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FEDERAL TRADE COMMISSION

[File No. 141 0207]

Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders 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 methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent orders--embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before August 3, 2015.

ADDRESSES: Interested parties may file a comment at https://ftcpublic.commentworks.com/ftc/dollartreeconsent online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Dollar Tree, Inc. and Family Dollar Stores, Inc. - Consent Agreement; File No. 141-0207" on your comment and file your comment online at https://ftcpublic.commentworks.com/ftc/dollartreeconsent by following the instructions on the web-based form. If you prefer to file your comment on paper, write "Dollar Tree, Inc. and

Family Dollar Stores, Inc. - Consent Agreement; File No. 141-0207" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Sean Pugh, Bureau of Competition, (202-326-3201), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing consent orders 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 July 2, 2015), on the World Wide Web, at http://www.ftc.gov/os/actions.shtm.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 3, 2015. Write "Dollar Tree, Inc. and Family Dollar Stores, Inc. - Consent Agreement; File No. 141-0207" 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 Website, 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 Website.

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 privileged or confidential," as discussed 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).[1] 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.

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[1] 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).

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a 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://ftcpublic.commentworks.com/ftc/dollartreeconsent 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 website.

If you file your comment on paper, write "Dollar Tree, Inc. and Family Dollar Stores, Inc. - Consent Agreement; File No. 141-0207" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website 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 August 3, 2015. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see http://www.ftc.gov/ftc/privacy.htm.

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Order") from Dollar Tree, Inc. ("Dollar Tree") and Family Dollar Stores, Inc. ("Family Dollar"), (collectively, the "Respondents"). On July 27, 2014, Dollar Tree and Family Dollar entered into an agreement whereby Dollar Tree would acquire Family Dollar for approximately $9.2 billion (the "Acquisition"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from Dollar Tree's acquisition of Family Dollar. Under the terms of the proposed Consent Order, Respondents are required to divest 330 stores in local geographic markets (collectively, the "relevant markets") in 35 states to the Commission-approved buyer. The divestitures must be completed within 150 days from the date of the Acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets to maintain the viability of Respondents' assets until they are transferred to the Commission-approved buyer.

The proposed Consent Order 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 again will review the proposed Consent Order and any comments received, and decide whether the Consent Order should be withdrawn, modified, or made final.

The Commission's Complaint alleges 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, by removing an actual, direct, and substantial competitor in localized geographic markets in 222 cities nationwide.[2] The elimination of this competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices unilaterally above competitive levels. Similarly, absent a remedy, there is significant risk that the merged firm may decrease the quality and service aspects of its stores. The proposed Consent Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in these markets because of the Acquisition.

II. THE RESPONDENTS

As of January 31, 2015, Dollar Tree operated 5,157 discount general merchandise retail stores across the United States under the Dollar Tree and Deals banners. Presently, Dollar Tree banner stores are located in 48 states and the District of Columbia, while Deals banner stores are currently located in 18 states and the District of Columbia. In the Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise for $1 or less. At its Deals banner stores, Dollar Tree offers an expanded assortment of this merchandise at prices generally less than $10. Dollar Tree and Deals banner stores range in size from 8,000 to 12,000 square feet of selling space and typically carry between 6,600 to 7,000 stock keeping units ("SKUs").

As of February 28, 2015, Family Dollar operated approximately 8,184 discount general merchandise retail stores nationwide. Family Dollar sells an assortment of consumables, home products, apparel and accessories, seasonal items, and electronic merchandise at prices

[2] The list of cities in which stores will be divested is attached as Appendix A. The list of stores to be divested is attached to the Decision and Order as Schedule A.

generally less than $10. Currently, Family Dollar stores are located in 46 states and the District of Columbia. Stores typically have 7,150 square feet of selling space and carry approximately 6,500 to 7,000 SKUs.

III. COMPETITION IN THE RELEVANT MARKETS

Dollar stores are small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under $10. Dollar stores differentiate themselves from other retailers on the basis of both convenience and value by offering a broad assortment but limited variety of general merchandise items at discounted prices in stores with small footprints (*i.e.*, approximately 7,000 to 10,000 square feet of selling space), located relatively close to consumers' homes or places of work.[3] Customers often shop at dollar stores as part of a "fill-in" shopping trip. Dollar stores typically compete most closely with other dollar stores that provide the same kind of convenient shopping trip for discounted general merchandise.

Walmart competes closely with dollar stores and offers a wide assortment of products at deeply-discounted prices. Although Walmart does not provide the same kind of convenience as that of dollar stores given its less-accessible locations, larger store footprints, and greater assortment of products, Walmart nevertheless competes closely with dollar stores by offering a comparable or better value to consumers in terms of pricing. For purposes of this matter, "discount general merchandise retail stores" refers to dollar stores and the retailer Walmart.

Although other retail stores (*i.e.*, supermarkets, pharmacies, mass merchandisers, and

[3] The term "dollar stores" as used here includes stores operated by Respondents, Dollar General, 99 Cents Only, and Fred's Super Dollar. Independently-owned retailers that sell discounted merchandise at the $1 or multi-price point in substantially smaller stores are not included.

discount specialty merchandise retail stores) often sell discounted merchandise similar to that offered by dollar stores and Walmart, these other retailers generally are not as effective at constraining Respondents as are other discount general merchandise retail stores.[4] These other retailers do not offer the same value as Walmart or the same combination of convenience and value offered by dollar stores, which tends to make them less effective substitutes for discount general merchandise retail stores. As a result, consumers shopping at discount general merchandise retail stores are unlikely to significantly increase purchases of discounted merchandise at other retailers in response to a small but significant price increase at discount general merchandise retail stores. However, in certain geographic markets, typically characterized by high population density, where the number and geographic proximity of these other retailers is substantial relative to the competing discount general merchandise retail stores, the collective presence of these other retailers acts as a more significant price constraint on the discount general merchandise retail stores operating in the area.[5]

Thus, the relevant line of commerce in which to analyze the Acquisition is no narrower than discount general merchandise retail stores. In certain geographic markets, the relevant line of commerce may be as broad as the sale of discounted general merchandise in retail stores (*i.e.*,

[4] The term "supermarkets" as used here includes traditional supermarkets such as Kroger and Publix, as well as supermarkets included within hypermarkets such as SuperTarget or Kroger's Fred Meyer banner. The term "pharmacies" includes national retail drug stores such as CVS, Rite Aid, and Walgreens. The term "mass merchandisers" includes retailers such as Target and K-Mart. The term "discount specialty merchandise retail stores" includes retailers such as Big Lots and Aldi.

