



## **Held Separate Business**

Understanding its dynamics and issues

While the majority of mergers either promote competition or are competitively neutral, a small percentage are closely scrutinized for anti-trust implications by federal and state regulatory agencies. A typical outcome of these investigations, which normally involve those mergers more strategic in nature, is the requirement to divest selected assets. The remedy to address these competitive concerns often involves a mechanism that has been successfully deployed in the past, that of the Held Separate Business (“HSB”).

The Federal Trade Commission (“FTC”) and other regulatory agencies have used “orders to hold separate” to create an entity that actually competes with the newly merged company during the time period prior to the divestiture. When properly framed and complied with, these orders can reduce both pre and post divestiture harm to competition and help assure the viability of the assets being sold. Regulatory agencies frequently use trustees to monitor these agreements and provide oversight to the business operations.

Ensuring the success of a HSB requires understanding its organization, the roles of the various Parties involved, and the multitude of challenges it faces. The eleven lessons learned that are discussed will help individuals involved in divestitures successfully navigate the dynamics of this structure.

## Background

The sharp increase in merger and acquisition activity that is currently taking place is driven by a number of factors. These factors include soaring profits and revenues, an explosion in the application of technology, the desire for globalization, inversions to a more favorable tax jurisdiction, and favorable equity market valuations. In the rush to occupy a particular space in the market, many CEOs are in pursuit of “scale,” believing that second-and third-tier competitors are doomed to lose market share to whichever company emerges as the largest player. Moreover, an apparent “herd mentality” appears to have had an impact on this increase in merger activity. Each mega-merger announcement seemed to trigger copycat mergers amongst other companies that seem fearful of being left behind.

Unlike the mergers during the 70’s and 80’s that created conglomerates consisting of unrelated assets on the theory that the whole was greater than the parts, the more disciplined mergers in the last ten years have focused on combining firms within one industry. Some of these deals looked less like an attempt at achieving convergence and synergy than an obvious effort at creating a near dominance in the marketplace. One example of this thinking was Gordon Eubanks, former CEO of software maker Symantec Corporation who said, “We don’t have competitors. We bought most of the competitors.”

Regulators can employ a range of options in attempting to address anticompetitive mergers. Divestitures (of an entire ongoing business or a business line) have continued to be the most common remedy<sup>1</sup>. As such, HSB’s will continue to play an important role in the divestiture process.

***“Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court’s mind when a violation has been found.”***  
- William Brennan, Supreme Court Justice  
Stated in *DuPont 366 U.S. at 330-331*

Other remedies employed include blocking the transaction, requiring contractual arrangements, e.g., licensing of intellectual capital, or some form of behavioral relief, e.g., firewalls and nondiscrimination provisions. A number of mergers are resolved with some combination of these remedial options.

## What is a Hold Separate Order?

A hold separate agreement requires that the assets to be divested be operated separately from, and independently of, the respondent’s business. In other words, an entity is created that actually competes with the respondent before the divestiture occurs. It preserves the assets to be divested and maintains interim competition by preventing co-mingling with the respondent’s business while preventing the transfer of competitively sensitive information.

The purpose of the HSB is to prevent interim competitive harm and to preserve the viability of the assets being sold. By placing the assets under the direction of an “independent” manager and the guidance of a Hold Separate Trustee (“HS Trustee or Trustee”), the business is protected from intentional or unintentional deterioration that would impact its ability to be operated in a manner that maintains or restores competition.

Hold separate orders sometimes are required if there is no up-front buyer. The order normally involves the assets to be divested rather than those to be retained by the respondent but occasionally includes a “Crown Jewel Asset” – a business being held in the event the respondent is unable to divest the designated assets in a timely manner. The HSB is not a legal entity, but it is an independent and autonomous business unit. (See for example BPAmoco/Arco, Dkt. No. C-3938). In some cases, the FTC has issued an order to preserve the assets to be divested without requiring that they be operated separately (e.g., Glaxo/SmithKline Beecham, Dkt. No. C-3990).

## **Typical HSB Structure**

The divested business includes all assets required to conduct business. These generally include all:

- All physical assets needed to operate the business.
- The personnel necessary to maintain the viability and competitiveness of the business.
- The licenses, permits and authorizations issued by any governmental organization for the benefit of the divested business.
- Relevant intellectual property.
- All contracts, agreements, leases, and commitments of the business to be divested.
- A listing of customers and other records.

