

Complaint

IN THE MATTER OF
FMC CORPORATION, ET AL.

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

Docket C-3935; File No. 9910218
Complaint, April 5, 2000--Decision, May 15, 2000

This consent order requires Respondents FMC Corporation, Solutia Inc., and Astaris LLC to divest to Societe Chimique Prayon-Rupel Solutia's Inc.'s phosphates plant in Augusta, Georgia, and divest to Peak Investments LLC FMC's phosphorous pentasulfide plant in Lawrence, Kansas. The divestitures are required to remedy anticompetitive effects from the joint venture of Respondents phosphates and phosphorous derivatives. The order also requires Respondents to provide Prayon with technologies that Solutia has used for manufacturing phosphates, and divest other assets from the Augusta plant, such as customer lists, contacts, and other tangible assets. In addition, Respondents are required to provide Peak with technologies that FMC has used for manufacturing phosphorous pentasulfide, and divest other assets from the Lawrence plant, such as customer lists, contacts, and other tangible assets. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to preserve the business as a viable, competitive, and ongoing operation and maintain inventories until the divestiture is achieved

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R Isso, Louis Silvia, and Gregory S. Vistnes.*

For the Respondents: *Raymond A. Jacobsen and Joel R. Grosberg, McDermott, Will & Emery, and Barry Pupkin, Squire, Sanders & Dempsey.*

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COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that FMC Corporation ("FMC") and Solutia Inc. ("Solutia") have entered into an agreement to form Astaris LLC ("Astaris"), a phosphates joint venture limited liability company, and that the joint venture, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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:

A. THE RESPONDENTS

1. Respondent FMC 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 200 East Randolph Drive, Chicago, Illinois 60601. FMC, among other things, engages in the development, manufacture and sale of elemental phosphorus, pure phosphoric acid, phosphate salts and phosphorus derivatives, primarily in North America and Europe.

2. Respondent Solutia 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 575 Maryville Centre Drive, St. Louis, Missouri 63141. Solutia, among other things, engages in the development, manufacture and sale of elemental phosphorus, pure phosphoric acid, phosphate salts and phosphorus derivatives, primarily in North America.

3. Respondent Astaris is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located at 575 Maryville Centre Drive, St. Louis, Missouri 63141.

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4. At all times relevant herein, Respondents FMC and Solutia have been and are now engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED JOINT VENTURE

5. On April 29, 1999, FMC and Solutia executed an agreement to combine most of their respective phosphates and phosphorus derivatives businesses into a joint venture company. The joint venture, which FMC and Solutia have named Astaris, would be owned equally by each company. According to FMC and Solutia, the joint venture company would have combined sales of approximately \$600 million.

C. RELEVANT MARKETS

6. One relevant line of commerce in which to analyze the effects of the proposed joint venture between FMC and Solutia is the manufacture, marketing and sale of pure phosphoric acid. Pure phosphoric acid is a syrupy tribasic acid that is used in disparate applications. It is used in food applications, such as cola beverages and pet food, and in technical applications, such as cleaning compounds, metal surface treatments, and water treatment products. Pure phosphoric acid is sold directly to end-users, and also is reacted with inorganic chemicals to create phosphate salts, such as sodium tripolyphosphate.

7. There are no economic substitutes for pure phosphoric acid. A small but significant and non-transitory price increase would not affect the current level of consumption of pure phosphoric acid in any of the significant end-use applications.

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8. Another relevant line of commerce in which to analyze the effects of the proposed joint venture is the manufacture, marketing and sale of phosphorus pentasulfide. Phosphorus pentasulfide, which is typically sold in a solid, flake form to customers, is used primarily in the manufacture of chemical additives for engine lubricating oils, and also is used to a smaller extent in the manufacture of different types of insecticides.

9. There are no economic substitutes for phosphorus pentasulfide, due to the fact that other products would not be nearly as effective as phosphorus pentasulfide in its major applications. Moreover, even attempting to find alternative products to substitute for this product would require lengthy product development efforts followed by extensive product testing. For these reasons, a small but significant and non-transitory price increase would not affect the current level of consumption of phosphorus pentasulfide in any of the significant end-use applications.

10. The relevant geographic market in which to analyze the effects of the proposed joint venture in pure phosphoric acid is the United States. The level of imports of pure phosphoric acid has been low compared to the overall market, and has not been highly responsive to changes in United States prices. Producers in the United States recognize that prices in the United States have historically been much higher than prices in other parts of the world.

11. There are several reasons why imports of pure phosphoric acid into the United States have been limited. One reason is that many of the overseas producers employ the older, higher-cost thermal process to produce pure phosphoric acid. In addition, transportation costs account for a significant portion of the delivered cost of phosphoric acid. Other reasons why imports have been limited include access to distribution, and the cost of terminal storage for product imported from overseas.

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12. The overseas producers that have been most active in making sales of pure phosphoric acid in the United States have been those that employ the low-cost solvent extraction process. Nevertheless, the level of United States sales even by these companies has been low. These overseas producers of pure phosphoric acid have faced significant countervailing and antidumping duties that have limited their ability to sell pure phosphoric acid in the United States. These duties have increased costs for the overseas producers, and also chilled sales by the overseas producers in the United States. In addition, agreements between producers in the United States and various overseas producers have had the effect of limiting the level of competition from these overseas producers.

13. The relevant geographic market in which to assess the effects of the proposed joint venture between FMC and Solutia in phosphorus pentasulfide is the United States. Imports of phosphorus pentasulfide into the United States are virtually non-existent, and are limited by difficulties in handling this material in ocean shipping. Phosphorus pentasulfide is a hazardous material which emits deadly gases when exposed to moisture, and therefore requires specialized and expensive containers even for inland transportation. Furthermore, FMC's documents indicate that overseas producers have higher production costs than producers in the United States.

