UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
GENERAL MILLS, INC., a corporation.	)	File No. 961-0101

AGREEMENT CONTAINING CONSENT ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by General Mills, Inc. ("GMI"), of the branded cereals and snack mix businesses of Ralcorp Holdings, Inc. ("Ralcorp"), and it now appearing that GMI, hereinafter sometimes referred to as "proposed respondent," is willing to enter into an agreement containing an order to cease and desist from certain conduct, and providing for other relief:

IT IS HEREBY AGREED by and between proposed respondent, by its duly authorized officers and attorney, and counsel for the Commission that:

1. Proposed respondent GMI 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 Number One General Mills Boulevard, Minneapolis, MN 55426.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

   a. any further procedural steps;

   b. the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to the proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public with respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I

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

A. "Respondent" or "GMI" means General Mills, Inc., its subsidiaries, divisions, and groups and affiliates controlled by General Mills, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "Ralcorp" means Ralcorp Holdings, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Ralcorp Holdings, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

C. "New Ralcorp" means New Ralcorp Holdings, Inc., an entity created by the Reorganization Agreement to acquire the Private Label cereal business and other businesses from Ralcorp.

D. "Commission" means the Federal Trade Commission.

E. "Ralston Purina Company" means Ralston Purina Company, a Missouri corporation, having its principal office in St. Louis, Missouri, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Ralston Purina Company, their successors and assigns, and their directors, officers, employees, agents, and representatives.

F. "Private Label" means a cereal product bearing the trade names or trademarks owned by a grocery retailer, a wholesaler, or broker, which entity is not a cereal producer or primarily in the cereal business, which trade names or trademarks are used by such entities to identify grocery products sold by such entities and in which New Ralcorp has no rights, except for the right to produce products utilizing such trade names or trademarks for such entities or their licensees, but which shall not, in any event, include trade names or trademarks described in sections 2(d)(i) and 2(d)(ii)(A) of the Trademark Agreement.

G. "Successor Party" means any entity which acquires (by way of asset transfer, stock transfer, merger, or otherwise), following the date of the acquisition of Ralcorp by GMI, all or substantially all of New Ralcorp's assets, title, properties, interests, rights, and privileges, tangible and intangible, to manufacture and sell cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, including any entity that is a subsidiary or affiliate of New Ralcorp, and any entity that is a subsequent transferee of such assets, title, properties, interests, rights, and privileges.

H. The "Relevant Geographic Market" means the United States.

I. "CHEX trademark" has the same meaning as any "CHEX trademark" identified in the Trademark Agreement.

J. "Agreement and Plan of Merger" means the Agreement and Plan of Merger by and among Ralcorp, GMI, and General Mills Missouri, Inc., dated August 13, 1996.

K. "Reorganization Agreement" means the Reorganization Agreement attached as Exhibit A to the Agreement and Plan of Merger.

L. "Technology Agreement" means the Technology Agreement attached as Exhibit 6.2(c) to the Reorganization Agreement.

M. "Trademark Agreement" means the Trademark Agreement attached as Exhibit 6.2(b) to the Reorganization Agreement.

N. "Supply Agreement" means the Transition Services -- Supply Agreement attached as Exhibit 6.2(d) to the Reorganization Agreement.

II

IT IS FURTHER ORDERED that:

A. Respondent shall, before consummating the Agreement and Plan of 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 in the Relevant Geographic Market Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark. These provisions shall permit the Successor Party to manufacture and sell these Private Label cereals without further authorization or approval from GMI or Ralston Purina Company.

B. Respondent shall not enter into, enforce or attempt to enforce any agreement that prohibits or delays New Ralcorp, as long as it retains the rights referred to in II.A., *supra,* or a Successor Party thereafter, from manufacturing and selling in the Relevant Geographic Market any Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark upon consummation of the Agreement and Plan of Merger.

C. Respondent shall not enforce any provision in the Technology Agreement, the Reorganization Agreement, the Trademark Agreement, the Agreement and Plan of Merger, or any other agreement with Ralcorp that would prevent the transfer to any Successor Party, of the right to manufacture and sell in the Relevant Geographic Market Private Label cereals

substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, provided, however, that nothing in this paragraph shall be construed to interfere with General Mills' rights to enforce the provisions of the Supply Agreement.

