competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the claim.

Part II prohibits Abott from misrepresenting that one serving of any Ensure product, or any other product advertised, marketed or sold as a meal replacement or supplement for healthy adults, provides vitamins in an amount comparable to typical vitamin supplements. It also prohibits Abbott from misrepresenting the absolute or comparative amount of any vitamin or any other nutrient or ingredient provided by such products. Part II also requires that any representation covered by that Part that conveys a nutrient content claim defined for labeling by any regulation of the Food and Drug Administration (''FDA'') must comply with the qualifying amount set forth in that regulation.

Part III provides that representations that would be specifically permitted in food labeling, under regulations issued by the FDA pursuant to the Nutrition Labeling and Education Act of 1990, are not prohibited by the order.

The proposed order also requires Abbott to maintain materials relied upon to substantiate the claims covered by the order, to distribute copies of the order to certain current and future officers and employees, to notify the Commission of any changes in corporate structure that might affect compliance with the order, and to file one or more reports detailing compliance with the order. The order also contains a provision stating that it will terminate after twenty (20) years absent the filing in federal court, by either the United States or the FTC, of a complaint against Abbott alleging a violation of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify any of their terms.

Donald S. Clark,

Secretary,

[FR Doc. 97–922 Filed 1–14–97; 8:45 am]

BILLING CODE 6750–01–M

[File No. 961–0101]

General Mills, Inc.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, the Minneapolis-based producer of ready-to-eat cereals to permit New Ralcorp Holdings, Inc. to transfer to any successor party, without any authorization or approval from General Mills, the right to manufacture and sell cereals identical to the Chex brand products. The order also bars General Mills from delaying production of the private label Chex rivals. The agreement settles allegations that General Mills' acquisition of Ralcorp's branded cold cereal business, including the Chex line of cereals, would boost General Mills' share of the U.S. ready-to-eat cereals market to 31 percent and that it would have restricted the entry of new private label cereal products to compete with the General Mills brands. The Commission had alleged that the acquisition could have resulted in higher prices for Chex brand cereals.

DATES: Comments must be received on or before March 17, 1997.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: William J. Baer, Federal Trade Commission, H–374, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580. (202) 326–2932.

George S. Cary, Federal Trade Commission, H–374, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580. (202) 326–3741.

Phillip L. Broyles, Federal Trade Commission, S–2105, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580. (202) 326–2805.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the accompanying complaint. An electronic copy of the full text of the consent agreement package can be obtained from the Commission Actions section of the FTC Home Page (for December 26, 1996), on the World Wide Web, at ''http://www.ftc.gov/os/actions/htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis to Aid Public Comment on the Provisionally Accepted Consent Order

The Federal Trade Commission has accepted for public comment from General Mills, Inc. (''General Mills''), an agreement containing a consent order. The Commission designed the agreement to remedy any anticompetitive effects stemming from General Mills's acquisition of the branded ready-to-eat (''RTE'') cereal business from Ralcorp Holdings, Inc. (''Ralcorp'').

This agreement has been placed on the public record for sixty (60) days for reception of comments from interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received. The Commission will then decide whether it should withdraw from the agreement or make final the order contained in the agreement.

The Commission's Complaint charges that on or about August 13, 1996, General Mills agreed to acquire the branded RTE cereal and snack-mix businesses owned by Ralcorp. Among the cereals that General Mills agreed to acquire are Corn CHEX, Rice CHEX, and Wheat CHEX. The Commission has reason to believe that the acquisition and the agreement to acquire Ralcorp may have anticompetitive effects and be in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

According to the Commission's Complaint, General Mills is the second largest producer of RTE cereals and Ralcorp is the fifth largest producer of branded RTE cereals. Ralcorp is also the largest producer of private label RTE cereals. In 1994, the Ralston Purina Company created Ralcorp by distributing shares of Ralcorp to Ralston's Purina's shareholders. General Mills will not acquire Ralcorp's private label RTE cereal business. Ralcorp will form a new entity, New Ralcorp Holdings, Inc. (''New Ralcorp''), which will continue producing RTE cereals.