D. MARKET STRUCTURE

14. The United States market for pure phosphoric acid is highly concentrated. Four manufacturers, including Rhodia, Albright & Wilson, FMC and Solutia, currently account for approximately 95% of the local production capacity that can supply United States customers, and 95% of sales of pure phosphoric acid. FMC's share of current net sales (which includes sales among producers of pure phosphoric acid, and also

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excludes purchases of the product by producers) is over 20%, and Solutia's share is close to 11%. The proposed joint venture would increase the Herfindahl-Hirschman Index for United States sales by over 450 points, from over 2070 to over 2500.

15. FMC produces pure phosphoric acid via the thermal process in the United States at plants in Lawrence, Kansas and Carteret, New Jersey. FMC has also announced that it is in the process of building a plant in Idaho that will produce pure phosphoric acid via the solvent-extraction process. FMC also produces phosphate salts at the Lawrence and Carteret plants, and also at a plant in Green River, Wyoming.

16. FMC sells pure phosphoric acid directly to end-customers, and also uses it in the manufacture of phosphate salts. FMC's sales of phosphate salts included products such as sodium tripolyphosphate, sodium hexametaphosphate, sodium acid pyrophosphate, and tetrapotassium phosphate.

17. Solutia produces pure phosphoric acid via the thermal process at plants in Carondolet, Missouri and Trenton, Michigan. Solutia also has a pure phosphoric acid plant in Augusta, Georgia, but is not currently operating the plant. The plant has been mothballed since the beginning of 1998. Solutia also produces phosphate salts at its plants in Carondolet, Trenton and Augusta.

18. Solutia sells pure phosphoric acid directly to end-customers, and also uses it internally in the production of phosphate salts. Solutia's sales of phosphate salts included products such as sodium tripolyphosphate, sodium hexametaphosphate, sodium acid pyrophosphate, dicalcium phosphate and tetrapotassium phosphate.

19. FMC and Solutia manufacture and sell pure phosphoric acid in direct competition with each other, and also manufacture and sell phosphate salts in direct competition with each other.

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20. Besides FMC, Solutia, Rhodia, and Albright & Wilson, two other companies that produce pure phosphoric acid in North America for sale in the United States are Earth Sciences and Simplot. Earth Sciences and Simplot have each been producing pure phosphoric acid for the last two to three years, using processes to manufacture pure phosphoric acid different from the other North American producers. Both of these companies have very limited production capacity and sales compared to the other four producers, and are unlikely to grow their sales substantially in the foreseeable future.

21. The United States market for phosphorus pentasulfide is highly concentrated. Three manufacturers, FMC, Solutia and Rhodia, currently account for all of the sales of this product in the United States. FMC produces phosphorus pentasulfide at its plant in Lawrence, Kansas, and Solutia produces phosphorus pentasulfide at its plant in Sauget, Illinois. Rhodia, the smallest producer, has announced that it is exiting the phosphorus pentasulfide market, and is in the process of closing the facility in Morrisville, Pennsylvania where it manufactured this product.

22. FMC and Solutia together accounted for over 85% of United States sales of phosphorus pentasulfide in 1998. Solutia had a share of over 67% of sales and FMC had a share of close to 18% of sales. As measured by 1998 sales, the proposed joint venture would increase the Herfindahl-Hirschman Index for United States sales by over 2500 points, from approximately 5100 to over 7600. With Rhodia's announced exit, moreover, the proposed joint venture would establish a monopoly in this product.

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E. CONDITIONS OF ENTRY

23. *De novo* entry or fringe expansion into the pure phosphoric acid market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

24. The minimum viable scale of a pure phosphoric acid production facility likely precludes new entry. The prevailing pure phosphoric acid technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- the production of pure phosphoric acid. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from pure phosphoric acid sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky.

25. *De novo* entry or fringe expansion into the phosphorus pentasulfide market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

26. The minimum viable scale of a phosphorus pentasulfide production facility likely precludes new entry. A new plant would need to be built at a scale that either would be as large as the entire market, or would account for a large proportion of total market size, in order to operate efficiently. This technology has but a single use -- the production of phosphorus pentasulfide. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from sales of phosphorus pentasulfide. Because economic entry would require that a new producer capture a significant market share from existing producers, in a market that is enjoying no growth in demand, and because the costs of such entry would be sunk, such entry is inherently risky.

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27. Some firms produce phosphorus pentasulfide for captive use in the manufacture of insecticides. However, these firms have limited available capacity, and would need additional investments, in manufacturing, product development and marketing, in order to compete to make sales against FMC and Solutia. They would also need to establish that their products can meet the end-use requirements of the major customers in lubricant additives. Primarily for these reasons, these firms are unlikely to divert their production to making external sales, even in response to significant price increases.

F. MARKET CHARACTERISTICS WHICH FACILITATE
COORDINATED INTERACTION IN PURE PHOSPHORIC
ACID

28. The characteristics of the market for pure phosphoric acid facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The United States market for pure phosphoric acid is highly concentrated;
- b. Pure phosphoric acid is a highly homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available from customers, and from other producers due to the practice of publicly announcing price increases in advance of their implementation;
- d. Producers have made pricing decisions independently of industry operating rates;
- e. Producers undertake retaliation at specific accounts as a means to discipline and deter future competition.

