SUPERMARKET MERGER INVESTIGATIONS AND REMEDIES

Food Marketing Institute
Submission to the Federal Trade Commission
Workshops On Merger Investigations And Remedies

June 18, 2002

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Food Marketing Institute (FMI) appreciates this opportunity to provide comments to the Commission workshops on merger investigations and remedies. FMI is an international nonprofit association conducting programs in research, education, industry relations and public affairs on behalf of its 2,500 members – food retailers and wholesalers in the United States and 60 other countries. FMI's domestic member companies operate approximately 25,000 retail food stores accounting for nearly three-quarters of all grocery sales in the United States. FMI's membership ranges from the largest global companies to single-store family supermarkets.

FMI members have substantial experience with the Commission's merger investigation process. In recent years, a number of FMI members have been involved in merger investigations as parties. Many FMI members also have been required to provide information to the Commission in merger investigations involving their competitors. In addition, many FMI members have become familiar with the Commission's preferences and practices regarding supermarket divestitures, either as sellers of stores that were required to be divested or as buyers (or would-be buyers) of such stores. These experiences, it should be noted, are not limited to the largest supermarket chains. The Commission's policies and practices regarding merger investigations and remedies have direct impact on FMI members of all sizes, including single-store independents, local chains, regional chains, and multi-regional chains. FMI's wholesaler members also have had substantial involvement with merger investigations and remedies, frequently as buyers (or would-be buyers) of stores that were being divested. The comments set forth below reflect the cumulative experience of a broad cross-section of FMI members, from the smallest to the largest, and including wholesalers.

I. SUPERMARKET SECOND REQUESTS SHOULD BE PRUNED

The staff is well aware of the potential costs and delays associated with the Second Request process, and there is no need to repeat what has been said elsewhere on this general topic. Rather, FMI takes this opportunity to highlight some of the troublesome features of supermarket Second Requests.

Portions of a recent supermarket Second Request are attached to these comments. Over the years, supermarket Second Requests have grown by accretion. It seems that each year new requests and subparts are added, but none are dropped. The trend towards more, and more burdensome, data and document requests accelerated after *Staples/Office Depot* and the rise of unilateral effects analysis. The addition of new language in the *Merger Guidelines* on efficiencies also apparently triggered the addition of new document and information requests.

Unquestionably, many of the document and data requests that have become standard in supermarket Second Requests are reasonably calculated to obtain information that is necessary for the staff to assess a transaction's competitive effects. Some standard specifications, however, needlessly increase the cost and length of an investigation. These specifications should be pruned.

In a disconcerting number of instances, when the staff is asked: "Why do you want this information?," the response is something along the lines of: "I don't know; someone in BE must think it is important." Other specifications have been justified by the argument that "a company once raised such-and-such as an argument, and the staff must be ready in case that argument comes up in this matter. We will drop this specification if you will stipulate, at the outset, that this argument will not be raised." Clearly, the staff must be able to obtain the documents and information that are necessary to assess a transaction's competitive consequences, but Second Requests should not be used as fishing licenses by economists, and a sense of proportionality should temper the staff's desire to protect the Commission against every conceivable issue that might come up in the investigation or in subsequent litigation.

The routine use of a bloated supermarket Second Request can have carryover effects when the Commission investigates sub-HSR transactions. Once an over-broad Second Request becomes the template, the staff's tendency is to use it in all situations. Many of the most burdensome specifications from the standard supermarket Second Request have been deployed in Civil Investigative Demands in sub-HSR investigations.

To be sure, the staff often is willing to drop, modify, or defer certain specifications. Usually, however, the burden is put on the responding party to show why the specification is unduly burdensome and/or unlikely to result in useful information, and some staff members have unreasonably high standards of proof. Moreover, as previously noted, the staff sometimes is willing to relieve parties from tangential yet burdensome specifications only if they are willing to stipulate that certain substantive arguments will not be raised. The staff has a legitimate interest, of course, in preventing parties from "sandbagging" the Commission, and parties cannot expect to be allowed to withhold the very documents and information the staff needs to test their arguments. It is not appropriate, though, for the staff routinely to load-up Second Requests with specifications that deal with secondary or tertiary issues, in order to use such specifications as levers to extract substantive concessions (or time extensions) from the parties.