III

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after consummating the Agreement and Plan of Merger, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraph II. A. of this order.

B. One year (1) from the date this order becomes final, annually for the next three (3) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. B., and C., and III of this order.

IV

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, 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 the order.

V

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VI

IT IS FURTHER ORDERED that this order shall terminate twenty (20) years from the date this order becomes final.

Signed this _____ day of _____, 19____.

GENERAL MILLS, INC., A CORPORATION

By: _____
Stephen W. Sanger
Chief Executive Officer

_____
James F. Rill
Counsel for General Mills, Inc.

FEDERAL TRADE COMMISSION

By: _____
Anthony Low Joseph
Attorney
Bureau of Competition

Approved

_____
Robert W. Doyle, Jr.
Deputy Assistant Director
Bureau of Competition

_____
Phillip L. Broyles
Assistant Director
Bureau of Competition

_____
George S. Cary
Senior Deputy Director
Bureau of Competition

_____
William J. Baer
Director
Bureau of Competition

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
GENERAL MILLS, INC., a corporation,	)	File No. 961-0101

INTERIM AGREEMENT

This Interim Agreement is by and between General Mills, Inc., a corporation organized and existing under the laws of the State of Delaware ("General Mills") and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. § 41, et seq. (the "Commission").

WHEREAS, General Mills has proposed to acquire Ralcorp Holdings, Inc.'s ("Ralcorp") branded ready-to-eat ("RTE") cereal and snack businesses pursuant to an Agreement and Plan of Merger dated August 13, 1996 ("the proposed Acquisition"); and

WHEREAS, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

WHEREAS, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its Complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and,

WHEREAS, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm, and relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

WHEREAS, the entering into this Interim Agreement by General Mills shall in no way be construed as an admission by General Mills that the proposed Acquisition constitutes a violation of any statute; and

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

NOW, THEREFORE, General Mills agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public record comment, it will grant early termination of the Hart-Scott-Rodino-waiting period, as follows:

1. General Mills agrees to execute the Consent Agreement and be bound by the terms of the Order contained in the Consent Agreement, as if it were final, from the date General Mills signs the Consent Agreement.

2. General Mills agrees to submit, within twenty (20) days of the date the Consent Agreement is signed by General Mills, and every thirty (30) days thereafter until respondent has fully complied with the provisions of Paragraph II.A. of the Consent Agreement, written reports, pursuant to Section 2.33 of the Commission's Rules, signed by General Mills setting forth in detail the manner in which General Mills will comply or has complied with Paragraph II.A. of the Consent Agreement.

3. General Mills agrees that, from the date it signs the Consent Agreement until the first of the dates listed in subparagraphs 3.a and 3.b, it will comply with the provisions of this Interim Agreement:

   a. ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

   b. the date the Order is final.

4. General Mills waives all rights to contest the validity of this Interim Agreement.

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

   a. access, during the office hours of General Mills and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under

the control of General Mills relating to compliance with this Interim Agreement; and

b. upon five (5) days notice to General Mills and without restraint or interference from it, to interview officers, directors, or employees of General Mills, who may have counsel present, regarding any such matters.

6. Should the Federal Trade Commission seek in any proceeding to compel General Mills to divest itself of Ralcorp, or any other assets that it may hold as a result of the proposed Acquisition, or to seek any other

injuncti
ve or
equitabl
e relief,
General
Mills
shall
not
raise
any
objectio
n based
upon
the
expirati
on of
the
applica
ble
Hart-
Scott-
Rodino
Antitrus
t

Improvements Act waiting period or the fact that the Commission has permitted the proposed Acquisition.

7. This Interim Agreement shall not be binding until accepted by the Commission.

Dated: December 24, 1996

FEDERAL TRADE COMMISSION	GENERAL MILLS, INC.
By: _____	_____
Stephen Calkins	James F. Rill
General Counsel	Counsel for General Mills, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
GENERAL MILLS, INC., a corporation.	)	Docket No.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent General Mills, Inc., subject to the jurisdiction of the Commission, has agreed to acquire the branded ready-to-eat cereal and snack mix businesses from Ralcorp Holdings, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the acquisition, if consummated, would violate 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent General Mills, Inc.