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29. An agreement that limits competition is a January 1, 1998 agreement between Solutia and Emaphos, S.A. ("Emaphos"), a Moroccan producer which added a substantial amount of low-cost pure phosphoric acid capacity that came onstream in the beginning of 1998. Under the terms of the contract, Emaphos became a significant supplier of pure phosphoric acid to Solutia, which qualified and used the Emaphos acid in manufacturing different types of phosphate salts.

30. In addition to providing for supply from Emaphos to Solutia, the agreement between Solutia and Emaphos made Solutia the exclusive distributor in the United States for pure phosphoric acid produce by Emaphos, and therefore restricted Emaphos from selling pure phosphoric acid to direct customers in competition with Solutia. The only direct sales Emaphos was allowed to make under the terms of this agreement were sales to the other current large producers of pure phosphoric acid. This provision of the contract reduced Emaphos' impact as a direct and independent competitor.

G. EFFECTS OF THE PROPOSED JOINT VENTURE

31. The effect of the joint venture may be substantially to lessen competition and to tend to create a monopoly in the relevant markets 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, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. It will substantially increase concentration in the market for pure phosphoric acid;
- b. It will significantly enhance the likelihood of coordinated interaction among the competitors in the manufacture and sale of pure phosphoric acid;

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- c. It will increase the likelihood that purchasers of pure phosphoric acid in the relevant geographic market will be forced to pay higher prices;
- d. It will substantially increase concentration in the market for phosphorus pentasulfide, leading to a monopoly;
- e. It will significantly enhance the likelihood of a unilateral exercise of market power by the joint venture in phosphorus pentasulfide market;
- f. It will increase the likelihood that purchasers of phosphorus pentasulfide in the relevant geographic market will be forced to pay higher prices.

H. VIOLATIONS CHARGED

32. The joint venture agreement between FMC and Solutia, as described in Paragraph 5, violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

33. The joint venture between FMC and Solutia, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of April, 2000, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed joint venture between Respondent FMC Corporation ("FMC") and Respondent Solutia Inc. ("Solutia") to form Respondent Astaris LLC ("Astaris"), and Respondents 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 Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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1. FMC is 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 located at 200 East Randolph Drive, Chicago, Illinois 60601.
2. Solutia is 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 located at 575 Maryville Centre Drive, St. Louis, Missouri 63141.
3. Astaris is a limited liability company organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 575 Maryville Centre Drive, St. Louis, Missouri 63141.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "FMC" means FMC Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by FMC, its joint ventures, including the Joint Venture, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- B. "Solutia" means Solutia Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Solutia, its joint ventures, including the Joint Venture, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Astaris" means Astaris LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Astaris, its joint ventures, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means FMC, Solutia and Astaris, respectively and collectively.
- F. "Joint Venture" means the Joint Venture Between FMC and Solutia, as described in the April 29, 1999, Joint Venture Agreement Between FMC and Solutia.
- G. "Prayon" means Societe Chimique Prayon-Rupel S.A., its subsidiaries, divisions, groups, and affiliates controlled by Prayon.
- H. "Peak" means Peak Investments, L.L.C., its subsidiaries, divisions, groups, and affiliates controlled by Peak.
- I. "Emaphos" means Emaphos, S.A., its parents, subsidiaries, divisions, groups, and affiliates controlled by Emaphos.

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- J. "Augusta Assets To Be Divested" means the assets, properties and business, tangible and intangible, of the Augusta Plant, including, but not limited to:
1. all machinery, furniture, fixtures, tools and other tangible personal property at the Augusta Plant;
 2. a royalty-free, non-exclusive license to all rights, titles, and interest in and to Augusta Intellectual Property;
 3. all rights, title, and interest in and to inventories of raw materials (to the extent requested by the acquirer), supplies and parts for the Augusta Plant;
 4. all rights, title, and interest in and to the service contracts dedicated to the operations of the Augusta Plant and the customer contracts listed in Confidential Appendix A, attached hereto;
 5. all rights, title and interest in and to transferable governmental permits and approvals relating to the operation of the Augusta Plant, to the extent permitted by law;
 6. lists of the customers served by and service contracts used for the Augusta Plant;
 7. all equipment, vehicles and transportation facilities used since January 1, 1999 at the Augusta Plant;
 8. all storage capacity located at the Augusta Plant;
 9. all rights, titles, and interests in and to the owned real property on which the Augusta Plant is located;

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10. all rights under any third-party warranties and guarantees, express or implied, for the Augusta Plant; and
 11. all books, records, and files regarding operating procedures and policies at the Augusta Plant; provided, however, that Respondents may retain a copy of such books, records, and files solely for financial, tax reporting, legal, health, safety and environmental purposes.
- K. “Augusta Intellectual Property” means any form of intellectual property relating to the manufacture of products at the Augusta Plant, including, but not limited to, trade secrets, technical information, inventions, test data, technological know-how, licenses, specifications, designs, drawings, processes, formulas, customer lists, lists of significant current vendors, and quality control data, books, records, and files; provided, however, that Augusta Intellectual Property does not include proprietary information of other parties which Respondents are prevented from disclosing due to the existence of secrecy agreements.
- L. “Augusta Plant” means the Solutia manufacturing plant in Augusta, Georgia, which manufactures phosphate salts and has manufactured phosphoric acid.
- M. “Augusta Products” means the grades and types of phosphate salts that are and have been produced at the Augusta Plant since January 1, 1999.
- N. “Emaphos Phosphoric Acid Agreement” means the agreement dated January 1, 1998, between Solutia Inc. and Emaphos S.A. pursuant to which Solutia agreed to purchase, and Emaphos agreed to sell, specified volumes of phosphoric acid.