When a supermarket Second Request issues, the parties and the staff may spend weeks in back-and-forth negotiations, when much of this time could be better spent identifying and addressing the substantive issues, if any, that are raised by the transaction. The staff should reexamine the standard-issue supermarket Second Request, and eliminate or pare unnecessary specifications. This would enable the staff and parties in future transactions to come to grips more quickly with the substance of the matter.

Among the specifications that should be reexamined are the following:[1]

Store-level data: Specification 2 is the main store-level data specification in a supermarket Second Request. Over the years it has grown steadily in complexity and now contains multiple subparts. This is among the most burdensome specifications in a supermarket Second Request, and is a frequent source of disagreements and compliance controversies between parties and the staff. Part of the problem may be that the staff over-estimates the extent to which companies maintain the requested information in electronic form. Certain categories of data, such as weekly sales, typically are available in electronic form even at small retailers. In many cases, however, the information that is requested in specification 2 either is not kept in electronic form, or is kept in a manner that does not correspond to the staff's specifications. Efforts significantly to limit or modify specification 2 through negotiations with the staff often are fruitless. The staff has refused, for example, to allow parties to provide requested information in the form of documents or databases that are kept in the ordinary course of business. As a result, parties often are required to spend considerable time and money finding and organizing data, performing calculations, and formatting the results in the machine-readable form specified by the staff.

Some of the subparts of specification 2 are quite burdensome but have little utility. For example:

- Specification 2(b) requires a party to provide a 5" by 7" color photograph of the front of each of each of its stores and also provide a photo of "the Supermarket in its shopping center or other immediate surroundings." Another specification (3(c)) in the attached example) requires the company to provide color photographs of all competing retail stores, not limited to

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1 This discussion highlights several of the most problematic specifications. It is not intended as a complete discussion of the problems and issues that may arise.

supermarkets. In a large merger, this can amount to thousands of photographs. The burden of generating these photos would appear to far outweigh any usefulness they may have to the Commission.

- In specification 2(d), the company is required to state when it “first considered” opening each supermarket at its current location and when it “first considered opening any Supermarket in or near the same city, town, or other political subdivision.” Such information is rarely, if ever, maintained in machine-readable form and extensive research through archived real estate files may be required to formulate a response. While this question may be relevant to the issue of entry, it is unnecessary given the extensive and detailed entry interrogatories that appear later in the Second Request.

- Specification 2(g) requires data on the number of stock-keeping units (SKUs) by store (with and without the pharmacy) and by department. Many retailers do not stock exactly the same SKUs in all of their stores, and many do not maintain this information in machine-readable form, broken down by department. Thus, extensive tabulation and cross-checking may be required to respond to this request as written. General ranges or averages should be enough.

- Specification 2(h) asks for the number of customer parking spaces in each store’s parking lot, while specification 2(I) asks for the number of check-out lanes in each store. If a company has such information, it often must be extracted from documents or databases, and then put in machine-readable form, as requested by the staff. The burden of collecting and formatting this information likely far outweighs its utility to the Commission.

- Specification 2(l) requires gross margin and net margin data by store and by department (as defined by the staff). Again, such information may not be available in machine-readable form. Time-consuming calculations and formatting work often are required to comply with this request.

- Specification 2(o) requires the company to create a detailed database of information about lease terms, options, etc. Usually, such information must be collected from a number of source documents or databases, then formatted in machine-readable form. Parties should be allowed to respond to this request by providing ordinary course of business documents, such as lease abstracts or summaries, if the information is not readily available in electronic form.

- Specification 2(p) requires creation of a database regarding store revenues, hourly wages, hours, non-wage compensation, salaried compensation, utility costs, advertising costs, and local taxes. Creating such a database where one does not already exist can be very burdensome.

- Finally, specification 2(r) is a catch-all that requires submission of "all Documents relating to the condition, marketability, and viability" of each store. This is an extraordinarily broad and open-ended request. Countless categories of documents could be responsive, from a store manager's request to fix a balky door to an invoice for patching a hole in a store's roof.

Maps: The map specifications in supermarket Second Requests have grown to enormous proportions. While some supermarket operators have sophisticated mapping capabilities, the Commission's requests can overwhelm even the largest firm. The standard supermarket Second Request requires parties to create no fewer than six sets of store maps, including multiple maps for each store, in addition to providing preexisting maps.

- Specification 3(a) requires creation of trade area or "draw" maps for each store, showing the locations of all other supermarkets that are within the store's trade area.

