaches

⁶⁷*Supermarket Merger Investigations and Remedies*, Food Marketing Institute, Submission to the FTC Workshops on Merger Investigations and Remedies, June 18, 2002.

⁶⁸*Toward Guidelines for Merger Remedies*, Albert A. Foer, American Antitrust Institute, Case Western Reserve Law Review, Vol. 52:211, Fall 2001.

on the viability of buyers of divested assets or on competition in the marketplace. Although they could not pinpoint the actual cost of doing another study, they said that it could be labor-intensive and burdensome on businesses. FTC staff told us that the 1999 study was extremely labor intensive and another study, especially one attempting to assess market competition in each market, would require extensive resource allocations. FTC staff said that they do not currently have resources to commit to such a study at this time. For example, in doing the 1999 study, FTC staff had to first manually review all FTC actions, during the fiscal years 1990 through 1994 time period, to identify consent orders involving mergers and then, determine which orders required divestitures. They said that it might be easier today because recent divestiture orders are more readily available through FTC's Web site. However, our review of divestiture orders announced for public comment during fiscal years 1990 through 2000 revealed that the Web site does not provide a way to readily identify all of the divestiture orders FTC announced or made final each year.

Additionally, FTC staff told us that they would be concerned that such an effort could be burdensome on businesses.⁶⁹ For example, they said that they would have to rely on buyers of divested assets to obtain information post-divestiture, and currently, buyers are not parties to divestiture orders. Thus, currently buyers are not required to provide information to FTC post-divestiture. In performing the 1999 study, FTC staff relied on the cooperation of buyers to collect information for its divestiture study and, as noted previously, 13 of the 50 buyers (26 percent) did not participate in the study. However, FTC is currently examining whether it should take steps to overcome this problem. In June 2002, FTC began holding a series of public workshops to obtain insights into its merger remedy process. The workshops are designed to address, among other things, whether FTC should require the buyers of divested assets to report on their operations of the divested assets to permit FTC to better determine whether its remedy provisions have achieved the objective of maintaining or restoring competition in the relevant market.⁷⁰ The workshops also will consider

⁶⁹The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) seeks to ensure that federal agencies balance their need to collect information with the paperwork burden imposed on the public in complying with the collection. The act requires agencies to estimate the burdens that their individual collections impose on the public. FTC estimated the total burden for the divestiture study at 897 hours, rounded to 1,000 hours to allow for small additions, such as subsequent buyers of divested assets.

⁷⁰FTC news release, March 15, 2002, FTC Initiates "Best Practices Analysis" for Merger Review Process.

what any such reporting requirements should entail, how long they should be in place, and the impact of any such obligations on potential buyers' interest in acquiring divestiture assets.

FTC officials have frequently noted in speeches that if a merger does not result in restored competition, the remedy is not a success. For example, in a March 2001 speech, the then Acting Director of the Bureau of Competition said that consumers should not bear the risk of an inadequate or ineffective remedy. "A merger is forever... and, therefore, so is the harm caused by an incomplete remedy."⁷¹ These views are consistent with the then Chairman's statement in a February 2000 speech: "The law is clear that divestiture and other restructuring remedies should not be adopted unless they are likely to restore fully the competition lost as a result of the merger."⁷² He further said, "Enforcement agencies should not be expected and would not be justified in making the same mistake over again. If restructuring in a particular industry and in similar circumstances has been unsuccessful, enforcement officials have a responsibility to determine why." Moreover, FTC in explaining antitrust laws has said that a merger that lessens competition can lead to higher prices, reduced availability of goods or services, lower quality of products, and less innovation.⁷³ Despite this recognition, FTC has not fully evaluated whether the divestitures it has approved have achieved its goal of maintaining or restoring competition in the marketplace.

Conclusions

FTC's mission is, in part, to prevent business practices that are anticompetitive, deceptive, or unfair to consumers. FTC attempts to achieve its mission through preventing anticompetitive mergers from taking place. FTC's approaches to merger remedies have evolved over time. In fiscal year 1996, based on past experiences and preliminary findings of its divestiture study, FTC developed preferences for how to structure divestitures and began to modify its divestiture approaches. FTC

⁷¹*Report from the Bureau of Competition*, Molly S. Boast, Acting Director, Bureau of Competition, Federal Trade Commission, before the American Bar Association Antitrust Section, Spring meeting 2001, Washington, D.C., March 29, 2001.

⁷²*"The Nature and Limits of Restructuring in Merger Review,"* Robert Pitofsky, Chairman, FTC, February 17, 2000.

⁷³*"Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws."*

has not studied the effect of its recent approaches on the viability of buyers of divested assets or on competition in the marketplace. For example, in the grocery store industry, clean sweep divestitures, single buyers, and up-front buyers have been used with greater frequency in the late 1990s—a period not covered in FTC’s 1999 divestiture study. Because FTC has not systematically reviewed divestiture orders made final after fiscal year 1994, FTC does not know how these practices have impacted the viability of the buyers of divested assets or prices and/or innovation in the marketplace—key factors FTC uses to measure competition. Consequently, FTC cannot state that recent divestiture orders have, among other things, maintained or restored competition in the affected markets, or that smaller buyers continue to be as competitive as their larger counterparts in operating the divested assets.

Although the cost of doing a study of its recent divestiture orders could be considerable, such a study would give FTC the opportunity to develop and design a methodology to (1) overcome some of the limitations encountered during the earlier study; (2) provide greater insights into the impact of its divestiture preferences on potential buyers, including smaller businesses; and (3) better examine the short and long-term effects of various divestiture preferences on the markets in which divestitures take place. FTC staff acknowledged the benefit of conducting a more rigorous and comprehensive study to determine whether recent merger remedies are achieving their intent—to adequately maintain or restore competition and protect consumers so that consumers have the benefit of low prices and good product variety. Similarly, antitrust practitioners have said that collecting relevant economic data and including the data within the scope of future studies would place FTC in a better position to reach firm conclusions regarding the success or failure of its divestiture practices and to shape future divestiture orders.

We recognize the difficulties and costs inherent in conducting an evaluation that assesses the impact of FTC’s divestiture practices on the marketplace. However, the more that economic data are brought to bear on the questions of how FTC’s divestiture practices impact the marketplace, including smaller businesses, the more confident FTC can be that divestitures are having the intended effect of maintaining or restoring competition. We also recognize that the need for and benefits of conducting the analysis must be balanced against the costs of collecting the data as well as balanced against any logistical and legal implications. FTC could not provide us with an estimate of the costs to perform a more comprehensive divestiture study, nor could we estimate the costs. While we are aware that the costs could

be significant, we believe that the lack of a more rigorous and comprehensive study places FTC at risk of not being in the position to fully understand the effects of its divestiture practices, including possible negative effects, on competition in the marketplace—a risk that FTC officials have said that FTC cannot afford to take.

Recommendation

To ensure that FTC has complete and up-to-date information on the effectiveness of divestitures in industries in the retail sector, we recommend that the Chairman of FTC direct the Bureaus of Competition and Economics to undertake a study of the impact of divestiture orders made final since fiscal year 1994 that require divestitures in the retail sector on (1) the viability of buyers of divested assets and (2) competition in the marketplace. If the findings show that FTC's intended results have not been achieved, we further recommend that FTC explore expanding the study to include divestiture orders for other sectors of the economy that have been impacted by changes to FTC divestiture practices during the mid-1990s.

Agency Comments and Our Evaluation

In commenting on our report, FTC said that the report adds important information about the Commission's role in enforcing antitrust laws related to mergers and should lead to further improvement in the Commission's merger enforcement efforts. In its comments, which are included as appendix VIII, FTC said that our recommendation is consistent with the Commission's own objectives and its most recent Government Performance and Results Act report, which states that the Commission plans to "study and evaluate the remedies used in past antitrust cases, particularly divestiture orders used to resolve merger cases." FTC noted that it currently has two related studies underway concerning hospital and petroleum mergers.

FTC also provided additional information on the history of the Commission's divestiture and remedy practices. This information describes the impetus for Congress' passage of the HSR Act and reiterated that FTC is taking certain actions to seek public input on merger remedy issues, as discussed in our report. Additionally, FTC previously provided technical comments, which have been incorporated in this report where appropriate.

We are sending copies of this report to the Chairman of the Federal Trade Commission and interested congressional committees. We will also provide copies to others on request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact John F. Mortin at 202-512-5727 or me at 202-512-4636.

A handwritten signature in black ink that reads "Paul L. Jones". The signature is written in a cursive style with a long, sweeping tail on the letter "s".

Paul L. Jones
Director, Justice Issues

Objectives, Scope, and Methodology

Our objectives were to describe (1) the history of Federal Trade Commission's (FTC) clean sweep divestiture, single buyer, and up-front buyer practices within the context of FTC's overall merger remedies, and the circumstances under which these practices have been used; (2) the extent of FTC's use of these practices in the grocery store, drug store, funeral services,⁷⁴ and gas station industries; (3) the level of small business participation in purchasing divested assets in the four industries and the factors that may explain the level of small business participation; and (4) FTC's efforts to gauge the success or failure of these divestiture practices and the impact of these practices on the marketplace, especially small businesses. We also obtained information on the nature of comments FTC received pertinent to these practices in the four industries as well as comments on how they impacted the ability of small businesses to purchase divested assets. As agreed with your staff, we focused on divestitures required by consent orders that FTC announced for public comment between fiscal years 1990 through 2000 for four industries—grocery store, drug store, funeral services, and gas station industries—that sell products and/or services directly to consumers. We focused on proposed consent orders that were announced for public comment during fiscal years 1990 through 2000,⁷⁵ rather than consent orders made final during this period, because in most cases, at the point that FTC accepts a proposed consent order for public comment, the parties are allowed to consummate their merger.⁷⁶ Our work was limited to publicly available information because, according to FTC, under the Hart-Scott-Rodino Act (HSR Act) of 1976, FTC is prohibited from disclosing information provided by parties to merger transactions.

To address these objectives, we performed our work at FTC headquarters in Washington, D.C. We also contacted officials from various associations

⁷⁴The Funeral Services industry is classified as a Personal Services Industry under the Standard Industrial Classification description. However, we treated the funeral services industry as a retail-related trade industry because it provides goods and services to an end-user.

⁷⁵We used the date of FTC's press release announcing its acceptance of a proposed consent order as a proxy for the date that FTC entered into the proposed consent order with the merging parties because (1) many of the proposed consent orders posted on FTC's Web site did not contain a date, and (2) according to FTC staff, FTC typically issues a press release announcing the agency's acceptance of a proposed consent order within 1 or 2 days of the agreement.

⁷⁶According to FTC staff, final consent orders issued by FTC rarely differ from the proposed consent orders.

that represent or deal with small and/or independent businesses—the National Grocers Association (NGA), the Food Marketing Institute (FMI), the National Community Pharmacists Association (NCPA), the National Funeral Directors Association (NFDA), the Petroleum Marketers Association of America (PMAA), the National Federation of Independent Business (NFIB), the National Business Association (NBA), the National Small Business United (NSBU), the SCORE Association (SCORE), and the U.S. Chamber of Commerce. In addition, we obtained and reviewed relevant documents prepared by and discussed FTC’s divestiture practices with antitrust practitioners—attorneys and economists in private practice who specialize in antitrust issues—academicians and officials with the Small Business Administration (SBA).

To address the first objective concerning the history of FTC’s clean sweep divestiture, single buyer, and up-front buyer practices within the context of FTC’s overall merger remedies, and the circumstances under which these practices have been used, we met with staff from FTC’s Bureaus of Competition and Economics and its Office of General Counsel and interviewed a former FTC Commissioner and former staff. We also reviewed relevant FTC public speeches, articles, and documents prepared by current and former FTC Commissioners and staff between the years 1995 and 2002 pertaining to FTC’s divestiture practices. Furthermore, we obtained and reviewed relevant documents prepared by and talked with antitrust practitioners, academicians, associations that represent small and/or independent businesses, and officials from SBA to obtain their views of FTC’s divestiture practices. In addition, we met with an official of the Department of Justice’s (DOJ) Antitrust Division to obtain general information on DOJ’s merger remedies.

To address the second objective concerning the extent of FTC's use of the clean sweep divestiture, single buyer, and up-front buyer practices in the grocery store, drug store, funeral services, and gas station industries, we analyzed FTC consent orders that required a divestiture(s), also called divestiture orders, that were announced for public comment during fiscal years 1990 through 2000. Because FTC did not have a publicly available listing of the divestiture orders announced for public comment during fiscal years 1990 through 2000, we reviewed several sources of information. To identify divestiture orders FTC announced for public comment during fiscal years 1990 through 1995, we reviewed FTC decision books for calendar years 1989 through 1995 to identify all divestiture orders issued by FTC during that period.⁷⁷ We then reviewed FTC press statements announcing each of the proposed divestiture orders to determine the fiscal year in which FTC announced the order. To identify divestiture orders FTC announced for public comment during fiscal years 1996 through 2000, we reviewed a summary of FTC's Bureau of Competition activity for fiscal year 1996 through March 31, 2000.⁷⁸ We then reviewed FTC monthly actions announced for public comment and posted on FTC's Web site for the period April 1, 2000, through September 30, 2000, to identify the divestiture orders FTC announced for public comment during April 2000 through September 2000. Finally, we reviewed FTC's HSR Act annual reports⁷⁹ to Congress for fiscal years 1990 through 2000.

⁷⁷Federal Trade Commission Decisions, volumes 112 through 120.

⁷⁸American Bar Association Antitrust Section, Spring Meeting, Summary of Bureau of Competition Activity Fiscal Year 1996 through March 31, 2000.

⁷⁹Annual reports submitted jointly by FTC and DOJ pursuant to the HSR Act.

After we identified the 153 divestiture orders that were announced for public comment during fiscal years 1990 through 2000, we reviewed them to determine which ones required divestitures in the grocery store, drug store, funeral services, and gas station industries. We determined that during the 11-year period, FTC announced for public comment 33 divestiture orders that required divestitures in the four industries. However, we eliminated two funeral services divestiture orders from our review because, according to FTC staff, as of June 30, 2002, the divestitures had not taken place.⁸⁰

After we identified the divestiture orders for the four industries, we used a structured data collection instrument to gather information from each of the 31 divestiture orders and related documents, such as press releases announcing a proposed divestiture order, complaints, analyses to aid public comment, final divestiture orders, modifications to the orders, divestiture applications, and FTC letters approving divestiture applications. Specifically, we collected information on, among other things, (1) the date FTC announced the divestiture order for public comment; (2) the geographic market in which FTC required a divestiture; (3) the buyer(s) of the divested assets in each geographic market, both the “direct” buyers—buyers that purchased the divested assets directly from the merging parties—and the indirect buyers—third parties that purchased the assets from direct buyers of divested assets, generally a wholesaler; (4) whether the buyers were identified in the divestiture order at the time FTC announced it for public comment; and (5) whether the divestiture order required a single buyer and/or an up-front buyer. Because FTC’s divestiture orders and related documents typically do not indicate whether a divestiture is a clean sweep, we relied on clean sweep data provided by FTC.

Because FTC speeches about its merger remedies indicated that FTC began to make changes in its divestiture practices during fiscal year 1996, we focused our analysis of the use of clean sweeps, single buyers, and up-front

⁸⁰ The Service Corporation International and LaGrone divestiture order (C-3959) announced for public comment on May 18, 2000, required a divestiture of a funeral home only if the corporation acquired a particular funeral home. As of June 30, 2002, the corporation had not acquired the funeral home; therefore, it had no obligation to divest the funeral home. The Loewen Group Inc., and Loewen Group International, Inc., and Heritage Family Funeral Services, Inc., divestiture order (C-3678) announced for public comment on May 14, 1996, required a divestiture of a funeral home. As of June 30, 2002, the merger had not taken place; therefore, it has no obligation to divest the funeral home.

buyers on two periods—the period from fiscal years 1990 through 1995, before FTC started to make these changes, and fiscal years 1996 through 2000, the period during which FTC staff announced that FTC had begun to make changes. We determined the extent to which these practices were used in each of the two periods for the 31 divestiture orders included in our review. Additionally, because according to FTC staff each industry operates differently, we performed separate analyses for each of the four industries.

To address the third objective concerning the level of small business participation in purchasing divested assets in the four industries and the factors that may explain the level of small business participation, we obtained revenue data for the buyers of the divested assets, both the direct and indirect buyers. Because according to FTC staff, due to confidentiality restrictions, they could not provide us with the revenue data for the buyers of the divested assets, we obtained the revenue data from several sources. For publicly held buyers, we obtained the data from public sources, such as the Securities and Exchange Commission filings and Valueline Magazine. For privately held buyers for which we could not locate the data through publicly available sources, we contacted the buyers directly to obtain the data. When possible, we obtained the revenue data for the 3 most recent completed fiscal years prior to the buyers being identified in the proposed divestiture orders or in the divestiture applications. If revenue data were not available for the 3 most recent completed fiscal years, we obtained the data for the prior 2 years or year. For the direct buyer analyses, we were not able to obtain revenue data for 3 of the buyers of divested grocery store assets, and for the analyses that included direct and indirect buyers, we were not able to obtain revenue data for 5 of the buyers.

Because there were so few buyers of divested assets in the drug store, funeral services, and gas station industries during the period, we limited our analysis to the grocery store industry. According to FTC staff, SBA officials, grocery industry officials, and representatives of relevant small business associations, there is no generally accepted standard by which one could measure the relative size of businesses using revenues. They acknowledged that SBA's definition of a small business, which ranged from \$13.5 million to \$20 million in receipts from 1990 through 2000 for the grocery store industry, might be one indicator. However, they told us that SBA's threshold for a small grocery store business is too low given the relative size of grocery store businesses.

Because there appeared to be no generally accepted definition of a small grocery store business, we used two approaches to determine the level of smaller business participation in purchasing divested grocery store assets in fiscal years 1990 through 1996 and fiscal years 1997 through 2000. We used these two time periods for the size of buyers analyses, instead of the fiscal years 1990 through 1995 and fiscal years 1996 through 2000 time periods that we used in our analyses of FTC's divestiture practices, primarily because fiscal year 1997 is the first full fiscal year after FTC began altering its approach to divestitures. Additionally, there were too few observations in the fiscal years 1990 through 1995 period. Our analyses of the size of the buyers is based on the dates of the merging parties' divestiture applications or, in the case of up-front buyers, the dates of the proposed divestiture orders—generally the point at which FTC receives the revenue data for the proposed buyers to include in its review of the viability of the proposed buyers. Because FTC did not start to use up-front buyers in grocery store divestitures until fiscal year 1996, divestitures in the earlier period took much longer to occur. Additionally, fiscal year 1997 is the first full fiscal year after FTC began altering its approach to divestitures.

In regard to the two approaches we used to determine the level of smaller business participation in purchasing divested assets, we first analyzed the median of the average annual revenues of the buyers.⁸¹ Specifically, we calculated the average annual revenues of each of the buyers of divested grocery store assets using the buyers' 3 years revenues, when available, prior to their purchase of the divested assets in constant 2000 dollars. We then computed the median of the average annual revenues for all the buyers for the two periods and for fiscal years 1990 through 2000. We used the overall median of the buyers' average annual revenues for fiscal years 1990 through 2000 as a benchmark and determined the number of buyers in each of the periods that were below the overall median. We considered buyers below the overall median to be "smaller."

⁸¹Our reported results did not include buyers who formed newly created businesses to purchase the divested assets or the buyers for which we could not obtain their revenues. However, if we assume that all newly formed businesses are small, our results are unchanged—fewer smaller businesses purchased divested grocery store assets after fiscal year 1996.

Second, we used SBA's size standard for a small grocery store business at the time the buyers of divested assets were either identified in the divestiture order or in the divestiture application to determine the extent to which buyers in both periods did or did not meet SBA's thresholds.⁸² However, we used the buyers' average annual revenues in constant 2000 dollars before they purchased the divested assets as a proxy for receipts, because we were unable to obtain data on the buyers' receipts. We also adjusted SBA's size standards to constant 2000 dollars. We then determined if there was a statistically significant change in the number of buyers that met the adjusted SBA thresholds for the two periods.