[5] Online retailers are not participants in the relevant product market. The primary appeal of dollar stores is the combination of value and convenience they offer consumers. Given the time required to process and ship items ordered online, Internet retailers are less convenient shopping options for consumers looking to make an immediate purchase on a fill-in trip.

discount general merchandise retail stores as well as supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores). Whether the relevant line of commerce is discount general merchandise retail stores or discounted general merchandise in retail stores depends on the specifics of the geographic market at issue, such as population density and the density and proximity of the Respondents' stores and competing retailers.

The relevant geographic market varies depending on the unique characteristics of each market, including the local road network, physical boundaries, and population density. A strong motivation of consumers shopping at discount general merchandise retail stores is convenience. As with grocery shopping, the vast majority of consumers who shop for discounted general merchandise do so at stores located very close to where they live or work. The draw area of a dollar store, which varies depending on whether it is located in an urban, suburban, or rural area, may range from a couple of city blocks to several miles. Other market participants, such as supermarkets and retail pharmacies, may have similar, although somewhat broader draw areas. Walmart's stores, particularly Walmart Supercenters, tend to have a considerably broader draw area. In highly urban areas, the geographic markets are generally no broader than a half-mile radius around a given store. In highly rural areas, the geographic market is generally no narrower than a three-mile radius around a given store. In areas neither highly urban nor highly rural, the geographic market is generally within a half-mile to three-mile radius around a given store.

Respondents are close competitors in terms of format, customer service, product offerings, and location in the relevant geographic markets. With regard to pricing, product assortment, and a host of other competitive issues, Respondents typically focus most directly on the actions and responses of each other and other dollar stores, while also paying close attention to Walmart. In many of the relevant geographic markets, Dollar Tree and Family Dollar operate the only dollar stores in the area or the vast majority of conveniently-located discount general merchandise retail stores. Absent relief, the Acquisition would increase the incentive and ability of Dollar Tree to raise prices unilaterally post-Acquisition in the relevant geographic markets. The Acquisition would also decrease incentives to compete on non-price factors, including product selection, quality, and service.

Entry into the relevant geographic markets that is timely and sufficient to prevent or counteract the expected anticompetitive effects of the Acquisition is unlikely. Entry barriers include the time, costs, and feasibility associated with identifying and potentially constructing an appropriate and available location for a discount general merchandise retail store, the resources required to support one or more new stores over a prolonged ramp-up period, and the sufficient scale to compete effectively. An entrant's ability to secure a viable competitive location may be hindered by restrictive-use commercial lease covenants, which can limit the products sold, or even the type of retailer that can be located, at a particular location.

IV. THE PROPOSED CONSENT ORDER

The proposed remedy, which requires the divestiture of 330 Family Dollar stores in the relevant markets to Sycamore Partners ("Sycamore"), will restore fully the competition that otherwise would be eliminated in these markets as a result of the Acquisition. Sycamore is a private equity firm specializing in consumer and retail investments. The proposed buyer appears to be a highly suitable purchaser and is well positioned to enter the relevant geographic markets and prevent the likely competitive harm that otherwise would result from the

Acquisition. Sycamore's proposed executive team has extensive experience operating discount general merchandise retail stores.

The proposed Consent Order requires Respondents to divest 330 stores to Sycamore within 150 days from the date of the Acquisition. If, at any time before the proposed Consent Order is made final, the Commission determines that Sycamore is not an acceptable buyer, Respondents must immediately rescind the divestitures and divest the assets to a different buyer that receives the Commission's prior approval.

The proposed Consent Order contains additional provisions to ensure the adequacy of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will be issued at the time the proposed Consent Order is accepted for public comment. The Order to Maintain Assets requires Family Dollar to operate and maintain each divestiture store in the normal course of business through the date the store is ultimately divested to Sycamore. Because the divestiture schedule runs for an extended period of time, the proposed Consent Order appoints Gary Smith as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Order and Order to Maintain Assets. Mr. Smith has the experience and skills to be an effective Monitor, no identifiable conflicts, and sufficient time to dedicate to this matter through its conclusion.

* * *

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Order. This Analysis does not constitute an official interpretation of the proposed Consent Order, nor does it modify its terms in any way.

Appendix A

	City	Number of Stores Divested
Alabama	Montgomery	1
Arizona	Lake Havasu	1
Arizona	Tucson	1
California	Farmersville	1
California	Fresno	1
California	Inglewood	1
California	Lemoore	1
California	San Bernardino	1
Colorado	Aurora	1
Colorado	Colorado Springs	3
Colorado	Denver	1
Colorado	Federal Heights	1
Colorado	Lakewood	1
Connecticut	Bloomfield	1
Connecticut	Bridgeport	1
Connecticut	Groton	1
Connecticut	Meriden	1
Connecticut	New Haven	1
Connecticut	West Hartford	1
Delaware	Wilmington	1
Florida	Dania	1
Florida	Deltona	2
Florida	Hollywood	1
Florida	Homestead	1
Florida	Jacksonville	2
Florida	Kissimmee	3
Florida	Miami	3
Florida	Miami Gardens	1
Florida	Plantation	1
Florida	Tampa	3
Georgia	Atlanta	7
Georgia	Columbus	1
Georgia	Decatur	3
Georgia	Lake City	1

	City	Number of Stores Divested
Georgia	Norcross	1
Georgia	Stone Mountain	1
Idaho	Emmett	1
Illinois	Aurora	1
Illinois	Berwyn	1
Illinois	Chicago	13
Illinois	Elgin	1
Illinois	Harvey	1
Indiana	Fort Wayne	1
Indiana	Gary	2
Indiana	Indianapolis	2
Kentucky	Covington	1
Kentucky	Louisville	2
Louisiana	Baton Rouge	1
Louisiana	Lafayette	1
Louisiana	New Orleans	1
Maine	Caribou	1
Maine	Gray	1
Maine	Lewiston	1
Maine	Livermore Falls	1
Maine	Old Town	1
Maine	South Portland	1
Maine	Waterville	1
Maryland	Baltimore	4
Maryland	Capitol Heights	1
Maryland	Lanham	1
Maryland	Mount Rainier	1
Maryland	Oxon Hill	1
Maryland	Salisbury	1
Maryland	Silver Spring	1
Maryland	Temple Hills	1
Massachusetts	Boston	1
Massachusetts	Brockton	1
Massachusetts	Cambridge	1
Massachusetts	Chelsea	1
Massachusetts	Dorchester	1
Massachusetts	Framingham	1
Massachusetts	Gloucester	1
Massachusetts	Greenfield	1