- 3(c) requires creation of another set of maps, showing each retail store (not limited to supermarkets) "that the Company contends competes for any significant portion of the Company Supermarket's sales." For each competing store, moreover, the company is required to provide multiple pieces of information, on everything from the age of the facility to the SKU overlap with the company's store. The company also is required to provide color photographs of each supermarket or other retail store it identifies as a competitor.

- 3(e) requires the company to create, for each store, a trade area map that shows demographic information, including total population, population density, and income levels.

- Specification 4(a) requires the company to create larger maps of each Relevant Area as defined in the Second Request (typically an MSA or county), showing the locations of all supermarkets. Specification 4(c) requires yet another set of Relevant Area maps, showing all retail stores (not limited to supermarkets) that the company contends compete for any significant portion of the company's supermarket sales.

- Finally, specification 4(e) requires the company to create Relevant Area maps displaying demographic information, including total population, population density, and income levels.

The time and costs involved in preparing and printing such maps can be great. There was a time when it was sufficient to provide an overall market map showing the locations of all grocery outlets in the affected area. Now, however, multiple, detailed maps must be created for *each store*. To create such maps involves more than simply plugging store addresses into a software program. A substantial effort often is required to obtain precise street addresses, latitudes and longitudes for all competing outlets. The process of formatting and producing usable maps is highly labor-intensive. Moreover, the staff has taken the position that if parties do not have the information required to produce maps in the specified format, they must buy it. The staff has even required parties that already have latitude and longitude data going to four decimal places to purchase data going to *six* decimal places. Rarely, moreover, is it sufficient for the company to generate a single set of maps. Multiple sets usually are requested by the staffs of the Bureau of Competition and Bureau of Economics. If state attorneys general are involved in the investigation, they expect to receive maps as well.

Without question, maps play an important role in supermarket merger analysis, but the demands on merging parties have become unreasonably burdensome. The staff has the means – the mapping software, plotters, and know-how – to make maps equivalent to those the parties are required to create. Instead of requiring the parties to make multiple variations on market and trade area maps, the staff should obtain from the parties whatever relevant data (*e.g.,* competitor store addresses, customer spotting data) they maintain in the ordinary course of business, and use this information to create their own maps. In many cases, of course, the parties will conclude it is in their interest to create and provide various maps, but this should be an option, not a requirement.

Price data: Specification 19 in the attached example began appearing in supermarket Second Requests several years ago. This specification can be very burdensome for merging parties and has been a frequent source of compliance disputes. Moreover, it appears the staff rarely, if ever, obtains useful data in response to this specification.

For each supermarket owned or operated by the company, the company is required to provide the retail shelf price that was charged by the company *and each of its competitors* for more than 60 identified products, on each Friday over a multi-year period. The data must be provided in an electronic format pre-approved by the staff.

The data requested by this specification often is not maintained by firms in readily accessible, machine-readable form. Laborious manual research and data-inputting often is required to comply with this request. In many cases, moreover, much of the requested data either is unavailable or cannot be assembled without extraordinary effort, resulting in extensive and sometimes contentious discussions between the parties and the staff regarding what can and cannot be provided.

The price data specification has been omitted from some recent supermarket Second Requests. It is hoped this signals the staff's conclusion that the potential benefits of this request are far outweighed by the burdens and costs.

Efficiencies: This is another area where the number and complexity of the interrogatories has grown in recent years. The proliferation of efficiency interrogatories is consistent with what some have seen as a "scorched earth" attitude towards efficiency claims on the part of the staff. This is not the place to debate the proper standard of proof for efficiency claims. Two burden issues, however, require mention.

Several years ago, the staff began propounding an interrogatory and document request that requires the parties to identify and describe, and provide all documents relating to, every plan by the company relating to any *non-merger specific* cost savings, production increases, synergies or efficiencies. This is a broad and vague request. The response could encompass a wide range of plans and actions; *e.g.*, putting a new refrigeration unit in one of the stores, plowing the parking lots less frequently in winter (to save money), plowing the parking lots more frequently (to improve customer satisfaction), or training store-level employees to be friendlier. Supermarket operators engage in limitless activities that are intended to reduce costs and/or increase production or efficiency. The apparent goal of this interrogatory is to elicit information undermining claims of merger-specific efficiencies, but it is doubtful such a broadly-framed request achieves that result, and in any case the standard efficiency interrogatory already contains a subpart asking about alternatives to the acquisition for achieving any claimed efficiencies.