A Hold Separate Business Manager (“HSB Manager or Manager”) is appointed with responsibility for the day-to-day management of the divested business. The Manager directs the divested assets with the best interest of the business in mind. The objective is “business as usual” – that of maximizing the value of the asset, consistent with the requirement of continued economic viability, marketability and competitiveness. In addition, a Trustee is normally appointed to monitor compliance with the conditions and obligations of the Consent Order and serves as the de-facto Board of Directors of the business, providing oversight to the management of the HSB. The role of this Trustee should not to be confused with that of a Divestiture Trustee. The latter is an independent third party appointed by a regulatory agency to divest assets in those cases in which the respondent has failed to divest assets in a timely manner.

The Trustee has the authority to employ any consultants, accountants, attorneys, and other resources necessary to carry out its duties and responsibilities. When establishing a Held Separate Business, there is a need for the Trustee to complete an assessment of all aspects of the business and establish performance baselines. In order to accomplish these tasks, the Trustee team generally consists of individuals with specific experience and expertise in information systems, finance, operations, and human resources, in addition to industry experience. The activities typically undertaken during the Held Separate period (“HS period”) and their focus are identified in Exhibit 2.

## Exhibit 2 Major Focus Areas

Activity	Focus	Value
<b>Program Management</b>	Managing the Trustee team, directing the HSB manager, resolving issues, and communicating to the regulatory agencies.	Application of management guidelines and assurance of obligations consistent with the Held Separate Order.
<b>Human Resources</b>	Assessing impacts on employees and assuring that significant employee concerns are addressed and communications processes are in place.	Maintain an informed workforce and ensure employee impacts are minimized.
<b>Information Technology</b>	Safeguarding confidential information and facilitating systems transition once a buyer has been identified.	Prevent unintentional release of confidential information. Assure the buyer and seller adequately plan the transition and that ongoing communication takes place between IT leadership of both the Parties.
<b>Support Services</b>	Ensuring necessary services are provided to the Held Separate Business in consistent manner.	Facilitate resolution of issues, and reinforce obligations, between the Held Separate Business and support service organizations.
<b>HSB Management</b>	Managing HSB performance. Ensuring capital improvements continue as planned. Monitoring 'business as usual' decision-making.	Ensure employee allegiance shift does not impact "business as usual" operations. Reign in overly aggressive independent tendencies among management team
<b>Financial/Operational Performance</b>	Tracking performance to budget/plan	Understand and explain performance variances to the regulatory agency.

There are four phases in the lifecycle of the Held Separate Business, and the activities engaged in by the Trustee team vary depending on the phase that the HSB is in (Exhibit 3).

**Pre-HSB Phase (0 -3 months)** - The absence of establishing a clear framework for a successful divestiture can be a fatal flaw. A great deal of Trustee activity is focused on developing policies and procedures in order to satisfy the requirements for the separation of business operations and to ensure a smooth-running HS period for all concerned parties. In the first report to the FTC, a detailed work plan is normally presented describing how the Trustee team intends to monitor compliance with the obligations under the order and how the team intends to assess business performance. Often too, the Trustee works with the respondent to complete critical foundational work in advance of the actual formation of the HSB. These activities include:

- Define the population of HSB management, employees and support service personnel to begin the development of the policies and procedures that will be required.
- Initiate the development of a comprehensive inventory of all IT applications, major IT technology centers, networks, and infrastructure. Identify those that may contain material confidential information.
- Begin to define data security strategies for major applications.
- Identify the major corporate services that will need to support the HSB.
- Define a process to assure both HSB and corporate support personnel physically sign a Confidentiality Agreement.

Failure to involve the Trustee early in the completion of these foundational activities has resulted in later rework and, in some cases, has significantly delayed the implementation of effective Held Separate Business data security measures.