Additionally, to examine changes in the size of the buyers, we compared the median of the average annual revenues of the buyers for the two periods and determined whether differences in the medians were statistically significant. (Appendix II provides more detailed information on our approaches for determining the level of smaller business participation in purchasing divested assets in the grocery store industry.)

As part of our work addressing the factors that may explain the level of small business participation in purchasing divested assets in the four retail industries included in our review, we interviewed staff from FTC's Bureaus of Competition and Economics and its Office of General Counsel. We also interviewed antitrust practitioners and academicians to obtain their views on factors that may explain a decline in the level of small business participation in purchasing divested assets. In addition, we reviewed relevant articles to determine factors that may explain the level of small business participation. Unless provided in a public comment, we could not obtain information on small businesses that may have attempted to purchase divested assets but were not selected or approved as a buyer.

⁸²SBA defines small business according to small business size standards. SBA's size standards vary by Standard Industrial Code industry and are almost always based on a company's average annual receipts or number of employees. The small business size standard for the grocery store industry has been modified for the effect of inflation once during the 11-year period covered in our review from \$13.5 million effective December 21, 1989, to \$20 million effective April 7, 1994. The standard remained at \$20 million until February 22, 2002, when SBA increased it to \$23 million. According to an SBA official, even though technically there are slight differences between revenues and receipts, for most small businesses, those two values are synonymous.

To address the fourth objective concerning FTC's efforts to gauge the success or failure of its divestiture approaches and the impact of its approaches on the marketplace, especially small businesses, we reviewed FTC's 1999 Divestiture Study⁸³ and interviewed and reviewed relevant speeches and documents prepared by current and former FTC Commissioners and staff and antitrust practitioners. Specifically, we reviewed the study to determine whether it was methodologically sound and contextually sophisticated. We also interviewed and reviewed documents prepared by economists who consult merging parties and academic experts to obtain their views on FTC's 1999 Divestiture Study and how FTC should measure the success of its divestiture approaches.

To obtain information on the nature of comments FTC received pertinent to its clean sweep divestiture, single buyer, and up-front buyer practices and how these practices impact the ability of small businesses to purchase divested assets, we reviewed FTC public case files for the 31 divestiture orders included in our review to identify the public comments FTC received concerning the divestiture orders and divestiture applications. FTC staff told us that in some cases, the commenter requests that their comments be kept confidential. FTC keeps the confidential comments in nonpublic files. We did not review the nonpublic files nor did we verify that the public files contained all of the nonconfidential public comments received by FTC. We relied on FTC to provide us with the information. We reviewed each of the 1,902 public comments contained in the files and, when available, FTC's responses to the comments to determine if they related to the ability of small businesses to purchase divested assets due to FTC's divestiture practices.

In addition, we interviewed FTC staff to obtain information on their process for obtaining public comments and to determine whether FTC had received any complaints, outside of the public comment process, concerning its clean sweep divestiture, single buyer, and up-front buyer practices and how these practices impact the ability of small businesses to purchase divested assets. To determine if associations that represent small and independent businesses had concerns related to the impact of FTC's divestiture practices on the ability of small businesses to purchase divested assets, we also interviewed representatives from 10 associations whose membership in general, consists of the following:

⁸³A Study of the Commission's Divestiture Process, Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, William Baer, Director, 1999.

- NGA is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry.
- FMI conducts programs in research, education, industry relations, and public affairs on behalf of 2,300 food retailers and wholesalers in the United States and around the world. Its retail membership comprises of independent supermarkets, large multistore chains, and regional firms.
- NCPA represents the pharmacist owners, managers, and employees of nearly 25,000 independent community pharmacies across the United States. The independent community pharmacists are small business entrepreneurs and multifaceted health care providers.
- NFDA provides advocacy, education, information, products, programs, and services to help funeral directors enhance the quality of service to families. Ninety-three percent of its members are small business owners/operators with an average of four full-time employees.
- PMAA is a federation of 42 state and regional trade associations representing approximately 7,850 independent petroleum marketers nationwide. It seeks to further the common business interest of the petroleum marketing industry.
- NFIB is an advocacy organization representing 600,000 small and independent businesses. Its membership includes independent professional, retailers, service providers, manufacturers, farmers, and wholesalers.
- NBA is a nonprofit organization that supports and educates the small business community and the self-employed.
- NSBU is an advocacy organization representing over 65,000 U.S. members. It informs small business owners about legislative and regulatory issues that affect them.
- The U.S. Chamber of Commerce is a nonprofit business federation representing businesses of all sizes. More than 96 percent of its members are small businesses with 100 or fewer employees.
- The SCORE Association is a national, nonprofit association with 11,500 volunteer members and 389 chapters throughout the United States and

its territories. It provides general business advice to small businesses and to persons interested in starting a business.

We also reviewed comments provided to FTC for its June 2002 workshop on merger remedies.⁸⁴ In addition, we met with officials from SBA's Office of Advocacy to determine if the agency has received any complaints from small businesses about their ability to purchase divested assets due to FTC's divestiture practices. Finally, while obtaining revenue data from buyers of divested assets, representatives of 11 grocery store businesses with average annual revenues of \$200 million or less provided anecdotal comments about the challenges that smaller businesses face in purchasing divested assets and maintaining their viability.

We did our work between April 2001 and August 2002 in accordance with generally accepted government auditing standards.

⁸⁴FTC Press Release, May 21, 2002, "FTC Announces First Workshop on Merger Remedies Scheduled for June 18, 2002."

GAO Methodology to Determine the Level of Smaller Business Participation in Purchasing Divested Grocery Store Assets

As discussed in appendix I, to address our objective to determine the level of smaller business participation in purchasing divested assets in the grocery store, drug store, funeral services, and gas station industries, we collected publicly available data on the revenue of buyers of divested assets, both the direct and indirect buyers, for the four industries and, when public data were not available, from the buyers of divested assets. We did not have enough buyers in the drug store, funeral services, and gas station industries to analyze statistically the differences in the level of small business participation in purchasing divested assets in these industries from fiscal years 1990 through 2000. Therefore, we limited our analysis to the grocery store industry.

We used two approaches to determine the level of smaller business participation in purchasing divested grocery store assets in fiscal years 1990 through 1996 and fiscal years 1997 through 2000.⁸⁵ The analysis was done using these two time periods primarily because fiscal year 1997 was the first full fiscal year after FTC began altering its approach to divestitures and began increasingly using clean sweep, single buyer, and up-front buyer divestiture practices in the grocery store industry—practices that may impact the level of smaller business participation in purchasing divested assets. We did our analysis for the direct and indirect buyers of divested grocery store assets.⁸⁶

First, we analyzed the median of the average annual revenues of the buyers. Specifically, we calculated the average annual revenues of each of the buyers of divested grocery store assets using the 3 years revenues prior to the purchase of the divested assets, when available, in constant 2000

⁸⁵Our analyses of the level of smaller business participation in purchasing divested assets are based on the dates of the merging parties' divestiture applications or, in the case of up-front buyers, the dates of the proposed divestiture orders—generally the point at which FTC receives the revenue data for the proposed buyers to include in its review of the viability of the proposed buyers.

⁸⁶Analysis of the indirect buyers refers to the combined data for direct buyers that purchased divested assets and did not resell these assets and third parties who purchased the assets from direct buyers of the divested assets, generally a wholesaler.

Appendix II
GAO Methodology to Determine the Level of
Smaller Business Participation in Purchasing
Divested Grocery Store Assets

dollars.⁸⁷ We then computed the overall median of the average annual revenues for all the buyers for fiscal years 1990 through 2000. Using the overall median of the buyers' average annual revenues for fiscal years 1990 through 2000 as a benchmark, we determined the number of buyers in each of the two periods—fiscal years 1990 through 1996 and fiscal years 1997 through 2000—that were below the overall median. We considered buyers with average annual revenues below the overall median to be “smaller.”

To determine if the changes in the level of smaller business participation in purchasing the divested assets in the two time periods were statistically significant, we used the Fisher Exact test (in MegaStat, by J.B. Orris, Butler University), which compares the percentage of smaller buyers in each time period. The results, presented in table 4, indicate that the percentage of smaller buyers FTC approved to purchase divested assets in the grocery industry during fiscal years 1997 through 2000 was significantly less than the percentage of smaller buyer approved during fiscal years 1990 through 1996, when smaller businesses were both direct buyers and indirect buyers of divested grocery store assets.

⁸⁷There was a total of 51 direct buyers that purchased divested assets over the 11-year period. Seven of the buyers in the fiscal years 1990 to 1996 period were newly formed at the time they purchased the divested assets. Therefore, the buyers did not have prior-year revenues. We could not obtain the revenue data for 3 buyers, of which 2 were in the earlier period and 1 in the latter. We calculated average revenues based on the best available data for the 41 direct buyers for which we were able to obtain revenue data. For 1 of those buyers, the data were available for only 1 year. For another buyer, we calculated the average annual revenues over 2 years because the buyer was only in business 2 years prior to purchasing the divested assets. For the remaining 39 buyers, we calculated the average annual revenues over 3 years. In addition, there was a total of 70 direct and indirect buyers that purchased divested assets over the 11-year period. Six of the buyers in the fiscal years 1990 to 1996 period and 5 of the buyers in the fiscal years 1997 to 2000 period were newly formed at the time they purchased the divested assets. Therefore, the buyers did not have prior-year revenues. We could not obtain the revenue data for 5 buyers, of which 2 were in the earlier period and 3 in the latter. For 2 of the 54 buyers for which we were able to obtain revenue data, the data were available for only 1 year. Because 3 of the buyers were not in business for the entire 3 years before they purchased the divested assets, we calculated the average annual revenues over 2 years for 1 of the buyers and used revenue for 1 year for 2 of the buyers. For the remaining 49 buyers, we calculated the average annual revenues over 3 years.

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GAO Methodology to Determine the Level of
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Divested Grocery Store Assets

Table 4: Analysis of Buyers of Divested Grocery Store Assets That Were Below the Overall Median of the Average Annual Revenues for Fiscal Years 1990 through 2000

| Industry | Fiscal years 1990 through 1996 | | | Fiscal years 1997 through 2000 | | |
|---------------|--------------------------------|---------------------------------|---------------------------|--------------------------------|---------------------------------|---------------------------|
| | Total number of buyers | Buyers below the overall median | Percent of smaller buyers | Total number of buyers | Buyers below the overall median | Percent of smaller buyers |
| Grocery store | Direct 15 | 12 | 80 ^a | Direct 26 | 8 | 31 ^a |
| | Indirect 15 | 11 | 73 ^a | Indirect 39 | 16 | 41 ^a |

^aThe percent of smaller buyers were statistically different between the two periods, at the 5-percent significant level or lower, using the Fisher Exact test. (The p-values of the test are 0.0029 for the direct buyers and 0.0332 for the indirect buyers.)

Source: GAO's analysis of revenue data from public sources and direct and indirect buyers of divested assets.

Second, we used the Small Business Administration's (SBA) size standard for a small grocery store business to identify smaller buyers.⁸⁸ We used the buyers' average annual revenues in constant 2000 dollars before they purchased the divested assets as a proxy for receipts, because we were unable to obtain data on the buyers' receipts.⁸⁹ We also adjusted SBA's size standard to constant 2000 dollars. Table 5 shows SBA's size standard in current and in constant 2000 dollars for each year for the fiscal years 1990 through 2000 time period. We then determined the number of direct and indirect buyers of divested grocery store assets in each of the two periods that were below the adjusted SBA size standard for the grocery store industry. The results, presented in table 6, indicate that the percentage of smaller buyers FTC approved to purchase divested assets in the grocery industry during fiscal years 1997 through 2000 was significantly less than the percentage of smaller buyer approved during fiscal years 1990 through 1996 when smaller businesses were both direct and indirect buyers of divested grocery store assets.

⁸⁸SBA defines small business according to small business size standards. SBA's size standards vary by Standard Industrial Code industry and are almost always based on a company's average annual receipts or number of employees. The small business size standard for the grocery store industry has been modified for the effect of inflation once during the 11-year period covered in our review from \$13.5 million effective December 21, 1989, to \$20 million effective April 7, 1994.

⁸⁹ According to an SBA official, even though technically there are slight differences between revenues and receipts, for most small businesses, those two values are synonymous.

Appendix II
GAO Methodology to Determine the Level of
Smaller Business Participation in Purchasing
Divested Grocery Store Assets

Table 5: SBA's Size Standard for the Grocery Store Industry

(Dollars in millions)

| Year | Current dollars | Constant 2000 dollars^a |
|-------------|------------------------|--|
| 1990 | \$13.5 | \$15.6 |
| 1991 | \$13.5 | \$15.3 |
| 1992 | \$13.5 | \$15.1 |
| 1993 | \$13.5 | \$14.9 |
| 1994 | \$20.0 | \$22.0 |
| 1995 | \$20.0 | \$21.6 |
| 1996 | \$20.0 | \$21.0 |
| 1997 | \$20.0 | \$20.9 |
| 1998 | \$20.0 | \$21.1 |
| 1999 | \$20.0 | \$20.8 |
| 2000 | \$20.0 | \$20.0 |

^aThe constant dollars are based on the producer price index by stage of processing (total finished goods) in the Economic Report of the President (2000), Table B-66, p. 397.

Source: GAO's conversion of SBA's data.

Table 6: Analysis of Buyers of Divested Grocery Store Assets That Were Below SBA's Size Standard for Fiscal Years 1990 through 2000

| Industry | Fiscal years 1990 through 1996 | | | Fiscal years 1997 through 2000 | | |
|-----------------|---------------------------------------|---|----------------------------------|---------------------------------------|---|----------------------------------|
| | Total number of buyers | Buyers below SBA's size standard | Percent of smaller buyers | Total number of buyers | Buyers below SBA's size standard | Percent of smaller buyers |
| Grocery store | Direct 15 | 4 | 27 ^a | Direct 26 | 1 | 4 ^a |
| | Indirect 15 | 4 | 27 ^a | Indirect 39 | 6 | 15 ^a |

^aThe percent of smaller buyers were statistically different between the two periods, at the 10- percent significant level or lower, using the Fisher Exact test. (The p-values of the test are 0.0514 for the direct buyers and 0.9079 for the indirect buyers.)

Source: GAO's analysis of revenue data from public sources and direct and indirect buyers of divested assets.

Additionally, to examine changes in the size of the buyers, for both the direct and the indirect buyers, we calculated the overall medians of the average annual revenues for fiscal years 1990 through 1996 and fiscal years 1997 through 2000. We then compared the overall medians of the annual revenues of the buyers for the two time periods. To determine if the

Appendix II
GAO Methodology to Determine the Level of
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changes in the sizes of the buyers of the divested assets in the two time periods were statistically significant, we used the Wilcoxon-Mann/Whitney test for two independent samples (in MegaStat, by J.B. Orris, Butler University), which compares the locations (medians) of two independent samples. The results, presented in table 7, indicate that the sizes of the buyers have increased significantly from the fiscal years 1990 through 1996 to fiscal years 1997 through 2000, for both the direct and indirect buyers.

Table 7: Analysis of Revenues of Buyers of Divested Assets in the Grocery Store Industry for Fiscal Years 1990 through 2000

(Dollars in millions)

| Industry | Fiscal years 1990 through 1996 | | Fiscal years 1997 through 2000 | |
|---------------|--------------------------------|---|--------------------------------|---|
| | Total number of buyers | Median of average annual revenues of buyers | Total number of buyers | Median of average annual revenues of buyers |
| Grocery store | Direct 15 | \$89 ^a | Direct 26 | \$3,300 ^a |
| | Indirect 15 | \$78 ^a | Indirect 39 | \$288 ^a |

^aThe median of the average annual revenues of the buyers were statistically different between the two periods, at the 5- percent significant level or lower, using the Wilcoxon-Mann/Whitney test. (The p-values of the test are 0.0000 for both the direct buyers and for the indirect buyers.)

Source: GAO's analysis of revenue data from public sources and direct and indirect buyers of divested assets.

FTC Divestiture Orders in the Grocery Store, Drug Store, Funeral Services, and Gas Station Industries, Fiscal Years 1990 through 2000

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|---------------------|-----------------|--|---|---|---|
| Supermarkets | | | | | |
| 9228 | 891-0055 | Promodes, S.A.+ Red Food Stores, Inc. & The Kroger Company | Retail sale of food and grocery items in supermarkets. | February 27, 1990 | 1990 |
| C-3391 | 921-0015 | The Vons Companies, Inc. & Williams Bros. Markets, Inc. | Retail sale and distribution of food and grocery items in supermarkets. | May 21, 1992 | 1992 |
| 9266 | 911-0123 | Red Apple Companies, Inc. + John A. Catsimatidis + Supermarket Acquisition Corp. + Designcraft Industries, Inc. & Sloan's Supermarkets, Inc. | Retail sale of food and grocery products in supermarkets. | December 13, 1994 | 1995 |
| C-3577 | 951-0009 | The Penn Traffic Company & American Stores Company | Retail sale of food and grocery products in supermarkets. | January 19, 1995 | 1995 |
| C-3585 | 941-0131 | Schnuck Markets, Inc. & National Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | March 8, 1995 | 1995 |
| C-3584 | 941-0130 | Schwegmann Giant Super Markets, Inc. & National Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | March 8, 1995 | 1995 |
| C-3649 | 951-0086 | The Stop and Shop Companies, Inc. & Purity Supreme, Inc. | Retail sale of food and grocery products in supermarkets. | November 1, 1995 | 1996 |
| C-3687 | 961-0052 | Koninklijke Ahold nv + Ahold USA, Inc. & The Stop & Shop Companies, Inc. | Retail sale of food and grocery products in supermarkets. | July 15, 1996 | 1996 |
| C-3784 | 971-0093 | Jitney-Jungle Stores of America, Inc. + Delta Acquisition Corporation & Delchamps, Inc. | Retail sale of food and grocery products in supermarkets. | September 12, 1997 | 1997 |
| C-3838 | 981-0134 | Albertson's, Inc. + Locomotive Acquisition Corporation & Buttrey Food and Drug Store Company, Inc. | Retail sale of food and grocery products in supermarkets. | September 22, 1998 | 1998 |
| C-3861 | 981-0254 | Koninklijke Ahold nv & Giant Food Inc. | Retail sale of food and grocery products in supermarkets. | October 20, 1998 | 1999 |
| C-3917 | 991-0024 | The Kroger Co. & Fred Meyer, Inc. | Retail sale of food and grocery products in supermarkets. | May 27, 1999 | 1999 |
| C-3986 | 981-0339 | Albertson's, Inc. + Abacus Holdings, Inc. & American Stores Company | Retail sale of food and grocery products in supermarkets. | June 22, 1999 | 1999 |

**Appendix III
 FTC Divestiture Orders in the Grocery Store,
 Drug Store, Funeral Services, and Gas
 Station Industries, Fiscal Years 1990 through
 2000**