	City	Number of Stores Divested
Massachusetts	Holyoke	1
Massachusetts	Lowell	1
Massachusetts	Medford	1
Massachusetts	New Bedford	1
Massachusetts	North Adams	1
Massachusetts	Randolph	1
Massachusetts	Revere	1
Massachusetts	South Yarmouth	1
Massachusetts	Springfield	2
Massachusetts	Ware	1
Massachusetts	West Springfield	1
Massachusetts	Worcester	1
Michigan	Benton Harbor	1
Michigan	Burton	1
Michigan	Detroit	5
Michigan	Eastpointe	1
Michigan	Ferndale	1
Michigan	Grand Rapids	2
Michigan	Hamtramck	1
Michigan	Hazel Park	1
Michigan	Highland Park	1
Michigan	Holland	1
Michigan	Inkster	1
Michigan	Lansing	1
Michigan	Livonia	1
Michigan	Mount Morris	1
Michigan	Oak Park	1
Michigan	Portage	1
Michigan	Saginaw	1
Michigan	Taylor	1
Michigan	Westland	1
Michigan	Wyoming	1
Minnesota	Minneapolis	3
Minnesota	Robbinsdale	1
Minnesota	St. Paul	3
Mississippi	Jackson	1
Missouri	Jennings	1
Missouri	St. Louis	6
Nebraska	Omaha	1

	City	Number of Stores Divested
New Jersey	Belmar	1
New Jersey	Brigantine	1
New Jersey	East Orange	1
New Jersey	Elizabeth	2
New Jersey	Ewing	1
New Jersey	Glassboro	1
New Jersey	Hamilton Township	1
New Jersey	Irvington	1
New Jersey	Mount Holly	1
New Jersey	Newark	2
New Jersey	Paterson	1
New Jersey	Pleasantville	1
New Jersey	Vineland	1
New Mexico	Albuquerque	3
New Mexico	Las Cruces	1
New York	Astoria	1
New York	Bronx	8
New York	Brooklyn	7
New York	College Point	1
New York	East Aurora	1
New York	Far Rockaway	1
New York	Glendale	1
New York	Grand Island	1
New York	Greece	1
New York	Jamaica	2
New York	Johnstown	1
New York	Lindenhurst	1
New York	Mattydale	1
New York	Mount Vernon	1
New York	Patchogue	1
New York	Poughkeepsie	1
New York	Queens	2
New York	Queens Village	1
New York	Ridgewood	1
New York	Rochester	3
New York	Rocky Point	1
New York	Saranac Lake	1
New York	Selden	1

	City	Number of Stores Divested
New York	Shirley	1
New York	Springfield Gardens	1
New York	Staten Island	2
New York	Syracuse	2
New York	Utica	1
North Carolina	Charlotte	2
Ohio	Akron	1
Ohio	Canton	1
Ohio	Cincinnati	5
Ohio	Cleveland	4
Ohio	Columbus	3
Ohio	East Cleveland	1
Ohio	Milford	1
Ohio	St. Bernard	1
Ohio	Toledo	2
Ohio	Whitehall	1
Oklahoma	Oklahoma City	2
Pennsylvania	Allentown	1
Pennsylvania	East Liberty	1
Pennsylvania	Edwardsville	1
Pennsylvania	Harrisburg	2
Pennsylvania	Lansdowne	1
Pennsylvania	Levittown	1
Pennsylvania	Mckeesport	1
Pennsylvania	Middletown	1
Pennsylvania	Morrisville	1
Pennsylvania	Philadelphia	5
Pennsylvania	Pittsburgh	2
Pennsylvania	Swissvale	1
Pennsylvania	Upper Darby	1
Pennsylvania	Yeadon	1
Rhode Island	Bristol	1
Rhode Island	Central Falls	1
Rhode Island	Pawtucket	2
Rhode Island	Providence	2
Rhode Island	Rumford	1
Tennessee	Memphis	3
Tennessee	Nashville	1

	City	Number of Stores Divested
Texas	Arlington	1
Texas	Balch Springs	1
Texas	Beaumont	1
Texas	Brownsville	1
Texas	Corpus Christi	1
Texas	Dallas	1
Texas	Eagle Pass	1
Texas	El Paso	3
Texas	Fort Worth	2
Texas	Houston	5
Texas	Lubbock	1
Texas	Odessa	1
Texas	Pasadena	1
Texas	San Antonio	2
Utah	Midvale	1
Utah	Ogden	1
Utah	Provo	1
Utah	Salt Lake City	1
Utah	St. George	1
Utah	West Valley City	1
Vermont	Morrisville	1
Vermont	Newport	1
Virginia	Alexandria	1
Virginia	Chesapeake	1
Virginia	Hampton	1
Virginia	Lynchburg	1
Virginia	Norfolk	3
Virginia	Portsmouth	1
Virginia	Richmond	1
West Virginia	Huntington	1
Wisconsin	Appleton	1
Wisconsin	Eau Claire	1
Wisconsin	Milwaukee	3
Wisconsin	St. Francis	1

By direction of the Commission, Commissioner Wright dissenting.

Donald S. Clark
Secretary.

Statement of the Federal Trade Commission

The Federal Trade Commission has accepted a proposed settlement to resolve the likely anticompetitive effects of Dollar Tree, Inc.'s proposed $9.2 billion acquisition of Family Dollar Stores, Inc.[1] We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially lessen competition between Dollar Tree and Family Dollar in numerous local markets. Under the terms of the proposed consent order, Dollar Tree and Family Dollar are required to divest 330 stores to a Commission-approved buyer. As we explain below, we believe the proposed divestitures preserve competition in the markets adversely affected by the acquisition and are therefore in the public interest.