**Held Separate Phase (3 -12 months)** - The focus in this phase involves overseeing the on-going management of the divested business, with a view to ensuring that the asset is maintained and operated consistently with historical business practices. In addition, compliance to the conditions and obligations attached to the Order is monitored. During this phase the Trustee:

- Monitors the formation of the HSB as a separate entity.
- Monitors the preservation of the economic viability and competitiveness of the divested business.
- Supervises the management of the divested business as a distinct entity.
- Develops the necessary measures to ensure that the respondent does not, after the effective date of the Hold Separate Order, obtain any business secrets, know-how, commercial knowledge, or any other information of a proprietary nature relating to the business.
- Monitors the allocation of personnel to assure that the business is adequately staffed.
- Assesses capital and operational expenditures to assure that they are consistent with historical and /or budgetary levels.
- Publishes a comprehensive report at the end of every month. The report reviews operational and financial results and assesses whether the business is held in a manner consistent with the Order.

***“It’s been a long and difficult transition, but the process did work and, thanks to the FTC and the Trustee, we ended up a strong competitor.”***

*Senior Executive of a business unit that had been held separate*

Exhibit 3 **Held Separate Business Phases**

Phase	Pre-Held Separate Business	Held Separate Period	Transition Preparation	Close
<b>Focus</b>	Establishing framework for successful divestiture	Ensuring HSB is run consistent with historical business practices	Laying the groundwork for successful Buyer transition	Monitoring the transition to the Buyer
<b>Key Activities</b>	<ul style="list-style-type: none"> <li>• Workplan</li> <li>• Report definition</li> <li>• Communication planning</li> <li>• Confidentiality assessment/ agreements</li> <li>• Services inventory</li> <li>• Applications inventory</li> <li>• Data security strategies</li> <li>• Technology infrastructure review</li> <li>• Management guidelines development</li> </ul>	<ul style="list-style-type: none"> <li>• HSB/ Corporate communication</li> <li>• Issue management</li> <li>• Reporting to regulators</li> <li>• Employee concerns identification</li> <li>• Systems access monitoring</li> <li>• Network security review</li> <li>• Confidentiality monitoring</li> <li>• Support Service performance</li> <li>• Capital projects review</li> <li>• Financial/ operational performance reporting</li> </ul>	<ul style="list-style-type: none"> <li>• HR benefits analysis</li> <li>• IT systems transition</li> <li>• Security verification</li> <li>• Transition planning</li> <li>• Confidentiality monitoring</li> </ul>	<ul style="list-style-type: none"> <li>• Buyer communication</li> <li>• Reporting to regulatory agencies</li> <li>• Employee concerns identification</li> <li>• Financial/operational performance reporting</li> <li>• Issue closeout</li> </ul>

**Transition Preparation Phase** - This phase involves laying the groundwork for a successful transition to the buyer and occurs during the latter portion of the HS period. Typical Trustee activities involve (1) reviewing and assessing the transition planning process and progress of the divestiture; (2) helping the buyer accelerate its learning curve around the respondent’s IT applications and organization; (3) identifying and communicating deficiencies identified in the transition process that could jeopardize a successful transition; (4) working with both buyer and seller to find common ground in resolving disputes; (5) verifying that potential purchasers receive appropriate information; and (6) reviewing employee benefit programs to gauge comparability between the existing program and that proposed by the buyer.

**Closing Phase (0 -30 days)** - The Trustee continues to work with HSB and respondent management to monitor operating and financial performance; identify issues affecting the business; ensure compliance; and generally reinforce awareness of the importance of continuing independence. After the buyer is identified, a process is established to monitor all information requests between HSB employees and the buyer to ensure that competitively sensitive information is not compromised.

## Benefits of engaging a Trustee

One of the most significant roles performed by a trustee is the facilitation of communication between all Parties. The 1999 study of the Divestiture Process, conducted by the FTC, found that buyers quite frequently were reluctant to alert the Commission to difficulties they encountered in dealing with respondents<sup>2</sup>, causing problems to be unnecessarily elevated prior to being addressed. Employing a Trustee can mitigate this situation, since the Trustee has unrestricted access to both the respondent and the buyer, and an ongoing dialogue with the regulatory agency

R. Shermer and Company recently conducted a survey of senior managers and in-house counsels from a number of companies involved in recent divestitures/acquisitions. Specifically, individuals indicated the following benefits when asked about their overall experience of having a Trustee/Monitor involved in their transactions. Some examples of the benefits stated were:

- "The Trustee assured that there was communication between the buyer, seller and the HSB."
- "Assured that competitive information was safeguarded."
- "The Trustee team has really helped the FTC understand the complexities of our business."
- "By checking on us, our obligations were reinforced time and time again."
- "Hugely beneficial...we remained focused on the right issues."
- "Played the role of referee very effectively...helped resolve a number of issues."
- "Trustee involvement assured that the transaction was completed successfully."
- "Looked after the people in the HSB when it appeared no one else was interested in their issues."