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment^a | Fiscal year FTC announced divestiture order for public comment^a |
|-------------------------------------|------------------------|---|--|---|---|
| C-3934 | 991-0075 | Shaw's Supermarkets, Inc. + J Sainsbury plc & Star Markets Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | June 28, 1999 | 1999 |
| C-3905 | 991-0041 | The Kroger Co. & The John C. Groub Company, Inc. | Retail sale of food and grocery products in supermarkets. | August 23, 1999 | 1999 |
| C-3962 | 991-0308 | Delhaize America, Inc. (Food Lion) + Etablissements Delhaize Freres et Cie "Le Lion" S.A. & Hannaford Bros. Co. | Retail sale of food and grocery products in supermarkets. | July 25, 2000 | 2000 |
| Drug stores | | | | | |
| C-3540 | 941-0075 | Revco D.S., Inc. & Hook-SupeRx, Inc. | Sale of prescription drugs in retail stores. | July 15, 1994 | 1994 |
| C-3519 | 941-0024 | TCH Corporation & Green Equity Investors, L.P. & Kmart Corporation | Sale of prescription drugs in retail stores. | February 24, 1994 | 1994 |
| C-3546 | 941-0081 | Rite Aid Corporation & LaVerdiere's Enterprises, Inc. | Sale of prescription drugs in retail stores. | September 2, 1994 | 1994 |
| C-3721 C-3722 | 971-0016 971-0017 | J.C. Penney Company + Thrift Drug, Inc. & Eckerd Corporation & Rite Aid Corporation | Retail sale of pharmacy services to third-party payors. | December 9, 1996 | 1997 |
| C-3762 | 971-0060 | CVS Corporation & Revco D.S., Inc. | Retail sale of pharmacy services to third-party payors. | May 30, 1997 | 1997 |
| Funeral services^b | | | | | |
| C-3348 | 891-0086 | Sentinel Group, Inc. | Provision of funeral services. | July 30, 1991 | 1991 |
| C-3440 | 911-0087 | Service Corporation International & Sentinel Group, Inc. | Provision of funeral services. | July 30, 1991 | 1991 |
| C-3372 | 911-0127 | Service Corporation International & Pierce Brothers Holding Company | Provision of funerals. | November 29, 1991 | 1992 |
| C-3579 | 951-0012 | Service Corporation International + SCI Oregon Funeral Services, Inc. + UC Acquisition Corp. & Uniservice Corporation | Provision of funerals and provision of perpetual care cemetery services. | March 1, 1995 | 1995 |
| C-3646 | 951-0108 | Service Corporation International + Rocky Acquisition Corp. & Gibraltar Mausoleum Corporation | Provision of funerals, the provision of perpetual care cemetery services, and the provision of crematory services. | October 11, 1995 | 1996 |

**Appendix III
FTC Divestiture Orders in the Grocery Store,
Drug Store, Funeral Services, and Gas
Station Industries, Fiscal Years 1990 through
2000**

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment^a | Fiscal year FTC announced divestiture order for public comment^a |
|--------------------------|------------------------|---|---|---|---|
| C-3677 | 931-0052 | The Loewen Group Inc. + Loewen Group International, Inc. & Garza Memorial Funeral Home, Inc. + Thomae-Garza Funeral Directors, Inc. (Texas) | Provision of funerals. | May 14, 1996 | 1996 |
| C-3869 | 981-0353 | Service Corporation International & Equity Corporation International | Funeral services; cemetery services. | January 15, 1999 | 1999 |
| Gas stations | | | | | |
| C-3803 | 971-0026 | Shell Oil Co. & Texaco Inc. | Refining, transportation, terminaling, wholesale sales, and retail sales of conventional unleaded gasoline, CARB-II gasoline; diesel fuel, kerosene jet fuel, and asphalt; and the transportation of undiluted heavy crude oil to the San Francisco, Cal. area. | December 19, 1997 | 1998 |
| C-3868 | 981-0345 | The British Petroleum Company p.l.c & Amoco Corporation | Terminals of gasoline and other light petroleum products; wholesale sale of gasoline. | December 30, 1998 | 1999 |
| C-3907 | 991-0077 | Exxon Corporation & Mobil Corporation | Marketing of motor gasoline; refining and marketing of CARB gasoline; bidding for and refining of jet fuel for the U.S. Navy; terminaling of gasoline and other light petroleum products; pipeline transportation of light petroleum products; pipeline transportation of crude oil; refining and marketing of paraffinic base oil; production and sale of jet turbine oil. | November 30, 1999 | 2000 |

^aWe used the date of FTC's press release announcing its acceptance of a proposed consent order as a proxy for the date that FTC entered into the proposed consent order with the merging parties because (1) many of the proposed consent orders posted on FTC's website did not contain a date and (2) according to FTC staff, FTC typically issues a press release announcing FTC's acceptance of a proposed consent order within 1 or 2 days of the agreement.

^bExcludes two divestiture orders in the funeral services industry. The Service Corporation International and LaGrone divestiture order (C-3959; 981-0108) announced for public comment on May 18, 2000, required a divestiture of a funeral home only if the corporation acquired a particular funeral home. As of June 30, 2002, the corporation had not acquired the funeral home; therefore, it had no obligation to divest the funeral home. The Loewen Group Inc., and Loewen Group International, Inc., and Heritage Family Funeral Services, Inc., divestiture order (C-3678; 931-0084) announced for public comment on May 14, 1996, required a divestiture of a funeral home. As of June 30, 2002, the merger had not taken place; therefore, it had no obligation to divest the funeral home.

Appendix III
FTC Divestiture Orders in the Grocery Store,
Drug Store, Funeral Services, and Gas
Station Industries, Fiscal Years 1990 through
2000

Source: GAO's analysis of 31 retail divestiture orders FTC announced for public comment during fiscal years 1990 through 2000 and related documents.

Overview of FTC's Merger Review and Merger Remedy Processes

Merger Review

The Hart-Scott-Rodino Act (HSR Act) of 1976 reviews usually begin with the parties filing for a proposed merger or acquisition. The premerger notification provisions of the HSR Act require companies exceeding certain thresholds of company size and value of the transaction to notify the Federal Trade Commission (FTC) and the Department of Justice's (DOJ) Antitrust Division of the proposed merger transaction,⁹⁰ submit documents and other information to the agencies concerning the transaction,⁹¹ and refrain from consummating the transaction until a specified waiting period has expired or their request for early termination of the waiting period is granted by the appropriate antitrust enforcement agency.

⁹⁰The FTC's Premerger Notification Office is responsible for administering the HSR premerger notification program for both the FTC and the Antitrust Division. The HSR Act rules and formal interpretations are proposed by FTC and adopted with the concurrence of the Assistant Attorney General for Antitrust. If the filing does not comply with the rules, the parties are notified that it is deficient, and the waiting period does not begin until the parties' filing complies with the act's rules. *See* 16 C.F.R. 803.10(c)(2).

⁹¹The merging parties must provide the agencies with information concerning both of the parties to the transaction and the structure of the transaction; information concerning each party's revenues, by Standard Industrial Classification codes (or, as of July 1, 2001, North American Industry Classification System); copies of certain Securities and Exchange Commission filings and annual reports; information related to prior relevant acquisitions; and certain certifications. Additionally, each party is required to submit copies of any documents that have been prepared in connection with the transaction by or for any officer or director for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, potential for sales growth or expansion into product or geographic markets. A filing fee must accompany the filing. A filing fee of \$20,000 regardless of the size of the transaction, became effective on November 28, 1989; was raised to \$25,000 effective October 7, 1992, and to \$45,000 effective August 29, 1994. Effective February 1, 2001, the HSR Act fee structure was revised to account for the size of the transaction and is now set at \$45,000 for transactions valued at less than \$100 million; \$125,000 for transactions valued at \$100 million to less than \$500 million; \$280,000 for transactions valued at \$500 million or more. (Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, P. L. 106-553, Section 630 (Dec. 21, 2000)). The statutory amendment provides that these dollar thresholds will be adjusted annually, beginning with fiscal year 2005, to reflect percentage changes in the gross national product from fiscal year 2004, compared with fiscal year 2003, and calculated thereafter in the same manner as provided in Section 8(a)(5) of the Clayton Act, 15 U.S.C. 19(a)(5).

Appendix IV
Overview of FTC's Merger Review and Merger
Remedy Processes

Table 8 shows that the number of transactions reported has more than doubled from 2,262 in fiscal year 1990 to 4,926 in fiscal year 2000, and the percent of early terminations granted has ranged from 65.8 percent to 81.3 percent over the same time period. In fiscal 2001, however, after the filing thresholds and filing fees were raised, there were only 2,376 filings. The HSR Act was amended in late 2000 to significantly increase the filing thresholds.⁹²

Table 8: Number of HSR Act Transactions Reported and Early Termination Requests Granted and Denied for Fiscal Years 1990 through 2000

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | Total |
|--------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|--------|
| Transactions reported | 2,262 | 1,529 | 1,589 | 1,846 | 2,305 | 2,816 | 3,087 | 3,702 | 4,728 | 4,642 | 4,926 | 33,432 |
| Requests for early termination | 1,975 | 1,321 | 1,403 | 1,689 | 2,081 | 2,471 | 2,861 | 3,363 | 4,323 | 4,110 | 4,324 | 29,921 |
| Percent | 87.3 | 86.4 | 88.3 | 91.5 | 90.3 | 87.7 | 92.7 | 90.8 | 91.4 | 88.5 | 87.8 | 89.5 |
| Early termination granted | 1,299 | 907 | 1,020 | 1,201 | 1,508 | 1,869 | 2,044 | 2,513 | 3,234 | 3,103 | 3,515 | 22,213 |
| Percent | 65.8 | 68.7 | 72.7 | 71.1 | 72.5 | 75.6 | 71.4 | 74.7 | 74.8 | 75.5 | 81.3 | 74.2 |
| Early termination denied | 676 | 414 | 383 | 488 | 573 | 602 | 817 | 850 | 1,089 | 1,007 | 809 | 7,708 |
| Percent | 34.2 | 31.3 | 27.3 | 28.9 | 27.5 | 24.4 | 28.6 | 25.3 | 25.2 | 24.5 | 18.7 | 25.8 |

Source: FTC and DOJ Annual HSR Report to Congress, Fiscal Years 1990 through 2000.

FTC and the Antitrust Division also may become aware of mergers that are not subject to HSR Act requirements but that are potentially anticompetitive, using techniques such as (1) monitoring the trade press and Internet resources; (2) responding to and following up on case leads from congressional offices, other executive branch agencies, and state and local governments; and (3) encouraging consumers, businesses, and the bar to notify the FTC and the Antitrust Division of possibly anticompetitive

⁹²Unless otherwise noted, the discussion of tests for reportability pertains to the period we reviewed (fiscal years 1990 through 2000). Legislation that took effect February 1, 2001, made changes in these tests. (Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, P.L. 106-553, Section 630 (Dec. 21, 2000)) (amending 15 U.S.C. 18a).

mergers.⁹³ FTC's Performance Plan for fiscal years 2002 through 2003 states that after the reporting thresholds were increased on February 1, 2001, the FTC began to devote more effort to identifying mergers that may harm (or have harmed) competition but are not subject to HSR Act requirements.

Reporting Requirements and FTC's Review of HSR Act Filings

There are three tests, all of which must be met, in order for a transaction to be reportable.⁹⁴ The first test is the commerce test, which requires that either the acquiring party or the acquired party must be engaged in commerce or in any activity affecting interstate commerce, as defined by Section 1 of the Clayton Act. The second test is the size-of-person test, which is based on the annual sales or assets of the merging parties. For the period we reviewed, one party to the transaction had to have annual sales or assets of at least \$100 million and the other party of at least \$10 million.⁹⁵ The third test is the size-of-transaction test. Under this test, for the period we reviewed, as a result of such acquisition, the acquiring party had to hold (1) voting securities or assets worth in the aggregate more than \$15 million or (2) voting securities that confer control (50 or more percent) of an issuer with annual sales of \$25 million or more.⁹⁶

⁹³For this report, we use the term merger generally to include both a complete merger of the parties involved, as well as certain acquisitions of stocks or assets that may not constitute such a complete merger of the parties.

⁹⁴See footnote 91.

⁹⁵When the acquired party is not engaged in manufacturing and does not have at least \$100 million of sales or assets, then it must have assets of at least \$10 million

⁹⁶See 15 U.S.C. 18(a) and 16 C.F.R.802.20. The legislation that took effect on February 1, 2001, discussed in footnote 3, raised the size-of-transaction threshold from \$15 million to \$50 million. The legislation also eliminated the alternative percentage threshold. Accordingly, no transaction resulting in an acquiring person holding less than \$50 million or voting securities of an acquired person will be reportable. In addition, under the new legislation, transactions valued at greater than \$200 million are reportable without regard to whether the size-of-person threshold is met.

FTC has 30 days (15 days for cash tender offers and bankruptcy filings) from the date the filing for the proposed acquisition is accepted to review the filing and to determine whether to seek additional information and documents from the merging parties and thereby extend the waiting period to enable further review.⁹⁷ If FTC's initial review does not indicate a need for further investigation, the merging parties can consummate the merger at the end of the waiting period, or when their request for early termination has been granted. If FTC's initial review indicates a need for further review, a second request may be issued to the parties. A second request extends the waiting period for an additional 30 days (20 days prior to February 1, 2001, and 10 days for cash tender offers) after the parties have substantially complied with the request.

The Assistant Directors in the Bureau of Competition offices have the authority to request clearance to investigate a merger under the FTC-DOJ liaison agreement⁹⁸ and to open an initial phase investigation, even before an HSR Act filing is actually received. Obtaining clearance to investigate and open an initial phase investigation allows FTC staff to contact third parties as well as the parties to the merger. The Bureau Director has the authority to authorize a full phase investigation and to approve or reject staff's recommendations to the FTC to authorize the use of compulsory process. The Commissioner assigned to the matter must approve the issuance of particular subpoenas to the merging parties or to others. While the full Commission acts on recommendations to authorize compulsory process, the Chairman approves, rejects, or modifies staff's second request recommendations as approved by the Bureau Director.⁹⁹

⁹⁷The FTC and the Antitrust Division review mergers and acquisitions to determine whether they are anticompetitive and should be challenged. Therefore, the antitrust agencies do not "approve" a merger, but rather decide whether to challenge it. Moreover, FTC and the Antitrust Division are not precluded from pursuing enforcement actions, such as challenging the merger through litigation, even after the transaction has closed

⁹⁸Prior to initiating an investigation, under longstanding liaison agreements, FTC and the Antitrust Division determine which of the two agencies will investigate the merger to ensure that there is no duplication of effort or conflict between the investigations of the two agencies. According to FTC staff and Antitrust Division officials, the two agencies allocate matters mainly on the basis of their experience. 4 Trade Reg. Rep. (C.H.) ¶ 9565 citing Trade Reg. Rep. Transfer Binder 1985-1997 ¶ 50,125.

⁹⁹The Merger Screening Committee assists the Director in determining whether to recommend that FTC authorize the use of compulsory process and issue second requests. The committee members may include the bureau directors for the Bureaus of Competition and Economics, deputy directors, assistant directors, and relevant Bureaus of Competition and Economics staff.

After FTC issues its second request to the merging parties,¹⁰⁰ the parties begin assembling their responses. In the meanwhile, FTC staff are to employ other appropriate investigative techniques to obtain additional information relevant to determining the legality of the transaction¹⁰¹ and to evaluate the possible effects of the proposed transaction, such as concerns of third parties that may be affected by the merger. The third parties may include, among others, competitors, customers, and suppliers. In addition, when appropriate, staff may consult with state attorneys general, other U.S. governmental officials, and foreign antitrust authorities. When the parties comply with the second requests by submitting their responses to FTC, a second statutory waiting period is triggered. During that time, FTC staff are to review the material submitted by the parties, continue assembling third-party information, and complete staff's evaluation and recommendations to FTC on whether enforcement action is warranted.¹⁰² According to FTC staff, parties often agree to extend the statutory time limits for FTC action to permit settlement negotiations. Antitrust practitioners and FTC staff told us that the merger investigation work generally is done with both the parties and FTC preparing for potential litigation. Table 9 shows the number of adjusted HSR Act transactions in which a second request could have been issued and the number of second requests issued by the FTC and the DOJ for fiscal years 1990 through 2000.¹⁰³

¹⁰⁰A second request is a request for additional information and documents from the merging parties that enable FTC staff to undertake a more thorough review.

¹⁰¹Legislation that took effect on February 1, 2001, extended the 20-day period to 30 days, while leaving the 10-day period for cash tender offers and bankruptcy sales unchanged. (Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, P.L. 106-553, Section 630 (Dec.21, 2000)).

¹⁰²In non-HSR Act merger investigations, with the exception of a required initial filing, the second request, and the statutory deadlines, FTC staff are to follow the same procedures used for HSR Act investigations.

¹⁰³These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information, including (1) incomplete transactions because only one party filed a complete notification; (2) transactions reported pursuant to the exemption provisions of Sections 7A(c)(6) and 7A(c)(8) of the act; and (3) transactions which were found to be nonreportable. In addition, where a party filed more than one notification in the same year to acquire voting stock of the same corporation, only a single consolidated transaction has been counted because, as a practical matter, the agencies do not issue more than one second request in such a case; and (4) secondary acquisitions filed pursuant to 16 C.F.R. 801.4 of the premerger notification rules. Secondary acquisitions have been deducted in order to be consistent with statistics reported in prior annual reports.

Appendix IV
Overview of FTC's Merger Review and Merger
Remedy Processes

Table 9: Number of Adjusted HSR Act Transactions in Which Second Request Could Have Been Issued and Number of Second Requests Issued by FTC and DOJ for Fiscal Years 1990 through 2000

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | Total |
|------------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|--------|
| Adjusted transactions ^a | 1,955 | 1,376 | 1,451 | 1,745 | 2,128 | 2,612 | 2,864 | 3,438 | 4,575 | 4,340 | 4,749 | 31,233 |
| Second request issued | 89 | 64 | 44 | 71 | 73 | 101 | 99 | 122 | 125 | 111 | 98 | 997 |
| FTC | 55 | 33 | 26 | 40 | 46 | 58 | 36 | 45 | 46 | 45 | 43 | 473 |
| Percent of adjusted transactions | 2.8 | 2.4 | 1.8 | 2.3 | 2.2 | 2.2 | 1.3 | 1.3 | 1.0 | 1.0 | 0.9 | 1.5 |
| DOJ | 34 | 31 | 18 | 31 | 27 | 43 | 63 | 77 | 79 | 68 | 55 | 526 |
| Percent of adjusted transactions | 1.7 | 2.3 | 1.2 | 1.8 | 1.3 | 1.6 | 2.2 | 2.2 | 1.7 | 1.6 | 1.2 | 1.7 |

^aTransactions in which a second request could have been issued.

Source: FTC and DOJ Annual HSR Report to Congress, Fiscal Years 1990 through 2000.

According to FTC staff, generally at least two conditions are necessary for a merger to have a likely anticompetitive effect. The market must be substantially concentrated after the merger, with the merger substantially increasing concentration, and it must be difficult for new firms to enter the market in the near-term to provide effective competition. The majority of mergers that raise antitrust concerns are horizontal mergers. According to FTC staff and Antitrust Division officials, the joint *Horizontal Merger Guidelines* accurately outline how the agencies generally conduct their analysis of proposed mergers. The guidelines were originally developed by DOJ in 1968 and were updated in 1982 when FTC and DOJ issued separate statements and again in 1984 by the DOJ. The DOJ and the FTC issued joint *Horizontal Merger Guidelines* in 1992. In 1997, the agencies amended and expanded the efficiencies section of the guidelines.¹⁰⁴ The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or facilitate its exercise. The guidelines define a seller's market power as the ability to profitably maintain selling prices above competitive levels for a significant period of time. Similarly, a

¹⁰⁴Revised and issued on April 8, 1997, the efficiencies section states that the government will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.

buyer's market power is defined as the ability to profitably maintain buying prices below competitive levels for a significant period of time.

FTC's Analysis of Proposed Mergers in Certain Retail Industries

The *Horizontal Merger Guidelines* outline the five-step analytical process the FTC and the Antitrust Division use to determine whether a merger is likely to substantially lessen competition and, ultimately, whether to challenge a merger. FTC staff are to: (1) define the relevant product market and geographic market, identify the market participants, assign market shares, and assess whether increased market concentration from the proposed merger raises concern about potential adverse competitive effects, that is, increase in prices or a decrease in quality or output;¹⁰⁵ (2) assess the potential competitive effects of the proposed merger, and the factors in addition to market concentration relevant to each; (3) assess whether entry into the market would be timely, likely, and sufficient either to deter or to counteract the competitive effects of concern; (4) assess any efficiency gains that cannot be reasonably achieved by the parties absent the proposed merger; and (5) if the parties have raised the "failing firm" as an affirmative defense, determine whether, but for the merger, either party to the transaction would be likely to fail and result in its assets exiting the market.