Another specification requires the company to provide detailed descriptions of "each efficiency (including cost savings, new product or service introductions, and product or service improvements)" derived from each of the company's prior acquisitions of one or more supermarkets. The response must include, among other things, "the proportion of the dollar value of the efficiency that the Company passed on to consumers and the manner and form (*e.g.*, lower prices, better service) in which the Company passed on the efficiency." It may be reasonable to require production of any preexisting studies or analyses a company has in its files regarding the efficiencies it achieved as a result of prior acquisitions. It is not reasonable, though, to require a company to undertake a full-blown retrospective efficiency study of every prior acquisition, from single-store acquisitions on up, in order to respond to a Second Request.

II. THE COMMISSION SHOULD RECONSIDER ITS POLICIES AND PRACTICES REGARDING SUPERMARKET DIVESTITURES

Since approximately 1996, the Commission has applied increasingly rigorous policies to supermarket divestitures. Although the staff generally describes these policies as "preferences," they often have been interpreted and applied in the manner of inflexible *rules*. The most significant of these policies are:

- "Up front buyers" are required for divested stores.
- Respondents must divest sufficient assets to result in no change in market concentration ("zero delta").

- Respondents must divest all of one firm's stores or all of the other firm's stores ("all of A or all of B").

- All stores being divested in a particular market must be divested to a single buyer.

The staff recently published a description of the Commission's policies regarding merger consent orders, *Frequently Asked Questions About Merger Consent Order Provisions* ("Consent Order FAQs"). The *Consent Order FAQs* are helpful. They bring together in one place important policies and guidance which, until now, had resided in scattered sources. Nevertheless, the *Consent Order FAQs* provide an incomplete description of the Commission's actual policies and practices regarding supermarket divestitures. Some of those policies and practices should be reconsidered. We identify them below, with particular emphasis on policies and practices that make it harder for independents and small chains to acquire divested stores. Before addressing the Commission's current policies and practices, it is useful to review the evolution of the Commission's approach to supermarket divestitures.

A. The Commission's Ever-Tightening Approach To Supermarket Divestitures

1. The Pre-1996 Approach

Before 1996, supermarket consent orders contained certain standard features:

- The order identified the stores that were to be divested. In some cases, alternative divestiture stores were identified, and the respondent was allowed to choose which one it would divest.

- Divestitures were required to be made to Commission-approved buyers within a fixed time, typically 12 months.

- A trustee could be appointed to accomplish the divestitures if the respondent failed to carry out its obligations.

- Respondents entered an asset maintenance agreement, whereby they agreed to maintain the competitiveness, viability, and marketability of the stores pending divestiture. In a few cases, hold separate provisions were used to prevent buyers from scrambling the acquired stores with their existing stores.

In determining which stores were to be divested, the staff considered a variety of factors, including: the structure of the market; the relative locations of the parties' stores; the sizes, ages, features, sales and profitability of the stores; and any other aspects of the market that might provide grounds for requiring more or fewer divestitures, such as anticipated or ongoing entry or expansion by competitors. The staff was not at an information disadvantage as it conducted this assessment. Consent order negotiations typically took place after the merging parties complied partially or fully with Second Requests, and even when that was not the case, the staff typically insisted on obtaining detailed information regarding sales, profitability, and other factors that might affect the condition, marketability, and viability of the parties' stores.

2. 1996-1998 Approach: Up Front Buyers "Preferred"

The approach just described prevailed until 1996, when the staff announced a new approach in a series of speeches. The 1996 approach stemmed, in part, from several supermarket cases in which the Commission alleged that respondents disregarded their divestiture obligations or failed adequately to maintain stores that were required to be divested.[2] The policy announced in 1996 had several features:[3]

- Respondents no longer were given 12 months to complete divestitures. In retail industries, a four-month divestiture henceforth would be the norm.
- The staff expressed a "preference" for up front buyers. The staff explained that it would be to the acquiring company's benefit to come forward with an up front buyer. An up front buyer was said to be "particularly valuable when the

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2 Prominent among them were the *Promodes*, *Furr's*, and *Schnucks* matters (Promodes, S.A., 113 F.T.C. 372 (1990); Supermarket Development Corp., 110 F.T.C. 369 (1988); Schnuck Markets, Inc., 119 F.T.C. 798 (1995). There were also problems with several drug store divestitures.