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- O. "Lawrence Plant" means FMC's plant in Lawrence, Kansas, which is used to manufacture phosphoric acid, phosphate salts and phosphorus derivatives, and includes the Lawrence P₂S₅ Plant.
- P. "Lawrence Plant Facilities" means all Lawrence Plant facilities used for the operation of the Lawrence P₂S₅ Plant, whether or not used exclusively in the manufacture of P₂S₅.
- Q. "Lawrence Plant Services" means the plant services and functions supplied by Respondents for operation of the Lawrence P₂S₅ Plant.
- R. "Lawrence P₂S₅" means the grades and types of P₂S₅ that are and have been produced at the Lawrence P₂S₅ Plant since January 1, 1997.
- S. "Lawrence P₂S₅ Plant" means the P₂S₅ manufacturing unit located at the Lawrence Plant.
- T. "Lawrence P₂S₅ Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of products at the Lawrence P₂S₅ Plant, including, but not limited to, trademarks (except "FMC," "Solutia" and "Astaris," and associated trademarks), patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files; provided,

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however, that Lawrence P₂S₅ Intellectual Property does not include non-transferable software licenses.

- U. “Non-Public P₂S₅ Information” means Lawrence P₂S₅ Intellectual Property, and any information not in the public domain furnished to Respondents by the acquirer of the P₂S₅ Assets to Be Divested, or learned by Respondents as suppliers of products, services or facilities to the acquirer, and (1) if written information, designated in writing by the acquirer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the acquirer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public P₂S₅ Information shall not include: (i) information already known to Respondents; (ii) information which subsequently falls within the public domain through no violation of this Order by Respondents; (iii) information which subsequently becomes known to Respondents from a third party not in breach of a confidential disclosure agreement; (iv) information after six (6) years from the date of such disclosure of such Non-Public P₂S₅ Information to Respondents, or such other period as agreed to in writing by Respondents and the provider of the information; or (v) information which Respondents develop independently.
- V. “Peak Divestiture Agreement” means the December 8, 1999, and December 20, 1999, agreements between FMC and Peak by which FMC has agreed to sell and Peak has agreed to acquire the P₂S₅ Assets to Be Divested, attached hereto as Confidential Appendix 1.
- W. “Prayon Divestiture Agreement” means the December 8, 1999, and January 31, 2000, agreements between Solutia and Prayon by which Solutia has agreed to sell

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and Prayon has agreed to acquire the Augusta Assets To Be Divested, attached hereto as Confidential Appendix 2.

X. "P₂S₅ Assets to Be Divested" means:

1. the Lawrence P₂S₅ plant, including all machinery, furniture, fixtures, tools and other tangible personal property dedicated to the manufacture and sale of P₂S₅ at the Lawrence Plant;
2. all rights, title, and interest in and to Lawrence P₂S₅ Intellectual Property dedicated to the research, development, manufacture and sale of Lawrence P₂S₅, and a non-exclusive, perpetual, royalty-free transferable license for Lawrence P₂S₅ Intellectual Property not dedicated to the research, development, manufacture or sale of Lawrence P₂S₅; provided that the acquirer has rights to transfer such license only to any person to whom it is transferring its entire interest in the P₂S₅ Assets to Be Divested, or from whom it has agreed to purchase elemental phosphorus for use in the manufacture of P₂S₅;
3. all rights, title, and interest in and to inventories of products that are useable and saleable in the ordinary course of business, raw materials (to the extent requested by the acquirer), supplies and parts, or the part thereof, dedicated to the manufacture or sale of Lawrence P₂S₅, including work-in-process and finished goods;
4. all rights, title, and interest in and to agreements, express or implied, necessary for the manufacture or sale of Lawrence P₂S₅, including, but not limited to,

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contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;

5. all rights, title and interest in and to transferable permits and approvals dedicated to the research, design, development, manufacture, distribution, marketing or sale of Lawrence P₂S₅, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
6. all customer and vendor lists relating to Lawrence P₂S₅, including, without limitation, correspondence with customers, customer files and account history (including, without limitation, receivable and collection history), sales literature and promotional material used in the manufacture and sale of P₂S₅;
7. all equipment, vehicles and transportation facilities, dedicated to the manufacture and sale of Lawrence P₂S₅;
8. all storage capacity at the Lawrence P₂S₅ Plant;
9. all of FMC's rights, title and interest under each of the personal property leases for tangible assets (other than office equipment) and property leased by FMC, which leases are dedicated to the manufacture and sale of Lawrence P₂S₅;
10. all rights under any third-party warranties and guarantees, express or implied, for the manufacture and sale of Lawrence P₂S₅; and
11. all books, records, and files regarding operating procedures and policies at the Lawrence P₂S₅ Plant; provided, however, that Respondents may retain a

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copy of such books, records and files as appropriate for operation of the Lawrence Plant, for provision of Lawrence Plant Services or P₂S₅ Technical Services, and for financial, tax reporting, legal, health, safety and environmental purposes.

- Y. “P₂S₅ Construction Project” means construction of new facilities or modification of the Lawrence P₂S₅ Plant for purposes of creating access to the Lawrence P₂S₅ Plant, receiving raw materials for use in the Lawrence P₂S₅ Plant, or manufacturing or transporting Lawrence P₂S₅.
- Z. “P₂S₅ Nameplate Level” means the rated nameplate capacity of the Lawrence P₂S₅ Plant.
- AA. “P₂S₅ Technical Services” means research and development and laboratory analysis relating to Lawrence P₂S₅, whether conducted by Respondents at the Lawrence Plant or at other facilities, in the form of personnel time, access to equipment and materials, or otherwise.
- BB. “Trustee” means a trustee appointed pursuant to Paragraph VII.A. of this Order.
- CC. “Assets To Be Divested” means the Augusta Assets To Be Divested and the P₂S₅ Assets to Be Divested.