According to FTC staff, while the analytical framework for merger analysis is generally the same regardless of the industry in which the merger is taking place, the particular facts of each merger are unique and outcome determinative. FTC staff told us that investigations are extraordinarily fact-specific.¹⁰⁶ For example, supermarkets constitute a differentiated product market. No two supermarkets or chains are the same. Each store sells similar or the same products, but each store competes differently on price, level of service, and has different direct competitors. Similarly, FTC staff told us that the size of a geographic market also varies based on the facts of the case and the location of the merging parties' and competitors' assets.

¹⁰⁵According to FTC staff, the critical question in defining relevant antitrust markets is whether enough consumers will switch to other sellers, products, or locations within the hypothetical markets to make a small but significant nontransitory increase in price (usually about 5 percent) unprofitable.

¹⁰⁶Staff may employ inside or outside experts as necessary to address economic or technical issues.

Merger Remedies

Once it is determined that a merger is likely to be anticompetitive, FTC may take action designed to prevent an anticompetitive result from a proposed merger by: (1) conducting successful litigation to block the merger; (2) negotiating a settlement to resolve anticompetitive aspects of the merger while allowing the underlying transaction to go forward; or (3) identifying antitrust concerns sufficient to cause the parties to abandon the transaction without court action. As FTC staff are reviewing the transaction, they are to invite the merging parties to discuss the competitive problem(s) and potential remedies to address the problem(s).

FTC may decide that no remedy, short of blocking the transaction, will fully and effectively resolve the competitive concerns. FTC may also decide that to resolve the competitive concerns one of the merging parties must divest all of its assets in a single geographic market, or that a partial divestiture would be acceptable. Additionally, the anticompetitive effects of a merger may be remedied through contractual arrangements, such as the licensing of intellectual property or a short-term supply agreement. Alternatively, FTC may decide to use some form of behavioral relief, such as establishing firewalls in vertical mergers, to prevent the sharing of competitive information. Finally, the anticompetitive effects of some mergers may be addressed with a combination of these remedies. According to FTC staff, the remedy is based on the particular facts of the case.

In response to FTC's concerns, the merging parties might attempt to solve the competitive problem(s), abandon the transaction, or pursue the case through litigation. If an effective consent order cannot be negotiated and the merger has not yet been consummated, FTC staff are to recommend, in appropriate cases, that FTC authorize the filing of an action in federal district court for a preliminary injunction to stop the merger. If authorized, staff litigate preliminary injunction actions and appellate review proceedings.¹⁰⁷

According to FTC staff, the team responsible for a merger investigation and consent negotiations typically includes the Bureau of Competition staff investigating the merger; staff from the Bureau of Competition's Compliance Division, who are experienced in order drafting and enforcement; Bureau of Economics staff; and staff from FTC's Office of the General Counsel. The team is to work together to develop and negotiate a consent agreement containing a proposed order with the merging parties. According to FTC staff, the parties may not agree with how the agency has defined the competitive harm, but they are aware of FTC's concerns. FTC staff told us that generally the merging parties come forward with the first set of proposed remedies. FTC staff advised us that the merging parties often have extensive information about their industry and the effect of the proposed remedy. They also told us that FTC staff's job is to make clear what their concerns are about the proposed transaction, to be available for constructive dialogue on how the problem can be adequately addressed, and to evaluate the adequacy of proposed remedies.

¹⁰⁷FTC issues an administrative complaint within 10 days of the grant of an injunction by a federal district court. Preliminary injunctions are issued by the federal district court pending an administrative trial on the merits. See 16 C.F.R. 3.11-3.11A. According to FTC staff, in appropriate cases, staff recommend that the FTC issue an administrative complaint against the merger, as when a preliminary injunction is not sought because the merger has already occurred, or when the grant of a preliminary injunction does not result in abandonment of the merger. Similarly, if a court has denied a preliminary injunction, staff assess the public interest in proceeding with a full administrative trial on the merits before an administrative law judge and make an appropriate recommendation to FTC. FTC determines whether to proceed with the administrative trial on the merits. After FTC issues an administrative complaint, staff litigate the merger before an administrative law judge and pursue or defend appeals to FTC as directed by the Bureau Director. The administrative law judge issues an initial decision which may be appealed to the full Commission. After briefing and oral arguments, the Commission issues its final decision. If the decision finds that the merger is anticompetitive, the parties may appeal the decision to the appropriate federal court of appeals.

Factors FTC Considers in Evaluating a Remedy

According to a March 2000 speech by the then FTC General Counsel, FTC generally considers several factors in evaluating a proposed restructuring remedy.¹⁰⁸ Specifically, she said that FTC staff generally consider

- whether the remedy is likely to protect, promote, or restore competition in the affected market. For example, in the case of a remedy involving divestiture of assets, FTC determines whether the buyer is obtaining sufficient assets, and the right kind of assets, to be able to create and operate a successful, competitive business, and whether that buyer has sufficient expertise, experience, incentives, and resources to accomplish its goal of maintaining or restoring competition in the relevant markets;
- whether efficiencies justify restructuring, rather than condemning, a merger transaction;
- the complexity of a proposed remedy; and
- whether its acceptance of a restructuring remedy might have implications for future matters. For example, according to the March 2000 speech, when FTC accepts a restructuring remedy, parties to subsequent proposed mergers tend to insist on a similar resolution to the competitive problems raised by their transactions, although FTC may view the matters as distinguishable on factual or economic grounds.

¹⁰⁸ "Merger Enforcement: Multijurisdictional Review and Restructuring Remedies," Debra A. Valentine, General Counsel, FTC, before the International Bar Association, March 24, 2000.

Approval Process for Proposed Consent Agreement

FTC staff negotiate a proposed consent agreement with the merging parties. Once the merging parties sign the proposed consent agreement and the Director of the Bureau of Competition approves the execution of the draft consent agreement, it is reviewed by the full Commission, which determines if the agency will accept the agreement for public comment.¹⁰⁹ For an agreement containing a proposed order to be approved subject to public comment, a majority of the Commissioners must vote to accept the agreement. In general, if the Commission votes to accept the agreement subject to public comment, the HSR Act waiting period is terminated, and the parties can consummate the merger. In consent agreements that require up-front buyers, the divestitures also may be consummated, but the divestiture must include a clause requiring its rescission if FTC does not give final approval to the proposed consent order. The merging parties generally can consummate the transaction as soon as they are notified of FTC action. This notification occurs before the public announcement, which generally occurs within a few days of the Commission's vote to accept the agreement.

Although not statutorily required, FTC places the consent agreement along with an analysis to aid public comment on the public record, generally for a 30-day comment period,¹¹⁰ in which the public is invited to comment on the merger and the proposed relief. At end of the comment period, FTC staff are to analyze the comments received and forward a second set of recommendations to the Commission on whether the agency should issue the final consent order.¹¹¹ According to FTC staff, typically the Commission accepts the consent agreement and issues a complaint and decision and order. They told us that it is highly unusual for FTC to receive new

¹⁰⁹The Commission is not bound to accept a consent agreement for comment, nor is it bound to make the order final whether or not public comments are received. The comment period is for the Commission's benefit to ensure that its decision is appropriate. The Commission may reject the consent agreement, whereupon it may close the matter; direct the staff to seek a preliminary injunction; renegotiate the consent; or issue a complaint and place the matter into administrative adjudication under Part 3 of the FTC Rules of Practice. 16 C.F.R. Part 3.

¹¹⁰FTC may also, in appropriate cases, issue its Complaint and Final Decision and Order, before seeking public comment. 16 C.F.R. 2.34, as amended.

¹¹¹Unlike DOJ, which is required by the Tunney Act, 15 U.S.C.16, to obtain public comments, the FTC is not statutorily required to obtain public comments on proposed consent agreements. FTC's Rule of Practice 2.34 specifies that the FTC will place consent agreements on the public record for comment. 16 C.F.R. 2.34.

antitrust-related information during the public comment period that staff had not already considered as part of their investigation. In addition, they said that after considering public comments, FTC has rarely modified a consent order because in most instances, the complaint and order, as proposed, provided the most appropriate relief.

Common Provisions Included in Orders

FTC staff have said that every order has the same goal: to preserve fully the existing competition in the relevant market or markets. According to FTC staff, while developing appropriate merger remedies is a very fact-specific process, many provisions have been developed over the years that appear in almost every order. These required provisions are readily apparent from even a cursory review of merger consent orders posted on FTC's Web site. In March 2002, FTC's Bureau of Competition posted on its Web site a document that provides responses to frequently asked questions about merger consent order provisions.¹¹² This document as well as a review of FTC orders, other public documents prepared by FTC staff, and our discussions with FTC staff provide some insight into FTC's consent order provisions.

Divestitures

Most orders relating to a merger will require a divestiture—the selling of a business or assets by one or both of the merging parties—in order to maintain or restore the level of competition that existed before the merger. During fiscal years 1990 through 2000, FTC announced 192 proposed consent orders¹¹³ involving mergers for public comment, of which 153 required divestitures. FTC has the authority to decide the extent of the divestiture. A divestiture can range from a partial divestiture to a divestiture of an on-going business. Table 10 shows that most (about 80 percent) of the consent orders involving mergers that FTC announced for public comment during fiscal years 1990 through 2000 required divestiture of assets. (Appendix V provides information on the 153 consent orders requiring divestitures that FTC announced for public comment during fiscal years 1990 through 2000.)

¹¹²"Frequently Asked Questions About Merger Consent Order Provisions," Posted on FTC's Web site (www.ftc.gov/bc/mergerfac.htm) on March 15, 2002.

¹¹³Some of these mergers were nonhorizontal mergers. Nonhorizontal mergers generally do not require divestitures.

**Appendix IV
Overview of FTC's Merger Review and Merger
Remedy Processes**

Table 10: Number of Consent Orders Involving Mergers FTC Announced for Public Comment During Fiscal Years 1990 through 2000 and the Nature of the Orders

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | Total |
|--|------|------|------|------|------|------|------|------|------|------|------|-------|
| Consent orders announced | 17 | 9 | 6 | 10 | 22 | 31 | 20 | 17 | 21 | 20 | 19 | 192 |
| Consent orders requiring divestitures ^a | 12 | 6 | 5 | 8 | 19 | 21 | 17 | 15 | 17 | 15 | 18 | 153 |
| Consent orders requiring only behavioral remedy | 5 | 3 | 1 | 2 | 3 | 10 | 3 | 2 | 4 | 5 | 1 | 39 |

^aThe consent orders requiring divestitures may also require behavioral remedies.

Source: GAO's analysis of FTC's consent orders.

According to FTC staff, FTC generally requires divestitures in the geographic and product markets where the merging parties have competitive overlaps and FTC has competitive concerns. However, it is within FTC's power to require divestiture of a greater set of assets than those which participate in the overlap markets in order to effectively replace competition. According to FTC staff, sometimes the buyers of the divested assets will need other ancillary assets in order to effectively restore competition. Without these ancillary assets the buyer will not be able to replicate the economies of scale of the firm that has been acquired. In other cases, these additional assets will be necessary to give the buyer both the incentive and ability to fully restore competition. FTC staff told us that the merging parties generally are the first to respond to staff's concerns by proposing appropriate assets to be divested.

According to FTC staff, an acceptable divestiture package is one that maintains or restores competition in the relevant market. FTC staff have said that the divestiture of an entire business of either the acquired or acquiring firm relating to the markets in which there is concern about anticompetitive effects, is most likely to maintain or restore competition in the relevant market, and thus will usually be an acceptable divestiture package. FTC has issued orders that require divestitures of less than the entire business operating in, or producing for, the relevant market. In those cases, FTC concluded that the assets to be divested were sufficient to allow the buyer of the assets to begin to compete in the market immediately and

to remedy the likely or actual anticompetitive effects of the challenged acquisition. According to FTC staff, the burden is on the merging parties to provide concrete and convincing evidence that the asset package is sufficient to allow the proposed buyer, whether large or small, to operate in a manner that maintains or restores competition in the relevant market.

FTC also generally requires that a divestiture be absolute. This means that the merging parties are to have no continuing ties to the divested business or assets, no continuing relationship with the buyer, and no financial stake in the buyer's success. According to FTC staff, divestiture proposals in which the buyer intends to rely on the merging parties to finance the divestiture, or where the proposal includes performance payments by the buyer generally have been rejected.¹¹⁴

For consent orders in which FTC has required a divestiture(s), and the buyer(s) of the divested asset(s) is not identified in the proposed order, the merging parties must submit an application to FTC requesting approval to divest the asset(s) to a proposed buyer(s) and await FTC approval before consummating the divestiture. According to FTC staff, the more information the divestiture application contains about the transaction and the proposed buyer, the more likely the approval can be obtained quickly. The application must show how the proposed divestiture will remedy the competitive problem identified in FTC's complaint and restore competition. Additionally, there must be a final signed contract for a divestiture application to be sufficient. The contract should conform to the requirements of the consent order or, if it does not, explain how the respondent will satisfy the order's requirements. The divestiture proposal should demonstrate that the proposed buyer will be an effective competitor after the divestiture. The proposed buyers of the divested assets are to provide directly to the FTC information on their (1) financial capability, including the financing in place both to pay for the acquisition and to fund working capital and other needs associated with an on-going business; (2) technical and management skills; and (3) business plans and other evidence of the proposed buyer's intention and ability to compete.

¹¹⁴According to FTC staff, some cases have provided for short-term, continuing post divestiture relationships to ensure the competitiveness and viability of the buyer as it begins to compete. In such cases, FTC recently has required the use of a monitor trustee to review and help ensure respondent's compliance with the order's obligations.

In evaluating whether a proposed buyer has the financial resources to remain a vigorous competitor in the market, FTC staff are to examine the proposed buyer's commitment to remain in the market by analyzing its past operations and business plans as well as its future business plans for the divested assets. The staff also will likely talk with industry members familiar with the proposed buyer, such as competitors, suppliers, and customers. The staff also are to evaluate the proposed buyer's experience and expertise to operate effectively in the market. They also may examine information on the proposed buyer's debt structure to determine whether the transaction is very risky for the company. However, information on debt structure is not collected for each buyer. FTC staff told us that the information provided by each buyer varies on a case-by-case basis. FTC does not use a standard form or checklist to collect information from buyers because the facts of each case and, thus, the requirements for information from the buyers differ.

Up-Front Buyer

FTC frequently requires that the merging parties find an acceptable buyer(s) for the assets to be divested and that it execute an acceptable purchase agreement and all the necessary ancillary agreements with the buyer(s) before the FTC accepts the proposed consent order for public comment. FTC staff refers to such a buyer as an up-front buyer or buyer up-front. According to FTC staff, an up-front buyer may be the best way to ensure a successful divestiture in the supermarket industry because the approach enables staff to evaluate the marketability of the divestiture assets with more concrete evidence and better determine whether, among other things, there is a viable buyer(s) for the proposed divestiture assets. Additionally, FTC staff told us that an up-front buyer

- reduces the amount of time needed for the assets to be divested because a buyer can be identified before the merger transaction occurs—a factor in supermarket mergers and those of other retail operations, where assets may quickly deteriorate during the search for a buyer; and
- generally increases the likelihood that a buyer will restore the competition that otherwise would be lost through the merger.

To preserve FTC's ability to reject an up-front buyer following the public comment period, consent orders accepted subject to public comment require the merging parties to include a rescission provision in any divestiture contracts in which closing on the divestiture will occur before final FTC approval of the consent order. According to FTC staff, as of June 30, 2002, FTC had not ordered rescission of an up-front divestiture. FTC staff told us that there have been instances in which the buyers will purchase the assets only after the final order has been approved. Additionally, they said that one FTC order, not in the retail industry, specified that the assets could not be divested until the order was final.¹¹⁵

Amount of Time to Divest Assets

Divestiture orders specify the timeframe in which the assets must be divested. The merging parties must find a buyer(s), negotiate a contract(s), submit the contract(s) to the FTC for its approval, and complete the divestiture(s) within that time. If there is an up-front buyer, the divestiture is required almost immediately upon consummation of the subject merger and FTC approves the up-front buyer when it issues the final consent order. In other cases, however, the merging parties must submit their divestiture application(s) to FTC early enough to allow for the 30-day public comment period required by FTC rules. According to FTC staff, to satisfy its obligation to divest by the date required in the order, the merging parties have to actually consummate the sale by that date. Executing an agreement or filing an application for the FTC's approval by that date does not satisfy the obligation to divest by that date.

Trustees

FTC may appoint trustees or independent auditors in three situations. First, most orders authorize FTC to appoint a trustee to divest the assets if the merging parties fail to divest them within the time frame required by the consent order.¹¹⁶ In addition, where there is a hold separate order, FTC appoints an independent auditor to ensure the independence of the assets to be divested when they must be operated separately from the other assets of the merging parties until they are sold. Finally, where there is to be a

¹¹⁵Softsearch Holdings, Inc., Docket No. C-3759 (1997).

¹¹⁶According to FTC staff, as of June 30, 2002, FTC had appointed a trustee to divest assets in 12 cases, 5 of which were included in consent orders in the retail sector announced for public comment during fiscal years 1990 through 2000.

short-term continuing relationship after the divestiture, FTC may appoint a trustee to ensure that the merging parties fully perform their responsibilities by the order.

Crown Jewels

Some orders authorize a divestiture trustee to divest a different or larger package of assets, referred to as a crown jewel, if the assets are not divested on time.¹¹⁷ According to FTC staff, a crown jewel is used where there is risk that, if the respondent fails to divest the original divestiture package on time or if the original divestiture does not take place for any reason, a divestiture trustee may be needed to divest an expanded or alternative package of assets to accomplish the divestiture remedy. FTC staff have said that a crown jewel provision may be particularly valuable when there are some uncertainties about the marketability or viability of the initial divestiture package. FTC staff also have said that a crown jewel provision increases the incentive for the merging parties to accomplish the divestiture within the time required by FTC's divestiture order, and it provides a bigger, and presumably more attractive, package for the trustee in the event the merging parties are unsuccessful in divesting the assets.

Asset Maintenance and Hold Separate Agreements

A consent order may include an asset maintenance agreement that requires the merging parties to maintain the viability, marketability, and competitiveness of the assets. FTC also has included hold-separate agreements to protect all the assets to be divested to prevent interim competitive harm and to preserve the viability and competitiveness of the assets pending divestiture. According to FTC staff, a hold separate agreement is designed to keep the divestiture assets from being intermingled with the divesting party's other assets pending divestiture by requiring the divestiture assets to be operated separately from and independently of the remaining business. Additionally, a "hold separate" agreement prevents the transfer of competitively sensitive information and, by taking the assets out of the hands of the divesting party, better protects the assets from intentional or unintentional physical or intangible

¹¹⁷According to FTC staff, as of June 30, 2002, FTC required the divestiture of a crown jewel only once. In *Aventis*, Docket C-3919, FTC required divestiture of the alternate assets and appointed a trustee to accomplish the divestiture when the merging parties failed to divest the original assets on time.

deterioration that would affect their ability to be operated in a manner that maintains or restores competition. According to FTC staff, hold-separate agreements are generally required if there is no up front-buyer.

Prior Approval

A provision that required the merging parties to obtain FTC's prior approval for future transactions in the same product and geographic market(s), usually for a period of 10 years was among the commonly included provisions. However, on June 21, 1995, FTC issued a new policy regarding the use of prior approval requirements in FTC orders.¹¹⁸ Previously, whenever FTC found reason to believe that the respondent had attempted (or completed) a merger transaction that was anticompetitive, a prior approval provision was included in the order. In some cases, according to FTC staff, FTC also required prior notice of transactions that would not be reportable under the HSR Act. According to FTC staff, under the new policy that is no longer the case. The general rule now is that FTC will not use prior approval or prior notice requirements except in special cases.