Dollar Tree operates over 5,000 discount general merchandise retail stores across the United States under two banners which follow somewhat different business models. In its Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise—all for $1 or less. At its Deals banner stores, Dollar Tree sells an expanded assortment of this merchandise at prices that may go above the $1 price point but are generally less than $10. Family Dollar operates over 8,000 discount general merchandise retail stores. Family Dollar sells an assortment of consumables, home products,

[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Ohlhausen, and McSweeny.

apparel and accessories, seasonal items, and electronic merchandise at prices generally less than $10, including items priced at or under $1.

Dollar Tree and Family Dollar compete head-to-head in numerous local markets across the United States. They are close competitors in terms of format, pricing, customer service, product offerings, and location. When making competitive decisions regarding pricing, product assortment, and other salient aspects of their businesses, Dollar Tree and Family Dollar focus most directly on the actions and responses of each other and other "dollar store" chains, while also paying close attention to Walmart. In many local markets, Dollar Tree and Family Dollar operate stores in close proximity to each other, often representing the only or the majority of conveniently located discount general merchandise retail stores in a neighborhood.

To evaluate the likely competitive effects of this transaction and identify the local markets where it may likely harm competition, the Commission considered multiple sources of quantitative and qualitative evidence. One component of the investigation involved a Gross Upward Pricing Pressure Index ("GUPPI") analysis. As described in the 2010 Horizontal Merger Guidelines, this mode of analysis can serve as a useful indicator of whether a merger involving differentiated products is likely to result in unilateral anticompetitive effects.[2] Such effects can arise "when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm" because the merged entity stands to profit from any sales that are then diverted to products that would have been "previously sold by the other

[2] U.S. DEPT. OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

merging firm."[3] Using the value of diverted sales as an indicator of the upward pricing pressure resulting from the merger, a GUPPI is defined as the value of diverted sales that would be gained by the second firm measured in proportion to the revenues that would be lost by the first firm. If the "value of diverted sales is proportionately small, significant unilateral price effects are unlikely."[4]

The Commission's investigation involved thousands of Dollar Tree and Family Dollar stores with overlapping geographic markets. A GUPPI analysis served as a useful initial screen to flag those markets where the transaction might likely harm competition and those where it might pose little or no risk to competition. As a general matter, Dollar Tree and Family Dollar stores with relatively low GUPPIs suggested that the transaction was unlikely to harm competition, unless the investigation uncovered specific reasons why the GUPPIs may have understated the potential for anticompetitive effects. Conversely, Dollar Tree and Family Dollar stores with relatively high GUPPIs suggested that the transaction was likely to harm competition, subject to evidence or analysis indicating that the GUPPIs may have overstated the potential for anticompetitive effects.

While the GUPPI analysis was an important screen for the Commission's inquiry, it was only a starting point. The Commission considered several other sources of evidence in assessing the transaction's likely competitive effects, including additional detail regarding the geographic proximity of the merging parties' stores relative to each other and to other retail stores, ordinary course of business documents and data supplied by Dollar Tree and Family

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[3] *Id*.

[4] *Id*.

Dollar, information from other market participants, and analyses conducted by various state attorneys general who were also investigating the transaction. After considering all of this evidence, the Commission identified specific local markets where the acquisition would be likely to harm competition and arrived at the list of 330 stores slated for divestiture.

In his statement, Commissioner Wright criticizes the way that the Commission used the GUPPI analysis in this case and argues that GUPPIs below a certain threshold should be treated as a "safe harbor."[5] We respectfully disagree.

As an initial matter, Commissioner Wright mischaracterizes the way that the GUPPI analysis was used in this case. Contrary to his suggestion, GUPPIs were not used as a rigid presumption of harm. As explained above, they were used only as an initial screen to identify those markets where further investigation was warranted. The Commission then proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information.[6] Based on this complete body of evidence, we have reason to believe that, without the proposed divestitures, the acquisition would substantially lessen competition in each of the relevant local markets.

Our market-by-market review showed that the model of competition underlying the GUPPI analysis was largely consistent with other available evidence regarding the closeness of

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[5] Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part, *Dollar Tree, Inc. and Family Dollar Stores, Inc.*, File No. 141-0207.

[6] As Joseph Farrell and Carl Shapiro have noted, "[r]eal-world mergers are complex, and our proposed test, like the concentration-based test, is consciously oversimplified. . . . In the end, the evaluation of any merger that is thoroughly investigated or litigated may come down to the fullest feasible analysis of effects." Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1, 26 (2010).

competition between the parties' stores in each local market. For example, stores with high GUPPIs were generally found in markets in which there were few or no other conveniently located discount general merchandise retail stores. The GUPPI analysis did have some limitations, however. For example, there were Family Dollar stores with relatively low GUPPIs in markets that were nevertheless price-zoned to Dollar Tree stores, which meant that if Dollar Tree stores were removed as competition, then the prices of certain items at those Family Dollar stores would likely go up. The GUPPI analysis also was not sufficiently sensitive to differentiate between Dollar Tree and Family Dollar stores that were in the same shopping plaza from those that were almost a mile away from each other. For these situations, we appropriately relied on other evidence to reach a judgment about the closeness of competition.[7]

More broadly, Commissioner Wright's view that the Commission should identify and treat GUPPIs below a certain threshold as a "safe harbor" ignores the reality that merger analysis is inherently fact-specific. The manner in which GUPPI analysis is used will vary depending on the factual circumstances, the available data, and the other evidence gathered during an investigation. Moreover, whether the value of diverted sales is considered "proportionately small" compared to lost revenues will vary from industry to industry and firm to firm.[8] For example, intense competition between merging firms may cause margins to be

[7] Commissioner Wright cites the Albertson's/Safeway transaction as another recent case in which a GUPPI analysis was used. *See* Wright Statement at 2 n.6. To be precise, the Commission analyzed that transaction using diversion ratios, not GUPPI scores, but in any event, Commissioner Wright himself voted to accept the consent order in that case.

[8] Marginal cost efficiencies, as well as pass-through rates, also will vary from industry to industry and from firm to firm. The pass-through rate will determine the magnitude of the post-merger unilateral price effects.

very low, which could produce a low GUPPI even in the presence of very high diversion ratios. Such conditions could produce a false negative implying that the merger is not likely to harm competition when in fact it is.[9]

Indeed, we agree with Commissioner Wright that "a GUPPI-based presumption of competitive harm is inappropriate at this stage of economic learning."[10] We think that a GUPPI-based safe harbor is equally inappropriate. In antitrust law, bright-line rules and presumptions rest on accumulated experience and economic learning that the transaction or conduct in question is likely or unlikely to harm competition.[11] We do not believe there is a basis for the recognition of a GUPPI safe harbor.