1. Respondent General Mills, Inc. ("General Mills"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. General Mills' headquarters, office and principal place of business is located at Number One General Mills Boulevard, Minneapolis, Minnesota 55426. In fiscal year 1996, General Mills had sales of approximately $5.4 billion.

2. Respondent General Mills is, and at all times relevant herein has been, engaged in the sale of branded ready-to-eat ("RTE") cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. General Mills's primary RTE cereals include Cheerios, Total, and Wheaties. General Mills is the

nation's second largest producer of RTE cereals, measured based on pound sales or dollar revenues. General Mills's revenue from the sale of RTE cereals worldwide was $2.75 billion in fiscal year 1996.

II. Ralcorp Holdings, Inc.

3. Ralcorp Holdings, Inc.("Ralcorp"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Ralcorp's headquarters, office and principal place of business is located at 800 Market Street, Suite 2900, St. Louis, Missouri 63101. In fiscal year 1995, Ralcorp had sales of approximately $1 billion.

4. In 1994, the Ralston Purina Company created Ralcorp, as a wholly owned subsidiary, and then distributed Ralcorp's shares to Ralston Purina's shareholders. As part of the creation of an independent Ralcorp, Ralston Purina entered into a technology license authorizing Ralcorp to use certain identified technology in the production of branded and private label RTE cereals.

5. Ralcorp is, and at all times relevant herein has been, engaged in the sale of branded and private label RTE cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. Ralcorp's primary RTE cereals include Corn CHEX, Rice CHEX, and Wheat CHEX. Ralcorp is the nation's fifth largest producer of branded RTE cereals and the largest producer of private label RTE cereals. Ralcorp's revenue from the sale of RTE cereals was $585.5 million in fiscal year 1995. Its revenue from branded RTE cereals was more than $311 million for the same year.

III. Jurisdiction

6. General Mills is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. The Acquisition

7. On or about August 13, 1996, General Mills and Ralcorp entered into an agreement for General Mills to acquire Ralcorp's

branded RTE cereal and snack mix businesses. In exchange for these businesses, General Mills agreed to give Ralcorp's shareholders General Mills' common stock and to assume certain Ralcorp debt. The total value of this consideration is approximately $570 million.

8. General Mills will not acquire Ralcorp's private label RTE cereal business or other non-cereal or snack mix businesses. Ralcorp will form a new entity, New Ralcorp Holdings, Inc., ("New Ralcorp") to hold the businesses that General Mills will not acquire. As a result of the acquisition agreement, New Ralcorp acquired the right to manufacture and sell private label CHEX products, but was restricted from transferring this right to a third party without permission from General Mills and Ralston Purina Company. The agreement also restricts New Ralcorp from producing private label CHEX products for a period ending eighteen months after consummation of General Mills' acquisition of Ralcorp's branded RTE cereal and snack mix businesses.

V. Trade and Commerce

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of branded and private label RTE cereals.

10. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the acquisition is the United States.

VI. Market Structure

11. The sale of RTE cereals in the United States is highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly called the "HHI") or by four-firm concentration ratios.

12. The post acquisition HHI for the sale of RTE cereals in the United States measured based on dollar revenues would increase by approximately 223 points, from 2,317 to 2,540. Measured in pounds, the post acquisition HHI for the sale of RTE cereals in the United States would increase by 158, from 2,103 to 2,261. Post acquisition General Mills' market share in dollars would be almost 31 percent. Its share in pounds would be almost 27 percent.

VII. Entry Conditions

13. Entry of new RTE cereal producers into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

VIII. Effects of the Acquisition

14. The effects of the acquisition, if consummated, may be substantially to lessen competition in the RTE cereal market in the United States 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, by increasing the likelihood of the unilateral exercise of market power and simultaneously restricting the entry of new private label cereal products into competition with General Mills.

IX. Violations Charged

15. The acquisition agreement, entered into between General Mills and Ralcorp for General Mills to acquire Ralcorp's branded RTE cereal and snack mix businesses, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, violate 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____, 19____, issues its Complaint against Respondent General Mills.

By the Commission.

SEAL:

_____
Donald S. Clark
Secretary

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 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.

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,

[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.

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.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

In the Matter of

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 ("RTE") 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 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

---

[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 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.

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

---

[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.").

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]

---

[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.

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.