***“With the combination of their technical knowledge and their unrestricted access, they can resolve disagreements between the respondent and the buyer.... The auditor trustee creates a basis for trust between parties that do not have a community of interest.”***

*- Study of the Commission’s Divestiture Process*

*Bureau of Competition of the Federal Trade Commission, 1999*

## HSB Challenges

In order for the Held Separate Business to function properly and achieve its stated purpose, there are several issues or challenges that need to be addressed by the Trustee and HSB management.

### Exhibit 4 Challenges to HSB success



### Communication

One of the greatest challenges faced in creating an HSB is for the divesting company to assure compliance from all of the employees impacted by a new set of requirements. Various groups are affected by the obligations including HSB management and employees, support service staff and corporate management. The HSB Trustee assists in developing appropriate communications to reinforce the importance of compliance and to reduce uncertainty within the workforce.

Often, during the Transition Phase of the HSB, the Trustee assists the buyer's management team in conducting a series of informational meetings with employees. The subject matter usually covered during these meetings centers on the strategic importance of the acquisition and on confirming the company's commitment to invest in these operations for the long term. Questions from employees regarding the buyer typically include the following topics:

- When will the transaction close?
- Do you plan on keeping the existing management team?
- How does the buyer's benefits compare to what we currently have?
- How strong is the company's track record on people, environmental and safety issues?
- Will you be able to finance this acquisition and still be able to invest in the company?

Throughout the HS period, the Trustee team is available and accessible to the employees of the business in order to facilitate communications and to assure that concerns are addressed. By assuring that adequate communication exists between all parties, disruptions and distractions are kept to a minimum.



## **Sharing of Competitive Information**

One of the challenges of an HSB is to keep business information separate from that of the former parent organization. Therefore, a great deal of time is spent controlling the flow of confidential material. This is especially true for those groups that are supporting operations on the opposite side of the held separate line. Confusion often arises in the employee population as to what constitutes Material Confidential Information (“MCI”). MCI is generally defined as that which is:

- Competitively sensitive or proprietary;
- Not independently known to an individual or an entity from sources other than the entity to which it pertains;
- Including, but not limited to, information on customers, pricing, marketing methods, patents, technologies, processes or other trade secrets.

In order to operate the HSB separate and apart from the respondent, the Trustee implements several controls. A primary control is restricting access to information systems containing MCI. The Trustee works with the respondent’s information technology management to identify systems and applications containing MCI. Security strategies are then put in place to control access to these systems and applications. On a parallel path, the Trustee works with the Respondent to identify all support service employees requiring access to MCI. Once initial access control has been established, procedures for granting access to these systems and applications are implemented. The purpose of these procedures is to ensure that access is limited to support service providers and HSB employees only. Other controls include: conducting informational meetings with HSB employees and support service personnel; removing HSB data from management reports; limiting communications between HSB and non-HSB employees; requiring all HSB employees, respondent employees and contractors with access to HSB MCI to sign Confidentiality Agreements; and the ongoing monitoring of compliance.

In addition, procedures to monitor communications that might contain MCI are established by the Trustee. For example, the HSB Management Guidelines generally require that all e-mails for non-routine requests of information must be copied to an e-mail address that has been established for the Trustee. A member of the Trustee team regularly reviews these e-mails to determine if they contain MCI and if the messages are being sent to appropriate individuals. All phone calls regarding non-routine information requests for services are logged and submitted to the Trustee team, and all written requests are copied to the Trustee. As with the e-mails, the Trustee reviews the logs on a monthly basis for those entries in which at least one of the phone call participants had not signed a confidentiality agreement or the topic discussed appears to concern MCI.