Accordingly, in any case where a GUPPI analysis is used, the Commission will consider the particular factual circumstances and evaluate other sources of quantitative and qualitative

[9] Joseph Farrell & Carl Shapiro, *Upward Pricing Pressure and Critical Loss Analysis: Response*, CPI ANTITRUST J. 1, 6−7 & n.15 (Feb. 2010); Farrell & Shapiro, *Antitrust Evaluation of Horizontal Mergers, supra* note 6, at 13−14.

[10] Wright Statement, *supra* note 5, at 8 & nn.23 & 24 (citing commentators' concerns and criticisms regarding the use of GUPPI analysis generally). Such concerns and criticisms, if valid, would apply equally to the wisdom of using GUPPIs to recognize a safe harbor.

[11] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886−87 (2007) ("As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, . . ."); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) ("The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 570, 571 (6th Cir. 2014) (noting that "the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated—converge in a manner that fully supports the Commission's application of a presumption of illegality" but also noting that "the Commission did not merely rest upon the presumption, but instead discussed a wide range of evidence that buttresses it").

evidence.[12] As with other quantitative evidence such as market shares and HHIs, we believe that GUPPIs should be considered in the context of all other reasonably available evidence. The 2010 Horizontal Merger Guidelines do not instruct otherwise.[13] For all of these reasons, we believe it is appropriate to use GUPPIs flexibly and as merely one tool of analysis in the Commission's assessment of unilateral anticompetitive effects.

By direction of the Commission, Commissioner Wright not participating.

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[12] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 729 (2010) ("The value of diverted sales is an excellent simple measure for *diagnosing or scoring* unilateral price effects, but it cannot capture the full richness of competition in real-world industries. Indeed, as stressed above, all of the quantitative methods discussed here must be used in conjunction with the broader set of qualitative evidence that the Agencies assemble during a merger investigation."); Farrell & Shapiro, *Upward Pricing Pressure*, *supra* note 8, at 6 ("Whatever measure is used for screening purposes, it is important that the full analysis give proper weight to all the available evidence."). Notwithstanding Commissioner Wright's suggestion to the contrary, we do not believe that the Commission's use of GUPPIs as a tool for assessing unilateral effects differs materially from their use by the Department of Justice.

[13] Recognizing in the 2010 Horizontal Merger Guidelines that when the "value of diverted sales is proportionately small, significant unilateral price effects are unlikely" does not necessarily mean that "proportionately small" should be reduced to some numerical value that applies in all cases. *See* Merger Guidelines, *supra* note 2, § 1 ("These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology.").

Statement of Commissioner Joshua D. Wright

Dissenting in Part and Concurring in Part

The Commission has voted to issue a Complaint and a Decision & Order against Dollar Tree, Inc. ("Dollar Tree") and Family Dollar Stores, Inc. ("Family Dollar") to remedy the allegedly anticompetitive effects of the proposed acquisition by Dollar Tree of Family Dollar. I dissent in part from and concur in part with the Commission's decision. I dissent in part because in 27 markets I disagree with the Commission's conclusion that there is reason to believe the proposed transaction violates the Clayton Act.

The record evidence includes a quantitative measure of the value of diverted sales as well as various forms of qualitative evidence. The value of diverted sales is typically measured as the product of the diversion ratio between the merging parties' products – the diversion ratio between two products is the percentage of unit sales lost by one product when its price rises, that are captured by the second product – and the profit margin of the second product. When the value of diverted sales is measured in proportion to "the lost revenues attributable to the reduction in unit sales resulting from the price increase,"[1] it is the "gross upward pricing pressure index," or "GUPPI." The GUPPI is an economic tool used to score or rank the incentives for potential unilateral price effects. In the markets where I depart from the Commission's decision the GUPPI is below 5 percent, indicating insignificant upward pricing pressure even before efficiencies or entry are taken into account, and weak incentives for unilateral price increases. In my view, the available quantitative and qualitative evidence are

[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 n.11 (2010) [hereinafter MERGER GUIDELINES].

insufficient to support a reason to believe the proposed transaction will harm competition in these markets. I write separately to explain more fully the basis for my dissent in these markets.

I also write to address an important merger policy issue implicated by today's decision – that is, whether the FTC should adopt a safe harbor in unilateral effects merger investigations by defining a GUPPI threshold below which it is presumed competitive harm is unlikely. The *Merger Guidelines* clearly contemplate such a safe harbor. The *Merger Guidelines* explain that "[i]f the value of diverted sales is *proportionately small*, significant unilateral price effects are unlikely."[2] In other words, the *Merger Guidelines* recognize that if the GUPPI is small, significant unilateral price effects are unlikely.

Without more, one might reasonably conclude it is unclear whether the *Merger Guidelines* merely offer a truism about the relationship between the GUPPI and likely unilateral price effects or invite the agencies to take on the task of identifying a safe harbor of general applicability across cases. But there is more. A principal drafter of the *Merger Guidelines* has explained the *Merger Guidelines*' reference to a "proportionately small" value of diverted sales was intended to establish a GUPPI safe harbor. The Department of Justice's Antitrust Division ("Division"), consistent with this interpretation of the *Merger Guidelines*, publicly announced precisely such a safe harbor when the GUPPI is less than 5 percent.[3] Further, there is

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[2] *Id.* § 6.1 (emphasis added); *see* Steven C. Salop, Serge X. Moresi & John Woodbury, CRA Competition Memo, Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines 2 (Aug. 31, 2010), *available at* http://crai.com/sites/default/files/publications/Commentary-on-the-GUPPI_0.pdf.

[3] Carl Shapiro, Deputy Ass't Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Antitrust Law Fall Forum 24 (Nov. 18 2010).

significant intellectual support for a GUPPI-based safe harbor among economists[4] – once again including the principal drafters of the *Merger Guidelines.*[5] The Commission, however, has rejected the safe harbor approach both in practice – indeed, the Commission has recently entered into another consent involving divestitures in markets with GUPPI scores below 5 percent[6] – and as a matter of the policy announced in the Commission's statement today.[7]

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[4] *See, e.g.*, Salop, Moresi & Woodbury, *supra* note 2, at 2 (explaining that "a GUPPI of less than 5% would be reasonably treated as evidence that 'the value of diverted sales is proportionately small' and hence that the proposed merger is unlikely to raise unilateral effects concerns").

