

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

FIRST DATA CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3635. Complaint, Jan. 16, 1996--Decision, Jan. 16, 1996

This consent order requires, among other things, First Data, a New Jersey-based corporation, to divest, within 12 months to a Commission-approved acquirer, either its own MoneyGram business or First Financial's Western Union business. If the divestiture is not completed on time, the consent order allows the Commission to appoint a trustee.

Appearances

For the Commission: *Ann Malester, Craig Waldman, and William Baer.*

For the respondent: *David Bailis*, in-house counsel, Hackensack, N.J. and *William Fifield, Sidley & Austin*, Chicago, IL.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that First Data Corporation, hereinafter sometimes referred to as respondent, a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the stock of First Financial Management Corporation, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent First Data Corporation ("First Data") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 401 Hackensack Avenue, Hackensack, New Jersey.

2. Respondent, a corporation providing certain services including consumer money wire transfers marketed under the name "MoneyGram," is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. First Financial Management Corporation ("First Financial") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia.

4. First Financial, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc., is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On June 13, 1995, First Data and First Financial agreed to merge in a stock swap valued at \$6.7 billion. Under the proposed agreement, First Financial shareholders would receive 1.5859 shares of First Data stock for each share of First Financial ("the Acquisition").

IV. THE RELEVANT MARKET

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of consumer money wire transfer services.

7. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition.

8. The relevant market set forth in paragraphs six and seven is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant market, which requires significant sunk costs, would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph eleven because, among other things, of the difficulty of gaining brand name recognition and establishing a nationwide network of retail outlets to sell the relevant service.

10. First Data and First Financial are the only two actual competitors in the relevant market; thus, the Acquisition would result in a monopoly in the relevant market.

V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between First Data and First Financial;

b. By increasing the likelihood that First Data would unilaterally exercise market power;

c. By increasing the likelihood that consumers would be forced to pay higher transfer fees;

d. By increasing the likelihood that consumer money wire transfer agents would be forced to accept lower commissions and guarantees for providing consumer money wire transfer services; and

e. By increasing the likelihood that consumer money wire transfer advertising, services and innovation would be reduced.

VI. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The Acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger of respondent and First Financial Management Corporation ("First Financial"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment received, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent First Data Corporation ("First Data") is a corporation organized and existing under the laws of Delaware with its offices and principal place of business at 401 Hackensack Avenue, Hackensack, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order (including Appendix I), the following definitions shall apply:

A. "*Respondent*" or "*First Data*" means First Data Corporation, its subsidiaries, divisions, groups and affiliates controlled by First Data Corporation, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. "*First Financial*" means First Financial Management Corporation, a corporation providing certain services including consumer money wire transfers through Western Union Financial Services, Inc.

C. "*Western Union*" means Western Union Financial Services, Inc., a wholly-owned subsidiary of First Financial Management Corporation, with its principal office and place of business located at One Mack Center Drive, Paramus, New Jersey. Western Union provides and markets, among other things, consumer money wire transfer services.

D. "*Commission*" means the Federal Trade Commission.

E. "*Acquisition*" means the direct or indirect acquisition of control of First Financial by respondent First Data.

F. "*Consumer money wire transfer service*" means the business of transferring the right to money using computer or telephone lines from one person through the location of a selling agent to a different person physically present at the location of a selling agent available to the general public through selling agents at retail outlets as currently offered by First Data and Western Union. "Consumer money wire transfer service" does not include transactions involving

only one customer utilizing automatic teller machines and other point of sale devices, transactions involving debit cards, cash advances utilizing credit cards, home banking, prepaid telephone and cash cards, money orders, and utility bill payment services and further does not include the provision of data processing services to a consumer money wire transfer service business.

G. "*Selling agent*" means a person or business, such as a check cashing store, a drug store, a supermarket, a postal service, a bus station, or a travel agency, that contracts with consumer money wire transfer service providers to provide the consumer money wire transfer service to customers.

H. "*MoneyGram service*" means First Data's consumer money wire transfer service marketed under the name "MoneyGram."

I. "*MoneyGram Assets*" or "*MoneyGram Business*" include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the MoneyGram Service, including, but not limited to:

1. The MoneyGram trade name, trade dress, trade marks, and service marks; and,

2. A group of contracts with selling agents to provide the MoneyGram Service that provides a network of selling agents at least comparable to the group of selling agents under contract to provide the MoneyGram service on May 1, 1995 other than the American Express Travel Related Services Company Travel Services Offices, based on characteristics of the selling agents such as the countries and cities served, number of selling agents, and type of outlet; provided, however, that the condition regarding the "number of selling agents" is satisfied if the number of selling agents is 10,000 or greater.