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II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Augusta Assets To Be Divested to Prayon pursuant to the Prayon Divestiture Agreement no later than six (6) months after the Commission accepts the Consent Agreement for public comment. The purpose of the divestiture is to ensure the continued use of the Augusta Assets To Be Divested in the same business in which they were engaged at the time of the Joint Venture and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

Provided, however, that, if at the time the Commission issues the Order, the Commission notifies Respondents that Prayon is not an acceptable acquirer or that the Prayon Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within five (5) months of the date on which this Order is issued by the Commission, divest the Augusta Assets To Be Divested only to an acquirer that is approved by the Commission, and divest these assets only in a manner approved by the Commission.

- B. Within thirty (30) days of the date that this Order is accepted by the Commission for public comment, Respondents shall provide Prayon with a complete list of all non-clerical employees of Solutia employed at the Augusta Plant. If Respondents divest the Augusta Assets to Be Divested to an acquirer other than Prayon, then Respondents shall provide such list to the acquirer no later than the date on which a divestiture agreement is signed with such acquirer. Such list shall

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state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with the Augusta Products.

- C. Respondents shall provide Prayon with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees at the Augusta Plant, to the extent permissible under applicable laws, at the request of Prayon, within sixty (60) days of the date that this Order is accepted by the Commission for public comment. If the Augusta Assets to Be Divested are divested to an acquirer other than Prayon, then Respondents shall provide such opportunity no later than the date on which the divestiture agreement is signed with such acquirer.
- D. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with the non-clerical employees described in Paragraph II.B.
- E. Respondents shall provide the Commission-approved acquirer with the opportunity to enter into employment contracts with up to two (2) sales and marketing employees (including business directors, managers, and technical services employees) who are currently or have been employed by Solutia or FMC within the last two (2) years, and who, within thirty days after the date that the Consent Agreement is accepted by the Commission for public comment, have not received offers, or who have decided not, to become employees of Astaris, and shall not interfere with the employment by the Commission-approved acquirer of such individuals; shall not offer any incentive to such

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employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer.

- F. Respondents shall not make employment offers to any individual described in Paragraphs II.D. and II.E., above, who accepts employment with the acquirer of the Augusta Assets To Be Divested, for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer.

III.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the P₂S₅ Assets To Be Divested to Peak pursuant to the Peak Divestiture Agreement no later than thirty (30) days after the parties form the Joint Venture. The purpose of the divestiture is to ensure the continued use of the P₂S₅ Assets To Be Divested in the same business in which they were engaged at the time of the Joint Venture and to remedy the lessening of competition resulting from the Joint Venture as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

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Provided, however, that, if at that time the Commission issues the Order, the Commission notifies Respondents that Peak is not an acceptable acquirer or that the Peak Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within five (5) months of the date on which this Order is issued by the Commission, divest the P₂S₅ Assets to Be Divested only to an acquirer that is approved by the Commission, and divest these assets only in a manner approved by the Commission.

- B. Respondents shall provide and make available to the acquirer of the P₂S₅ Assets To Be Divested, all Lawrence Plant Services, all P₂S₅ Technical Services and access to all Lawrence Plant Facilities that are requested by the acquirer up to a level sufficient to allow the acquirer to practicably operate the P₂S₅ Assets To Be Divested at the P₂S₅ Nameplate Level. Such services and facilities shall be provided and made available at the times requested by the acquirer, except to the extent that such delivery is inconsistent with the safe and orderly operation of the Lawrence Plant, but the provision of such services or the availability of access to such facilities shall be no less timely than was normal during the period beginning January 1, 1999 and ending December 31, 1999.
- C. Respondents shall provide the acquirer of the P₂S₅ Assets To Be Divested with continuing access to all Lawrence Plant Facilities requested by the acquirer to receive raw materials and other supplies to support the operation of the Lawrence P₂S₅ Plant and to transport finished products from the Lawrence P₂S₅ Plant. Such access shall be provided at the times requested by the acquirer, except to the extent that such delivery is

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inconsistent with the safe and orderly operation of the Lawrence Plant, but such provision or availability shall be no less timely than was normal during the period beginning January 1, 1999 and ending December 31, 1999.

- D. Respondents shall provide, at the request of the acquirer of the P₂S₅ Assets To Be Divested, an ongoing supply of elemental phosphorus to support the acquirer's business of the manufacture and sale of P₂S₅, for a period of no less than ten (10) years from the time that this Order is issued by the Commission, unless Respondents cease the manufacture or purchase of elemental phosphorus.
- E. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested, upon timely notice to Respondents, access to Lawrence Plant Facilities to provide any Lawrence Plant Service which Respondents have failed to provide, except to the extent that such access would be inconsistent with the safe and orderly operation of the Lawrence Plant.
- F. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested to initiate and undertake, in a manner consistent with its access rights to the Lawrence Plant, P₂S₅ Construction Projects to replace any Lawrence Plant Facility or Lawrence Plant Service or to purchase elemental phosphorus from any source other than the Joint Venture.

Provided, however, that Respondents may take steps in conjunction with such P₂S₅ Construction Projects to ensure that the projects do not unreasonably interfere with continuing commercial operations at the Lawrence Plant.