[5] *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1 (2010).

[6] *See* Cerberus Institutional Partners V, L.P., FTC File No. 141-0108 (July 2, 2015). There, though one could not possibly infer this from the public-facing documents in the case, the Commission applied a diversion ratio threshold to identify stores for divestiture. To be accurate, a GUPPI threshold could be implied from the Commission's analysis and, as algebraically mindful readers will note, setting a diversion ratio threshold given profit margin data and a predicted price increase is not analytically distinguishable from the analysis in this matter. The Commission rightly points out that I voted in favor of the consent in *Cerberus*. As to whether I am merely being inconsistent in my views on the role of GUPPIs in merger analysis or, alternatively, there is some other more reasonable explanation for my votes, I can provide the explanation and let readers decide. In *Cerberus*, I voted for the consent on the basis that the use of diversion or GUPPI-based analysis was a step forward relative to relying exclusively upon structural analysis. The fact that there were stores identified for divestiture with implied GUPPIs less than 5 percent was unique. It is now a trend reinforced by a Commission decision to reject a GUPPI-based safe harbor – a decision I do not believe is in the public interest.

Regarding *Cerberus*, it is worth pointing out further that even a careful reader of the public documents in that case would come away with the impression that the Commission's analysis was largely structural, and concluded a number of six-to-five mergers were presumptively anticompetitive. *See* Analysis of Agreement Containing Consent Order to Aid Public Comment Exhibit A, *id.* An ancillary benefit of the transparency reluctantly generated by today's Commission statement is that the antitrust community is now on notice that more sophisticated economic tools were used in that matter, how they were used, and that the potential structural

This is unfortunate. The legal, economic, and policy case for the GUPPI-based safe harbor contemplated by the *Merger Guidelines* is strong.[8] There are a number of reasons why such a safe harbor might be desirable as a matter of antitrust policy if sufficiently supported by economic theory and evidence. Efficient resource allocation – expending agency resources on the transactions most likely to raise serious competitive concerns and quickly dispensing with those that do not – is one such goal.

A second reason a safe harbor for proportionately small diversion might be desirable antitrust policy is to compensate for the sources of downward pricing pressure not measured by the GUPPI but expected with most transactions, including efficiencies, entry, or repositioning. Some have argued that – as a GUPPI attempts a rough measure of upward pricing pressure without a full blown analysis – a symmetrical approach would include a standard efficiencies deduction which would be applied to account for the downward pricing pressure from the

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policy change signaled by those public documents does not appear to describe accurately the Commission's complete analysis in that case.

[7] Statement of the Federal Trade Commission at 3, Dollar Tree, Inc., FTC File No. 141-0207 (July 13, 2015) [hereinafter Majority Statement] ("[A] GUPPI-based safe harbor is . . . inappropriate.").

[8] A second question is whether a presumption of competitive harm should follow, as a matter of economic theory and empirical evidence, from a demonstration of a GUPPI above a certain threshold value. There appears to be a consensus that the answer to this question, at this point, is no. I agree. *See, e.g.*, Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies* 13 (Heritage Foundation Legal Memorandum No. 144, Jan. 28, 2015) (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers"); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 40-41 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/ ("The 2010 Merger Guidelines do not adopt an anticompetitive enforcement presumption based on high values of the GUPPI score. This was a practical policy decision at this time because the use of the *GUPPI* was new to much of the defense bar and the courts.").

marginal-cost efficiencies that can typically be expected to result from transactions.[9] This approach would permit the identification of a gross-upward-pricing-pressure threshold that triggers additional scrutiny.[10]

Yet a third reason a safe harbor might be desirable is to compensate the well-known feature of GUPPI-based scoring methods to predict harm for any positive diversion ratio – that is, even for distant substitutes – by distinguishing *de minimis* GUPPI levels from those that warrant additional scrutiny.[11] The *Merger Guidelines* contemplate a "safe harbor" because it "reflects that a small amount of upward pricing pressure is unlikely . . . to correspond to any actual post-merger price increase."[12] Carl Shapiro explained shortly after adoption of the *Merger Guidelines*, on behalf of the Division, that "Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues."[13]

Against these benefits of adopting a GUPPI-based safe harbor, the Commission must weigh the cost of reducing its own flexibility and prosecutorial discretion. This begs the

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[9] Farrell & Shapiro, *supra* note 5, at 10-12.

[10] *See id.* at 12.

[11] James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 7 ANTITRUST L.J. 587, 628 (2010) ("an uncalibrated tool cannot have predictive value as a screen if it always indicates postmerger price pressure").

[12] Shapiro, *supra* note 3, at 24. Shapiro further cautioned that, although a GUPPI analysis "can be highly informative, the Agencies understand full well that measuring upward pricing pressure . . . typically is not the end of the story . . . . Repositioning, entry, innovation, and efficiencies must also be considered." *Id.* at 26.

[13] *Id.* at 24. Others have interpreted this speech as clearly announcing Division policy. *See* Salop, *supra* note 8, at 43 & n.105 ("In a speech while he was Deputy AAG, Carl Shapiro also specified a GUPPI safe harbor of 5%. As a speech by the Deputy AAG, this statement appeared to reflect DOJ policy." (citing Shapiro, *supra* note 3)). Other economists agree that a GUPPI safe harbor should apply. *E.g.*, Farrell & Shapiro, *supra* note 5, at 10; Salop, Moresi & Woodbury, *supra* note 2, at 2.

question: how likely are mergers within the proposed safe harbor to be anticompetitive? The benefits of this flexibility are proportional to the probability that the Commission's economic analysis leads them to conclude that mergers with a GUPPI of less than 5 percent are anticompetitive. I am not aware of any transactions since the *Merger Guidelines* were adopted other than the two already mentioned that meet these criteria. The domain in which flexibility would be reduced with adoption of a reasonable safe harbor is small and the costs of doing so correspondingly low.