The Commission's investigation of this matter found potential anticompetitive problems arising from

this acquisition. The Complaint alleges that concentration is high in the RTE cereal market and entry is difficult and unlikely. Although this transaction does not reduce the number of established substantial firms in the RTE cereals market, it does increase General Mills' market share by approximately 3 percent and thus increases overall concentration in the market. Of particular concern is that the acquisition agreement restricts New Ralcorp's freedom to produce and sell private label CHEX products as well as its ability to transfer the rights to manufacture and sell private label CHEX products to a third party without permission from General Mills.

Under the terms of the proposed order, General Mills must, before consummating the merger, include in its agreements with Ralcorp and New Ralcorp provisions that will permit the transfer to any successor party of the right to manufacture and sell private label CHEX in the United States. These provisions will permit the successor party to sell these private label cereals without further authorization or approval from General Mills or Ralston Purina Company. The proposed order also prohibits General Mills from taking any action to prevent or delay New Ralcorp's sale of private label CHEX products in the United States. Finally, the proposed order prohibits General Mills from enforcing any agreement that would prevent the transfer to a successor party of the right to manufacture and sell private label CHEX in the United States.

Presently, neither Ralcorp nor any other person produces private label CHEX products. The proposed order will increase the likelihood that someone will produce and sell private label CHEX in competition with General Mills' branded CHEX products.

To reduce the possibility of competitive harm before the Commission's entry of a final order, the interim agreement binds General Mills to the terms of the order, as if it were final. The interim agreement became effective on the date General Mills signed the consent agreement.

The purpose of this analysis is to invite public comment concerning the consent order. The Commission does not intend this analysis to be an official interpretation of the agreement and order or to modify their terms in any way.

Donald S. Clark,

Secretary.

Statement of Commissioner Mary L. Azcuenaga Concurring in Part and Dissenting in Part in General Mills, Inc., File No. 961–0101

The Commission today issues for public comment a consent order based on a complaint alleging that the acquisition by General Mills, Inc., of the branded ready-to-eat cereal business of Ralcorp Holdings, Inc., violates Section 7 of the Clayton Act. The order is narrow, but I would narrow it even further. In particular, I would delete Paragraph II(B) of the proposed order, which requires elimination of a noncompete clause that would have prevented Ralcorp for a period of eighteen months from introducing a new private label cereal identical or similar to the CHEX-brand cereals being sold to General Mills.

Paragraph 14 of the complaint alleges that the noncompete clause described in paragraph 8 would have the anticompetitive effect of ''restricting the entry of new private label cereal products into competition with General Mills.'' That effect, of course, is precisely the purpose of this (and every other) noncompete clause.[1] Although the complaint might be read as alleging that noncompete clauses are *per se* anticompetitive, that interpretation would be inconsistent with the Commission's decision a few days ago to accept for public comment an order that in paragraph VI imposed an affirmative prohibition on competition for six years between the merged firm and the acquirer of certain animal health assets to be divested under the order. ''Ciba Geigy Limited,'' (File No. 961–0055, December 17, 1996). The Ciba Geigy decision recognizes the efficiency potential of noncompete clauses, which, among other benefits, may facilitate an orderly transfer of ownership and provide a brief transition period for new owners to establish themselves in the business.

Although the appropriate duration of a noncompete clause may vary depending on the circumstances of the industry and the acquisition, using a noncompete clause for a short period to smooth a transition may be procompetitive. I do not find reason to believe that this short-term noncompete clause is anticompetitive, and I dissent from the order requirement to eliminate it.

Statement of Commissioner Roscoe B. Starek, III, Dissenting in General Mills, Inc., File No. 961–0101

I respectfully dissent from the decision of the majority to accept for public comment a consent agreement with General Mills, Inc. relating to the proposed acquisition of the branded ready-to-eat (''RAE'') cereal and snack food businesses of Ralcorp Holdings, Inc. (''Ralcorp''). My dissent rests on two grounds.