Compliance Reports

In cases in which the merging parties have a post-order divestiture obligation, the merging parties generally are required to keep FTC informed of their divestiture efforts every 30 or 60 days by submitting verified written compliance reports. To the extent there are obligations in the order beyond the divestiture obligation, the merging parties are usually required to submit verified written annual reports to FTC on their continued compliance with those obligations.

Public Comments on Divestiture Orders

In the case of a post-order divestiture requirement, when the merging parties file an application seeking approval of a particular divestiture, that application is also placed on the public record for a 30-day comment period. Again, staff must analyze the comments received and make recommendations to FTC. In some cases, buyers are identified before FTC accepts the consent agreement for public comment. If the buyer is identified early in the consent process and is identified in the proposed consent order, there is no separate comment period because the public is

¹¹⁸June 21, 1995, 60 Fed. Reg. 39, 745-47 (Aug. 3, 1995), 4 Trade Reg. Rep. (CCH) ¶ 13, 241.

commenting on both the proposed order and divestiture at the same time. Consequently, according to FTC staff, the public comment serves the twin purposes of giving the public a chance to comment on the substance of relief obtained as well as the opportunity to comment on the suitability of the proposed buyers. According to FTC staff, FTC has negotiated with merging parties for divestitures of additional assets based on comments received during the public comment period. They also told us that after considering public comments, FTC has rarely modified a consent order accepted subject to public comment or disapproved an up-front divestiture.

Modification of Consent Orders

FTC can reopen and modify a final consent order when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.¹¹⁹ FTC also may modify an order when, although changed circumstances would not require reopening, it determines that the public interest so requires. According to standard language in FTC orders reopening and modifying an order, FTC will balance the reasons favoring the requested modification against any reasons not to make the modification. FTC also considers whether the particular modification sought is appropriate to remedy the identified harm.

¹¹⁹Section 5(b) of the FTC Act, 15 U.S.C. 45(b); 16 C.F.R. 2.51.

FTC Divestiture Orders Announced for Public Comment, Fiscal Years 1990 through 2000

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|---------------------|-----------------|--|---|---|---|
| Supermarkets | | | | | |
| 9228 | 891-0055 | Promodes, S.A.+ Red Food Stores, Inc. & The Kroger Company | Retail sale of food and grocery items in supermarkets. | February 27, 1990 | 1990 |
| C-3391 | 921-0015 | The Vons Companies, Inc. & Williams Bros. Markets, Inc. | Retail sale and distribution of food and grocery items in supermarkets. | May 21, 1992 | 1992 |
| 9266 | 911-0123 | Red Apple Companies, Inc. + John A. Catsimatidis + Supermarket Acquisition Corp. + Designcraft Industries, Inc. & Sloan's Supermarkets, Inc. | Retail sale of food and grocery products in supermarkets. | December 13, 1994 | 1995 |
| C-3577 | 951-0009 | The Penn Traffic Company & American Stores Company | Retail sale of food and grocery products in supermarkets. | January 19, 1995 | 1995 |
| C-3585 | 941-0131 | Schnuck Markets, Inc. & National Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | March 8, 1995 | 1995 |
| C-3584 | 941-0130 | Schwegmann Giant Super Markets, Inc. & National Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | March 8, 1995 | 1995 |
| C-3649 | 951-0086 | The Stop and Shop Companies, Inc. & Purity Supreme, Inc. | Retail sale of food and grocery products in supermarkets. | November 1, 1995 | 1996 |
| C-3687 | 961-0052 | Koninklijke Ahold nv + Ahold USA, Inc. & The Stop & Shop Companies, Inc. | Retail sale of food and grocery products in supermarkets. | July 15, 1996 | 1996 |
| C-3784 | 971-0093 | Jitney-Jungle Stores of America, Inc. + Delta Acquisition Corporation & Delchamps, Inc. | Retail sale of food and grocery products in supermarkets. | September 12, 1997 | 1997 |
| C-3838 | 981-0134 | Albertson's, Inc. + Locomotive Acquisition Corporation & Buttrey Food and Drug Store Company, Inc. | Retail sale of food and grocery products in supermarkets. | September 22, 1998 | 1998 |
| C-3861 | 981-0254 | Koninklijke Ahold nv & Giant Food, Inc. | Retail sale of food and grocery products in supermarkets. | October 20, 1998 | 1999 |

**Appendix V
 FTC Divestiture Orders Announced for
 Public Comment, Fiscal Years 1990 through
 2000**

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|-------------------|-----------------|---|--|---|---|
| C-3917 | 991-0024 | The Kroger Co. & Fred Meyer, Inc. | Retail sale of food and grocery products in supermarkets. | May 27, 1999 | 1999 |
| C-3986 | 981-0339 | Albertson's, Inc. + Abacus Holdings, Inc. & American Stores Company | Retail sale of food and grocery products in supermarkets. | June 22, 1999 | 1999 |
| C-3934 | 991-0075 | Shaw's Supermarkets, Inc. + J Sainsbury plc & Star Markets Holdings, Inc. | Retail sale of food and grocery products in supermarkets. | June 28, 1999 | 1999 |
| C-3905 | 991-0041 | The Kroger Co. & The John C. Groub Company, Inc. | Retail sale of food and grocery products in supermarkets. | August 23, 1999 | 1999 |
| C-3962 | 991-0308 | Delhaize America, Inc. (Food Lion) + Etablissements Delhaize Freres et Cie "Le Lion" S.A. & Hannaford Bros. Co. | Retail sale of food and grocery products in supermarkets. | July 25, 2000 | 2000 |
| Energy | | | | | |
| C-3314 | 901-0010 | Atlantic Richfield Company & ARCO Chemical Company & Union Carbide Corporation | Manufacture and sale of propylene oxide; manufacture and sale of urethane polyether polyol; manufacture and sale of propylene glycol . | September 17, 1990 | 1990 |
| C-3580 | 941-0043 | Montedison S.p.A. & HIMONT Incorporated & Royal Dutch Petroleum Company & The "Shell" Transport and Trading Company, p.l.c. & Shell Oil Company | Licensing of polypropylene technology; polypropylene technology; licensing, production, and sales of high-yield/high-specificity polypropylene catalysts and catalyst technology; production and sales of polypropylene resin; production and sales of polypropylene impact copolymer resin. | January 11, 1995 | 1995 |
| C-3697 | 961-0046 | NGC Corporation & Chevron U.S.A., Inc. | Fractionation of natural gas liquids. | August 28, 1996 | 1996 |

Appendix V
FTC Divestiture Orders Announced for
Public Comment, Fiscal Years 1990 through
2000

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|-------------------|-----------------|--|--|---|---|
| C-3759 | 951-0130 | SoftSearch Holdings, Inc.+ Dwight's Energydata, Inc. & Petroleum Information Corporation + GeoQuest International Holdings, Inc. | Sale or licensing of well data and production data. | December 5, 1996 | 1997 |
| C-3728 | 961-0056 | Phillips Petroleum Company + GPM Gas Corporation & Coastal Corporation + ANR Pipeline Company | Natural gas gathering services. | December 30, 1996 | 1997 |
| C-3803 | 971-0026 | Shell Oil Co. & Texaco, Inc. | Refining, transportation, terminaling, wholesale sales, and retail sales of conventional unleaded gasoline, CARB-II gasoline (specially formulated gasoline required in California), diesel fuel, kerosene jet fuel, and asphalt; and the transportation of undiluted heavy crude oil to the San Francisco, Cal. area. | December 19, 1997 | 1998 |
| N/A | 971-0091 | PacifiCorp and The Energy Group PLC ^b | Mining, production, and sale of coal; wholesale electricity sales. | February 18, 1998 | 1998 |
| C-3817 | 981-0076 | The Williams Companies, Inc. & MAPCO, Inc. | Transportation by pipeline and terminaling of propane; transportation by pipeline of raw mix. | March 27, 1998 | 1998 |
| C-3833 | 971-0007 | Exxon Corporation & The Shell Petroleum Company Limited + Shell Oil Company | Development, manufacture, marketing, and sale of viscosity index improver or viscosity modifiers for motor oil for automobiles and trucks. | August 20, 1998 | 1998 |
| C-3843 | 981-0166 | Shell Oil Company + Tejas Energy, LLC + Transok, LLC & The Coastal Corporation + ANR Field Services Company + ANR Production Company | Natural gas gathering services. | October 1, 1998 | 1999 |

Appendix V
FTC Divestiture Orders Announced for
Public Comment, Fiscal Years 1990 through
2000

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|-------------------|-----------------|--|--|---|---|
| C-3868 | 981-0345 | The British Petroleum Company p.l.c & Amoco Corporation | Terminaling of gasoline and other light petroleum products; wholesale sale of gasoline. | December 30, 1998 | 1999 |
| C-3915 | 991-0178 | El Paso Energy Corporation & Sonat, Inc. | Transportation of natural gas out of producing fields; transportation of natural gas into gas consuming areas. | October 22, 1999 | 2000 |
| C-3901 | 991-0244 | Dominion Resources, Inc. & Consolidated Natural Gas Company | Generation of electric power and the distribution of natural gas. | November 5, 1999 | 2000 |
| C-3907 | 991-0077 | Exxon Corporation & Mobil Corporation | Marketing of motor gasoline; refining and marketing of "CARB" gasoline (specially formulated gasoline required in California); bidding for and refining of jet fuel for the U.S. Navy; terminaling of gasoline and other light petroleum products; pipeline transportation of light petroleum products; pipeline transportation of crude oil; refining and marketing of paraffinic base oil; production and sale of jet turbine oil. | November 30, 1999 | 2000 |
| C-3932 | 001-0080 | Duke Energy Corporation & Phillips Petroleum Company & Duke Energy Field Services L.L.C. | Natural gas gathering. | March 31, 2000 | 2000 |

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|-------------------|-----------------|--|---|---|---|
| C-3938 | 991-0192 | BP Amoco p.l.c. & Atlantic Richfield Company | Production, sale, and delivery of Alaska North Slope crude oil; production, sale, and delivery of crude oil used by targeted West Coast refiners; production, sale, and delivery of all crude oil used by refiners on the West Coast; purchase of exploration rights; pipeline transportation of Alaska North Slope crude oil; development for commercial sale of natural gas; oil pipeline and storage services into and in Cushing. | April 13, 2000 | 2000 |

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| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|-----------------------------------|-----------------|--|---|---|---|
| Health care/pharmaceutical | | | | | |
| C-3305 | 901-0026 | Amersham International plc & Medi-Physics, Inc. | Formulating, manufacturing, marketing, and selling radiopharmaceutical brain perfusion imaging agents for use with Single Positron Emission Tomography equipment. | June 13, 1990 | 1990 |
| C-3311 | 891-0054 | E-Z-EM, Inc. & Lafayette Pharmacal, Inc. | Formulating, manufacturing, marketing, and selling barium diagnostic products and related accessories. | July 17, 1990 | 1990 |
| C-3301 | 891-0098 | Institut Merieux S.A. & Connaught BioSciences, Inc. | Rabies-vaccines. | January 17, 1990 | 1990 |
| C-3315 | 901-0072 | Roche Holdings, Inc. + Hoffman-La Roche Inc. + Roche Holdings Ltd. & Genentech, Ltd. | Research and development and production and manufacture of: vitamin C; therapeutics for treatment of human growth hormone deficiency or other short stature deficiency; and CD4-based therapeutics for the treatment of AIDS and HIV infection. | September 7, 1990 | 1990 |
| C-3472 | 931-0111 | Columbia Hospital Corporation & Galen Health Care, Inc. | Production and sale of acute care inpatient hospital services. | August 27, 1993 | 1993 |
| C-3530 | 901-0109 | Home Oxygen & Medical Equipment Company | Sale, rental, or lease of oxygen systems. | November 2, 1993 | 1994 |
| C-3531 | 901-0109 | Certain Home Oxygen Pulmonologists & Home Oxygen & Medical Equipment Company | Sale, rental, or lease of oxygen systems. | November 2, 1993 | 1994 |
| C-3532 | 911-0020 | Homecare Oxygen & Medical Equipment Company | Sale, rental or lease of oxygen systems. | November 2, 1993 | 1994 |
| C-3505 | 941-0005 | Columbia Healthcare Corporation & HCA-Hospital Corporation of America | Production and sale of acute care inpatient hospital services. | February 8, 1994 | 1994 |
| C-3519 | 941-0024 | TCH Corporation & Green Equity Investors, L.P. & Kmart Corporation | Sale of prescription drugs in retail stores. | February 24, 1994 | 1994 |

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| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment^a | Fiscal year FTC announced divestiture order for public comment^a |
|--------------------------|------------------------|---|--|---|---|
| C-3538 | 941-0020 | Healthtrust, Inc- The Hospital Company & Holy Cross Health System Corporation | Production and sale of acute care inpatient hospital services. | July 11, 1994 | 1994 |
| C-3540 | 941-0075 | Revco D.S., Inc. & Hook-SupeRx, Inc. | Sale of prescription drugs in retail stores. | July 15, 1994 | 1994 |
| C-3542 | 941-0085 | Roche Holding Ltd. & Syntex Corporation | Manufacture and sale of drugs of abuse reagent products. | August 30, 1994 | 1994 |
| C-3546 | 941-0081 | Rite Aid Corporation & LaVerdiere's Enterprises, Inc. | Sale of prescription drugs in retail stores. | September 2, 1994 | 1994 |
| C-3544 | 941-0108 | Columbia/HCA Healthcare Corporation & Medical Care America, Inc. | Production and sale of outpatient surgery services. | September 15, 1994 | 1994 |
| C-3557 | 941-0116 | American Home Products Corporation & American Cyanamid Company | Manufacture and sale of combined tetanus and diphtheria vaccine (adult Td); manufacture and sale of combined diphtheria and tetanus vaccine (pediatric DT); manufacture and sale of tetanus vaccine (tetanus toxoid); research and development of vaccine against Rotavirus infection in humans; research, development, production, and sale of cytokines for white blood cell and platelet restoration. | November 10, 1994 | 1995 |
| C-3564 | 951-0015 | Wright Medical Technology, Inc. + Kidd, Kamm Equity Partners, L.P. + Kidd, Kamm Investments, L.P. + Kidd, Kamm Investments, Inc. & Orthomet, Inc. | Manufacture and sale of orthopedic implants used or intended for use in the human hand approved by the Federal Drug Administration; research and development of orthopedic implants used or intended for use in the human hand. | December 8, 1994 | 1995 |

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|--------------------------|------------------------|--|---|---|---|
| C-3570 | 951-0007 | Healthsouth Rehabilitation Corporation & ReLife, Inc. | Production and sale by rehabilitation hospital facilities of comprehensive, acute inpatient medical rehabilitation services. | December 29, 1994 | 1995 |
| C-3573 | 951-0002 | Boston Scientific Corporation & Cardiovascular Imaging Systems, Inc. & SCIMED Life Systems, Inc. | Research, development, manufacture, and sale of intravascular ultrasound catheters. | February 24, 1995 | 1995 |
| C-3586 | 951-0054 | Glaxco plc & Wellcome plc | Research and development of noninjectable 5HT-ID agonists. | March 16, 1995 | 1995 |
| C-3619 | 951-0022 | Columbia/HCA Healthcare Corporation & Healthtrust, Inc.- The Hospital Company | Production and sale of acute care in-patient hospital services. | April 21, 1995 | 1995 |
| C-3627 | 951-0044 | Columbia/HCA Healthcare Corporation & Hopewell Hospital Authority + John Randolph Medical Center | Production and sale of psychiatric hospital services. | August 29, 1995 | 1995 |
| C-3629 | 951-0090 | Hoechst AG & Marion Merrell Dow, Inc. | Research, development, manufacture, and sale of: once a day diltiazem; oral dosage forms of mesalamine; rifampin; drugs approved by FDA for treatment of intermittent claudication. | September 18, 1995 | 1995 |
| C-3638 | 951-0140 | Upjohn Company & Pharmacia Aktiebolag | Research, development, manufacture, and sale of Topoisomerase I inhibitors for the treatment of colorectal cancer. | October 27, 1995 | 1996 |
| C-3645 | 961-0014 | Johnson & Johnson & Cordis Corporation | Manufacture and sale of neurological shunts. | December 20, 1995 | 1996 |
| C-3689 | 961-0053 | Fresenius AG + Fresenius USA, Inc. & National Medical Care, Inc. | Hemodialysis concentrate. | July 25, 1996 | 1996 |
| C-3721 C-3722 | 971-0016 971-0017 | J.C. Penney Company + Thrift Drug, Inc. & Eckerd Corporation & Rite Aid Corporation | Retail sale of pharmacy services to third-party payors. | December 9, 1996 | 1997 |

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|--------------------------|------------------------|--|--|---|---|
| C-3725 | 961-0055 | Ciba-Geigy Limited + Ciba-Geigy Corporation & Sandoz Ltd. + Sandoz Corporation | Gene therapy technology and research and development of gene therapies; research, development, manufacture, and sale of flea control products; research, development, manufacture, and sale of corn herbicide. | December 17, 1996 | 1997 |
| C-3726 | 971-0002 | Baxter International Inc. & Immuno International AG | Research, development, manufacture, and sale of Factor VIII Inhibitor Treatments; research and development, manufacture, and sale of Fibrin Sealant. | December 19, 1996 | 1997 |
| C-3743 | 971-0024 | Tenet Healthcare Corporation & OrNda Healthcorp | Production and sale of acute care inpatient hospital services. | January 29, 1997 | 1997 |
| C-3740 | 971-0009 | American Home Products Corporation & Solvay, S.A. | Research, development, manufacture, and sale of canine lyme, canine corona virus, and feline leukemia vaccines. | February 25, 1997 | 1997 |
| C-3762 | 971-0060 | CVS Corporation & Revco D.S., Inc. | Retail sale of pharmacy services to third-party payors. | May 30, 1997 | 1997 |
| C-3809 | 971-0103 | Roche Holding Ltd. & Corange Limited | Research, development, manufacture, and sale of Cardiac Thrombolytic agents; research, development, manufacture, and sale of drug abuse testing reagents used in workplace testing. | February 25, 1998 | 1998 |
| C-3879 | 981-0329 | Medtronic, Inc. & AVecor Cardiovascular, Inc. | Research, development, manufacture, and sale of non-occlusive arterial pumps. | March 10, 1999 | 1999 |
| C-3880 | 991-0089 | Zeneca Group PLC & Astra AB | Manufacture and sale of Long-Acting Local Anesthetics. | March 25, 1999 | 1999 |

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|-------------------|-----------------|---|--|---|---|
| C-3889 | 991-0095 | SNIA S.p.A. & COBE Cardiovascular, Inc. + COBE Laboratories, Inc. + Gambro AB | Research, development, manufacture, and sale of heart-lung machines. | May 14, 1999 | 1999 |
| C-3919 | 991-0071 | Hoechst AG + Rhône-Poulenc S.A. & Aventis S.A. | Research, development, manufacture, and sale of direct thrombin inhibitors; manufacture, marketing, and sale of cellulose acetate. | December 7, 1999 | 2000 |
| C-3957 | 001-0059 | Pfizer Inc. & Warner-Lambert Company | Research, development, manufacture, and sale of over the counter pediculicides; research, development, manufacture, and sale of selective serotonin reuptake inhibitor/selective norepinephrine reuptake inhibitors drugs for treatment of depression; research, development, manufacture, and sale of drugs for the treatment of Alzheimer's disease; research, development, manufacture, and sale of EGFR-tk inhibitors for the treatment of cancer. | June 19, 2000 | 2000 |
| Defense | | | | | |
| C-3656 | 961-0022 | Litton Industries, Inc. & PRC, Inc. | Research, development, manufacture, and sale of Aegis destroyers; Systems Engineering and Technical Assistance Services. | February 15, 1996 | 1996 |

