

0 H U J H U 5 H P H Q L H

6 W D W H P H Q W R I W K H
% X U H D X R I & R P S H W L W L R Q
) H G H U D O 7 U D G H & R P P L V V

5 L F K D U G) H L Q V W H L Q
' L U H F W R U

- D Q X D U \

7 K H Y L H Z V H [S U H V K R V G H K R H U W H L Q D X H H D X R I & R P S H W L W L R Q
D Q G G R Q R W Q H F H V V D U L O \ U H I O H F W W K H Y L H Z V R I W K
& R P P L V V L R Q R U R I D Q \ L Q G L Y L G X D O & R P P L V V L R Q H U

Statement of the Federal Trade Commission's Bureau of Competition
on Negotiating Merger Remedies

7KHHD07DHRPPKDRIRPSHWWRQMHGKWDWHPHQ
KRRHHDHWRWKMQRWDWDMWWOHPHQDPHHEDM 7KH
KQQRPDRIWKTNRWRQFWIHTNQODMDQSHSHWHQRWDWRQ ,Q
DWRQHEDWHRKQHWRPPKDFRPSODQRKDDODWHG
RFRHQWRMHDEKHSRQFWWRPPKMTNSDWFDMV
DFRHHQNKAMDQSRMRHPHEDONWHRQKSDWEDDIDFWKI
WKFDMFRQDWRWWHRPPKDFHSHWHSWEDSRQKSDWDO
QRWRQFWEDDORQEHSHMFWWWPHSRKQEHDFHSHWQDZDWWHU
7KRPPEQWWDIIDHFRQDQOQHDHFPWKHSHHQSRQ
SHKDMWFSRHEHQPDQWEHDFHSHWDEOHQKMTNQFDM

7WDWHPHQDKHWEWWKWDIIMHQIHERQHESRSRMRU
FRPDWHQDQFWRQFWWWKPHEDWHDQDIIDHQRWDWDMWWOHPHQ
7WDWHPHQDHMDQKIROORDHDWDMWWREHFWHQ
DFFHSWDEOHEFWWWNDHHPHQDWRQORHSRQHW
ROMSDDWHDQEDQDQWSHQFWWWNDSSOEDWRQ
WED⁴

6HHWSZFRFEHWSDFWEHQWP IRWDESWDQODWHG
KPRQIWKKNKSWWWKMDMORPHHHPHMDOK
HTNQONHCNWRQERW0HHEQ2HBRQW
WWSZFRFPHTWP DQKMDRIRPSHWWRQWVN6WVW
WWSZFRKHWVNSG

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The Proposed Divestiture

‡ Anticompetitive horizontal mergers are most often remedied by a divestiture; a proposal to divest one party's demonstrably autonomous, on-going business unit will usually expedite settlement.

7KRPPEQVFWDIIDQOHSESRMRERFPDWHCHHEHWVHQ
FRPSHWVRWRGWHPHFWKWVDFDMDQVERPSHWVHHIIFWQ
KODWRQI6HFWRQIWHQDWRQW ,IWDIHWHPQWFWQVERPSHWVHHIIFWVH
ONHOWDQVWHSWVHEWVFOHDQWVEHOHDDQFFHSWDEOH
HHPVQONWRPDQDRHWRFPSHWVROKPDNHWDIIFWHEWKPHE\$
QRWDWHFWWOHPHQVHQWRDFHFWVWHPHSHDOORVHSWVHWRSEFHHG
VWKPHEH\$REOHPDWESRWRQ

7KSDWHFWVHFHFWKWRHRHQVWOHPHQVWVW
WDII 2QVHRPPEQVWKEKQOHVWRPPEQDRI
RPSHWVROQVHRPSODEHEQVHMDRIFRQPEVQVHSWVHEWHPENVp000PHHPpDOHT
QORPHWWHRVPHHPVPSODRQKPHH\$

0RWPHEHEDMOMRQ/DOPHHQ/HRPPESHIFWFWNO
HOHQ/KIRPRIDMWNWRHPHWKQ/ERPSHW/MHIIHFWKIDQDNRQ/DO
PHURQ/FWNRORERQ/WHOHIPDDOK EHTNQRIDHTMFWW/NWR
HPHW/KMIIHFV6KWRQ/OHOHIPDQONSODHHPHQ/MPSORHH
REODWRQR/HQ/DOW/SFWHFWRQW/KSRKQ/FH/WRSRWDKFM
MWWN RQ/WHOHIDOKPDEHTNWR/HPHWKQ/ERPSHW/MHIIHFWKID
MWEDOPHH6KKRQ/WHOHIPDQON DHTNPHQ/WRHHFWIHD/OOWRSEWFWF
FRQHQ/DOQRDWRQ/DHTNPHQ/RWWRIDKEHW/DHQ/VHV