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- G. Respondents shall allow the acquirer of the P₂S₅ Assets To Be Divested to initiate and undertake, in a manner consistent with its access rights to the Lawrence Plant, P₂S₅ Construction Projects to create separate access to the Lawrence Plant Facilities. In the event that the acquirer undertakes such a P₂S₅ Construction Project, Respondents shall maintain no continuing control or influence over access through such facility to the Lawrence P₂S₅ Plant, except to the extent necessary to maintain orderly and safe operation of the areas of the Lawrence Plant that are not dedicated to the manufacture of P₂S₅.

Provided, however, that Respondents may take steps in conjunction with such P₂S₅ Construction Projects to ensure that the projects do not unreasonably interfere with continuing commercial operations at the Lawrence Plant.

- H. Respondents shall provide access to the facilities used at the Lawrence Plant in connection with the manufacture and sale of P₂S₅ to all individuals invited by the acquirer, provided that such access does not unreasonably interfere with the continuing commercial operations of the Lawrence Plant.
- I. Respondents shall, for a period of two (2) years from the date that this Order is issued by the Commission, pay the acquirer of the P₂S₅ Assets To Be Divested for damages to the extent proximately caused by failures by Respondents to provide the acquirer of the P₂S₅ Assets To Be Divested with Lawrence Plant Services or P₂S₅ Technical Services, to provide access to Lawrence Plant Facilities, to provide elemental phosphorus pursuant to a supply agreement, or to comply with the requirements of Paragraph IV, below.

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- J. Respondents shall provide the acquirer of the P₂S₅ Assets To Be Divested with the rights to sell or transfer the P₂S₅ Assets To Be Divested, together with all rights obtained by the acquirer in connection with the divestiture, to any third person that is financially and technically capable of operating such assets on a commercial basis in compliance with safety, health, environmental and legal requirements.
- K. Respondents shall not interfere with the employment of the individuals listed in Confidential Appendix B attached to this Decision and Order, by the Commission-approved acquirer; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of the those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver may be limited to employment with the Commission-approved acquirer or persons to whom the acquirer transfers the Lawrence P₂S₅ Plant.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not, absent the prior written consent of the acquirer of the P₂S₅ Assets To Be Divested, obtain, provide, disclose, or use any Non-Public P₂S₅ Information for purposes other than facilitating the P₂S₅ acquirer's business at the Lawrence Plant or

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complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

- B. Respondents shall establish and enforce procedures to prevent the transmission of any Non-Public P₂S₅ Information to any of Respondents' employees with responsibilities concerning Respondents' P₂S₅ business.

V.

IT IS FURTHER ORDERED that Respondents, for a period of ten (10) years, shall not seek to enforce any provisions in the Emaphos Phosphoric Acid Agreement or any other agreement which directly or indirectly provide that sales of phosphoric acid in the United States by Emaphos or Prayon be made exclusively to Respondents, and shall not enter into any other agreements which directly or indirectly provide that sales of phosphoric acid in the United States by Emaphos or Prayon be made exclusively to Respondents.

VI.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Agreement Containing Consent Orders in this matter, the Commission may appoint an Interim Trustee to ensure that Respondents expeditiously perform their responsibilities as required by Paragraphs III and IV of this Order and the divestiture agreement approved by the Commission. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this Paragraph VI.:

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1. The Commission shall select the Interim Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. The Interim Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this order and with the terms of the divestiture agreement.
3. Within ten (10) days after appointment of the Interim Trustee, Respondents shall execute a trust agreement (in the form attached) that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor Respondents' compliance with the terms of this order and with the divestiture agreement.
4. The Interim Trustee shall serve for a term of two (2) years from the date the Interim Trustee and the trustee agreement are approved by the Commission. The term of the Interim Trustee may be extended up to an additional two (2) years at the option of the Commission.
5. The Interim Trustee shall have full and complete access to Respondents' personnel, books, records, documents, facilities and technical information used for the research, manufacture, marketing, distribution and sale of P_2S_5 and relating to the Lawrence Plant Services, the Lawrence Plant Facilities, the P_2S_5

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Technical Services, and the supply of elemental phosphorus, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that are used for the manufacture of P_2S_5 , and all documents and records kept in the normal course of business that relate to the Lawrence Plant Services, Lawrence Plant Facilities, and the P_2S_5 Technical Services. Respondents shall cooperate with any reasonable request of the Interim Trustee. Respondents shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondents' compliance with Paragraphs III. and IV. of this Order and the divestiture agreement.

6. The Interim Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondents shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the

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extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.

8. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph VI.A.1. of this Order.
 9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the divestiture agreement.
- B. The Interim Trustee shall report to the Commission in writing, concerning compliance by Respondents with the provisions of Paragraph VI. within ten (10) days from the date the Peak Divestiture Agreement is approved and every sixty (60) days thereafter.

VII.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested in accordance with Paragraphs II.A. and III.A. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to ' 5(l) of the Federal Trade Commission Act, 15 U.S.C. ' 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the

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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 ' 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VII.A. of this Order, Respondents 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 Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have 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 Respondents of the identity of any proposed trustee, Respondents 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 Assets To Be Divested.
 3. Within ten (10) days after appointment of the trustee, Respondents 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,

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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 VII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-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 Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in the manner and to the acquirer as set out in Paragraphs II and III of this

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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 selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, 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 divestiture 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 Respondents, 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 Assets To Be Divested.
8. Respondents 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

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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 losses, claims, damages, liabilities, 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 in the same manner as provided in Paragraph VII.A. 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 any assets relating to the research, development, manufacture or sale of Augusta Products or Lawrence P₂S₅.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

- A. Acquire more than 2% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns or controls the Augusta

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Assets to Be Divested or the P₂S₅ Assets to Be Divested; or

- B. Acquire all or part of the Augusta Assets to Be Divested or the P₂S₅ Assets to Be Divested.