As noted in the Commission's proposed complaint, General Mills will not acquire the private label RTE cereal or snack food businesses of Ralcorp. Ralcorp instead will form a new entity, New Ralcorp Holdings, Inc. (''New Ralcorp''), to hold the private label cereal and snack food businesses that General Mills will not acquire. Under the acquisition agreement, New Ralcorp has the right to manufacture and sell a private label version of the Chex RTE cereal products, but is restricted from transferring this right to a third party without permission from General Mills. The acquisition agreement further provides that New Ralcorp may not produce private label Chex products for a period of eighteen months following consummation of the acquisition.

My first reason for voting against acceptance of the proposed consent order is that the Commission lacks sufficient evidence to support the unilateral effects theory alleged in the complaint. Second, it is completely unnecessary—and in fact creates inefficiency—to bar enforcement of the parties' non-compete agreement. Whatever minimal competitive risks this transaction may raise are adequately addressed by eliminating the restrictions on Ralcorp's ability to transfer manufacturing and sales rights for private label Chex to a third party.

General Mills' share of the RTE cereal market will increase by approximately three percent as a result of the proposed acquisition. The number of competitors in the RTE cereal industry will remain the same, and General Mills will remain the second largest RTE cereal producer in the United States.[1] New Ralcorp will

[1] The noncompete clause described in paragraph 8 of the complaint prohibits Ralcorp from entering the market with a private label, CHEX-type cereal product for eighteen months. As indicated in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992), a merger is unlikely to create or enhance market power if entry is ''timely, likely and sufficient,'' and entry is deemed ''timely'' if it can be achieved within two years. Under this standard, the noncompete clause is unlikely to create or enhance market power.

[1] General Mills' share of branded cereals will of course increase as a result of the transaction, but the complaint does not allege a relevant market

Continued

immediately assume Ralcorp's position as the largest private label cereal producer in the United States. Moreover, General Mills' post-merger share of the RTE cereal market will be between 25 and 31 percent (depending on whether share is measured in pounds or sales dollars), well below levels suggested by the Horizontal Merger Guidelines as the minimum threshold at which the Commission might reasonably presume market power.[2] It is hard to understand under these simple facts how the majority determined that the proposed acquisition will enable General Mills unilaterally to exercise market power.

Unable to presume market power, the Commission instead relies upon a ''close substitutes'' theory of unilateral harm, notwithstanding a paucity of empirical evidence demonstrating that Ralcorp's branded Chex products are the closest substitutes to the branded cereals of General Mills. Although Chex products clearly compete with the branded General Mills RTE cereal products, consumers have a preference for variety when they choose RTE cereals and frequently choose among the many branded and private label cereals produced by RTE cereal manufacturers in the United States. Not surprisingly, Judge Wood reached this conclusion in her opinion explaining why she refused to block the acquisition of the Nabisco RTE cereal assets by Kraft General Foods in early 1993.[3] In *Kraft General Foods*, an empirical analysis of cereal purchasing patterns suggested—as it does in the present matter—that consumers have many attractive alternatives from which to choose in the event that one RTE cereal producer tries to raise prices above competitive levels. Overall, the empirical evidence does not support the Commission's claim, under either a ''close substitutes'' or a dominant firm theory, that General Mills would be able unilaterally to raise the prices of its branded RTE cereals after the acquisition.