## **Support Services**

Every HSB has significant ties into, and receives support from, its former parent organization, and will continue to receive a number of services (e.g., accounting, advertising, audit, financial reporting, legal, procurement; treasury). An objective of the Trustee team is to ensure that the business is receiving those critical services it cannot perform itself and to ensure in the course of providing support services that MCI is protected.

The Trustee also ensures that all of the support services are being provided to the HSB in substantially the same manner, and at the same level and quality, as they were prior to the merger. Unfortunately, many organizations do not have a formal shared services structure in place. Thus, there are neither Service Level Agreements, nor strong performance management frameworks in place. One group that typically has sufficient performance measurement metrics in place is the information technology group. Monitoring the performance (in terms of quality, timeliness and reliability) of other support services is accomplished through a mixture of existing performance metrics and user surveys.

### **Information Systems**

Major companies typically have hundreds and often thousands of computer based applications supporting their businesses. Having a complete accounting of all of these applications in a comprehensive inventory is essential for identifying those that contain confidential information. Without such an inventory, it can take several months to identify and control the applications that must be secured. It is a time consuming process to review these applications to determine which support HSB assets and contain confidential information. Following the review, data security strategies are developed and implemented for selected applications consistent with the requirements of the Order. Finally, ongoing monitoring procedures are put in place to assure that the data security strategies are completely implemented for the life of the Held Separate Business.

A typical assessment includes group meetings and interviews with key personnel from both the business and application support groups; an evaluation of system documentation and application summaries; and reviews of related reports, screens and access lists where appropriate. The respondent's IT professionals design and propose data security strategies that can include application level controls; data base level controls; wholesale elimination of access for large numbers of users; creation of separate instances of specific applications; and physical separation of servers and networks. The Trustee works with the respondent's IT staff to determine the adequacy of controls for each affected application.

In accordance with the "business as usual" approach, attempts are made to achieve a balance between meeting security requirements for MCI and the effective support of business operations. In addition, during the design, implementation and ongoing monitoring of these requirements the Trustee builds an understanding of the respondent's organization, capabilities and applications. This knowledge is of real value to both buyer and seller during the transition phase.

### **Independence of Management Team**

The HSB Trustee not only ensures that the Management Team decision making is independent of headquarters influence, but also prevents deviation from required corporate guidelines, processes and procedures.

### **Allegiance Shift to Buyer**

At a certain point in the divestiture, HSB employees will naturally begin to shift their allegiance to the selected acquirer. This can lead to an acceleration of capital or operational spending and a willingness to share information. The Trustee will help control these behaviors, by ensuring employees continue to operate under a "business as usual" framework and through enforcing strict controls over expenditures and information dissemination.

## Lessons Learned

Many dynamics influence the success of a Held Separate Business. The following eleven “Lessons Learned” will help ensure the objectives of the HSB are met. They are based on the insights acquired by the staff of R. Shermer & Company.

### **1 Place only assets to be divested in the HSB**

When the HSB consists of a mixture of businesses to be divested and “crown jewel” or other assets that will be retained, the respondent and the Trustee can spend needless time establishing and monitoring business units to be reintegrated, which the respondent has little incentive not to support. Furthermore, the respondent has few restrictions on these assets that are to be retained – making consistent guidelines for all parts of the HSB unnecessary. This mixing of assets also has implications regarding the segregation of information systems – potentially resulting in less protection of competitively sensitive information. In addition, complete or self-contained businesses need to be placed in the HSB if possible. The segregation of the physical assets, intellectual property and human resources involved in a “business line” can be extremely difficult.

#### **Recommendations:**

- Those assets to be divested should be the only ones included in the HSB.
- The establishment of firewalls (covering the various information systems supporting the assets to be divested) will be facilitated if the divested assets are segregated into an HSB.
- All of the components of the HSB should be complete businesses to the extent possible.

### **2 Choose the “right” HSB Manager**

If the HSB Manager is a “dual offer” employee - one who will receive an offer of employment from both buyer and seller - questions around decision-making on expenditures might arise along with perceptions of a conflict of interest. Moreover, if the HS period is an extended one, the HSB Manager will have a “long-term” impact on the assets to be divested. The Manager should be identified early in the process in order to enable his/her involvement in the structuring and establishment of the HSB.