7KWDIIRWONHOWRDFHSSWWHSDW/HRIIHWREWDDWRQ/PRKQ
EQW/WFRPSHD/WOHDWRQSDW/HQ/HEHQ/KHOHDQ/PDNHW 6K
HPHQ/OPRWP/PHQ/WHOHO/PQ/WHWK/FRPSHW/M/SREOHP/HDWHEW/KPHHE/
SHM/HFH/DW/H/FRPSHW/MWDW/XRDQ/HQ/DDW/HOHDW/DPN/RIN ,W
DOKHTNWR/KRPPKQ/HWDIIWR/PDNHW/KIHN/WDSWRQ/ERX/WK/PDNHW/DQ
WSDW/ESDQ/DQ/ERX/WK/D/ED/DQ/RPSHW/M/HKI/W/SR/SR/M/W/W

7KSDWHKQ/ESHSDHWRKQ/FWWHEM/FRODDQ/OFRPSRQ/V
HFHDW/RRS/DWHDW/RQ/PROV/W/W/RS/DW/HQ/W/RQ/PROV/W/W/MHDEOHIRP
WKS/DH/Q/DQ/F/W/W/KQ/V/NO/OEHDEOHW/RP/DQ/D/RHWR/HFRPSHW/W/RQ/OPRW
EPHQ/WHO/7KEM/HR/SO/HKQ/ESHSDHWR/H/SODQ/HQ/V/KRSHDWRQ
DQ/R/SR/M/HO/HQ/DQ/DQ/DQ/RP/DQ/SDDW/HIQ/DQ/DQ/R/HQ/V/M/G
EHOR/S/SR/DOK/WRIW/FWHTN/WK/W/DIIWR/DMDQ/RQ/OTNWRQ/RQ/W/W/KU
DQ/DQ/HQ/WFRPSOHW/R/W/DWRQ/OONHOW/DNHPRHWEH

7KWDIIOHDPHDSRSMFWW/NWRHWHPHH/WK/W/DONDOORIWH
W/R/PSRQ/V/KM/FRPSRQ/V/HQ/DOOQON

- ‡ PDQ/FW/RQ/W/H/D/F/D/W/H/V
- ‡ DFFHW/RN/HQ/W/DQ/W/K/S/O\
- ‡ DFFHW/RP/DN/H/W/R/DQ/DODQ/W/S/W/V
- ‡ HMDEKQ/MORS/PHQ/FDS/DEQ/W\
- ‡ Q/HOO/HFW/NOSRSHW/W/KRQ/RQ/OEHQ/G
- ‡ WHFRQ/RDQ/RKQ/D/H/H/F/H/W/D/OODQ/R/DW/RQ/HFRQ/RJ

FRQNG
DFTMOMWWHRPPKQTNW/KHSRQ/WRHRD/HW/KFRPSDQ/RW
MSDDWHWDQORQ/QWRQ/RRIWHP *In the matter of Chicago Bridge & Iron
& RFW aff'd Chicago Bridge & Iron Company v. Federal Trade Commission*
WLUDDLQW

‡HQVEDWRQIDQFFHWRSHHQO
 ‡PDNHWDQWEXRQDSDEDDWHV
 ‡SOMEDHDQWRPHHODWREN
 ‡FDSWDOHKKHV
 ‡DQWROMHFHQWRFRPSHWHHIIHFWMOQKHOHDDQPDNHW

7HSRSRMSDFNDHPDDORQONENRPSRQWMOHWDRPDNHWRKWH
 WKHOHDDQHRDSKRSREWPDNHWIKRPSRQVHHQFHQWRDMWFEWWH
 ENHWDQKDPHIIIEHQHWFWWWKHSRQVQHDPSONHQQKSKWV
 PDNHWDQWEXHWRKWSRWWWKDMWREHFWHHPDDONDMWV
 HODWDRWKMRRWHSRQVQHWHRHPDQIEHQ 6DDOIMWEDODHWDRQ
 DQSRWDQFRPSHWWMHOHPHQWPDHFHFHWDRQONDMWDPWRHWRRQOHMORI
 WKQU

- If the proposed package of assets does not comprise a separate business unit that has operated autonomously in the past, the staff is unlikely to recommend that the Commission accept such a proposal until the parties show that the package includes all necessary components, or that those components are otherwise available to a prospective buyer.