3 *See, e.g.,* William J. Baer, Director, Bureau of Competition, Federal Trade Commission, *Reflections On 20 Years Of Merger Enforcement Under The Hart-Scott-Rodino Act,"* before The Conference Board, Oct. 29, 1996; William J. Baer, Director, Bureau of Competition, Federal Trade Commission, *Report From The Bureau Of Competition,* before the American Bar Association Section of Antitrust Law Spring Meeting, Apr. 9-10 (1997).

> Bureau and the parties disagree on the size of the divestiture package. A knowledgeable buyer identified up-front can alleviate concerns about the sufficiency of a divestiture package."[4]

3. Post-1998 Approach: Up Front Buyers Mandatory; "All Of A Or All Of B"

By 1998, however, the staff had begun telling counsel for merging supermarkets that the policies announced in 1996 no longer were operative, and was applying a stricter approach. Under the 1998 approach:

- Up front buyers were mandatory, whereas previously they had been "preferred."
- The HHI thresholds in the *Merger Guidelines* were treated as absolute legal standards, rather than guidelines.
- In geographic markets where the staff identified a *Guidelines* "violation," all of one firm's stores had to be divested, to a single buyer. These have been referred to as the "zero delta" and "all of A or all of B" policies. The term "clean sweep" also has been used.

An explanation for the new approach came in a March 1998 interview with the Assistant Director and Deputy Assistant Director of the staff responsible for investigating supermarket mergers:

> [Q]: Is the analysis as to what would be an appropriate divestiture different in a retail case than in other cases?
>
> [A}: The analysis is – in broad terms – the same. I mean – we identify a problem and then we try to determine whether or not what's being proposed will fix the problem . . . . Let's take the example of grocery stores in a market. You've got a firm that has five stores in a market, you've got one that's got four stores in a market and you want to fix that market. What we're going to try to do is to make sure that either all of one chain or all of the other are divested. That does a couple of things. Number one, it gets us out of the task of trying to do due diligence on each store where they

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[4] Baer, *Reflections On 20 Years Of Merger Enforcement Under The Hart-Scott-Rodino Act,* at 15. Baer reemphasized this point in 1997, saying that an up front buyer "greatly increases our confidence that the divestiture package will be sufficient to be viable and restore competition. *If the package is not sufficient to be viable, prospective buyers presumably would raise that concern.*" Baer, *Report From The Bureau Of Competition, supra* n.2, at 11 (emphasis added).

> want to pick and choose to make sure that we're not getting dog stores. Secondly, it also gives us a greater confidence that those stores, which had existed and competed in that market, can do so both in terms of the geographic location within the market and in terms of the distribution system that has been set up to supply them in the customer pattern. It's different in that respect.[5]

Thus, the "all of A or all of B" policy initially was justified in part on grounds of administrative convenience and in part by the argument that an "unmixed" package of stores was likely to perform better than a "mixed" package, no matter what the buyer might think.

What was described in 1998 as a clean and predictable approach to supermarket divestitures has since become *ad hoc* and unpredictable. For example, for a time after the "all of A or all of B" policy was put in place in 1998, the staff told counsel for supermarket companies that their clients were free to "trade up," as long as they divested all of one firm's stores in the market. In other words, the acquiring firm could divest its stores in the market and keep the acquired company's stores. But this supposed benefit of the "all of A or all of B" policy vanished in 2000, when the staff recommended challenging Ahold's proposed acquisition of Pathmark. Reportedly, Ahold offered to divest all of its "Edwards" stores in the affected markets, but the staff refused to accept this trade-up settlement, arguing that the Edwards stores would be less competitive once they were removed from the Ahold corporate umbrella. Since the *Ahold/Pathmark* matter, some members of the staff have told counsel that "trade ups" are not and have never been allowed, or are allowed only in "exceptional" circumstances.

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5 American Bar Association Section of Antitrust Law, Committee On The Federal Trade Commission, Interviews With Phillip L. Broyles, Assistant Director, and Richard Liebeskind, Deputy Assistant Director, Bureau of Competition, Mar. 27, 1998, transcript at 28 (answer by Mr. Broyles).

B. The Commission Should Revise Several Of Its Supermarket Divestiture Policies

Several of the Commission's supermarket divestiture policies rest on weak foundations and should be reevaluated. Even if the Commission decides to keep these policies, they should be treated as preferences and not rules, and they should be applied with flexibility and transparency.

