TABLE 1—COORDINATES FOR THE RESEARCH AREA

Point ID	Latitude (north, in degrees)	Longitude (west, in degrees)
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: *Effective 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, *dducore@ftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

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, *inter alia,* 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 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 *Frequently Asked Questions about Merger Consent Order Provisions,* available on the FTC's Web site at: *http://www.ftc.gov/bc/mergerfaq.shtm;* and *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies,* available at: *http://www.ftc.gov/bc/mergerfaq.shtm.*

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,

[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.

[2] Rule 2.41(f) continues to apply as well to applications for approval of *acquisitions* 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 Dr Pepper/Seven-Up Companies, Inc.* v. *F.T.C.,* 991 F.2d 859, 863 (DC Cir. 1993).

fails to comply with the underlying divestiture order.[5]

The Commission has consistently taken the position that it must approve any changes to a divestiture agreement previously approved through an order or in response to an application filed under Rule 2.41. The Commission must review and approve changes to a previously-approved divestiture agreement to ensure that the agreement remains consistent with the order and will continue to achieve its purposes. The Commission's main concern is that post-approval changes to the agreements, although acceptable to both the respondent and the acquirer, may nevertheless diminish the competitive and remedial effectiveness of the order.

Historically, the Commission's divestiture orders required a respondent to divest a specified business or set of assets, which the respondent accomplished soon after the order became final. Because the respondent's obligations under the divestiture agreement were fully performed in a short time frame, there was no need for parties to modify their agreements. In recent years, however, the Commission's orders have frequently included ongoing obligations to supply products or services to the acquirer for some interim period, and at times the parties have agreed to modify the agreements implementing these obligations. Therefore, the need to review changes in divestiture agreements has become more common.

The Commission recognizes, however, that there may be instances in which the parties change their agreements in ways that are purely ministerial, or that are unlikely under any plausible facts to affect achieving the order's remedial purposes. There is currently no procedure for distinguishing such changes from those that more appropriately require the Commission's approval.[6] As detailed further below, the Commission has therefore modified Rule 2.41 to authorize certain staff in the Commission's Bureau of Competition to waive the prior approval requirement—or to shorten, eliminate, extend, or reopen the public comment period—in appropriate circumstances.

II. The Amendment to the Rules

New paragraph (5) of § 2.41(f) confirms the Commission's long-standing position that modifications to divestiture agreements must be approved by the Commission. The new paragraph, accordingly, expressly provides that, before modifying an agreement subject to paragraph § 2.41(f), a respondent must obtain either the Commission's approval of the proposed modification or a waiver of the approval requirement.[7] Item (i) Identifies the types of agreements that are subject to the proposed modification review and approval process and states the approval requirement. Item (ii) allows a waiver of the approval requirement and the public comment period, and item (iii) confirms that a modified agreement remains subject to the Commission's order to the same extent as the original unmodified agreement, and that all modifications shall be considered part of the original agreement when determining compliance with and enforcement of a Commission order.

As described in item (i) of § 2.41(f)(5), agreements subject to the new paragraph are those that accomplish divestitures and related remedial measures required by orders issued by the Commission in connection with an investigation of a proposed or consummated merger, acquisition or similar transaction. These agreements are either incorporated into a final Commission order or approved by the Commission through the process provided in Rule 2.41(f)(i).

Item (i) of the new paragraph states that the respondent shall use the process set forth in Rule 2.41(f)(1)–(4) to submit an application requesting approval of a proposed modification. The process requires a respondent to submit an application to the Commission explaining the proposed modification and describing its necessity and purpose. The respondent should also indicate that all signatories to the agreement have agreed to the proposed modification. The level of detail required in an application for approval of a proposed modification will vary depending on the complexity and significance of the proposed modification, but it should be sufficient to establish that the proposed modification will not interfere with the requirements or purpose of the Commission-ordered remedial measures implemented through the underlying agreement. If an initial application lacks sufficient detail, the Commission may deny approval, or may request further information to enable it to effectively evaluate the proposed modification. Pursuant to the provisions of existing Rule 2.41(f), an application for approval of a proposed modification, except for confidential portions, will be placed on the public record for comment.

Item (ii) of new paragraph (5) delegates to certain Commission officials, including the Bureau of Competition's Assistant Director for Compliance, the authority, for good cause shown, to shorten, eliminate, extend or reopen the public comment period for an application for modification.[8] As with the underlying remedial agreements, modifications subject to proposed paragraph (5) often contain sensitive non-public information, which is accorded confidential treatment by the Commission. *See* Rule 4.10, 16 CFR 4.10. In such cases, there may be little information regarding the proposed modification that can be disclosed publicly, and therefore little benefit in providing a public comment period. Further, there may be cases where prompt action on a modification is necessary to prevent economic harm to the parties or competition. Such circumstances will often provide good cause to shorten or eliminate the public comment period. However, the Commission will be unlikely to take that step in cases where the comment period may provide transparency or where the proposed modification involves an issue of general interest and applicability that can be discussed without disclosing confidential information.