Even if I agreed with the majority that this consent agreement rests upon an empirically sound theory of competitive harm, the proposed order would bar General Mills from enforcing an arguably procompetitive non-compete agreement that is properly limited in scope and duration. Covenants not to compete are often included in contracts for the sale of a business, and generally are enforceable when ancillary to an enforceable agreement and reasonable in geographic coverage, scope of activity, and duration. *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (''The recognized benefits of reasonably enforced non-competition covenants are now beyond question.''), *cert. denied*, 455 U.S. 921 (1982); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281–82 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).[4] Judicial inquiry into non-compete provisions generally focuses on whether the restriction is reasonably necessary to protect the legitimate business interests of the party seeking to enforce the provision. *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Sound Ship Bldg. Corp.* v. *Bethlehem Steel Corp.*, 387 F. Supp. 252, 255 (D.N.J. 1975), *aff'd*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 680 (1976).

The Commission has often recognized that competitive benefits can flow from a non-compete clause in the context of the sale of a business. The Commission's recent acceptance for public comment of a consent agreement in *Ciba-Geigy, Ltd., et al.*, File No. 961 0055 (consent agreement accepted for public comment, Dec. 16, 1996), is illustrative. In *Ciba-Geigy*, the Commission imposed an affirmative obligation on the newly merged entity, Novartis AG, not to compete in the United States and Canada for six years in the sale of animal flea control products.[5] As the *Ciba-Geigy* order indicates, the Commission clearly recognizes that non-compete clauses—even when long in duration and broad in scope—can serve legitimate procompetitive purposes in some circumstances by allowing an acquiring entity a brief period to re-deploy the acquired assets in a manner that increases competition in the marketplace. I am therefore puzzled why the Commission so hastily condemns a non-compete provision here that is only eighteen months in duration, limited to the manufacture and sale of private label Chex products, and arguably necessary to protect the legitimate interests of the contracting parties.[6]

Because I find that the facts do not support the Commission's theory of unilateral competitive harm in this instance, and because in any event I disagree with the Commission's decision to bar enforcement of the non-compete provision contained in the parties' acquisition agreement, I have voted to reject the consent agreement.

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consisting of ''branded RTE cereal.'' Indeed, the provisions of the proposed order (which affect the disposition of assets used in the production of nonbranded cereals) make sense only in the context of an ''all RTE cereal'' product market.

[2] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 2.211, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20573–9.

[3] *State of New York* v. *Kraft General Foods, Inc.*, 1995–1 Trade Cas. (CCH) ¶ 70,911, at 74,039, 74,066 (S.D.N.Y. 1995).

[4] *See also Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (''The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market.'').

[5] *See* Paragraph VI of the proposed order in *Ciba-Geigy*.

[6] Barring enforcement of the non-compete agreement might undermine adherence by the parties to the supply agreement, an element of the acquisition agreement found acceptable by the majority.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

NIOSH Meeting; The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) Announces the Following Meeting

Name: ''Correlation of Seven Quantitative Fit Test Methods to an Actual Measurement of Exposure Using Negative-Pressure Full Facepiece Respirators,'' and ''Development and Correlation of a New Quantitative Fit Test Method for Health-Care Industry Respirators'' study protocol peer review.

Time and Date: 9 a.m.–3 p.m., February 4, 1997.

Place: NIOSH, CDC, Room L–1047A, 1095 Willowdale Road, Morgantown, West Virginia 26505.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 20 people.

Purpose: Participants will provide NIOSH with their individual advice and comments regarding technical and scientific aspects of the protocols for two NIOSH studies. The first study is entitled ''Correlation of Seven Quantitative Fit Test Methods to an Actual Measurement of Exposure Using Negative-Pressure Full Facepiece Respirators.'' The second study is entitled ''Development and Correlation of a New Quantitative Fit Test Method for Health-Care Industry Respirators.'' Peer review panelists will review the study protocols and provide individual advice on the conduct of the studies. Individual viewpoints and suggestions from industry, labor, academia, other governmental agencies, and the public are invited.

Agenda items are subject to change, as priorities dictate.

Contact Person for Additional Information: Christopher C. Coffey, M/S 1138, NIOSH, CDC, 1095 Willowdale Road, Morgantown, West Virginia 26505, telephone (304) 285–5958, fax (304) 285–6047.