1. Up Front Buyers Should Not Be Mandatory

In 1996, when the staff announced a *preference* for up front buyers, the advantages to respondents of identifying a buyer up front were stressed: "Where a respondent confidently asserts that a more limited divestiture package will both resolve our competitive concerns and be saleable, it can put its money where its mouth is by bringing us the buyer to evaluate in conjunction with the Commission's initial consideration of the settlement."[6] Since then, however, this rationale has disappeared in supermarket mergers and counsel have been informed that up front buyers are mandatory.

The hardening of the Commission's policy coincided with the Bureau of Competition's *Study of the Commission's Divestiture Process (Divestiture Study)*, which was issued in August 1999. The *Divestiture Study* examined 35 consent orders that were proposed and/or finalized between 1990 and 1994. It found that the majority of consent orders were successful, but it also identified a number of issues and problems requiring further attention. Notwithstanding the *Divestiture Study's* generally positive assessment of divestitures during the period studied, even before it was published the *Divestiture Study* was being cited by the staff as justification for an increasingly rigid set of policies, especially for supermarket mergers.

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[6] William J. Baer, Director, Bureau of Competition, Federal Trade Commission, *Report From The Bureau Of Competition: Looking Back And Going Forward,* before the American Bar Association Section of Antitrust Law Spring Meeting, Mar. 28, 1996, at 14.

The results of the *Divestiture Study* have been over-extrapolated. The sample size was small, and the staff apparently limited the interviews to buyers, who could be expected to complain about purported information disadvantages and lack of negotiating leverage.[7] Moreover, while the *Divestiture Study* was never intended to be a surrogate rulemaking record, it took on that character for some members of the staff.

The staff's insistence on up front buyers for supermarkets is often traced to the 1995 *Schnucks* case. In *Schnucks*, a supermarket operator was given 12 months to divest 24 supermarkets in St. Louis to a Commission-approved buyer. The divestitures ultimately were accomplished, but Schnucks allegedly violated its asset maintenance obligations, causing the stores to deteriorate and lose business and, according to the Commission, undermining their viability and competitiveness. Schnucks paid $3 million to settle the Commission's claims of consent order violations, a then-record penalty.

The staff often cites *Schnucks* for the "lesson" that up front buyers must be required in supermarket mergers. The facts, however, were more ambiguous than the staff suggests and lend themselves to different conclusions. The purchaser of the divested Schnucks stores, and the alleged victim of the company's failure to maintain the assets, was a gentleman named James Gibson. Gibson was new to the supermarket business, but he had amassed impressive wealth in other businesses. After Schnucks settled the compliance investigation with the Commission, Gibson took Schnucks to arbitration, piggybacking on the allegations and evidence developed by the FTC staff. After a full trial-type proceeding, Gibson lost on all counts and reportedly was ordered to pay $1.3 million of Schnucks' attorneys fees.[8] He soon threw the acquired stores into bankruptcy and fled the country. After several years living aboard a luxury

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7 The methodological shortcomings of the *Divestiture Study* are well summarized in Ilene K. Gotts, *The FTC's New Divestiture Policy: One Size Fits Most?*, Antitrust, May 2000, at 29.

8 *Schnucks Awarded $1.3 Million From National Markets' Owner*, St. Louis Post-Dispatch, July 26, 1999.

yacht in the tropics, Gibson was apprehended and returned to the U.S. to face fraud charges.[9] Gibson is now serving time in a federal prison, after pleading guilty to defrauding clients of his investment consulting service. According to prosecutors, Gibson had purchased the divested supermarkets using money he was supposed to be investing for his clients, some of whom were, literally, widows and orphans.[10] Thus, the *Schnucks* case may say more about the importance of carefully scrutinizing the experience of proposed buyers, and their sources of financing, than it does about the necessity for up front buyers.

The up front buyer requirement should be revisited for another reason: landlord consents often are required before store leases can be assigned, and there have been instances when landlords, recognizing that their consent was the only thing holding up the underlying merger, engaged in conduct verging on extortion. The *Consent Order FAQs* offer little constructive guidance on this problem. They say that "[I]f third-party rights might make it impossible for respondents to divest to an acceptable acquirer, then respondents must deal with that issue, perhaps by divesting different assets. The Commission may insist that respondents do whatever it takes to make the agreed-to divestiture occur." In practice, the staff generally has been unsympathetic to respondents who were being held up by landlords and has not allowed them to divest substitute stores. A rigid up front buyer policy encourages unreasonable conduct by landlords, because they have the respondent over a barrel. A more flexible approach might make landlords less bold by decreasing their leverage.