IX.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days of the date this Order is issued and every thirty (30) days thereafter until Respondents have obtained Commission approval for the acquirers and the manner of divestitures required by Paragraphs II. and III. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their 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 this Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, and all transition services required to be rendered pursuant to the agreement approved by the Commission.
- K. One year from the date this Order becomes final and annually for the next nine (9) years on the anniversary of the date that this Order becomes final, and at other

Decision and Order

times that the Commission may require, Respondents shall file a verified written report setting forth in detail the manner in which they have complied and are complying with this Order.

X.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents 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.

XI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

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XII.

IT IS FURTHER ORDERED that this Order shall terminate on May 15, 2020.

By the Commission.

[Confidential Appendices A, B, 1 and 2 Redacted From
Public Record Version of Decision & Order]

**STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY, MOZELLE W.
THOMPSON, ORSON SWINDLE,
AND THOMAS B. LEARY**

We believe that the divestitures and other relief mandated by the Commission order should restore the competition lost through the joint venture between FMC Corporation and Solutia Inc. Nevertheless, we recognize that both divestitures are somewhat out of the ordinary.

When remedying a Clayton Section 7 violation, the Commission usually orders a complete divestiture of one merging party's assets that produce the relevant product. In the pure phosphoric acid ("PPA") market, though, the Commission requires the divestiture to Prayon of a plant that manufactures phosphate salts but not PPA. And in the phosphorus pentasulfide

Analysis to Aid Public Comment

market, the Commission orders the divestiture to Peak of what is essentially a “plant within a plant.” Due to the novelty of the relief, the Commission will monitor closely the respondents’ compliance with their obligations under the order and will ascertain whether the relief ordered in this case effectively restores competition in each of the markets.

Analysis to Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from FMC Corp. (“FMC”), Solutia Inc. (“Solutia”), and Astaris LLC (“Astaris”). The Consent Agreement is intended to resolve anticompetitive effects stemming from the proposed joint venture between FMC and Solutia to combine their respective phosphates and phosphorus derivatives businesses. The Consent Agreement includes a proposed Decision and Order (the “Order”), which would require FMC and Solutia to divest to Societe Chimique Prayon-Rupel (“Prayon”) the portion of Solutia’s phosphates business based in Augusta, Georgia, and to divest to Peak Investments, L.L.C. (“Peak”) FMC’s phosphorus pentasulfide business based in Lawrence, Kansas. The Consent Agreement also includes an Order to Maintain Assets which requires respondents to preserve the assets they are required to divest as viable, competitive, and ongoing operations until the divestitures are achieved.

The Order, if issued by the Commission, would settle charges that the proposed joint venture between FMC and Solutia may have substantially lessened competition in the United States markets for pure phosphoric acid and phosphorus pentasulfide. The Commission has reason to believe that the proposed joint venture would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The

Analysis to Aid Public Comment

Commission's complaint, described below, relates the basis for this belief.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and comments received and decide whether to withdraw its acceptance of the agreement or make the Order final.

According to the Commission's complaint, one relevant line of commerce in which to analyze the effects of the proposed joint venture between FMC and Solutia is pure phosphoric acid, and the relevant geographic market for this product is the United States. Pure phosphoric acid is used as an input into a wide variety of consumer and industrial products, ranging from cola beverages to cleaning compounds and metal treatments. The complaint describes FMC's and Solutia's production and sale of pure phosphoric acid, and further describes how each of the companies sells pure phosphoric acid directly to end-customers and uses it internally in the manufacture of different types of phosphate salts. According to the Commission's complaint, FMC and Solutia compete with each other in the manufacture and sale of pure phosphoric acid directly to end-customers, and in the manufacture and sale of phosphate salts.

The complaint alleges that the pure phosphoric acid market in the United States already is highly concentrated, and that the proposed joint venture would increase concentration in that market, as measured by the Herfindahl-Hirschman Index, by over 450 points, to a level over 2500. Furthermore, according to the complaint, new entry into this market is not likely.

Analysis to Aid Public Comment

The Commission's complaint further states that the market for pure phosphoric acid is conducive to coordination, that producers already price independently of industry operating rates, and that producers target competitors' customers in retaliation against aggressive bidding as a means of deterring future competition. Furthermore, according to the complaint, prices for pure phosphoric acid are already the highest in the world. The complaint also describes how Solutia's agreement to purchase pure phosphoric acid from Emaphos, S.A. ("Emaphos"), a new producer of pure phosphoric acid in Morocco, makes Solutia the exclusive distributor in North America for Emaphos' pure phosphoric acid and restricts Emaphos from selling pure phosphoric acid to end-customers. According to the complaint, this provision of Solutia's agreement with Emaphos reduced the impact of potential competition from Emaphos in the United States market.

According to the Commission's complaint, another line of commerce in which to analyze the effects of the proposed joint venture is phosphorus pentasulfide. Phosphorus pentasulfide, which is typically sold in a solid, flake form to customers, is used primarily in the manufacture of chemical additives for engine lubricating oils, and also is used to a smaller extent in the manufacture of different types of insecticides. The complaint alleges that the only three companies that manufacture and sell phosphorus pentasulfide in the United States are Solutia, FMC and Rhodia, and Rhodia has announced that it is exiting the market. Therefore, the proposed joint venture would create a monopoly in this line of commerce. The complaint also states that the entry of new producers into this market is not likely. The complaint therefore alleges that the proposed joint venture would likely be able to exercise market power on a unilateral basis.