The Commission rejects a GUPPI safe harbor on the grounds that such an approach "ignores the reality that merger analysis is inherently fact-specific."[14] The Commission appears especially concerned that a GUPPI-based safe harbor might result in a false negative – that is, it is possible that a merger with a GUPPI less than 5 percent harms competition. This objection to safe harbors and bright-line rules and presumptions is both conceptually misguided and is in significant tension with antitrust doctrine and agency practice. Merger analysis is, of course, inherently fact specific. One can accept that reality, as well as the reality that evidence is both imperfect and can be costly to obtain, and yet still conclude that the optimal legal test from a consumer welfare perspective is a rule rather than a standard. This is a basic insight of decision theory, which provides a lens through which economists and legal scholars have long evaluated antitrust legal rules, burdens, and presumptions.[15] The Commission's assertion that the mere

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[14] Majority Statement, *supra* note 7, at 3.

[15] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974);

possibility of false negatives undermines in the slightest the case for a safe harbor reveals a misunderstanding of the economic analysis of legal rules. The relevant question is not which legal rule drives false positives or false negatives to zero, but rather which legal rule minimizes the sum of the welfare costs associated with false negatives, false positives, and the costs of obtaining evidence and otherwise administering the law.

Existing antitrust law regularly embraces bright-line rules and presumptions – rejecting the flexibility of a case-by-case standard taking full account of facts that vary across industries and firms. A simple example is the application of *per se* rules in price-fixing cases.[16] This presumption of illegality is not based upon a belief that it is impossible for a horizontal restraint among competitors to increase welfare. Rather, the *per se* prohibition on naked price fixing "reflects a judgment that the costs of identifying exceptions to the general rule so far outweigh the costs of occasionally condemning conduct that might upon further inspection prove to be acceptable, that it is preferable not to entertain defenses to the conduct at all."[17] Similar

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David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 27 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

[16] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on . . . whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.").

[17] Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 104-05 (2d ed. 2008); *see* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or

decision-theoretic logic explains, for example, the presumption that above-cost prices are lawful.[18] A GUPPI-based presumption would be based upon the same economic logic – not that small-GUPPI mergers can *never* result in anticompetitive effects, but rather that mergers involving small GUPPIs are sufficiently unlikely to result in unilateral price increases such that incurring the costs of identifying exceptions to the safe harbor is less efficient than simply allowing mergers within the safe harbor to move forward.[19]

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vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding the administrative virtues of simplicity outweigh the occasional 'economic' loss."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 50 (2005) ("[N]ot every anticompetitive practice can be condemned."); Thomas A. Lambert, Book Review, *Tweaking Antitrust's Business Model*, 85 TEX. L. REV. 153, 172 (2006) ("Hovenkamp's discussion of predatory and limit pricing reflects a key theme that runs throughout *The Antitrust Enterprise*: that antitrust rules should be easily administrable, even if that means they must permit some anticompetitive practices to go unpunished.").

[18] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993); *see also Barry Wright Corp.*, 724 F.2d at 234 ("Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. . . . [A] price cut that ends up with a price exceeding total cost—in all likelihood a cut made by a firm with market power—is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.' To do so opens the door to similar speculative claims that might seek to legitimate even the most settled unlawful practices.").

[19] The Commission asserts that a GUPPI safe harbor cannot be justified by economic theory and evidence unless a presumption of liability can also be supported. I appreciate the Commission clarifying its view, but I believe it to be based upon a false equivalence. The Commission appears to misunderstand the difference between evidence sufficient to conclude harm is *likely* and evidence sufficient to conclude harm is *unlikely*. These are two very different economic propositions and it should not be surprising that one might be substantiated while the other is not. For example, one might rationally be uncomfortable pointing to the economic literature for support that mergers above a certain level of concentration are sufficiently likely to harm competition to support a presumption of antitrust liability, but also recognize the same body of economic theory and evidence would indeed support a safe harbor for mergers involving markets with thousands of competitors. To the extent the Commission appeals to academics who have raised concerns with GUPPI-based merger screens, my view clearly differs from the

Whether the Commission should adopt a GUPPI-based safe harbor is particularly relevant in the instant matter, as the FTC had data sufficient to calculate GUPPIs for Dollar Tree, Deals,[20] and Family Dollar stores. The sheer number of stores owned and operated by the parties rendered individualized, in-depth analysis of the competitive nuances of each and every market difficult, if not impossible, to conduct. GUPPI calculations provided an efficient and workable alternative to identifying the small fraction of markets in which the transaction may be anticompetitive. This was a tremendous amount of work and I want to commend staff on taking this approach. Staff identified a GUPPI threshold such that stores with GUPPIs greater than the threshold were identified for divestiture. About half of the 330 stores divested as part of the Commission's Order were identified through this process.

What about the other stores? The Commission asserts I "mischaracterize[]" its use of GUPPIs and that "GUPPIs were not used as a rigid presumption of harm."[21] It claims that GUPPIs were used only as "an initial screen" to identify markets for further analysis, and that the Commission "proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information."[22] The evidence suggests otherwise. One might reasonably hypothesize that further consideration and analysis of "numerous sources of information" should result in both the identification of some stores *above* the GUPPI threshold

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Commission. The Commission's more important dispute, in my view, is with the *Merger Guidelines* and its principal drafters, who clearly contemplated such a safe harbor.

[20] Deals is a separate banner under which Dollar Tree operates. *See* Majority Statement, *supra* note 7, at 1.

[21] *Id.* at 2.

[22] *Id.*

that were ultimately determined unlikely to harm competition as well as some stores with GUPPIs *below* the threshold that nonetheless did create competitive problems – that is, further scrutiny might reveal both false negatives and false positives.

The number of stores with GUPPIs exceeding the identified threshold that, after evaluation in conjunction with the qualitative and other evidence described by the Commission, were not slated for divestiture is nearly zero. This outcome is indistinguishable from the application of a presumption of competitive harm. The additional stores with GUPPIs below the threshold that were then identified for divestiture based upon additional qualitative factors included a significant number of stores with GUPPIs below 5 percent. The ratio of stores falling below the GUPPI threshold but deemed problematic after further qualitative evidence is taken into account to stores with GUPPIs above the threshold but deemed not to raise competitive problems after qualitative evidence is accounted for is unusual and remarkably high. It is difficult to conceive of a distribution of qualitative and other evidence occurring in real-world markets that would result in this ratio. Qualitative evidence should not be a one-way ratchet confirming the Commission's conclusion of likely anticompetitive effects when GUPPIs are high and providing an independent basis for the same conclusion when GUPPIs are low.