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|-------------------|-----------------|---|--|---|---|
| C-3685 | 961-0026 | Lockheed Martin Corporation & Loral Corporation | Research, development, manufacture, and sale of air traffic control systems; provision of Systems Engineering and Technical Assistance services; research, development, manufacture, and sale of commercial low earth orbit satellites; research, development, manufacture, and sale of commercial geosynchronous earth orbit satellites; research, development, manufacture, and sale of military aircraft; research, development, manufacture, and sale of NITE Hawk systems (same as nonpublic military aircraft information); research, development, manufacture, and sale of simulation and training systems; research, development, manufacture, and sale of electronic countermeasures; research, development, manufacture, and sale of mission computers; research, development, manufacture, and sale of unmanned aerial vehicles; research, development, manufacture, and sale of integrated communications systems. | April 18, 1996 | 1996 |

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|-------------------------------|-----------------|---|--|---|---|
| C-3723 | 971-0006 | The Boeing Company & Rockwell International Corporation | Research, development, manufacture, and sale of high altitude endurance unmanned air vehicles, research, development, manufacture, and sale of space launch vehicles, research, development, manufacture, and sale of space launch vehicle propulsion systems. | December 5, 1996 | 1997 |
| C-3790 | 981-0081 | TRW Inc. & BDM International, Inc. | Research, development, manufacture, and sale of a ballistic missile defense system; Systems Engineering and Technical Assistance Services. | December 24, 1997 | 1998 |
| Information technology | | | | | |
| N/A | 941-0008 | Tele-communications, Inc., and Liberty Media Corporation & QVC Network, Inc. ^c | Subscription television program distribution to consumers and/or in cable premium movie channels. | November 15, 1993 | 1994 |
| C-3536 | 941-0059 | Adobe Systems Incorporated & Aldus Corporation | Development and sale of professional illustration software for use on Apple Macintosh and Power Macintosh computers. | July 27, 1994 | 1994 |
| C-3575 | 941-0132 | Tele-Communications, Inc. & TeleCable Corporation | Multichannel video programming. | January 26, 1995 | 1995 |
| C-3709 | 961-0004 | Time Warner Inc. & Turner Broadcasting System, Inc. & Tele-Communications, Inc. & Liberty Media Corporation | Sale of cable television program services to Multichannel Video Programming Distributors; sale of cable television programming services to households. | September 12, 1996 | 1996 |

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|-------------------|-----------------|---|---|---|---|
| 9282 | 951-0113 | Automatic Data Processing, Inc., and AutoInfo, Inc. | Integrated group of information products and services that form the complete salvage yard information systems network, consisting of an interchange integrated with yard management systems and electronic communications systems; development and sale of automotive parts and assemblies interchanges; development and sale of yard management systems integrated with interchange; development and sale of electronic communications systems used by salvage yards to locate parts through searches of a central database of parts; collection and provision of salvage yard inventory data to customers who provide such data as a part of estimating products sold to insurance companies. | June 18, 1997 | 1997 |
| C-3804 | 971-0095 | Cablevision Systems Corporation & Tele-Communications, Inc. | Distribution of multichannel video programming by cable television. | January 16, 1998 | 1998 |
| C-3818 | 981-0040 | Digital Equipment Corporation & Intel Corporation | Manufacture and sale of high-performance, general purpose microprocessors capable of running Windows NT; manufacture and sale of general-purpose microprocessors; design and development of high-performance, general-purpose microprocessors. | April 23, 1998 | 1998 |

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|---|-----------------|--|---|---|---|
| Industrial Products and Services | | | | | |
| C-3291 | 901-0009 | Emerson Electric Company + Emerson Power Transmission Co. & McGill Manufacturing Company, Inc. | Production and distribution of mounted ball bearings. | February 15, 1990 | 1990 |
| C-3306 | 901-0096 | Reckitt & Colman plc & American Home Products Corporation | Rug cleaning products business. | July 6, 1990 | 1990 |
| C-3312 | 901-0092 | T&N plc & J. P. Industries, Inc. | Manufacture and sale of thinwall engine bearings; design, manufacture, and sale of tri-metal heavywall engine bearings. | August 17, 1990 | 1990 |
| C-3374 | 921-0014 | Hanson PLC + H B Acquisitions PLC & Beazer PLC | Manufacture and sale of portland cement. | November 27, 1991 | 1992 |
| C-3378 | 911-0110 | Mannesmann, AG + Mannesmann Capital Corporation & Rapistan Corp. + Lear Siegler Holdings Corp. | Manufacture and sale of high speed, light-to-medium duty unit handling roller and belt conveyor systems for distribution end users. | January 16, 1992 | 1992 |
| C-3387 | 921-0032 | Rohm and Haas Company & Union Oil Company of California | Acrylic emulsion polymers for exterior architectural coatings. | May 13, 1992 | 1992 |
| C-3407 | 921-0084 | Dentsply International, Inc. & Johnson & Johnson | Premium silver alloy business. | October 8, 1992 | 1993 |
| C-3469 | 931-0086 | Cooper Industries, Inc.+ Cooper (U.K.) Limited & The Fusegear Group of BTR p.l .c. | Low voltage industrial fuse market. | June 25, 1993 | 1993 |
| C-3460 | 931-0092 | Consol, Inc. + E.I. du Pont de Nemours + RWE Aktiengesellschaft & Island Creek Coal, Inc. | Coal export terminal services. | July 1, 1993 | 1993 |
| C-3473 | 921-0099 | Imperial Chemical Industries plc & E.I. du Pont de Nemours and Company | Manufacture and sale of acrylic plastic. | July 1, 1993 | 1993 |
| C-3478 | 931-0098 | The Valspar Corporation + McWhorter, Inc. & Cargill, Incorporated | Manufacture and sale of coating resins and other markets contained therein. | October 22, 1993 | 1994 |

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|-------------------|-----------------|---|---|---|---|
| 9226 | 891-0037 | Textron, Inc. & Avdel PLC and Banner Industries, Inc. | Design, manufacture, and sale of aerospace blind rivets; design, manufacture, and sale of nonaerospace structural blind rivets. | October 28, 1993 | 1994 |
| C-3488 | 931-0138 | Alvey Holdings, Inc. + Alvey, Inc. & White Storage & Retrieval Systems, Inc. | Manufacture and sale of horizontal carousels. | December 7, 1993 | 1994 |
| C-3533 | 941-0019 | The Dow Chemical Company + Marion Merrell Dow Inc. & Rugby-Darby Group Companies, Inc. | Dicyclomine hydrochloride capsules and tablets. | June 22, 1994 | 1994 |
| C-3559 | 941-0073 | Sulzer Limited & Perkin-Elmer Corporation | Manufacture and sale of aluminum polyester powder. | September 29, 1994 | 1994 |
| C-3555 | 941-0054 | Oerlikon-Bührle Holding AG & Leybold AG + Degussa Aktiengesellschaft | Manufacture, distribution, and sale of turbomolecular pumps; manufacture, distribution, and sale of compact disc metallizers. | October 27, 1994 | 1995 |
| C-3571 | 951-0013 | Reckitt & Colman plc & L&F Products, Inc. | Development, manufacture, marketing, and sale for resale of carpet deodorizer products. | December 23, 1994 | 1995 |
| C-3624 | 931-0121 | Mustad Connecticut Inc. + Mustad International Group NV & Cooper Horseshoe Nail Co., Ltd. | Manufacture and sale of rolled horseshoe nails. | August 3, 1995 | 1995 |
| C-3648 | 961-0017 | Praxair, Inc. & CBI Industries, Inc. | Manufacture and sale of merchant argon, merchant oxygen, merchant nitrogen. | January 11, 1996 | 1996 |
| C-3651 | 951-0091 | Illinois Tool Works & Hobart Brothers | Industrial power sources, industrial engine drives, battery chargers, and aircraft ground power units. | February 2, 1996 | 1996 |
| C-3673 | 951-0096 | Compagnie de Saint Gobain + Societe Europeenne des Produits Refractaires + Saint-Gobain/Norton Industrial Ceramics Corporation & British Petroleum Company p.l.c. + The Carborundum Company | Fused cast refractories; hot surface igniters; silicon carbide refractory bricks. | February 26, 1996 | 1996 |

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|--------------------------|------------------------|---|--|---|---|
| C-3757 | 971-0013 | Cooperative Computing, Inc. & Triad Systems Corporation | Electronic automotive parts catalogs; management information systems integrated with an electronic catalog. | February 26, 1997 | 1997 |
| C-3746 | 961-0085 | Mahle GmbH + Mahle, Inc. & Metal Leve, S.A. | Research, development, design, production, and sale of articulate pistons; research, development, design, production, and sale of large bore two-piece pistons. | February 27, 1997 | 1997 |
| C-3783 | 961-0106 | Insilco Corporation & Helima-Helvetion Incorporated | Large Welded Aluminum Tubes; small Welded Aluminum Tubes. | August 27, 1997 | 1997 |
| C-3785 | 971-0105 | Dow Chemical Company & Sentrachem Limited + Hampshire Chemical Corporation | Research, development, manufacture, and sale of chelants. | November 28, 1997 | 1998 |
| C-3802 | 981-0086 | S.C. Johnson & Son, Inc. & Dow Brands Inc. + Dow Brands L.P. + Dow Brands Canada Inc. | Research, development, manufacture, and sale of soil and stain removers; research, development, manufacture, and sale of glass cleaner product. | January 23, 1998 | 1998 |
| C-3836 | 981-0011 | Federal-Mogul Corporation & T&N p.l.c. | Development, manufacture, and sale of thinwall bearings; development, manufacture, and sale of light duty engine bearings; development, manufacture, and sale of heavy duty engine bearings; m-manufacture and sale of aftermarket bearings. | March 6, 1998 | 1998 |
| C-3825 | 981-0173 | Global Industrial Technologies, Inc. & AP Green Industries, Inc. | Glass-furnace silica refractories. | June 26, 1998 | 1998 |
| C-3831 | 981-0111 | Nortek, Inc. + NTK Sub, Inc. & NuTone, Inc. | Manufacture, production, and sale of hard-wired residential intercoms. | July 27, 1998 | 1998 |

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|-------------------|-----------------|---|--|---|---|
| C-3883 | 991-0112 | Rohm + Haas Company & Morton International, Incorporated | Research, development, manufacture, and sale of water-based polymers. | April 26, 1999 | 1999 |
| N/A | 981-0327 | Quexco Incorporated and Pacific Dunlop Limited ^d | Smelting and refining of lead; recycling of junkers. | May 14, 1999 | 1999 |
| C-3904 | 991-0240 | Precision Castparts Corp. & Wyman-Gordon Company | Development, manufacture, and sale of Titanium Aerospace Investment Cast Components; development, manufacture, and sale of Large Stainless Steel Aerospace Investment Cast Components; development, manufacture, and sale of Large Nickel-based Superalloy Aerospace Investment Cast Components. | November 10, 1999 | 2000 |
| C-3918 | 991-0306 | Reckitt + Colman plc & Benckiser N.V. | Research, development, formulation, manufacture, marketing, and sale of hard surface bathroom cleaners; research, development, formulation, manufacture, marketing, and sale of fine fabric wash products. | November 24, 1999 | 2000 |
| C-3911 | 991-0167 | MacDermid, Inc. & Polyfibron Technologies, Inc. | Research, development, manufacture, and sale of liquid photopolymers; research, development, and sale of solid sheet photopolymers. | December 22, 1999 | 2000 |

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|-------------------|-----------------|--|---|---|---|
| C-4005 | 991-0281 | RHI AG & Global Industrial Technologies, Inc. | Research, development, manufacture, and sale of magnesia-carbon refractory bricks for basic oxygen furnaces; research, development, manufacture, and sale of magnesia-carbon bricks for electric arc furnaces; research, development, manufacture, and sale of magnesia-carbon refractory bricks for basic oxygen furnaces steel ladles; research, development, manufacture, and sale of magnesia chrome refractory bricks for steel degassers; research, development, manufacture, and sale of high-alumina refractory bricks for basic oxygen furnaces steel ladles; research, development, manufacture, and sale of high-alumina refractory bricks for torpedo cars. | December 30, 1999 | 2000 |
| C-3930 | 991-0237 | Rhodia & Albright & Wilson PLC + Donau Chemie AG | Manufacture, marketing, and sale of pure phosphoric acid. | March 14, 2000 | 2000 |
| C-3981 | 001-0100 | Agrium Inc. & Union Oil Company of California & Unocal Corporation | Production, distribution, and wholesale sale of nitrogen-based fertilizer urea; production, distribution, and wholesale sale of Urea Ammonia Nitrogen 32 solution; production, distribution, and wholesale sale of ammonia. | September 29, 2000 | 2000 |

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|---|-----------------|--|--|---|---|
| Other Consumer Products and Services | | | | | |
| 9215 | 851-0015 | Coca-Cola Bottling Company of the Southwest & San Antonio Dr Pepper Bottling | Branded carbonated soft drinks. | October 3, 1989 | 1990 |
| C-3289 | 901-0007 | Archer-Daniels-Midland Company + ADM Milling Co. & Dixie Portland Flour Mills, Inc. + Dixie Portland of Georgia, Inc. + The White Lily Foods Company | Production and sale of bulk bakery wheat flour. | January 25, 1990 | 1990 |
| C-3287 | 891-0115 | Rhone-Poulenc & Marschall Dairy Products + Miles Inc. | Manufacture and sale of dairy cultures. | February 16, 1990 | 1990 |
| C-3347 | 891-0071 | PepsiCo, Inc. & MEI Corporation | Branded carbonated soft drinks; all carbonated soft drinks. | November 15, 1990 | 1991 |
| C-3331 | 911-0032 | American Stair-Glide Corporation + Access Industries, Inc. & The Cheney Company, Inc. | Manufacture and sale of curved stairway lifts; manufacture and sale of straight stairway lifts; manufacture and sale of vertical wheelchair lifts. | January 18, 1991 | 1991 |
| C-3335 | 962-3310 | Alleghany Corporation & Chicago Title & Trust Company + Westwood Equities Corporation + New TC Holding Corporation | Production and sale of title plant information; production and sale back plant information. | February 26, 1991 | 1991 |
| C-3349 | 911-0040 | Alpha Acquisition Corporation + RWE-DEA Aktiengesellschaft fur Mineraloel and Chemie + RWE Aktiengesellschaft & Vista Chemical Company | High-purity alcohol process alumina. | June 7, 1991 | 1991 |
| C-3348 | 891-0086 | Sentinel Group, Inc. | Provision of funeral services. | July 30, 1991 | 1991 |
| C-3440 | 911-0087 | Service Corporation International & Sentinel Group, Inc. | Provision of funeral services. | July 30, 1991 | 1991 |
| C-3372 | 911-0127 | Service Corporation International & Pierce Brothers Holding Company | Provision of funerals. | November 29, 1991 | 1992 |
| C-3418 | 931-0023 | S.C. Johnson & Son, Inc. & The Drackett Company + Bristol-Myers Squibb Company | Continuous action air freshener products business and the instant air freshener products business; furniture care products business. | December 28, 1992 | 1993 |

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|-------------------|-----------------|--|--|---|---|
| C-3458 | 931-0047 | Monsanto Company & Chevron Corporation | Residential nonselective herbicide market. | May 13, 1993 | 1993 |
| C-3468 | 931-0071 | McCormick & Company, Inc. & Haas Foods, Inc. + John I. Hass, Inc. | Dehydrated onion business. | August 3, 1993 | 1993 |
| C-3523 | 921-0023 | Sara Lee Corporation + Kiwi Brands Inc. & Knomark, Inc. + Reckitt & Colman p.l.c. | Sale of chemical shoe care products used in the maintenance, cleaning, and protection of shoes. | June 30, 1994 | 1994 |
| N/A | 931-0090 | First Data Corporation and Western Union Financial Services, Inc. ^e | Consumer money transfer services. | August 18, 1994 | 1994 |
| 9271 | 941-0080 | B.A.T. Industries p.l.c. & Brown and Williamson Tobacco Corporation & American Tobacco Company & American Brands, Inc. | Manufacture and sale of cigarettes for U.S. consumption. | December 22, 1994 | 1995 |
| C-3579 | 951-0012 | Service Corporation International + SCI Oregon Funeral Services, Inc. + UC Acquisition Corp. & Uniservice Corporation | Provision of funerals and provision of perpetual care cemetery services. | March 1, 1995 | 1995 |
| C-3613 | 951-0056 | Scotts Company & Stern's Miracle-Gro Products, Inc. | Water soluble fertilizer for consumer use. | May 19, 1995 | 1995 |
| C-3635 | 951-0107 | First Data Corporation & First Financial Management Corporation | Sale of consumer money wire transfer services. | September 21, 1995 | 1995 |
| C-3646 | 951-0108 | Service Corporation International + Rocky Acquisition Corp. & Gibraltar Mausoleum Corporation | Provision of funerals, the provision of perpetual care cemetery services, and the provision of crematory services. | October 11, 1995 | 1996 |
| C-3650 | 951-0072 | Devro International & Teepak International | Manufacture and distribute collagen sausage casings. | December 5, 1995 | 1996 |
| C-3678 | 931-0084 | The Loewen Group Inc. + Loewen Group International, Inc. & Heritage Family Funeral Services, Inc. (Virginia) | Provision of funerals. | May 14, 1996 | 1996 |

**Appendix V
 FTC Divestiture Orders Announced for
 Public Comment, Fiscal Years 1990 through
 2000**

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment^a | Fiscal year FTC announced divestiture order for public comment^a |
|--------------------------|------------------------|---|---|---|---|
| C-3677 | 931-0052 | The Loewen Group Inc. + Loewen Group International, Inc. & Garza Memorial Funeral Home, Inc. + Thomae-Garza Funeral Directors, Inc. (Texas) | Provision of funerals. | May 14, 1996 | 1996 |
| C-3700 | 961-0060 | Wesley-Jessen Corporation & Pilkington Barnes Hind International, Inc. | Manufacture and sale of opaque contact lenses. | September 30, 1996 | 1996 |
| C-3742 | 961-0101 | General Mills, Inc. & Ralcorp Holdings, Inc. | Sale of branded and private label ready-to-eat cereals. | December 26, 1996 | 1997 |
| C-3801 | 971-0081 | Guinness PLC & Grand Metropolitan PLC | Premium scotch; premium gin. | December 15, 1997 | 1998 |
| C-3805 | 971-0087 | CUC International Inc. & HFS Incorporated | Sale of timeshare exchange services. | December 17, 1997 | 1998 |
| C-3808 | 971-0115 | LandAmerica Financial Group & Reliance Group + Commonwealth Land Title Insurance Company + Transnation Title Insurance Company | Production and sale of title plant services. | February 24, 1998 | 1998 |
| C-3867 | 991-0040 | ABB AB + ABB AG & Eltag Bailey Process Automation N.V. | Manufacture and sale of Process Gas Chromatograph; manufacture and sale of Process Mass Spectrometer. | January 11, 1999 | 1999 |
| C-3869 | 981-0353 | Service Corporation International & Equity Corporation International | Funeral services; cemetery services. | January 15, 1999 | 1999 |
| C-3933 | 981-0030 | Ceridian Corporation + Comdata Network, Inc. & NTS, Inc. + First Data Corporation + Comdata Holdings Corporation + Trendar Corporation | Provision of fleet card services to over the road trucking companies; development, manufacture, and sale of truck stop fuel desk automation services. | September 29, 1999 | 1999 |
| C-3900 | 991-0319 | VNU N.V. & Nielsen Media Research, Inc. | Advertising expenditure measurement service. | October 22, 1999 | 2000 |
| C-3929 | 991-0298 | Fidelity National Financial, Inc. & Chicago Title Corporation | Provision of title information services. | January 12, 2000 | 2000 |

**Appendix V
 FTC Divestiture Orders Announced for
 Public Comment, Fiscal Years 1990 through
 2000**

(Continued From Previous Page)

| FTC docket number | FTC file number | Merging parties | Product market(s) | Date FTC announced divestiture orders for public comment ^a | Fiscal year FTC announced divestiture order for public comment ^a |
|-------------------|-----------------|---|--|---|---|
| C-3935 | 991-0218 | FMC Corporation & Solutia, Inc. | Manufacture, marketing, and sale of pure phosphoric acid; manufacture, marketing, and sale of phosphorus pentasulfide. | April 7, 2000 | 2000 |
| C-3959 | 981-0108 | Service Corporation International and LaGrone | Funeral services. | May 18, 2000 | 2000 |

Note: N/A refers to not applicable.

