

TABLE 1 COORDINATES FOR THE RESEARCH AREA

| PF t ID | L t tu (F t ,) | LF t u (t ,) |
|---------|---------------------|-------------------|
| 1 | N 31.362732 | W 80.921200 |
| 2 | N 31.384444 | W 80.921200 |
| 3 | N 31.384444 | W 80.828145 |
| 4 | N 31.362732 | W 80.828145 |
| 5 | N 31.362732 | W 80.921200 |

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FEDERAL TRADE COMMISSION

16 CFR Part 2

Commission Approval of Divestiture Agreements

AGENCY: Federal Trade Commission (FTC).

ACTION: Final rule.

SUMMARY: This final rule clarifies the process whereby the FTC will consider for approval a modification to a divestiture agreement, which agreement the Commission has either previously approved or incorporated by reference into a final order. As described fully below, the final rule delegates to certain senior staff at the Commission the authority, following notice to the Commissioners, to waive formal application to the Commission for approval of certain modifications, and to waive the otherwise required period for public comment; the delegation will streamline the process for approval of ministerial and other minor contract modifications that will not diminish the Commission's order.

DATES: *Effect e Date:* This rule shall be effective on November 14, 2011.

FOR FURTHER INFORMATION CONTACT: Daniel P. Ducore, Bureau of Competition, Compliance Division, 600 Pennsylvania Avenue NW., Washington, DC, 20580, (202) 326-2526, *dd c e@ftc.g*.

SUPPLEMENTARY INFORMATION:

. B e

The Federal Trade Commission has amended § 2.41 of its Rules of Practice, 16 CFR 2.41, which deals with requests for the Commission's approval of divestitures and acquisitions, pursuant to final orders. The Commission has amended the section to add a new paragraph (f)(5) and to modify existing paragraphs (f)(1) and (f)(2). New paragraph (f)(5) codifies and improves the Commission's existing process for reviewing and approving modifications

to certain agreements that have been approved by the Commission or incorporated by reference into the Commission's final orders. The modifications to paragraphs (1) and (2) add to the public comment requirements in Rule 2.41(f) applications for approval of agreement modifications under new paragraph (5). The Commission has also amended the title to reflect better the subjects addressed by the rule. These changes are effective November 14, 2011.

The Federal Trade Commission, *te a a*, enforces Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and, with the Department of Justice, Section 7 of the Clayton Act, 15 U.S.C. 18, to challenge mergers and acquisitions that the Commission has reason to believe would unlawfully lead to a substantial lessening of competition. In some circumstances, the Commission seeks to prevent such mergers through litigation to enjoin the merger. In other circumstances, however, the Commission seeks to prevent the harm either by unwinding the merger entirely (if the merger has already occurred) or, as is much more common, by negotiating a settlement with the parties that requires them to sell off a business or set of assets, with the goal of recreating, to the greatest extent possible, the competition that is, or would be, eliminated through the merger.¹

Rule 2.41(f) applies specifically to final administrative orders issued by the Commission. With the exception of Federal court actions seeking to enjoin a pending merger, the Commission typically achieves its merger remedies in one of two ways. If the acquirer has been identified during negotiation of the settlement, the order will require divestiture to that acquirer pursuant to the agreement(s) that are attached to and incorporated into the order (known as a divestiture with an "up-front buyer"). If the order requires the respondent to divest within some deadline after the order is final, it will require the

¹ Most settlements are reached during the Commission's review of the merger, pursuant to the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a.

respondent to obtain subsequent approval under Rule 2.41(f) (known as a "post-order" divestiture). The criteria used by the Commission to determine whether a divestiture is more appropriately "up-front" or "post-order" are detailed in *F e e t A e d Q e t a b t M e g e C e t O d e P*, available on the FTC's Web site at: *tt :// .ftc.g /bc/ e g e f a . t ; and State e t f t e F e d e a T a d e C ' B e a f C e t t N e g t a t g M e g e R e e d e*, available at: *tt :// .ftc.g /bc/ e g e f a . t*.

