

**FEDERAL TRADE COMMISSION**

[File No. 111 0122]

**Western Digital Corporation; Analysis of Agreement Containing Consent Order to Aid Public Comment****AGENCY:** Federal Trade Commission.**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 4, 2012.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Western Digital, File No. 111 0122” on your comment, and file your comment online at <https://ftcpublish.commentworks.com/ftc/westerndigitalhitachiconsent>, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Gris (202-326-3468), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission 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 thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 5, 2012), on the World Wide Web, at <http://www.ftc.gov/os/actions.shtm>. A paper copy can be obtained from the FTC Public Reference

Room, Room 130-H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326-2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 4, 2012. Write “Western Digital, File No. 111 0122” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone’s Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>1</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a

<sup>1</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublish.commentworks.com/ftc/westerndigitalhitachiconsent> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#/home>, you also may file a comment through that Web site.

If you file your comment on paper, write “Western Digital, File No. 111 0122” on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 4, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

**Analysis of Agreement Containing Consent Order to Aid Public Comment***I. Introduction*

The Federal Trade Commission (“Commission”) has accepted from Western Digital Corporation (“Western Digital”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”), designed to remedy the likely anticompetitive effects resulting from Western Digital’s proposed acquisition of Vivoti Technologies Ltd., formerly known as Hitachi Global Storage Technologies Ltd. (“HGST”), a wholly-owned subsidiary of Hitachi, Ltd. (“Hitachi”).

Pursuant to an agreement dated March 7, 2011, Western Digital intends to acquire HGST from Hitachi for approximately \$4.5 billion in cash and Western Digital stock. The proposed merger would result in a merger to duopoly in the market for 3.5 inch hard disk drives used in desktop computers (“desktop HDDs”). The Commission’s Complaint alleges that the proposed 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, by lessening competition in the market for desktop HDDs.

The Consent Agreement remedies the alleged violation by replacing the lost competition in the desktop HDD market that would result from the proposed acquisition. Under the terms of the Consent Agreement, Western Digital will divest to Toshiba Corporation ("Toshiba") all of the assets relating to the manufacture and sale of desktop HDDs necessary to replicate HGST's position in the desktop HDD business. The Consent Agreement requires Western Digital to provide Toshiba with access to employees involved in the research, development, and production of desktop HDDs, cross license all intellectual property necessary to manufacture and sell desktop HDDs, and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. In addition, the Consent Agreement requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make final the accompanying Decision and Order.

## *II. The Products and Structure of the Market*

HDDs are key inputs into computers and other electronic devices used to store and allow fast access to data. HDDs are used in various end-use applications including desktop and mobile computers, and in enterprise computing applications.

The relevant line of commerce in which to analyze the effects of the Acquisition is desktop HDDs. Desktop HDDs are utilized in non-portable desktop or tower personal computers. Consumers of these products demand HDDs with the highest available capacity at the lowest price per gigabyte. Desktop HDDs are the only HDDs that meet these specifications. As a result, customers would likely not switch to a different kind of HDD in response to a five to ten percent increase in the price of desktop HDDs in sufficient numbers to make that price increase unprofitable for a hypothetical monopolist.

The relevant geographic market for desktop HDDs is worldwide. Most

HDDs, including desktop HDDs, are manufactured in Asia and are shipped to customers worldwide. Also, most large customers negotiate the purchase price of desktop HDDs at a global level.

The desktop HDD market is highly concentrated, with three manufacturers currently in the market. After Western Digital's acquisition of HGST, Western Digital's market share would increase to approximately 50 percent, and the number of suppliers of desktop HDDs would decrease from three to two.

## *III. Entry*

Neither new entry nor repositioning and expansion sufficient to deter or counteract the likely anticompetitive effects of the proposed acquisition in the desktop HDD market is likely to occur. Deterrents to entry into the desktop HDD market include high capital expenditures and intellectual property barriers. Because the market for desktop HDDs is mature with limited growth potential, it is unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter this market.

## *IV. Effects of the Acquisition*

The proposed acquisition likely would result in anticompetitive effects in the market for desktop HDDs. The structure and characteristics of this highly concentrated and mature market, where competitors sell largely homogenous products and have substantial insight into their competitors' price and output levels, suggests that the two remaining firms in the market would likely find it possible and profitable to coordinate on pricing or output. In addition, HDD customers generally wish to have at least three suppliers available to them. The fact that customers have a strong desire to source their desktop HDD purchases from several suppliers simultaneously in order to obtain competitive pricing and adequate supply suggests that the transaction could result in unilateral effects as well.

## *V. The Consent Agreement*

The Consent Agreement resolves the competitive concerns raised by Western Digital's proposed acquisition of HGST by requiring the divestiture of HGST's assets relating to the manufacture and sale of desktop HDDs to Toshiba. This divestiture must occur within fifteen days after the acquisition but may be extended an additional fifteen days, if necessary, to allow for regulatory approval in other jurisdictions.

Toshiba has the industry experience, reputation, and resources to replace

HGST as an effective competitor in the desktop HDD market. Headquartered in Tokyo, Japan, Toshiba is a diversified manufacturer and marketer of advanced electronic and electrical products spanning digital consumer products, electronic devices and components, power systems, industrial and social infrastructure systems, and home appliances. Toshiba does not currently compete against Western Digital or HGST in the sale of desktop HDDs, but it does manufacture HDDs for use in mobile and enterprise applications. Because Toshiba has extensive experience manufacturing these other types of HDDs, and has a worldwide infrastructure for the research, development, and sale of desktop HDDs, Toshiba is well-positioned to replace the competition that will be eliminated as a result of the proposed transaction.