J. "*Western Union Service*" means Western Union's Consumer Wire Transfer Service.

K. "*Western Union Assets*" or "*Western Union Business*" include all assets, properties, business and goodwill, tangible and intangible, related to the sale and marketing of the Western Union Service, including, but not limited to:

1. The Western Union trade name, trade dress, trade marks, and service marks; and,

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2. All contracts with selling agents to provide the Western Union Service.

L. "*Assets To Be Divested*" means either the MoneyGram Assets or the Western Union Assets. The definition of "*Assets To Be Divested*" as well as any other provision in this order, however, shall not be construed to prohibit First Data from divesting both the MoneyGram Assets and the Western Union Assets to different acquirers.

M. "*Marketability, viability, and competitiveness*" of the Assets To Be Divested means that such assets when used in conjunction with the assets of the acquirer or acquirers are capable of providing a consumer money wire transfer service substantially similar to the consumer money wire transfer service that the Assets To Be Divested are capable of providing at the time of the Acquisition.

N. "*Non-public information*" means any information not in the public domain furnished to First Data in its capacity as a provider of data processing services by a consumer money wire transfer service provider.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months after the date this order becomes final, the Assets To Be Divested and shall also divest such additional ancillary assets and businesses other than money order or utility bill payments businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same businesses in which the Assets To Be Divested are presently engaged, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall make available to the acquirer or acquirers such First Data personnel, assistance and training as the acquirer or acquirers reasonably need to transfer technology and know-how, and First Data shall continue providing such personnel, assistance and training at no additional cost for a period of time sufficient to satisfy the acquirer's or acquirers' management that its personnel are appropriately trained in the business. However, respondent shall not be required to continue providing such personnel, assistance and training for more than six (6) months after the Assets To Be Divested are divested pursuant to this order.

D. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the marketability, viability, and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Assets To Be Divested except for ordinary wear and tear. Provided, however, that nothing in this paragraph shall be construed to prohibit First Data from competing in the ordinary course of business.

E. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all Assets To Be Divested as required by this order.

III.

It is further ordered, That:

A. If First Data has not divested, absolutely and in good faith, and with the Commission's prior approval, the Assets To Be Divested within the time period specified in paragraph II. A. of this order, the Commission may appoint a trustee to divest the Western Union Assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, First Data shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee,

pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III. A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Western Union Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III. B. 3. to accomplish the divestiture of the Western Union Assets, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Western Union Assets or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other

information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II. of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Western Union Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed to the same manner as provided in this paragraph of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Western Union Assets.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That if First Data divests the MoneyGram Assets pursuant to paragraph II. of this order, First Data shall not enter into any consumer money wire transfer service contract with any selling agent who is under contract to provide the MoneyGram Service at the time of the divestiture; provided, however, that First Data may enter into such a consumer money wire transfer service contract (i) after the time the selling agent's contract with First Data would have expired had the divestiture not occurred, determined without regard to any contract extension or renewal that could occur after the date of the divestiture, (ii) if the contract is terminated in accordance with its terms other than as may be permitted as a result of the divestiture of the MoneyGram Assets or (iii) if the First Data consumer money wire transfer service being provided is a transfer service utilizing automatic teller machines or any other point of sale device, and the MoneyGram Service contract upon its terms would not have barred the selling agent from entering into such a contract.

V.

It is further ordered, That nothing in this order shall be construed as prohibiting First Data from entering into agreements with any consumer money wire transfer service provider, including the acquirer or acquirers of the MoneyGram Business and the Western

Union Business, for the provision of data processing service provided that:

A. Any such agreement entered into within eighteen (18) months of the date of the divestiture does not run for a period of more than two years;

B. No First Data officer, employee or agent who is involved in providing First Data's consumer money wire transfer service receives non-public information of any other consumer money wire transfer service provider;

C. First Data uses any non-public information obtained by First Data only in First Data's capacity as a provider of data processing services; and

D. First Data delivers a copy of this order to each officer, employee or agent involved in marketing First Data's consumer money wire transfer service or in providing data processing to any other consumer money wire transfer service provider prior to First Data's obtaining any non-public information relating to the provider's business.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. and III. of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV. and V. of this order.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to First Data made to its General Counsel, respondent shall permit any duly authorized representative of the Commission:

A. Access during office hours of First Data and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present regarding such matters.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between First Data Corporation ("First Data"), a corporation

organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 401 Hackensack Avenue, Hackensack, New Jersey; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, First Data has proposed to acquire, directly or indirectly, all of the voting stock or substantially all of the assets of First Financial Management Corporation ("First Financial"), (hereinafter "Acquisition"); and

Whereas, First Data, with its principal office and place of business located at 401 Hackensack Avenue, Hackensack, New Jersey, provides and markets, among other things, consumer money wire transfer services; and

Whereas, First Financial, with its principal office and place of business located at 3 Corporate Square, Suite 700, Atlanta, Georgia, provides and markets, among other things, consumer money wire transfer services; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the MoneyGram Business during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Assets To Be Divested as

described in paragraph I. of the consent order and the Commission's right to have the MoneyGram Business continued as a viable competitor; and

Whereas, the purpose of the Agreement and the consent order is:

1. To preserve the viability of the MoneyGram Business pending the divestiture of the Assets To Be Divested as a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition, and
3. To preserve the MoneyGram Business as an ongoing and competitive consumer money wire transfer service until divestiture is achieved; and

Whereas, First Data's entering into this Agreement shall in no way be construed as an admission by First Data that the Acquisition is illegal; and

Whereas, First Data understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the consent order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the consent order, it will not seek further relief from First Data with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Agreement to Hold Separate and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Western Union Assets pursuant to the consent order, as follows:

1. First Data agrees to execute and be bound by the attached consent order.
2. First Data agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph 3. of this Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's rules;

b. The day after the divestiture required by the consent order has been completed.

3. To ensure the complete independence and viability of the MoneyGram Business and to assure that no competitive information is exchanged between the MoneyGram Business and First Data, First Data shall hold the MoneyGram Business separate and apart on the following terms and conditions:

a. First Data will appoint three individuals to manage and maintain the MoneyGram Business. These individuals ("the management team") shall manage the MoneyGram Business independently of the management of First Data's other businesses. The individuals on the management team shall not be involved in any way in the marketing, selling or management of any other First Data business, including the Western Union Business.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by First Data. The independent auditor/manager shall have expertise in management and marketing. The independent auditor/manager shall have exclusive control over the operations of the MoneyGram Business, with responsibility for the management of the MoneyGram Business and for maintaining the independence of that business.

c. First Data shall not exercise direction or control over, or influence directly or indirectly the independent auditor/manager or the management team or any of its operations relating to the operations of the MoneyGram Business; provided, however, that First Data may exercise only such direction and control over the independent auditor/manager, management team and MoneyGram Business as is necessary to assure compliance with this Agreement and with all applicable laws.

d. First Data shall maintain the marketability, viability, and competitiveness of the MoneyGram Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the management team, sales and marketing employees involved in the MoneyGram Business, and support service employees involved in the MoneyGram Business, such as human resource, legal, tax, accounting, insurance, and internal audit employees, First Data shall not permit any other First Data employee, officer, or director to be involved in the management of the MoneyGram Business. Sales and marketing employees involved in the MoneyGram Business, shall not be involved in any other First Data business, including the Western Union Business. Support service employees involved in the MoneyGram Business shall not be involved in the Western Union Business.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to divest assets, First Data, other than sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business, shall not receive or have access to, or the use of, any material confidential information about the MoneyGram Business, the activities of the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business in managing that business not in public domain, nor shall the management team, sales and marketing employees involved in the MoneyGram Business, or support service employees involved in the MoneyGram Business receive or have access to, or the use of, any material confidential information about the Western Union Business or the activities of First Data in managing the Western Union Business not in the public domain. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to:

(a) First Data, with regard to the MoneyGram Business, from sources other than the management team, sales and marketing employees involved in the MoneyGram business, or support service employees involved in the MoneyGram Business; or

(b) The management team, sales and marketing employees involved in the MoneyGram Business, or support service employees

involved in the MoneyGram Business with regard to the Western Union Business

and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. First Data shall not change the composition of the management team unless the independent auditor/manager consents. The independent auditor/manager shall have the power to remove members of the management team and to require First Data to appoint replacement member to the management team in the same manner as provided in paragraph 3.a. of this Agreement to Hold Separate.

h. First Data shall circulate to all its employees involved with the MoneyGram Business, Western Union Business, or the data processing services provided to either the MoneyGram or Western Union Businesses, and appropriately display, a notice of this Hold Separate Agreement and consent order in the form attached hereto as Attachment A.

i. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested is accomplished an amount of money for advertising and trade promotion of the MoneyGram Service not lower than \$24 million annually, with no less than \$10 million for any two consecutive quarters. First Data shall pay all direct costs and indirect overheads for the MoneyGram Business. The MoneyGram Business shall not be charged with the compensation and expenses of the independent auditor/manager.

j. First Data shall make available for use in the MoneyGram Business until divestiture of the Assets To Be Divested an amount of money needed to provide an additional 20% sales commission to the MoneyGram Business sales force on all MoneyGram agent renewals and MoneyGram agent recruitments above and beyond the 1995 sales commission rate for MoneyGram agent renewals and MoneyGram agent recruitments.

k. The independent auditor/manager shall serve at the cost and expense of First Data. First Data shall indemnify the independent auditor/manager against any losses or claims of any kind that might arise out of his or her involvement under this Agreement to Hold Separate, except to the extent that such losses or claims result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the independent auditor/manager.

l. If the independent auditor/manager ceases to act or fails to act diligently, a substitute auditor/manager shall be appointed in the same manner as provided in paragraph 3.b. of this Agreement to Hold Separate.

m. The independent auditor/manager shall have access to and be informed about all companies who inquire about, seek or propose to buy the MoneyGram Assets. First Data may require the independent auditor/manager to sign a confidentiality agreement prohibiting the disclosure of any material confidential information gained as a result of his or her role as independent auditor/manager to anyone other than the Commission.

n. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a - 3.n. hereof, shall be subject to a majority vote of the management team. In case of a tie, the independent auditor/manager shall cast the deciding vote.

o. The independent auditor/manager shall report in writing to the Commission every thirty (30) days concerning the independent auditor/manager's efforts to accomplish the purposes of this Agreement to Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel First Data to divest itself of the MoneyGram Assets or the Western Union Assets, or to seek any other equitable relief, First Data shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. First Data also waives all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to First Data made to its General Counsel, First Data shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of First Data and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the

possession or under the control of First Data relating to compliance with this Agreement; and

b. Upon five days' notice to First Data, and without restraint or interference from it, to interview officers or employees of First Data, who may have counsel present, regarding any such matters.

6. This Agreement shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

First Data Corporation ("First Data") has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of the MoneyGram Business or the Western Union Business. Until after the Commission's order becomes final and First Data's interest in either the MoneyGram Business or the Western Union Business is divested, the MoneyGram Business must be managed and maintained as a separate, ongoing business, independent of all other First Data businesses and independent of the Western Union Business. All competitive information relating to the MoneyGram Business, except information received by First Data in connection with the provision of data processing services to the MoneyGram Business as described in and protected by the confidentiality provision of paragraph V. of the consent order, must be retained and maintained by the persons involved in the MoneyGram Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other First Data business, including the Western Union Business. Similarly, all such persons involved in the Western Union Business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the MoneyGram Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject First Data to civil penalties and other relief as provided by law.

STATEMENT OF COMMISSIONER CHRISTINE A. VARNEY

The First Financial/First Data merger represents another milestone in the fast-paced development of electronic payment systems. While combinations such as this may have efficiency driven, pro-competitive effects, I remain concerned about increased concentration in the merchant acquirer services industry. This market is growing dramatically, and is increasingly central to back-end processing of credit card purchases. I expect that we will soon see additional acquisitions in the merchant acquirer services industry and, in that light, I have asked the staff of the Commission to continue to monitor the competitive situation in this evolving market.

IN THE MATTER OF

JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3636. Complaint, Jan. 18, 1996--Decision, Jan. 18, 1996*

This consent order prohibits, among other things, a New Jersey-based personal health-care products company and its parent corporation from misrepresenting the results or conclusions of any test or study concerning any over-the-counter products with a use relating to human reproduction, reproductive organs or sexually transmitted diseases ("STDs"). It requires the respondent to have competent and reliable scientific evidence for any claims regarding the efficacy of over-the-counter contraceptives or products to protect against STDs. In addition, the respondent must have competent and reliable scientific evidence to substantiate the advertising claims of any personal lubricant and/or spermicide.

Appearances

For the Commission: *Linda K. Badger, Matthew D. Gold, and Jeffrey Klurfeld.*

For the respondent: *Clayton Patterson*, in-house counsel, New Brunswick, N.J.

COMPLAINT

The Federal Trade Commission, having reason to believe that Johnson & Johnson Consumer Products, Inc., ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Johnson & Johnson Consumer Products, Inc., a wholly-owned subsidiary of Johnson & Johnson, is a New Jersey corporation with its offices and principal place of business at 1999 Grandview Road, Skillman, New Jersey.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed K-Y Plus Nonoxynol-9