Up front buyers can serve several useful purposes, but they should not be required in all cases. As originally envisioned, up front buyers were a way to resolve

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9 *More Than 150 Angry Clients Want To Know: Where Is James Gibson? They Blame The Businessman For Losing Millions. He Was Last Seen In Belize,* St. Louis Post-Dispatch, Oct. 2, 2000.

10 *Gibson Pleads Guilty To Fraud,* St. Louis Post-Dispatch, Jan. 8, 2002.

uncertainties regarding the adequacy of the package of assets being offered and the existence of qualified buyers. Thus, it might be appropriate for the staff to require an up front buyer when a respondent is proposing to divest something less than all of one firm's assets in the market, or when a respondent proposes divesting a mixed package of stores. In such situations, the original "put your money where your mouth is" rationale may come into play.[11] But there is no basis for an inflexible rule. Short divestiture periods, together with clear asset maintenance obligations, should be sufficient for many supermarket divestitures, as they are for many divestitures in other industries.

2. The "Zero Delta" Policy Should Be Relaxed And Divestitures To In-Market Firms Should Be Permitted

The *Consent Order FAQs* state that the Commission does not always insist on zero change in concentration. They also indicate that divestitures to firms that are already operating in the relevant product and geographic markets are permitted in appropriate circumstances. If, going forward, these policies are applied in the context of supermarket divestitures, it would be a welcome development, because in recent years the staff has insisted on a "zero delta" in supermarket divestitures and has discouraged divestitures to in-market firms. These practices have been inconsistent with the *Merger Guidelines* and have thwarted attempts by small firms to grow by acquiring divested stores.

Over the past several years, the requirement that respondents achieve zero change in HHI by divesting "all of A or all of B" has led the staff to reject proposed divestitures that would have resulted in market structures which, viewed as independent transactions, would not have been grounds for challenge under the *Merger Guidelines*. For example, in a merger between a firm with three stores in a market and a firm with

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11 Baer, *supra* n.5, at 14.

two stores in a market, the staff has not allowed a respondent to divest one of its stores and one of the other firm's stores, even when this would have resulted in a post-acquisition HHI below 1,800.

In some cases, moreover, there has been a disconnect between the theory of competitive harm and the remedy. It is common for the staff's analysis to focus minutely on specific store pairings and proximities within a large metropolitan area. In such cases, the main competitive concern that has been expressed is the risk that certain stores would be shut down due to the closeness of the "overlap." Yet, the Commission has refused to accept divestiture of the stores that were said to be at risk of closure, and instead has required divestiture of all the "A" or all the "B" stores in the market as a whole.

The *Consent Order FAQ's* say the Commission is willing to consider divestitures to "smaller firms" or "mavericks" already operating within the same product and geographic markets. In theory, this flexibility has always existed, but in practice the staff has had a strong preference for out-of-market buyers. The staff generally has been careful not to reject in-market buyers out of hand. Rather, so long as there was any possibility of an out-of-market buyer, the staff's typical approach has been to warn counsel that securing approval for an in-market buyer would be difficult and time-consuming, and would likely raise numerous questions "across the street" (*i.e.,* in Commissioners' offices). Faced with such warnings, most counsel have taken the prudent course and found out-of-market buyers.

The staff should be more open to divestitures to in-market firms, especially smaller supermarket operators. Given the local market knowledge of such operators, the resulting "delta" in the HHI is likely to be more than offset by the greater likelihood of a successful remedy.

3. The "All Of A Or All Of B" Policy Should Be Relaxed And "Trade Ups" Should Be Allowed

The requirement that all of one firm's stores be divested rests, in part, on the premise that neither buyers nor the staff can adequately assess the viability of a "mixed" package of stores. This assumption is unwarranted and is inconsistent with the original explanations for the up front buyer "preference."

Under the up front buyer approach, the staff requires the respondent to present it with a binding, unconditional divestiture contract before it will recommend a proposed settlement to the Commission. When the up front buyer "preference" was first announced in 1996-97, the Bureau Director said that use of an up front buyer provided important assurances regarding the competitive viability of the assets being divested, because no buyer would enter such a contract without conducting due diligence and satisfying itself in this regard. *See* Baer, *Report From The Bureau Of Competition, supra* n.2 ("If the package is not sufficient to be viable, prospective buyers presumably would raise that concern.")