Pursuant to the Consent Agreement, Toshiba would receive all of the assets necessary to replicate HGST's market position in the desktop HDD business, including sixteen desktop HDD production lines, representing the capacity to produce more than twenty million desktop HDD units per year, along with the product designs for HGST's most recent and advanced desktop HDD products. The Consent Agreement further requires Western Digital to provide Toshiba with access to HGST and/or Western Digital employees involved in the research, development, and production of desktop HDDs. In addition, the Consent Agreement also requires Western Digital to cross license all intellectual property necessary to manufacture and sell desktop HDDs and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. The Consent Agreement also requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own. A divestiture of HGST's desktop HDD assets to Toshiba will enable Toshiba to compete immediately with the merged entity.

The Commission has appointed Phillip Comerford, Jr., Managing Director and Head of the Mergers & Acquisitions Group of ING Capital LLC, as Interim Monitor to oversee the divestiture of the desktop HDD assets. In order to ensure that the Commission remains informed about the status of the proposed divestiture, the Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished.

If, after the public comment period, the Commission determines that Toshiba is not an acceptable acquirer of

the assets to be divested, or that the manner of the divestiture is not acceptable, Western Digital must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If Western Digital fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

**Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd.**

After a thorough investigation the Federal Trade Commission has challenged Western Digital Corporation's ("Western Digital") proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies ("HGST"). This challenge comes several months after the Federal Trade Commission closed its investigation of Seagate Technology LLC's ("Seagate") acquisition of Samsung Electronics Co. Ltd.'s hard disk drive assets ("Samsung"). The two proposed transactions were announced within weeks of each other, and both had potential implications for competition in the same product markets. Commission staff reviewed both matters at the same time in order to understand the effects on competition resulting from each transaction on its own, as well as the cumulative effect on the relevant markets if both transactions were allowed to be consummated.

The evidence gathered in the Commission's investigation revealed that the relevant product markets in which to assess the competitive impact of the proposed transactions are based on specific end-uses for hard disk drives ("HDDs")—such as desktop, notebook, and enterprise—because product features, pricing, and competition differ by end-use applications. For many of these end-uses, we did not have reason to believe that the proposed transactions would result in effects that would have justified a challenge. In the 3.5 inch desktop HDD ("desktop HDD") market, however, we had reason to believe the

consummation of both of these acquisitions would result in likely anticompetitive effects. The Commission came to this conclusion based on the evidence from interviews with market participants, testimony of the parties' executives, and documents produced by the parties and other industry participants.

The Commission determined after its investigation that there were significant differences between the competitive implications of the two proposed mergers. Since in each case the acquiring firm was a strong competitor, attention turned to the characteristics of the two firms that were to be acquired in these proposed transactions—HGST and Samsung. Based on this analysis, it was clear that an independent HGST was much more likely to be an effective competitive constraint in the desktop HDD market than would an independent Samsung.

In particular, HGST has been a strong, high quality and innovative competitor in the desktop HDD market. Moreover, HGST has been identified by a number of industry participants as a key driver of aggressive price competition in the desktop HDD market in 2010, and was well-positioned to grow its desktop HDD business in the near future. In contrast, Samsung had struggled to be competitive in the desktop HDD market. In a market for desktop HDDs containing only Western Digital, HGST, and the combined Seagate/Samsung entity, HGST would retain the ability and incentive to act as an effective constraint on desktop HDD pricing. By contrast, Samsung would be less likely to serve as a meaningful constraint on pricing in a desktop HDD market consisting of Western Digital/Hitachi, Seagate, and Samsung. Based on these considerations, the Commission made the decision to challenge the Western Digital/HGST transaction while clearing the Seagate/Samsung transaction, and to preserve the competitiveness of the desktop HDD market by requiring Western Digital to divest HGST's desktop HDD assets to Toshiba Corporation under the terms of a proposed Consent Agreement.

As we have explained in other cases, each merger that comes before the Commission is investigated and considered based on the particular facts presented. These investigations bear out the assertion in our Horizontal Merger Guidelines that our review of mergers "is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to

evaluate competitive concerns in a limited period of time."<sup>2</sup>

In addition to the scrutiny they have received from the Commission, many other antitrust enforcement agencies investigated these mergers. Commission staff cooperated with agencies in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey, and worked closely with the agencies' investigative teams on the timing of review, substantive analyses, and potential remedies, during the pendency of these investigations. This close cooperation with foreign antitrust enforcers helped ensure an outcome that benefited consumers in the United States.

[FR Doc. 2012-5851 Filed 3-9-12; 8:45 am]

BILLING CODE 6750-01-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

**Statement of Organization, Functions, and Delegations of Authority**

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772-76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 77 FR 5804-5812, dated February 6, 2012) is amended to reflect the reorganization of the Office of the Chief Operating Officer, Office of the Director, Centers for Disease Control and Prevention.

*Section C-B, Organization and Functions, is hereby amended as follows:*

Delete in its entirety the functional statement for the Office of the Chief Operating Officer (CAJ), and insert the following:

Office of the Chief Operating Officer (CAJ). (1) Provides mission and values-based leadership, direction, support and assistance to CDC's programs and activities to enhance CDC's strategic position in public health; ensure responsible stewardship; maintain core values; optimize operational effectiveness of business services; and institutionalize accountability for achieving management initiatives; (2) directs the conduct of operational

<sup>2</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.