Rule 2.41(f) sets forth the procedure by which respondents must seek the Commission's approval of a divestiture if such approval has not been explicitly incorporated into a Commission order. Briefly, pursuant to the Rule, a respondent must file an application for prior approval of a proposed divestiture.² The application, along with relevant supporting material, is placed on the public record for thirty days for the receipt of public comments. Confidential portions of the application and supporting materials are not made public.³ Only after the Commission has approved an application for prior approval may the respondent consummate the proposed transaction. The burden of proof for any request for approval lies with the respondent.⁴

The Commission's divestiture orders mandate that the required divestiture be made "only to an acquirer approved by the Commission and only in a manner approved by the Commission." That is, the Commission must approve both the acquirer of the divested assets and all agreements relating to the divestiture. Further, once the Commission has approved a divestiture agreement, a respondent who does not perform as required in that agreement fails to divest in the approved manner, and thereby,

² Rule 2.41(f) continues to apply as well to applications for approval of *ac t* by a respondent, if the particular order includes a prohibition on acquisitions without the Commission's prior approval.

³ See Rules 4.9 and 4.10, 16 CFR 4.9, 4.10 for a description of the Commission's public records and what items are exempt from public disclosure.

⁴ See *D P e e /S e e -U C a e , I c . v . F . T . C . , 991 F . 2 d 859, 863 (DC Cir. 1993)*.

requirement will depend on the nature of the proposed modification. In all cases, a respondent should provide the exact language of the proposed modification and verify that the modification is agreed to by the signatories to the underlying agreement. It is anticipated that respondents will often be able to establish good cause for waiving approval for modifications that are purely ministerial in nature, such as a change in the method of service of required notices, on the basis of this information alone.

A modification that is more substantial—for example, alteration of the payment structure of an agreement—may also qualify for a waiver if the respondent can establish that the proposed change does not affect achievement of the order's remedial purposes. Respondents, however, will generally be required to submit facts beyond the language of the waiver itself to substantiate that there is good cause to grant a waiver for this type of modification. If a respondent believes there is good cause to waive the approval requirement for a particular proposed modification, the respondent should discuss the matter with the Commission's staff and obtain guidance on the type and level of information that should be provided.

The waiver of the modification approval requirement under the foregoing delegation shall not be effective, however, until the file has been transmitted to the Secretary and the Secretary shall have advised the Commission of the decision to waive and given the Commissioners three business days thereafter to object. If, upon the expiration of the three-day period, no Commissioner shall have objected, the Secretary shall enter upon the records of the Commission the waiver in the matter and take such other action as the matter requires.

A respondent may effect a proposed modification covered by proposed paragraph (5) after the respondent has obtained approval for the modification or a waiver of the approval requirement. In either case, staff will request that respondent submit a copy of the amendment to the agreement that contains the modification. Further, as item (iii) of the new paragraph confirms, a Commission order that incorporates the underlying agreement also incorporates all approved modifications to the agreement or modifications for which a waiver of the approval requirement was obtained.

Finally, the Commission has changed the title of Rule 2.41 to better reflect the subject matter included in the Rule. The

previous title did not fully describe the main provisions of the rule.

A. *Administrative Procedure Act*

The FTC has determined that implementation of this rule without prior notice and the opportunity for public comment is warranted because this rule is one of agency procedure and practice and therefore is exempt from notice and comment rulemaking requirements of the Administrative Procedure Act at 5 U.S.C. 553(b)(A) and (B).

B. *Regulatory Flexibility Act*

Because the Commission has determined that it may issue this rule without public comment, the Commission is also not required to publish any initial or final regulatory flexibility analysis under the Regulatory Flexibility Act as part of such action. See 5 U.S.C. 601(2).

C. *Paperwork Reduction Act of 1995*

The rule revisions to part 2 are also not subject to the requirements of the Paperwork Reduction Act, which contains an exemption for information collected during the conduct of administrative proceedings or investigations against specific individuals or entities. 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4(a)(2).

16 CFR 2

Administrative practice and procedure, Investigations, Reporting and recordkeeping requirements.

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For the reasons set forth in the preamble, the FTC is amending Title 16, Chapter I, part 2, as follows.

PART 2—RULES OF PRACTICE FOR DeterminedFA

By direction of the Commission.

D. C.

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¹ Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes interest assumptions for valuing

benefits under terminating covered single-employer plans for purposes of allocation of assets under

ERISA section 4044. Those assumptions are updated quarterly.