f. All material transactions of Miracle-Gro, out of the ordinary course of business and not precluded by this Hold Separate, shall be subject to a majority vote of the Miracle-Gro Board. The Miracle-Gro Board shall serve at the cost and expense of Scotts. Scotts shall indemnify the Miracle-Gro Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Miracle-Gro Board directors.

g. Scotts shall take all reasonable steps, consistent with the other provisions of this Hold Separate, to maintain the marketability, viability, and competitiveness of Miracle-Gro, and not to cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell. transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Miracle-Gro.

4. Should the Federal Trade Commission seek in any proceeding to compel Scotts to divest itself of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, Miracle-Gro, or any additional assets, or to seek any other equitable relief, Scotts shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvement Act waiting period or the fact that the Commission has permitted the Acquisition. Scotts also shall waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Scotts made to its General Counsel, Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro shall permit any duly authorized representative or representatives of the

Commission:

a. Access during the office hours of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro 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 Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro relating to compliance with this Hold Separate;

b. Upon five (5) days notice to Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and without restraint or interference from it, to interview officers or employees of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro, which officers or employees may have counsel present, regarding any such matters.

6. This Hold Separate shall not be binding until approved by the Commission.

## Attachment A—Notice of Divestiture and Requirement for Confidentiality

The Scotts Company ("Scotts") has entered into an Agreement Containing Consent Order

"Consent Order") and an Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. Until after the Commission's order becomes final and the Peters Consumer Water Soluble Fertilizer Business or the Peters Business is divested, Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") must be managed and maintained as a separate, ongoing business, independent of all other Scotts businesses. All competitive information relating to Miracle-Gro must be retained and maintained on a confidential basis by the persons involved in Miracle-Gro, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Scotts business, including the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

Any violation of the Agreement Containing Consent Order or the Agreement to Hold Separate, incorporated by reference as part of the Agreement to Hold Separate, incorporated by reference as part of the Agreement Containing Consent Order, may subject Scotts to civil penalties and other relief as provided by law.

## **Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement **Containing Consent Order** ("Agreement") from the Scotts Company 'Scotts").

The proposed Order has been placed on the public record for sixty (60) days for reception of comments by 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 and will decide whether it should withdraw from the Agreement or make final the Agreement's proposed Order.

Scotts has proposed to acquire the outstanding voting securities of Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") in exchange for voting securities of Scotts. Scotts and Miracle-Gro value the transaction at approximately \$200 million. The proposed complaint alleges that the merger, if consummated, would violate section 7 of 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.

The complaint alleges that Scotts and Miracle-Gro compete in the market for water soluble fertilizer for United States consumer use. Scotts sells consumer water soluble fertilizer under the Peters brand name, while Miracle-Gro sells consumer water soluble fertilizer under the Miracle-Gro brand name. The proposed complaint alleges that the

merger would significantly increase concentration in an already highly concentrated market, combining a firm with a 70 percent market share and a firm with a six to seven percent market share. The proposed complaint also alleges that timely entry on a competitively meaningful scale would require a significant sunk investment in advertising. Entry is likely to require a significant amount of time because of the seasonal nature of the consumer lawn and garden industry and consumer reluctance to try new fertilizer brands. The proposed complaint concludes that the merger would increase the likelihood of unilateral anticompetitive behavior by the merged firm, because Miracle-Gro consumer water soluble fertilizer is the closest substitute for Peters consumer water soluble fertilizer. In addition, the complaint alleges that the merger would increase the likelihood of coordinated interaction among marketers of consumer water soluble fertilizer.

The proposed Order would remedy the alleged violation by replacing the lost competition that would result from the merger of Scotts and Miracle-Gro. The proposed Order would require Scotts to divest the Peters consumer water soluble fertilizer business, including the exclusive right to sell products to consumers under the Peters brand name. The divestiture is to be made either (1) to Alljack & Co. or (2) to an acquirer approved by the Commission. In order to ensure that the acquirer would be able to step quickly into Scotts' shoes in marketing Peters water soluble fertilizer, the proposed Order requires Scotts to divest its inventory and to enter into an interim year supply agreement with the acquirer. After the expiration of the supply agreement, the acquirer will be able to either manufacture or to have a supplier manufacture water soluble fertilizer identical to the water soluble fertilizer supplied by Scotts under the supply agreement. The proposed Order prohibits Scotts from putting the Scotts brand name on water soluble fertilizer for consumer use for a period of two (2) years to prevent activity that might undermine the Peters brand for a reasonable transition period after the divestiture.

A Hold Separate Agreement signed by Scotts provides that Miracle-Gro will be operated independently of Scotts, pending the Commission's final approval of the proposed Order. The Hold Separate Agreement also requires Scotts to maintain the viability of the Peters consumer water soluble fertilizer business and limits the exchange of certain information pending divestiture.