Item (ii) of new paragraph (5) also provides that, in order to expedite the modification process, the designated officials can, for good cause shown, waive the modification approval requirement when a proposed modification is purely ministerial, or is unlikely under any plausible facts to affect achieving the remedial purposes of the order at issue. The information a respondent must provide to show good cause for a waiver of the approval

[5] The Commission thoroughly evaluates the proposed agreement (as well as the proposed acquirer) to determine whether it will achieve the order's purpose and is consistent with both the competition laws and any other provisions in the order. This evaluation includes review of the purchase and sale agreement, all exhibits and appendices to that agreement, and all related and ancillary documents.

[6] The Commission's orders do not exclude particular types of future modifications from the requirement to obtain approval. When a divestiture agreement is approved, it is difficult to predict what types of future modifications the parties may seek or to define a meaningful category of modifications that under no circumstances would implicate the purposes an order. For example, ''immaterial'' may have a specific meaning under contract law that is not fully consistent with the remedial goals of the order. Accordingly, the Commission will assess those proposed changes at the time they are made, and not hypothetically beforehand.

[7] In addition, applications for modifications have been explicitly added to the public comment requirements of § 2.41(f)(1) and (2).

[8] The Commission anticipates that most requests for waivers will be made to the Assistant Director of the Compliance Division, as the Compliance Division is responsible for reviewing and monitoring remedial agreements approved by the Commission and will be primarily responsible for reviewing proposed modifications under this paragraph.

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.

III. Procedural Requirements

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).

List of Subjects in 16 CFR Part 2

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

Authority and Issuance

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 NONADJUDICATIVE INVESTIGATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

■ 2. Amend § 2.41 by revising the section heading and paragraphs (f)(1) and (2), and adding paragraph (f)(5), to read as follows:

§ 2.41 General compliance obligations and specific obligations regarding acquisitions and divestitures.

* * * * *

(f)(1) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders (including modifications to previously approved transactions) shall fully describe the terms of the transaction or modification and shall set forth why the transaction or modification merits Commission approval. Such applications will be placed on the public record, together with any additional applicant submissions that the Commission directs be placed on the public record. The Director of the Bureau of Competition is delegated authority to direct such placement.

(2) The Commission will receive public comment on a prior approval application submitted pursuant to paragraphs (f)(1) or (5) of this section for thirty (30) days. During the comment period, any person may file formal written objections or comments with the Secretary of the Commission, and such objections or comments shall be placed on the public record. In appropriate cases, the Commission may shorten, eliminate, extend, or reopen a comment period.

* * * * *

(5)(i) Any application to modify either:

(A) An agreement that has been approved by the Commission pursuant to paragraph (f) of this section, or

(B) An agreement incorporated by reference into a final order of the Commission issued in connection with a merger, acquisition, or similar transaction shall be subject to review and approval in the manner described in paragraphs (f)(1) through (4) of this section, except as provided in paragraph (f)(5)(ii) of this section.

(ii) If the application establishes that the proposed modification is purely ministerial, or unlikely under any plausible facts to affect achieving the remedial purposes of the order at issue, the Commission has delegated to the Director, Deputy Directors, and Assistant Director for Compliance of the Bureau of Competition, without power of redelegation, for good cause shown, the authority.

(A) To waive the approval requirement of paragraph (f)(5)(i) of this section; and

(B) To shorten, eliminate, extend or reopen the comment period pursuant to paragraph (f)(2) of this section.

(iii) Any agreement containing a modification approved, or for which the approval requirement is waived, pursuant to this paragraph (f)(5), shall be subject to any outstanding Commission order to the same extent as was the original agreement.

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–26463 Filed 10–13–11; 8:45 am]

BILLING CODE 6750–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in November 2011. The interest assumptions are used for paying benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective November 1, 2011.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*Klion.Catherine@pbgc.gov*), Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulation are also published on PBGC's Web site (*http://www.pbgc.gov*).

PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for November 2011.[1]

The November 2011 interest assumptions under the benefit payments regulation will be 1.50 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for October 2011, these interest assumptions represent a decrease of 0.25 percent in the immediate annuity rate and are otherwise unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during November 2011, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 217, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	
217	11–1–11	12–1–11	1.50	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 217, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

[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.