^aWe used the date of FTC's press release announcing its acceptance of a proposed consent order as a proxy for the date that FTC entered into the proposed consent order with the merging parties because (1) many of the proposed consent orders posted on FTC's Web site did not contain a date and (2) according to FTC staff, FTC typically issues a press release announcing the agency's acceptance of a proposed consent order within 1 or 2 days of the agreement.

^bDuring the public comment period, Pacificorp withdrew its bid for The Energy Group and eventually sold all of its stock in the Group. Therefore, on July 2, 1998, FTC withdrew the proposed divestiture order and closed its investigation of the acquisition.

^cTele-communications, Inc., and Liberty Media Corporation & QVC Network, Inc., abandoned the transaction, and FTC withdrew acceptance of the proposed divestiture order and closed the investigation on March 16, 1994.

^dQuexco Incorporated and Pacific Dunlop Limited abandoned the transaction on July 14, 1999, and FTC subsequently withdrew the divestiture order.

^eFirst Data abandoned the proposed transaction, and FTC subsequently withdrew acceptance of the proposed divestiture order and closed the investigation on November 7, 1994.

Source: GAO's analysis of 153 FTC Divestiture Orders announced for public comment during fiscal years 1990 through 2000.

Antitrust Practitioners' Comments on FTC's Divestiture Practices

In recent years, antitrust practitioners have raised concerns regarding certain FTC's divestiture practices, particularly its preference for up-front buyers. Some practitioners we spoke with also raised concerns that the basis for FTC's merger remedy practices is not always clear and that the extent of information provided to them on the rationale for FTC's preferred remedies varies by staff. While interviewees had differing opinions on whether merger remedy guidelines are needed, the commenting practitioners generally agreed that there is a need for greater transparency in the merger remedy process.

Questions Raised about FTC's Up-Front Buyer Divestiture Practice

Antitrust practitioners' recent concerns about FTC's divestiture practices have largely focused on FTC's preference for up-front buyers. In a March 2001 speech, the former Acting Director of the Bureau of Competition noted that FTC staff had begun to hear criticisms that FTC had gone too far: "our policies are too inflexible... they impose unnecessary burdens, and that it takes too long to reach a resolution."¹²⁰ The official specified that FTC's preference for up-front buyers has been particularly singled out for criticism. Similarly, in an April 2002 speech,¹²¹ a DOJ Deputy Assistant Attorney General in the Antitrust Division commented that up-front buyers were one of the "hottest" topics over the past several years. The official also said that by the beginning of 2000 FTC had required up-front buyers in well over half of its cases in which a divestiture was required, but the Division had not adopted a similar policy and had not required an up-front buyer in any consent decrees. The official also noted that the up-front buyer requirement may have significant disadvantages:

"First, it can delay consummation of the transaction while the parties find, and obtain approval for, a buyer. Assuming the transaction has procompetitive components, this delay may have costs in the market. Second, an upfront buyer requirement can lead to strategic behavior by the potential purchasers who are given greater leverage in the negotiations. This may skew the bidding process in a way that is inconsistent with the agencies' [FTC and DOJ] goal of preserving competition in the marketplace."

¹²⁰ *Report from the Bureau of Competition*, Molly S. Boast, Acting Director, Bureau of Competition, Federal Trade Commission, before the American Bar Association Antitrust Section, Spring Meeting 2001, Washington, D.C., March 29, 2001.

¹²¹ *Houston, We Have a Competitive Problem: How Can We Remedy It?* Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the Houston Bar Association Antitrust and Trade Regulation Section, April 17, 2002.

The American Bar Association (ABA) also has questioned FTC's up-front buyer approach. In 2001, ABA's Task Force on Federal Antitrust Agencies of the Section of Antitrust Law issued a report on the state of federal enforcement of the antitrust laws.¹²² According to the report, there is some uncertainty in the legal and business communities concerning the circumstances under which FTC policy requires an up-front buyer. The report also stated that

"The policy needs to be clarified. In addition, the circumstances when up-front buyers should be required should be carefully examined to balance the need to preserve effective competition with the imposition of unnecessary costs on the merging parties."

Concerns Raised about Lack of Transparency in FTC's Merger Remedy Process

The lack of transparency in FTC's merger remedy process was another area of concern. Antitrust practitioners we spoke with told us that while FTC speeches, public workshops, and the 1999 divestiture study¹²³ provide some information on FTC's divestiture practices, the basis for the practices is not always clear, and the extent of information provided to the merging parties on the rationale for FTC's preferred remedy varies by staff. In the 2001 ABA Task Force report, ABA stated that "...press releases issued by FTC explaining its enforcement actions merely highlight the remedies achieved and provide conclusionary reviews of the competitive concerns, but generally do not meaningfully explain the market context, specific competitive concerns, and the mode of analyzing competitive effects." Similarly, in a recent article entitled *Toward Guidelines for Merger Remedies*,¹²⁴ the President of American Antitrust Institute (AAI) said that FTC's analysis to aid public comment documents do not offer insight into

¹²²*The State of Federal Antitrust Enforcement – 2001*, Report of the Task Force on Federal Antitrust Agencies – 2001, American Bar Association Section of Antitrust Law.

¹²³A Study of the Commission's Divestiture Process, Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, William J. Baer, Director, 1999.

¹²⁴*Toward Guidelines for Merger Remedies*, Albert A. Foer, American Antitrust Institute, Case Western Reserve Law Review, Vol. 52:211, Fall 2001, No.1.

trade-offs accepted during negotiations or reasons for accepting settlements that may differ in important respects from settlements in other apparently similar cases.¹²⁵

FTC staff acknowledged that FTC does not always provide a detailed rationale for its divestiture approaches. They told us that because FTC's decisions are largely tied to companies' trade secret information, which FTC is statutorily prevented from disclosing to the public, FTC can provide to the public only limited information on the basis for its decisions. ABA and AAI have concurred that FTC's lack of explanation of the basis for the remedies included in a divestiture order is due in part to the proprietary nature of the information. Nonetheless, in the AAI article on merger remedies, the President of AAI said that FTC has overused confidentiality as an excuse for not providing more transparency in the merger remedy process.

In fact, both ABA and AAI have said that there needs to be a more transparent approach to the remedy phase of the merger review process. Specifically, ABA has urged FTC to make greater efforts to more meaningfully explain the factors that give rise to competitive concerns, the type of evidence viewed as relevant, the econometric analysis used (if any), and other key considerations that led to the decision to bring a complaint or enter into a consent order. AAI also has recommended that FTC (1) study its enforcement patterns, (2) derive best practices, (3) formalize rules, (4) provide transparency so that the public can understand and evaluate decisions being made, and (5) conduct regular post hoc evaluations to determine how well a program is working.¹²⁶

FTC staff told us that FTC does in fact value transparency and has taken steps to provide the business community with information on FTC's merger review and merger remedy processes. In a June 10, 2002, speech¹²⁷ commemorating the twentieth anniversary of the merger guidelines,¹²⁸

¹²⁵The analysis to aid public comment describes both the allegations in the draft complaint that accompanies the proposed divestiture order and the terms of the proposed divestiture order that would settle the allegations.

¹²⁶ABA's and AAI's recommendations were directed to FTC's and DOJ's Antitrust Division.

¹²⁷"On the Occasion of the Celebration of the Twentieth Anniversary of the 1982 Merger Guidelines," Timothy J. Muris, Chairman, FTC, June 10, 2002.

¹²⁸U.S. Department of Justice, Merger Guidelines (1982).

which apply to the merger investigation phase of the merger review process, FTC's Chairman said that

"... the Guidelines demonstrated the value of transparency—having public antitrust authorities clearly state their enforcement attentions [sic], even at the risk of relinquishing the capacity to employ enforcement approaches that well-specified guidelines might disavow or disfavor. Experience with the 1982 Merger Guidelines has shown how the quality of policy improve when public officials specify clearly the bases on which they exercise their authority."

Questions Raised Regarding Whether Merger-Remedy Guidelines Are Needed

There has been some discussion among antitrust practitioners about whether merger-remedy guidelines are needed. Some practitioners have said that merger-remedy guidelines would provide a more structured, coherent, and transparent approach to the remedy phase of the merger review process. In fact, AAI prepared a proposal for merger-remedy guidelines and presented it to FTC in March 2002 for review and discussion at FTC's merger-remedies workshops.¹²⁹ Other practitioners have called for "practice guides" that could be used to educate antitrust practitioners and FTC staff about when and why to use certain divestiture practices, but would allow for greater flexibility in structuring a remedy. Regardless of whether they believed that guidelines are needed, they all agreed that there is a need for greater transparency in the merger-remedy process.

Conversely, FTC staff told us that merger-remedy guidelines are not needed for the following reasons:

- Because each case is unique and fact-based they draw on their past experiences and advice from experienced senior staff, rather than developing written policies and procedures to guide staff in fashioning merger remedies.
- The merging parties have very sophisticated antitrust counsel who are aware of how to structure remedies in order to obtain FTC approval.

¹²⁹The proposed guidelines are included in AAI's article mentioned in footnote 124.

- FTC speeches, workshops, consent orders, and public documents provide antitrust practitioners and the business community with information on FTC's merger remedy preferences.

According to FTC staff, in an effort to continue to build on its relationship with antitrust practitioners and other interest groups (such as consumer groups and corporate personnel) and to increase the transparency of its merger review and remedy processes, FTC planned two sets of public workshops, one focusing on merger investigations and the other focusing on remedies.¹³⁰ A March 15, 2002, FTC press release announcing the workshops states that the remedies workshops will consider whether the agency's remedy provisions are necessary or sufficient and if the process through which they are negotiated can be improved. The first remedy workshop was held in Washington, D.C., in June 2002.

¹³⁰The merger investigations workshops were held in San Francisco, New York, Chicago, Los Angeles, and Washington, D.C., during June 2002.

Comments on FTC's Divestiture Practices

Associations that represent grocery store businesses have complained to FTC that its clean sweep, single buyer, and up-front buyer divestiture practices have impaired the ability of small and independent businesses to purchase divested assets.¹³¹ Additionally, several smaller buyers of divested grocery store assets told us that other factors, such as the merging parties' bidding process, create additional challenges for smaller businesses in purchasing and maintaining the viability of divested assets. However, our review of public comments and discussions with associations that represent small and independent drug stores, funeral services, or gas station businesses (all the businesses we studied except groceries), revealed that few concerns have been raised concerning the impact of FTC's clean sweep, single buyer, and up-front buyer divestiture practices on the ability of small buyers in these industries to purchase divested assets.

Associations Representing Small Grocery Store Businesses Raised Concerns about FTC's Clean Sweep, Single Buyer, and Up-Front Buyer Divestiture Practices

The National Grocers Association (NGA) and the Food Marketing Institute (FMI) submitted comments to FTC saying that FTC's clean sweep, single buyer, and up-front buyer divestiture practices have hindered the ability of small and independent grocery store businesses to purchase divested assets.¹³² Both associations told FTC that these practices, described by FTC as preferences, have been interpreted in the business community as inflexible rules or policies.

NGA's September 6, 2000, public comment concerning the Food Lion and Hannaford divestiture in Richmond, Virginia, raised concerns about the impact of FTC's clean sweep and single buyer approaches on the ability of an independent grocer to purchase divested assets in the Richmond geographic market.¹³³ While NGA's concerns focused on the effect of these divestiture practices on a specific independent grocer, it also raised concerns about the impact of FTC's policies and practices on small and independent businesses in general. In its public comment, NGA said that

¹³¹The Food Marketing Institute defines an independent grocery store business as a business with 10 or fewer grocery stores.

¹³²FMI is the largest association that represents grocers. Its membership ranges from large chains to grocers with individual stores. NGA represents small and independent grocers.

¹³³NGA refers to clean sweep divestitures as the divestiture of all of the assets to be divested to a single buyer. Additionally, according to FTC staff, clean sweeps and single buyers are preferences not policies.

"These policies ignore the dynamics of the industry and the ever changing affects [sic] that these policies can have on the competitive environment. The FTC's criteria of having a single buyer replace things as they are is inherently flawed and plays directly into the hands of power buyers. The FTC criteria do not recognize the inherent difference between the top five multi-billion dollar chains and privately owned regional and community retailers."

FMI submitted a paper to FTC on June 18, 2002, as part of FTC's workshops on merger investigations and remedies.¹³⁴ According to FMI, since approximately 1996, FTC has applied increasingly rigorous policies to supermarket divestitures. FMI noted that while FTC staff describe these policies as preferences, they often have been interpreted as inflexible rules. Similar to NGA's comments, FMI said that the most significant policies that make it difficult for small and independent businesses to purchase divested assets are clean sweeps, single buyers, up-front buyers, and no change in market concentration policies. Specifically, FMI said that:

- FTC's preference for clean sweep divestitures may prevent small retailers from assembling divestiture packages that best suit their needs. According to FMI, to the extent that FTC's clean sweep policy is based on concerns about upsetting existing store networks or customer relationships, the concerns are overstated because (1) supermarket chains with a number of stores in a geographic market will inevitably contain some strong stores and some weaker stores and (2) there is no basis for assuming that a package of assets comprised of assets from both merging parties will contain a greater proportion of weaker stores. Additionally, FMI said that FTC's claim that the risk that divestiture of a mixed package of assets will cause a loss of distribution efficiencies also is exaggerated because there is no basis for FTC's assumption that an unmixed group of stores can always be supplied more efficiently than a mixed group of stores. FMI noted that "whatever logistical advantage lies in having all of the stores come from one prior owner rather than two generally is modest." Like NGA, FMI indicated that FTC's use of clean sweeps reflects the staffs' desire to avoid the burden of having to evaluate individual stores to examine the viability of each store and determine whether the merging parties may be attempting to divest their least profitable assets.

¹³⁴ *Supermarket Merger Investigations and Remedies*, Food Marketing Institute, submission to the FTC's Workshops on Merger Investigations and Remedies, June 18, 2002.

- FTC's preference for a single buyer limits opportunities for independents and small chains to purchase divested assets. FMI said that FTC staff rarely, if ever, allow stores to be sold to more than one buyer per market. Independents and small chains often are interested in buying, or may only have the ability to buy, a portion of the stores that are being divested in a market, but a single-buyer policy prevents this. According to FMI, a firm does not need to have complete market coverage or engage in marketwide advertising in order to be an effective competitor because no particular scale or degree of market coverage is necessary to compete effectively in grocery retailing. Additionally, FMI said that if more than one buyer is allowed to purchase the divested assets, the buyers of divested assets could seed a market with several growing chains.¹³⁵

Other Concerns Raised by Grocery Associations

NGA and FMI also raised several other concerns about the impact of FTC's divestiture practices on the ability of small businesses to purchase divested assets.

- Both NGA and FMI said that FTC's strong preference for out-of-market buyers (buyers that at the time of the proposed divestiture, are not already operating within the same product and geographic markets as the assets to be divested) has disadvantaged small businesses by preventing them from expanding to provide increased competition for the merged firm. According to FMI, as long as there is any possibility of a buyer that does not currently operate in the geographic market, FTC staffs' typical approach has been to warn counsel that securing approval for a buyer within the geographic market would be difficult and time-consuming. FMI said that in response to FTC's warnings, most counsel have found out-of-market buyers.
- NGA indicated that FTC's definition of the relevant geographic market also impacts the ability of small businesses to purchase divested assets

¹³⁵FMI said that while some supermarkets are vertically integrated, many others are supplied by wholesalers. Grocery wholesalers often have excess capacity in their distribution centers. They compete vigorously to supply existing retailers and establish new retailers in business. Wholesalers offer retailers many services, including: promotion, advertising, and merchandising programs; computerized orderings; receiving and scanning systems; retail accounting, budgeting, and payroll systems; management and employee training; consumer and market research; site selection and store development assistance; and insurance programs.

because FTC does not allow buyers already operating in the relevant geographic market to purchase the assets to be divested if their market share would increase above that permitted by the *Horizontal Merger Guidelines*. According to NGA's public comment on the Food Lion and Hannaford merger, FTC should have defined one of the relevant geographic markets—Richmond, Virginia—in which to analyze the competitive concerns differently because there was strong evidence that inner city Richmond was a separate geographic market. NGA claimed that if FTC had defined inner city Richmond as a separate market, the market share of an independent Richmond grocer interested in purchasing the divested assets would have increased only to a level acceptable under the *Horizontal Merger Guidelines*.

- NGA noted that the merging parties' bidding process for the assets to be divested may disadvantage small businesses. NGA suggested that FTC ensure a fair and open divestiture process by requiring the merging parties to provide FTC with information on the bidding process, such as copies of all expressions of interest in purchasing the assets to be divested and the merging parties' evaluations of each bid. According to NGA, in numerous meetings with FTC staff and Commissioners, NGA has consistently been told that FTC leaves the divestiture process in the hands of the merging parties, and its role is merely to approve or disapprove the proposed buyer(s). NGA said that FTC should play a greater role in the bidding process for the assets to be divested.
- According to FMI, independents and small firms believe they face closer scrutiny of their financial viability, experience, supply arrangements, and business plans than large chains. FMI reported that the additional scrutiny of independents and small firms takes time and brings added uncertainty to the process, usually at a late stage in the investigation, when the parties are becoming increasingly worried that the merger may fall apart. Additionally, FMI noted that given the perception that independents and small chains are subjected to more scrutiny than large chains to be approved as buyers of divested assets, merging parties are likely to seek a buyer that is a "sure thing"—a well-established, out-of-market chain, rather than proposing divestiture to one or more independents.

FMI concluded that in supermarket mergers, as perhaps no other industry, FTC in recent years has imposed a series of increasingly inflexible divestiture policies that place small chains and independent businesses at a disadvantage in the divestiture process, to their detriment and the

detriment of consumers. Additionally, FMI said that FTC could go a long way toward dispelling the perception of bias against small chains and independent businesses in part by not insisting on clean sweeps and single buyers and by being open to in-market buyers. These changes, according to FMI, would give small chains and independent businesses realistic opportunities to become stronger and larger competitors.

Smaller Buyers of Divested Grocery Store Assets Raised Concerns about the Challenges They Face in Purchasing Divested Assets and Maintaining Their Viability

While obtaining revenue data from buyers of divested assets, representatives of 11 grocery store businesses with average annual revenues of \$200 million or less provided anecdotal comments about the challenges that smaller businesses face in purchasing divested assets and maintaining their viability.¹³⁶ Regarding their ability to purchase divested grocery store assets, the buyers provided the following comments.

- One representative noted that currently there is limited opportunity for smaller grocery store businesses to purchase divested assets because the merging parties sell the assets as a package to a single buyer. Smaller businesses may have the necessary financing to purchase one or two of the assets, but usually do not have the financial strength to purchase all of the assets.¹³⁷
- Four representatives told us that the merging parties usually offer smaller businesses the stores that the larger chains have declined to purchase. They said that they generally have access to some of the least desirable grocery stores being divested in terms of the condition of the stores, and have had to spend a considerable amount of money to refurbish them.

¹³⁶Four of the buyers applied to purchase the divested assets during fiscal years 1990 to 1996 period, and seven buyers applied to purchase the divested assets during the fiscal years 1997 to 2000 period.