,JWHSWWMHNWRHFONDRQWHRPSRQWKPWHSDQKH
 FRPSRQVDHQWQONHQWDEKQQQHDGHSWDFWWDOKHSDQ
 KWKENDOEHDEOHWRQVHDWHWKKWHFRPSRQVQRVWKKSHDWRRRSHDWH
 FRPSHWWMO7KSDWHRKSHDWROHPSORHHWHQREHWKPRWNQOHDEOHDERXWWH
 M6SSOHWRPHFRPSHWVRDQWHSREOHEMDDOKSRHQKWH
 HMQHWKSDWHKQEHSHSDHWRPDNHKKKQHDQDDEOHHQFHWRRHFWWK
 WDIWRKHWFDQHREWDHG

EQDQHWDHWWRQWHSWDFWFWHDQPSRQVRRHPSONHWHHDEK
 DQHORSHPQVDRQWQFHDQOHHQDOORWEHSHMM 7KSDWHRKQG
 SRHHQHWBWWWKFDHRWDOQWQKHWKEMEDWRERPSHWVHQV
 RQVDFHDQSODQWRQVWDQNDFFHSWDEOHWRWHRPPQOBNHWKQ
 HMDERQHORSHPQVQVDEHSHMMVWHSWDFWHSRHHQHWRSRWWWK
 HSDQWRQKSDWHPDDOKHPRQVDFHWBWPDRQDFWQEDKWFOSORHHMDDFppE

The Commission will typically require an up-front buyer if the parties seek to divest assets comprising less than an autonomous, on-going business or if the to-be-divested assets are susceptible to deterioration pending divestiture.

,IWKSDWHSRSRHWREWPRHOPVHDMWWWKWDIIOOW\$EDOOFRQNE
SDFNDHRQIWKHSRSRMRHSHFIHDSIROENUWFWWKSDWHFW
HQIDQFFHSWDEOHEHNDQKQRWDWHIQOHQHFVHWKSKEMDHHPHQ
DQOODQDODDHHPHQVWWEWENEHIRHWDIIRVWHSRSRMRHWRWK
RPPKQKWDIIOFDHIOOHMERWWEHNDQKDHHPHQEHIRHPDNV
HFRPPHQWRQKHSRSRMRHOSHFIEDOQHQIWKENDQTHWVW
WRWEWENSMQWRWKHMMDU HHPHQWHDHHPHQDOEHDWWDFFKD
FRHQDOHKWDRSRDWHQRWRKRHUKHWWVHWWRWHQPHSROENU
PWEHFRPSOHWHBPHDWHODIWHWKRPPKQFFHSWWSRSRMRHUTQ
DSIROENUWKWDIIMHNWRPPHWHMWWKHHOQWpADCEPHDHSIROEWHWSWOP0WF
P0RHRFPPEHWWVHWWRDQROENONWRPPSWWK EpIWEVWDWWHSWDDPDDOQVHWV

not

~~ERRRPS~~~~MMR~~RPPLLRQ

~~PXUR~~~~FINDL~~~~YSUHH~~~~GH~~

‡ In evaluating the terms of the divestiture agreement, the staff will rely primarily on information obtained from the buyer; however, the staff remains aware that the buyer's incentives may not always be consistent with the Commission's objectives.

~~EMGWWDIIOOWRRRODQDHIOOHMZKHWWNDDHHPHQ~~
6WDIIOOHTHWIREDWRQRPWHENDQWKOQOEKDDHHPHQVWK
ENQHDODQSHDWRQOSHQQODPRQWVVENQREDWRQWHPHO\
PSRWDQ ~~WHM~~QKWKENEMMTCWDHHPHQDQDHHQWVWHPV
WDIIPDRQWQHOHYVWRSRQVWVWKENEDFFHSWHGKRPPEDQW
HOKOHORQKENHQVHWRFKHWKREMHFWVKIWKHEHFDKWKENQ
QHQMFDQWQFHDDFRQHWWRPPQEMHFWM

