

write separately to highlight several lingering concerns.

As explained in greater detail in the Analysis to Aid Public Comment, to remedy overlaps in the “superpremium” ice cream businesses of Nestlé and Dreyer’s, the parties will be required to divest a package of assets—including Dreyer’s Dreamery ice cream and Whole Fruit sorbet brands, Dreyer’s license to the Godiva brand,¹ and Nestlé’s frozen dessert Direct Store Delivery (DSD) distribution network—to CoolBrands International, Inc. However, Nestlé’s DSD system currently handles more product volume than that represented by the products CoolBrands will acquire. Therefore, the proposed consent agreement also requires the merged competitors, for a period of five years, to supply CoolBrands with sufficient volumes of additional ice cream products to enable it profitably to operate the distribution system.

CoolBrands is a qualified buyer whose management team has significant experience in the ice cream business. With respect to the acquisition of the three product brands, CoolBrands has existing manufacturing capacity and expertise, which should facilitate a smooth transition on the manufacturing side. With respect to the acquisition of Nestlé’s DSD distribution assets, CoolBrands already has some DSD assets and business of its own, and appears to understand how to operate a DSD network. This is particularly important, because DSD is the method currently used to sell virtually all superpremium ice cream in the United States. In sum, CoolBrands seems well-positioned to make the most of the product and distribution assets it will acquire.

However, the “mix-and-match” nature of the divestiture package is far from ideal, especially when compared with the assets to be retained by the combined Nestlé/Dreyer’s. Post-merger, Nestlé/Dreyer’s will own Nestlé’s dominant Häagen-Dazs superpremium ice cream brand as well as Dreyer’s superior DSD distribution system. CoolBrands, on the other hand, will end up with one company’s less-popular brands and the other company’s weaker DSD distribution system.

As Commission staff recently has acknowledged, and as I have maintained

throughout my tenure as Commissioner, the divestiture of a complete, autonomous, ongoing business unit minimizes the risks of anticompetitive harm because “such a remedy requires the Commission and the Bureau to make the fewest assumptions and to draw the fewest conclusions about the market and its participants and about the viability and competitiveness of the proposed package of assets.”² In this case, it is a foregone conclusion that the “mix-and-match” product and distribution assets to be acquired by CoolBrands are *not* a perfect fit for each other. The proposed consent agreement explicitly recognizes that, absent a short-term commitment of product volume from competitor Nestlé/Dreyer’s, CoolBrands would have insufficient volume to operate the Nestlé DSD distribution system profitably. The resulting volume commitments are a more regulatory form of relief than I ordinarily like to see, in large part because they effectively will require the Commission to supervise the superpremium ice cream marketplace for the next five years.

Moreover, there is no guarantee that the CoolBrands DSD distribution system will, in fact, be profitable once the volume commitments terminate. In the meantime, all of the risk of failure is borne by CoolBrands and, ultimately, consumers—not by the parties. Five years from now, Nestlé/Dreyer’s almost certainly will retain its leading Häagen-Dazs brand, an excellent DSD distribution system, and plenty of volume to drive through that system. In contrast, if CoolBrands finds itself unable to attract additional DSD product volume from third parties, the company may suffer from decreased profitability. Depending upon the strategic choices CoolBrands might be forced to make, consumers could be faced with fewer, higher-priced superpremium offerings on supermarket shelves.

Every settlement has elements of uncertainty and risk. Our job is to determine whether the risk is small enough to be acceptable. I have voted to accept the proposed settlement based upon staff’s extensive investigation of the ice cream industry, as well as CoolBrands’ track record. CoolBrands appears capable of attracting enough independent distribution business to fill its excess DSD capacity over time. In addition, CoolBrands always has the

option of scaling down its DSD system to more closely match available volume and maintain profitability. Therefore, based upon the evidence available to me at this time, I am reasonably comfortable that things will work out as intended, and that the competitive *status quo* can be attained.

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GENERAL ACCOUNTING OFFICE

Advisory Council on Government Auditing Standards; Government Auditing Standards

AGENCY: General Accounting Office.

ACTION: Notice of document availability.

SUMMARY: David M. Walker, Comptroller General of the United States and head of the U.S. General Accounting Office (GAO), on Wednesday, June 25, 2003, announced the release of a new edition of “Government Auditing Standards” commonly referred to as the Yellow Book. GAO’s publication of “Government Auditing Standards” provides a framework for ensuring the competence, integrity, objectivity, and independence of government audits at a time of urgent need for integrity in the auditing profession and for transparency and accountability in the management of limited government resources. This fourth revision since the standards were first published in 1972 will guide audits of financial and program management not only in Federal agencies, but also State and local governments, and nonprofit organizations that receive Federal funds. Bringing the 1994 edition up to date after an extensive process of consultation with auditors and stakeholders, the standards incorporate amendments on computer-based information systems, auditor communication, and auditor independence. The revision strengthens audit requirements for identifying fraud, illegal acts, and noncompliance; redefines the types of audits and services covered; provides consistency of requirements across types of audits; and gives clear guidance to auditors as they work toward a government that is efficient, effective, and accountable to the people.

New standards are applicable for financial audits and attestation engagements of periods ending on or after January 1, 2004, and for performance audits beginning on or after January 1, 2004. Early applications is permissible and encouraged.

“Government Auditing Standards” is available on the GAO Web site at

¹ The parties will not be required to divest Dreyer’s license to the Starbucks brand. The combined Nestlé/Dreyer’s will retain the existing Starbucks ice cream business. However, the current joint venture between Dreyer’s and Starbucks will be modified to make it a non-exclusive joint venture, thereby allowing Starbucks (if it so chooses) to conduct ice cream business apart from the joint venture.

² Bureau of Competition, Federal Trade Commission, Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm>.