#### **Recommendations:**

- The ideal candidate might be someone who will be retiring after the transition to the acquirer.
- The HSB Manager should reflect the corporate culture of the business being divested.
- The Trustee needs to publicly support the Manager in order to facilitate a team atmosphere during the HS period.
- Other characteristics to consider include the following:
  - ✓ Solid understanding of the businesses being divested.
  - ✓ Senior management level, respected within the organization.
  - ✓ Good communication/leadership skills.
  - ✓ Independent - works autonomously.

In addition to the HSB manager, it is necessary to identify seasoned Human Resources professionals, a dedicated representative of the respondent’s legal staff, a senior information technology manager, and a financial liaison to “round out” the management team for the Held Separate Business.

### **3 Engage the Trustee early**

In the early stages of the HSB, it is difficult to ascertain what areas are most vulnerable to potential violations of a company's obligations. The Trustee needs to be involved during the formation of the business to assist the respondent in structuring the organization; developing policies and procedures; protecting information flow; and establishing support service needs.

#### **Recommendations:**

- The Trustee needs to be brought in early (under an interim contract if needed) in order to gain an understanding of key issues, help set up the HSB and to assist in the development of a communications program for employee and support service providers.
- Policies and procedures should be developed only after the Trustee has a complete understanding of the uniqueness of the respondent's business.
- The systems requirements need to be assessed prior to the beginning of the HS period so that the solutions can be implemented quickly.

### **4 Agreed upon financial baselines**

Baseline metrics – those indicators with which the financial viability of an asset are measured – normally include historical and budgetary comparisons for both operating performance and capital expenditures. In order for the Trustee to monitor that “business as usual” is truly the norm, consensus needs to be obtained early in the process as to the operating goals and financial objectives of the various assets comprising the HSB.

#### **Recommendations:**

- The timelines and financial commitments on all capital spending must be clearly documented and agreed upon by all stakeholders prior to the establishment of the HSB.
- Likewise, agreements on expected monthly volumetric, financial, employee attrition, safety, and environmental results need to be established prior to “day one” of the HSB.
- A high level definition of success needs to be developed in order to articulate the desired outcome at the end of the HS period (normally used to design the incentive program for HS management).

### **5 Establish data security strategies early**

Without a comprehensive inventory, it can take several months to identify and control all of the applications that must be secured. This initial review must determine which applications support HSB assets and contain confidential or competitive information. Once this information is gathered, data security strategies for selected applications can be developed. The completion of the applications inventory and development of data security strategies for affected applications should begin prior to the establishment of the HSB, if at all possible. The strategies and associated monitoring procedures should be implemented during the initial portion of the HS period.

#### **Recommendations:**

- The detailed identification and analysis of all applications should be considered a priority for the respondent's information technology organization.
- The development of the applications inventory and identification of applications containing confidential information should begin prior to the HS period.
- The Trustee needs to rapidly develop tests to monitor data security compliance with the HSB requirements.

## **6 Mitigate the impact on the employees**

It is not uncommon for employees to feel that they, not the company, are being “punished” by being part of an asset to be divested. The longer they are “held separate” the greater their uncertainty and the potential impact. Further, as the HS period continues, more employees may begin to seek opportunities outside the organization.

### **Recommendations:**

- Set up an incentive system that rewards people for staying with the business through the HS period and during the first year of the transition. This retention bonus needs to be robust enough to encourage employees to continue to work for the business.
- Clearly identify, in the HS Order, the various employee groups associated with the divestiture, i.e., those who will remain with the asset to be sold, those who are “dual offer” employees, and those who will stay with the respondent.
- Ensure that retirement and other benefits are reviewed for comparability “in the aggregate” and for potential restrictions/barriers to ensure a smooth transition for employees.

## **7 Assess “flow” of support services early**

The biggest area of concern regarding the improper flow of information is through service organizations from the parent company that support HSB operations. A realistic approach, however, needs to be taken for many support service employees work in transaction processing and have little decision-making authority that could impact market competitiveness.

### **Recommendations:**

- Develop a comprehensive understanding of the functions of the support groups either before the HS period begins or immediately thereafter.
- Assign a single point of contact for each significant support service.
- Work quickly to understand constraints and to establish practical solutions.

## **8 Develop policies and procedures early**

The intent of the Consent and HS Orders needs to be simplified into easy-to-read policies and procedures. These policies and procedures need to be developed and distributed at the onset of the HS period and should be continuously reinforced by HSB management.