¹³⁷Usually, FTC does not allow the merging parties to finance the proposed buyer's purchase of the divested assets. FTC typically requires that a divestiture be absolute, which means that the merging parties are to have no continuing ties to the divested business or assets, no continuing relationship with the buyer, and no financial stake in the buyer's success. According to FTC staff, divestiture proposals in which the buyer intends to rely on the merging parties to finance the divestiture, or where the proposal includes performance payments by the buyer have been rejected.

- Two representatives indicated that smaller businesses usually do not have an opportunity to express an interest in purchasing divested assets because, in practice, the bidding process is often closed to small businesses. They indicated that typically the merging parties have already identified buyers for the divested assets by the time that small businesses become aware that the merging parties must divest assets.¹³⁸ One of the representatives said that FTC may need to play a greater role in the bidding process.

The anecdotal accounts suggested that the current environment, particularly the practices of merger parties, makes it difficult to maintain the viability of divested grocery store assets:

- Two representatives told us that they received inaccurate or incomplete information from the merging parties or wholesaler. They said that after purchasing the stores, they discovered that the stores generated considerably less sales than reported to them by the merging parties. For example, a buyer of one divested grocery store said that he had to close the store 5 months after purchasing the store because it generated only a fraction of the sales quoted by the merging parties.
- Two representatives said that buyers of divested assets, particularly smaller buyers, have faced challenges remaining in business when the merging parties build state of the art supermarkets in the same geographic markets in which they were required to divest assets. They said their sales declined and several supermarkets went out of business because they were unable to compete with the larger, state of the art supermarket.
- Two representatives told us that the biggest problem smaller grocers face in maintaining the viability of the divested stores they purchase is competing with grocery chains that have supercenters.¹³⁹ They told us that it is becoming extremely difficult for small businesses to compete with supercenters because the supercenters offer one-stop shopping—

¹³⁸According to FTC staff, in the case of retail divestitures, smaller businesses generally should have access to information on proposed mergers and related divestiture requirements. They said that sources such as the Wall Street Journal and trade publications typically provide this information.

¹³⁹A supercenter is a retail store with a combined full-line supermarket and a full-line discount merchandiser.

the convenience of being able to purchase groceries at the same time as other household items, such as clothes, appliances, and other household products. They also noted that while supercenters and large grocery chains are able to purchase and/or sell some products below costs, small businesses cannot afford to sell products below cost and remain profitable.

Public Comments Raised Few Concerns Regarding the Impact of FTC's Divestiture Practices on Small Businesses in the Drug Store, Funeral Services, and Gas Station Industries

Only one of the 1,902 public comments contained in FTC's public files for the 31 divestiture orders included in our review raised a specific concern about how FTC's clean sweep, single buyer, and/or up-front buyer divestiture practices have impacted the ability of small businesses to purchase divested assets.¹⁴⁰ However, we were unable to fully examine the public comments for the 31 divestiture orders included in our review because some of them were confidential and others appeared to be missing from the files.¹⁴¹ Of the 1,902 public comments, 1,441 related to grocery store divestiture orders, 455 related to gas stations, four to drug stores, and two to funeral services. Our review of the public comments for each of the industries showed that:

- About 80 percent (1,146 of 1,441) of the comments relating to the grocery store industry were petitions or form letters from individuals expressing objections to the divestiture of a supermarket to a proposed buyer for the Ahold and Stop and Shop divestiture order announced for public comment in fiscal year 1996. Specifically, the customers of an existing local grocery store were concerned that the proposed buyer of the divested supermarket would harm the market share of the existing local grocery store business. Most of the remaining comments concerning grocery store divestitures were from customers who did not want the store where they shopped to close or change ownership. Other comments were from employees of stores being divested that did not want to work for a proposed buyer(s) when the buyer(s) did not have a good history of managing its employees or they feared they would lose their jobs if the stores were divested.

¹⁴⁰Only 19 of the 31 divestiture orders had public comments contained in the public files. We did not identify any public comments in the public files for the remaining 12 divestiture orders.

¹⁴¹According to FTC staff, in some cases, the individual providing a comment requests that FTC keep the comment confidential. They told us that they keep confidential comments in the nonpublic files.

- Two of the four drug store industry comments opposed the merger, one requested that a particular drug store be included in the divestiture order and one requested that a specific drug store be sold to an independent drug buyer rather than another drug store chain.
- One of the two comments concerning the mergers in the funeral services industry expressed objection to the merging parties' selection of the funeral homes to be divested. The other comment questioned whether an investigation was made to determine if the required divestiture would restore competition.
- About 60 percent (275 of 455) of the comments relating to the gas station industry were petitions from retirees of one of the merging parties who were concerned about their medical coverage after the merger or citizens who wanted to continue the gasoline brands of the 2 merging parties. Most of the remaining comments were from independent gas station dealers or their representatives expressing concerns that the divestiture orders would remove dealers from their business place with no right of first refusal on the purchase of their gas stations.

FTC received only one public comment relating to small businesses that concerned the impact of FTC's clean sweep divestiture, single buyer, and up-front buyer practices on the ability of small businesses to purchase divested assets. Specifically, in response to the Food Lion and Hannaford divestiture order announced for public comment in fiscal year 2000, NGA, as discussed previously, commented that FTC's preference for clean sweeps, single buyers, and buyers that do not currently have a presence in the geographic market in which the assets are being divested have tremendously disadvantaged small businesses.¹⁴² Other public comments

¹⁴²NGA also said that an up-front buyer should not be permitted to acquire the divested stores prior to FTC's review of the public comments and entry of the final order. Under FTC's current practice, the merging parties can consummate the merger and provisionally approved buyers can purchase the divested assets prior to the public comment period and FTC's issuance of the final order. To preserve FTC's ability to reject an up-front buyer following the public comment period, the consent orders require the merging parties to include a rescission provision in any divestiture contracts in which closing on the divestiture will occur before final Commission approval of the consent order. As of June 30, 2002, FTC had not ordered rescission of an up-front divestiture. According to FTC staff, there have been instances in which the buyers will only purchase the assets after the final order has been approved. Additionally, they recalled one instance in which FTC said that the assets could not be divested until the order was final.

that related to small business ranged from whether a smaller business could effectively compete in a market dominated by larger companies to how a divestiture will impact supply contacts that small businesses had in place with one of the merging parties prior to the merger.

FTC staff told us that the formal public comment period is not the only opportunity for concerned parties to express their views on an FTC matter. According to FTC staff, it is customary for affected third parties, including smaller businesses, to communicate with Commissioners and staff throughout the merger investigation. As a result, they said that the formal public record of comments on a proposed divestiture order and FTC's responses do not represent the totality of FTC's responsiveness to small businesses who have concerns about a pending merger. They cited two instances in which FTC has received comments outside of the public comment process regarding small and independent businesses being unable to purchase divested assets. First, they told us that some time ago, an attorney representing a grocery wholesaler presented arguments for why FTC should accept wholesaler-suppliers as acquirers of supermarkets. They said that FTC has considered those arguments in all matters, as appropriate. Additionally, in regard to the divestitures of gasoline retailing assets in the Exxon and Mobil matter, FTC received communications from a small regional "jobber" who complained that the requirement that all assets be divested to a single acquirer foreclosed the jobber from bidding on the divested assets.¹⁴³ In that matter, FTC determined that an effective remedy precluded dividing the assets into smaller packages.

We also talked with associations that represent small and independent businesses as well as SBA officials who generally told us that they were unaware of concerns directly related to the impact of FTC's clean sweep, single buyer, and up-front buyer divestiture practices on the ability of small businesses to purchase divested assets. Specifically,

- The Petroleum Marketers Association of America expressed some concern about FTC's divestiture practices in general. The official we spoke with noted that FTC has the ability to influence the merging parties' choice of a buyer of divested assets even though FTC does not ultimately choose the buyer.

¹⁴³Jobbers are independent firms that distribute branded gasoline to retail gasoline stations, which are sometimes owned by a jobber.

- A National Community Pharmacists Association (NCPA) official told us that NCPA did not have any concerns directly related to FTC's divestiture practices. However, the official said that he was not aware that in certain situations FTC explicitly required merging parties to divest drug store assets to a single buyer. The official also said that it was his view that this requirement would definitely make it difficult for small businesses to purchase divested drug store assets.
- Officials of 4 of the 10 associations we contacted—the National Funeral Directors Association, the National Business Association, the National Small Business United, and the U.S. Chamber of Commerce—said that to their knowledge their members did not have any concerns directly related to the impact of FTC's divestiture practices on the ability of small businesses to purchase divested assets.
- Officials of the National Federation of Independent Business and the SCORE Association told us that their associations do not have an official position on the issue.

We also contacted staff in the Small Business Administration's (SBA) Office of Advocacy to determine whether any small businesses or associations representing small businesses had raised this issue with SBA. According to SBA staff, SBA had not been made aware of concerns about the impact of FTC's divestiture practices on the ability of small businesses to purchase divested assets. They noted that the issue that has been raised concerning mergers in the retail sector is whether small businesses will have access to products or services after the merger takes place. For example, they told us that in response to the Exxon and Mobil as well as the British Petroleum and Amoco Atlantic Richfield Company mergers, small businesses raised concerns regarding whether the merged companies would continue to provide them with access to crude oil.

Comments from the Federal Trade Commission



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

September 13, 2002

Mr. Paul L. Jones
Director
Justice Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Jones:

The Federal Trade Commission appreciates the opportunity to comment on the draft report submitted by the General Accounting Office ("GAO") to the Commission on August 22, 2002, and entitled: Federal Trade Commission: *Study Needed to Assess the Effects of Recent Divestitures on Competition in Retail Markets* (GAO-02-793) ("Report"). The Report discusses various aspects of the Commission's divestiture practices and policies.

The Commission has been pleased to work with the GAO staff conducting this review since April 2001, by providing information about the FTC's practices and policies concerning divestitures, particularly those in the retail industries identified by GAO. The Commission believes that the Report adds important information about the Commission's role in enforcing the antitrust laws related to mergers. The Commission provides below its comments on the draft Report.¹

History of Commission's Divestiture and Remedy Practices

Any review of the Commission's current merger remedy practices should be placed in the context of the history of the Commission's activity in this area. Prior to the passage of Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") and implementation of the premerger notification program,² the Commission and the Department of Justice were forced to seek post-merger remedies to anticompetitive mergers. Most anticompetitive mergers were consummated before the antitrust law enforcement authorities could challenge them. It was

¹ The Commission's staff has already provided technical comments to the GAO's staff.

² The premerger notification program was established by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, adding Section 7A of the Clayton Act, 15 U.S.C. § 18a. It is commonly known and referred to in GAO's Draft Report as the "HSR Act" or "Act." The regulations that implement the Act became effective on September 5, 1978.

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frequently impossible or nearly impossible to achieve an effective remedy because the companies' assets were combined and jointly operated during the lengthy litigation that followed. This so-called "egg-scrambling" made it extremely difficult to identify and segregate the assets that needed to be divested for effective relief. A study completed in the late 1960s showed that a majority of orders issued in cases involving mergers prior to 1960 failed to establish independent competitors in a timely fashion.³ To correct the problems associated with these "Pyrrhic victories," Congress enacted the HSR Act to require that companies contemplating mergers over a certain size report their intentions to the antitrust enforcement agencies before consummation of the merger.

The prior notice required by the HSR Act was intended to enable the antitrust agencies to prevent anticompetitive mergers prior to their consummation and thus prevent the interim loss of competition and the difficulties associated with restoring competition after the "egg-scrambling" that follows an acquisition. Immediately following enactment of the HSR Act, the Commission frequently sought to preliminarily enjoin transactions that raised competitive issues, although it also continued to issue orders requiring divestitures. In the early 1980s, the antitrust enforcement agencies appeared to be more willing to allow firms to restructure transactions to eliminate the potential competitive problems identified in the investigation. In the orders it did issue, the Commission began requiring that assets to be divested be held separate or otherwise independently maintained. The Commission began to require inclusion of crown jewel provisions (requiring divestiture of additional or alternative assets if the respondent failed to divest on time), and the Commission authorized a divestiture trustee to effectuate a required divestiture in the event that the respondent failed to do so. For the most part, the objective of divestiture orders during the early 1980s was to establish an immediate competitor in the market in question, thereby attempting to replace immediately the competition lost as a result of the illegal merger and to do so with as little interim harm as possible.

In the early 1990s, the Commission began taking a somewhat more flexible approach to merger remedies, ordering licensing remedies and divestiture of intangible assets, but often not mandating the divestiture of a going concern. The objective of such remedies was to facilitate entry into the market in question – by giving a would-be competitor the key assets needed to overcome the identified entry barriers and relying on that competitor to garner market share – rather than to establish an immediate competitor in the market by divesting a going concern with an established customer base. The use of these remedies increased during the 1990s.

³ Kenneth G. Elzinga, "The Antimerger Law: Pyrrhic Victories?," 12 J. LAW & ECON. 43 (1969). Professor Elzinga's classic study showed that 35 of 39 pre-HSR orders, issued in cases involving mergers that occurred prior to 1960, did not establish an independent competitor in a timely fashion. Rogowsky came to the same conclusion after examining 104 divestiture orders that were issued between 1969 and 1980. R. Rogowsky, *An Economic Study of Antimerger Remedies* (unpublished doctoral dissertation), U. Va. (1982). He ranked over 80 percent of the orders as unsuccessful. Both studies found that, on average, the divestitures occurred more than five years after the anticompetitive acquisition had been consummated.

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In the mid-1990s, the Commission believed it would be worthwhile to review its recent divestiture orders to assess how well they had met their goals. Also, the Commission became aware of problems with the implementation of some of the earlier orders it had issued. In a handful of instances, the assets that were required to be divested were allowed to deteriorate, and there was a perception, both in the private bar and among Commission staff, that some merger relief orders had not worked as well as expected. Based on those concerns, and on the Commission's ongoing interest in reviewing the effectiveness of its actions generally, the Commission authorized its Bureaus of Competition and Economics to conduct a more formal study of past divestitures, with an eye toward identifying potentially necessary or worthwhile improvements.⁴

After completion of the 1999 Divestiture Study, the Commission more frequently issued orders in which the parties to the transaction identified a "buyer up front" for the assets to be divested, and in which the assets to be divested constituted an "ongoing business." As the Commission's staff explained to GAO staff, the Commission had begun using buyers up front before the 1999 Divestiture Study and increased the use of buyers up front in order to lessen the time that respondents owned – and thus could diminish the competitiveness of – the assets to be divested. Through its experience with grocery store divestitures, the Commission became aware that mergers and divestitures involving grocery stores needed to be carefully structured and it was not aware of an alternative to the use of up-front buyers to avoid deterioration of the assets to be divested.⁵

⁴ The Commission's Bureaus of Competition and Economics conducted a study of the Commission's divestiture orders issued from 1990 through 1994, and the Bureau of Competition published the results of that study in 1999. The public version of the Bureau of Competition's report, *A Study of the Commission's Divestiture Process* ("1999 Divestiture Study") is available at <<http://www.ftc.gov/os/1999/9908/divestiture.pdf>>. The GAO's draft Report discusses the 1999 Divestiture Study and extrapolates the findings of that Study to the retail industry. The 1999 Divestiture Study was not limited, however, to divestitures in retail industries. Accordingly, there is some risk in extrapolating conclusions from a study of many industries and applying those conclusions to the retail industry alone.

⁵ See, e.g., *Schnuck Markets, Inc.*, 119 F.T.C. 798 (1995); see also Press Release, *Schnucks to Pay \$3 Million, Divest Two Additional Stores to Settle FTC Charges of Running Down Supermarkets Before Divesting* (July 30, 1997), available at <<http://www.ftc.gov/opa/1997/9707/schnuc-1.htm>> (respondents consented to a civil penalty and divestiture of additional stores, settling charges that some of the original assets to be divested were allowed to deteriorate significantly). The GAO's draft Report also identifies "clean sweeps" as one of the provisions recently used in the Commission's divestiture orders. As the Commission's staff noted to GAO staff, "clean sweep" is a colloquial term, appearing in speeches by current and former Commission staff, but is not a term itself used in final orders. In particular, the "clean sweep" concept varies among cases. Nevertheless, the Commission's recent grocery store orders have tended to require divestiture of all of the assets of one of the

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Through speeches, conferences, and informal talks, the Commission has sought and continues to seek input on merger issues from the public, including the business and legal communities. The Commission acknowledges, however, private sector concerns about changes in the divestiture process and the transparency with which that process is conducted. Within the last few months the Commission has (1) continued its ongoing public discussions and initiated a new series of discussions concerning both the remedy process and the merger investigation process⁶ (including in those discussions the antitrust groups identified by GAO in the Report) and (2) published, in the form of 45 questions and answers, the Bureau of Competition's "Frequently Asked Questions About Merger Consent Order Provisions" ("FAQs"),⁷ a detailed statement of the framework used in developing and considering appropriate remedies in merger cases.⁸ We have encouraged interested parties to review and comment on those questions and answers as part of our normal dialogue with parties affected by our activities. The first workshop specifically on merger remedies was held in Washington, D.C., on June 18, 2002. A number of the issues of concern in the draft Report were discussed at that workshop. The Bureau is planning a second merger remedy workshop to be held in New York City in October 2002.

GAO's Recommendation of an FTC Study

As a result of its review, GAO has recommended that the Commission undertake a study of divestiture orders issued in connection with mergers and acquisitions in the retail industry and made final after fiscal year 1994, in order to assess "the viability of buyers of divested assets" and "competition in the marketplace." Such a recommendation is consistent with the Commission's own objectives. As expressed in its most recent GPRA report, the Commission plans to "study and evaluate the remedies used in past antitrust cases, particularly divestiture orders used to resolve merger cases. This ongoing process focuses on what makes divestiture

merging firms within the identified geographic market, in order to replicate as closely as possible the competitive situation existing before the acquisition took place.

⁶ See Press Release, *FTC Initiates "Best Practices Analysis" for Merger Review Process* (Mar. 15, 2002), available at <<http://www.ftc.gov/opa/2002/03/bcfaq.htm>>. Transcripts of those sessions are available on the Commission's website, as are submissions of interested parties. Available at <<http://www.ftc.gov/bc/bestpractices/index.htm>>.

⁷ Available at <<http://www.ftc.gov/bc/mergerfaq.htm>>.

⁸ The FAQs provide guidance in addition to that in the 1999 Divestiture Study. Approximately one-half of the questions and answers provide detailed guidance on what factors the Commission staff considers (and why they consider them) when reviewing proposed buyers of divested assets, the timing of a divestiture, and what assets are to be divested by the merging parties.

Mr. Paul L. Jones

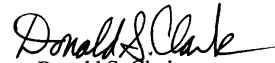
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orders most effective in preserving or restoring competition, and on how to expedite the completion of curative divestitures.”⁹

The Commission recognizes the benefits of reviewing the effectiveness of its divestiture orders, and the Commission and its staff continue to do so. The 1999 Divestiture Study reflects that the Commission was committed to evaluating the impact of its activities before the GAO’s study was begun. The Commission’s staff is conducting data- and resource-intensive retrospectives as part of its efforts to assess the effects of antitrust merger decisions. For example, the Commission’s staff is studying the impact of consummated hospital mergers on competition in cases where no restrictions were imposed on the merging parties. The hospital merger retrospectives focus on whether the prices of hospital services increased post-merger (when one controls for other factors). In addition, the Commission’s staff is working on a petroleum merger report that seeks to update previous Commission reports on merger activity and structural changes in the petroleum industry. Several of the mergers being studied resulted in divestiture orders. These studies meet the GAO’s recommendation that the Commission be aware of the competitive conditions in the marketplace and the economic effects of its enforcement actions on the markets over time.

This Report represents the results of an effective dialogue between the GAO and the Commission and should lead to further improvement in the Commission’s merger enforcement efforts. The Commission appreciates the opportunity to review and comment on GAO’s Report.

By direction of the Commission.


Donald S. Clark
Secretary

⁹ FTC GPRA Performance Plan FY 2002-2003 at 26, available at <<http://www.ftc.gov/opp/gpra/ppfy02fy03.pdf>>.

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