I applaud the FTC for taking important initial steps in applying more sophisticated economic tools in conducting merger analysis where the data are available to do so. Scoring metrics for evaluating incentives for unilateral price increases are no doubt a significant improvement over simply counting the number of firms in markets pre- and post-transaction. To be clear, it bears repeating that I agree that a GUPPI-based presumption of *competitive harm* is inappropriate at this stage of economic learning.[23] There is no empirical evidence to support the use of GUPPI calculations in merger analysis on a standalone basis, let alone the use of a particular GUPPI threshold to predict whether a transaction is likely to substantially harm competition.[24] I also agree that in the context of a full-scale evaluation of whether a proposed transaction is likely to harm competition, GUPPI-based analysis can and should be interpreted in conjunction with all other available quantitative and qualitative evidence. The relevant policy question is a narrow one: whether there exists a GUPPI threshold below which the Commission should presumptively conclude a proposed transaction is unlikely to violate the antitrust laws.

The FTC has not publicly endorsed a GUPPI-based safe harbor of 5 percent and disappointingly, has rejected the concept in its statement today. The Commission's

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[23] Joseph J. Simons & Malcolm B. Coate, *Upward Pressure on Price Analysis: Issues and Implications for Merger Policy*, 6 EUR. COMPETITION J. 377, 389 (2010) (the upward pricing pressure screen "identifies as potentially problematic far more mergers than would be challenged or even investigated under the enforcement standards that have existed for more than twenty years"); Lambert, *supra* note 8, at 13 ("In the end, the agencies' reliance on the difficult-to-administer, empirically unverified, and inherently biased GUPPI is likely to generate many false condemnations of mergers that are, on the whole, beneficial.").

[24] *See* Dennis W. Carlton, *Revising the Horizontal Merger Guidelines*, 10 J. COMPETITION L. & ECON. 1, 7 (2010) ("Perhaps most importantly, UPP [as described in the 2010 *Merger Guidelines*] is new and little empirical analysis has been performed to validate its predictive value in assessing the competitive effects of mergers."); Keyte & Schwartz, *supra* note 11, at 590 (discussing the 2010 *Merger Guidelines*' inclusion of the GUPPI and opining that "in light of the [its] extremely light judicial record, as well as the absence of demonstrated reliability in predicting real-world competitive effects, we think it is premature, at best, to embrace [it] as a screening tool for merger review"); Simons & Coate, *supra* note 23 ("Because screening mechanisms [such as the GUPPI] purport to highlight general results, they need empirical support to show the methodology actually predicts concerns relatively well. This empirical support is not available at this time."); Lambert, *supra* note 8, at 13 (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers").

interpretation is that what is a "proportionately small" value of diverted sales should vary according to the industry – and even the individual firms – in a given investigation.[25] As discussed, I believe this interpretation contradicts the letter and spirit of the *Merger Guidelines*.[26] Moreover, the Commission's apparent discomfort with safe harbors on the grounds that they are not sufficiently flexible to take into account the fact-intensive nature of antitrust analysis in any specific matter is difficult to reconcile with its ready acceptance of presumptions and bright-line rules that trigger *liability*.[27]

Once it is understood that a safe harbor should apply, it becomes obvious that, for the safe harbor to be effective, the threshold should not move. As the plane crash survivors in

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[25] Majority Statement, *supra* note 7, at 3.

[26] *See supra* text accompanying note 12.

[27] For example, the Commission regularly applies such presumptions of liability involving the number of firms in a market, or presumptions based upon increased market concentration as articulated by the *Merger Guidelines* or the courts. *See, e.g.*, Statement of the Federal Trade Commission, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015) (finding liability based upon, alternatively, changes in concentration and number of firms pre- and post-merger); Statement of the Federal Trade Commission, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (finding liability based upon number of firms pre- and post-merger); Mem. in Supp. of Pl. Federal Trade Commission's Mot. for T.R.O. and Prelim. Inj. at 23, FTC, v. Sysco Corp., 2015 WL 1501608, No. 1:15-cv-00256 (D.D.C. 2015) (arguing that the proposed merger was presumptively unlawful based upon the holding of United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963)). That the Commission's tolerance of presumptions that that satisfy its own *prima facie* burden does not extend to safe harbors raises basic questions about the symmetry of the burdens applied in its antitrust analysis. *See* Dissenting Statement of Commissioner Joshua D. Wright 6, Ardagh Group S.A., FTC File No. 131-0087 (June 18, 2014) ("[S]ymmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.").

LOST can attest, a harbor on an island that cannot be found and that can be moved at will is hardly "safe."[28]

In my view, the Commission should adopt a GUPPI-based safe harbor in unilateral effects investigations where data are available. While reasonable minds can and should debate the optimal definition of a "small" GUPPI, my own view is that 5 percent is a reasonable starting point for discussion. Furthermore, failure to adopt a safe harbor could raise concerns about the potential for divergence between Commission and Division policy in unilateral effects merger investigations.[29] What would be most problematic, however, is if, rather than moving toward a GUPPI-based safe harbor, the FTC were to use GUPPI thresholds to employ a presumption of competitive harm.[30]

For these reasons, I dissent in part from and concur in part with the Commission's decision.

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[28] Move the Island, *LOST – Move the Island,* YOUTUBE (Nov. 17, 2008), https://www.youtube.com/watch?v=Fa57rVkLal4.

[29] I do not take a position as to how the Division currently uses the GUPPI analysis. *But see* Majority Statement, *supra* note 7, at 4 n.12. However, public statements by the Division and the Commission – the only sources upon which business firms and the antitrust bar can rely – suggest there are material differences. *Compare id.* at 3 ("[W]hether the value of diverted sales is considered 'proportionately small' compared to lost revenues will vary from industry to industry and firm to firm.") *with* Shapiro, *supra* note 3, at 24 ("Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues.").

[30] A GUPPI-based safe harbor of the type endorsed by the *Merger Guidelines* implies a GUPPI above the threshold is necessary but not sufficient for liability. A GUPPI-based presumption of harm implies a GUPPI above the threshold is sufficient but not necessary for liability. Unfortunately, the use of GUPPIs here is more consistent with the latter than the former.