### **Recommendations:**

- Whenever possible, the Policies and Procedures of each business should be consistent with its heritage.
- Policies and procedures should be developed to guide the behavior of employees in the HSB and in the support service organizations in order to enhance the understanding of their obligations.
- Awareness of the Policies and Procedures should be a key component of the employee communication process, from the initial meeting to the end of the HS period.

## **9 Clearly define the Trustee or Monitor's role**

Define the role of the Trustee to be consistent with what it can reasonably perform, with the authority given. Asking the Trustee to “ensure” certain outcomes is optimistic. Invariably, different constituencies will have varying understanding of the Trustee’s role. The Trustee is, at times, limited in its ability to enforce HSB compliance under the Order, being instead merely able to monitor actions taken by the HSB and report the results to the regulatory authorities.

### **Recommendations:**

- Officially put the Trustee in the role of a “watchdog,” instead of an enforcement mechanism.
- Understand potential “problem areas” early in order to anticipate issues.
- Define the roles of all parties regarding the “Rules of Engagement.”

The Trustee or Monitor needs to have both an experienced resource base and a well-developed process in order to quickly establish credibility, develop guidelines and resolve issues from “day one.”

## **10 Address HR issues of the divested assets**

Properly addressing HR issues is one of the keys to a smooth divestment and transition. While effective communication is critical, the development and implementation of HR policies and guidelines to address this unique situation is important.

### **Recommendations:**

- The Trustee’s role needs to include an ongoing assessment of HR issues for the to-be-divested assets. These activities would include:
  - ✓ Assure that adequate staffing is in place to maintain viability.
  - ✓ Monitor the development and communication of a benefits and labor relation’s strategy.
  - ✓ Verify that an approach for the retention of key employees is developed.

## **11 Assure the transition is carefully planned**

The transition process must be well thought out and planned in detail. While it is quite common for both buyer and seller to push for an early closing date, time is not necessarily the enemy. It is absolutely critical that the following activities take place: a thorough due diligence process is performed, a detailed information system transition plan is developed, HR policies are finalized, transition services are defined, and customers/suppliers have an understanding of the implications of the transaction.

### **Recommendations:**

- The Trustee or Monitor needs to assure that the buyer receives open and unfiltered information.
- Employees need to be given a reasonable expectation of the timelines involved.
- Buyer and seller must adequately resource the transition and assign the “best and the brightest” staff members from HR, Information Technology, and other fields to make it successful.

There clearly is a difference between planning and implementing. While it is important that time be used effectively to plan the transition, integration must not take place before “the checkered flag drops.”

## Success of Held Separate Businesses

When can success be declared for a Held Separate Businesses? The measurement of it, at first, appears straightforward – “Did the HSB remain a viable and competitive entity in the marketplace in the long term?” However, it can be quite difficult in determining quantitatively whether the Held Separate Business was successful, given the changing market dynamics and the difficulty of gathering comprehensive information from a multitude of sources. HSB management, along with both customers and competitors of the business, provide a good qualitative source in attempting to answer this question. A senior leader of a held separate business summed it up the best by stating, “It’s been a long and difficult transition, but the process did work and, thanks to the FTC and the Trustee, we ended up a strong competitor.”

### Notes

1. See also *California v. American Stores Co.*, 495 U.S. 271, 285 (1990) (divestiture is “the remedy best suited to redress the ills of an anticompetitive merger”). *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (divestiture is “particularly appropriate” in merger cases).
2. *Federal Trade Commission, A Study of the Commission’s Divestiture Process (1999)*, available at [www.ftc.gov/os/1999/9908/index.htm#6](http://www.ftc.gov/os/1999/9908/index.htm#6).

### **R. Shermer & Company**

R. Shermer & Company specializes in providing services for companies undergoing transitions in ownership through mergers, acquisitions, or divestitures. Members of our professional staff have experience in performing the roles of Monitor, Asset Maintenance Trustee, Asset Management Trustee, and Held Separate Trustee - having been appointed in a number of regulatory agency-mandated transactions in both the United States and Europe. For additional information, visit our website at [www.rshermer.com](http://www.rshermer.com).