The proposed Order is designed to remedy the alleged anticompetitive effects of the joint venture in the United States markets for pure phosphoric acid and phosphorus pentasulfide, by requiring the divestiture to Prayon of Solutia's phosphates plant in

Analysis to Aid Public Comment

Augusta, Georgia, and the divestiture to Peak of FMC's phosphorus pentasulfide plant in Lawrence, Kansas.

The Order would require respondents to divest the Augusta plant to Prayon within six months of the date that the Consent Agreement was accepted by the Commission. The Order would also require the respondents to provide Prayon with technology Solutia has used for manufacturing phosphates at the Augusta plant, and to divest other assets relating to the Augusta plant, including customer lists, contracts, and other intangible assets.

Prayon, based in Belgium, is one of the world's leading and lowest-cost producers of pure phosphoric acid. It operates two low-cost solvent-extraction plants to produce pure phosphoric acid in Belgium, and also is a partner in Emaphos, which operates a new low-cost solvent-extraction plant in Morocco. Prayon currently imports small volumes of pure phosphoric acid into the United States. With the acquisition of Solutia's Augusta plant, Prayon's presence in the United States would become much stronger, providing it with a base from which to expand its sales of pure phosphoric acid. Its competitive presence will also be enhanced by the Order's requirement that respondents revise the existing contract between Solutia and Emaphos so as to remove the restrictions that prevent Emaphos from selling pure phosphoric acid to end-customers. Emaphos' expansion in the United States through acquisition of the Augusta plant, and by virtue of the other provisions in the Order, will offset the loss of competition that would otherwise occur as a result of the joint venture.

The Order would also require respondents to divest FMC's phosphorus pentasulfide plant in Lawrence, Kansas to Peak within 30 days of the date that the joint venture is formed. The Order would require the respondents to provide Peak with technology FMC has used for manufacturing phosphorus pentasulfide at the

Analysis to Aid Public Comment

Lawrence plant, and to divest other assets relating to the Lawrence plant, including customer lists, contracts, and other intangible assets. Because Peak will operate the phosphorus pentasulfide plant in Lawrence as part of a larger site that the joint venture will continue to own, and because Peak will rely on the joint venture for certain facilities and services, the proposed Order also contains several provisions designed to safeguard Peak's competitive position, in part by providing Peak with the opportunity to provide for itself the services and facilities it needs to operate the phosphorus pentasulfide plant. The proposed Order also contains a provision requiring the appointment of an interim trustee who would, for a period of two years, monitor the relationship at Lawrence to ensure that Peak has fair and full access to the services and facilities needed to operate the phosphorus pentasulfide plant.

If the Commission, at the time that it issues the Order, notifies respondents that it does not approve of the manner of either divestiture, or of either Prayon or Peak as purchasers of the Assets To Be Divested, the proposed Order provides that respondents would have five months to divest either the Augusta plant or the phosphorus pentasulfide business to a different acquirer. If respondents do not complete such divestiture in that period, a trustee would be appointed.

The Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the Assets To Be Divested as viable and competitive operations until they are transferred to the Commission-approved acquirers. It requires the respondents to maintain the viability and competitiveness of the Assets To Be Divested, and to conduct the businesses to be divested in the ordinary course of business. Furthermore, it includes an obligation on respondents to build and maintain inventories of products at the Augusta and Lawrence plants consistent with regular business practice. The Order to Maintain Assets also requires respondents to provide certain support to Prayon in advance of the divestiture of the Augusta plant, including agreements to toll produce phosphates at Augusta, to

Analysis to Aid Public Comment

allow Prayon to maintain an engineer at the Augusta site, and to provide certain information to Prayon regarding the Augusta operations.

The Consent Agreement requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the divestiture requirements of the Order, and also requires annual compliance reports for 10 years.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement or the proposed Order or in any way to modify the terms of the Consent Agreement or the proposed Order.

Complaint

IN THE MATTER OF
CMO DISTRIBUTION CENTERS OF AMERICA, INC.,
ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATIONS OF SEC. 5 AND 12 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-3942; File No. 9823180
Complaint, May 16, 2000--Decision, May 16, 2000

This consent order prohibits Respondents CMO Distribution Centers and Kalon Samluonis from making any representation that CMO or any similar product: (1) is effective in the mitigation, treatment, prevention, or cure of arthritis; (2) provides significant relief from symptoms of arthritis, including pain, swelling, impaired mobility, or deformity; (3) is as effective as, or superior to, prescription medications for the treatment of arthritis or the relief of arthritis symptoms; (4) is effective in the treatment of multiple sclerosis, leukemia, lupus, emphysema, cancer, benign prostate hyperplasia, silicone breast disease, asthma, fibromyalgia, or scleroderma; or (5) is safe or has no adverse side effects, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. The order also prohibits proposed respondents from making any representations about the performance, safety, efficacy, or health benefits of CMO or any other food, dietary supplement, or drug, or using the name “cmocure,” using the word “cure”, unless the respondents possess and rely upon competent, reliable scientific evidence substantiating the representation unless the claims are substantiated by competent and reliable scientific evidence. In addition, the order prohibits the proposed respondents from misrepresenting that a product or program is endorsed or approved by any governmental, professional, or private organization or association, or complies with standards or guidelines established by such organization or association, or the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or the experience represented by any user testimonial or endorsement of any product or program represents the typical or ordinary experience of members of the public who use the product or program.

Participants

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