7KRPPQEMHFWMWRPHWVPHHQNHODQERPSHWVHHIHFWDQ
WRPDQDRHWRFPSHWVROVHHOHDDQPDNHV7KENHQVWRHQDWHDQ

Additional Order Provisions

‡ In some cases, the buyer may need additional, short-term assistance from the merging parties, particularly when less than the entire business of one party is being divested

HWWRIDQWRRPRKQDQOORIWFRPSRQWKID
ENDEMERHWRDDEOHENQOQKPDMRWRIFDHEPHBWHOFDWH
DFRPSHWWRERPSDDEOHWRWFRPSHWWRVWFRWKEHEHHQDORWDIWHWKPHEHU
HWWRRIOWHEDQWRQPRKQDQOQWFHDWHWFWHWWQDWK
ENEDQOQKDSDDQERPSAPQHQQOQWWWpHWRW
HQ
QPD-ENQOODHFRPSAPHWAW50DMRQDQVTEH3FRPSAPPEDEOH50DMRQVTEHADDEEQVPE

The order to hold separate or maintain assets will include the appointment of an independent third party to oversee the operations of the held separate business or monitor the parties' compliance with the order.

~~QHWKROHSDDWHREDDQDQWWDODOKDWRHWRPPEQR
DSSRDQSHHQWEDWWRRHWHHWHHOSDDWHEKPRDWRKSDWHV
FRPSODQHWKRRHUQRHWRPDQDQWWHHSHHQWEDWDOEM
IQWRDODWRWKMRIWHPROREMBERMKRMOOEHWKHHHDDU
RIWHRPPEQWWDIIDQWVHWDIIDWHDH,QQHWKROG
MSDDWHWHHSHHQWEDWFKPHFWPRHHVHQRREODWRQRMO
PRORERPSODQHEWODOKRMMHWKRSHDWRRIWKKHOSDDWHEQVHWDI
RVEHGWKIQWRQIWFVWNOEDQORVDFEDQIWKERDG~~

~~7KSDWHFDQSHQHWKHPDWVHLWKDQVESDWHWQHQQHWKRRDEK
IRDQSSKSDWHPRVDRMDODSREOH7KWDIIDOEMWRHMMVHQOV
TNOIEDWRQQNDHHPHQEHWHHQKPROVRDQKSDWHKRDORRKH
SEFHWFHSDWDEOHPRVROHWKMMVQWQVHSHHQHQKPDNHWDQ
IQDORRWHVHWWRDQIWKSDWHVQOMGRPPEQDSSRDVHQOV
VHHEGDFNQRHMDPRVROQVWHHFWVHFRQWDOVQ
ODVWSDWENDHDDWRHSHHQ7KWDIIDOEHDHDDDEOHWRVHW
FEDFWHWEKIDQFFHSWDEOHPRVUR~~

Divestiture Applications

- In cases requiring a post-order divestiture, the respondent has the burden of showing that the proposed divestiture meets the order's specific requirements and satisfies the order's remedial purposes.

~~VNOODOORIWHRPPEQHWFVHTNDSRWRHFWVHWK
HSRQVKKHWRFVFWDDQWVRFHWDOVPHSHRVRDENVFW
HFHHWKSSEDSSEORIWHRPPEQDPDQVFWHFHHWKSSEDSSEDO
RIWHRPPEQHRRPPEQWVSSRMERWVHENRIWHDWVQVH
PDQRIWKSSESRHFWVH i.e. ~~RFKHQHRVDFDQOHV
DUHEVSRVQKURSRVHVV
DDQVUHVHLLIFUHKUHVQMLVHEDSKSRH~~~~

See Dr Pepper/Seven-Up Companies Inc. v. FTC & LU
~~LDSURFHQVBUERVULRUDSSURDIDSURSRVHVKVQ
RRIRRPPLVRVRRVRRPPLVRVRRRIW
SURSRVUHVVRVHVSURRIRVROVHVVH
KEDVW~~

The respondent must include in its application all information and documents sufficient to satisfy its burden and should en

>2 >3

8 6 & † D

7KH JUHDW PDMRULW\ RI SURSRVHG VHWWOHPHQWV KDY.
PRGLILFDWLRQ :H DUH QRW DZDUH RI DQ\ LQVWDQFH LQ ZKL
VHWWOHPHQW DIWHU WKH FRPPHQW SHULRG DQG WKHQ EURXJ

5XOH I RI WKH &RPPLVVLRQ¶V 5XOH RI 3UDFWLFH