To the extent the "all of A or all of B" policy reflects the staff's desire to avoid the burden of evaluating individual markets and stores, this is not an appropriate basis for Commission policy on merger remedies. Any suggestion that the staff is ill-equipped to conduct such analyses must be rejected. As then-Commissioner Azcuenaga once observed, "[w]hile the Commission can never, and should never, attempt to replace free market decisions with its own guesses, it has the tools to provide a realistic assessment whether a divestiture proposal has a serious prospect of success."[12]

To the extent the "all of A or all of B" policy is based on concerns about upsetting existing store "networks" or customer relationships, such concerns are overstated. A group of supermarkets operating under common ownership in a given town or city is not

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12 Mary L. Azcuenaga, Commissioner, Federal Trade Commissioner, *Remedy Options In Merger Cases*, before the Federal Bar Association, Nov. 17, 1987, at 12-13.

a network that can be divested along with a captive group of customers. When a store is divested and begins operating under the name of its new owner, some of the store's premerger customers may stay, and some may switch to other stores, depending on many factors, such as the reputation, pricing, and merchandising of the new owner, as compared with those of the former owner and other operators in the area. The fact that a particular store is divested along with a group of stores that formerly operated under one name may tell little, if anything, about how that store will perform once the acquired company disappears from the market and the new owner's name goes on the store. When a supermarket chain has a number of stores in a market, the group inevitably will contain some stronger stores and some weaker stores. There is no reason to assume that a "mixed" package will usually contain a greater proportion of weak stores unless, of course, one is also willing to assume negligence by both the staff and the divestiture buyer in evaluating the package.

The risk that divestiture of a mixed store packages will cause a loss of distribution efficiencies also is exaggerated. A divestiture buyer must, of course, integrate the new stores into its existing supply system, if it is self-warehousing, or arrange deliveries from a wholesaler if it is not. Whatever logistical advantage lies in having all of the stores come from one prior owner rather than two generally is modest. There is no reason to assume a mixed group of stores will be supplied less effectively or efficiently than stores that formerly were under common ownership. Some stores in a given chain may fit well with the divestiture buyer's existing stores and distribution system; others may not. There is no basis for assuming that an unmixed group of stores can always be supplied more efficiently than a mixed store package.

In sum, there is no sound basis for a rigid rule requiring respondents to divest all of one firm's stores. The staff should be more open to mixed store packages, especially in cases where the buyer of the divested stores is an experienced supermarket operator or grocery wholesaler. In addition, if the staff retains a preference for divesting all of one firm's stores, it should drop the recently adopted objection to "trade ups." This objection, which some staff members have described as "policy," has no justification as an across-the-board rule.

4. The Commission Should Not Require Divestiture Of An Entire Package To A Single Buyer

Reflecting recent Commission practice, the *Consent Order FAQs* say that a single buyer may be required for all retail operations being divested in a particular market, in order to ensure that the buyer will have a sufficient "footprint." This concern with "critical mass" has taken on great significance in supermarket consent orders. The staff rarely, if ever, allow stores to be sold to more than one buyer per market. This policy, in common with several other aspects of the staff's approach to supermarket divestitures, makes it harder for independents and small chains to purchase divested stores. Independents and small chains often are interested in buying, or may only have the ability to buy, a portion of the stores that are being divested in a market, but a single-buyer policy prevents this.

The significance of "critical mass" is overstated. Certainly, in evaluating a proposed divestiture buyer, the staff should satisfy itself that the buyer has a realistic business plan, including an advertising plan and/or promotional strategy, and a source of groceries at competitive cost. But a firm need not have complete market coverage or engage in market-wide advertising in order to be an effective competitor. No particular scale or degree of market coverage is necessary to compete effectively in grocery retailing, and "critical mass" should not be relied upon as a basis for requiring that all stores in a market be divested to a single buyer.

A common industry definition of a "supermarket" is a retail grocery store with annual sales of $2 million or more. There will be substantial variation in size, format, and operating characteristics among the supermarkets competing in any particular geographic market. Supermarkets range from less than 10,000 square feet to more than 100,000 square feet and have annual per-store sales ranging from $2 million to the tens of millions. While some supermarkets are vertically integrated, many others are supplied by wholesalers. Grocery wholesalers often have excess capacity in their distribution centers. They compete vigorously to supply existing retailers and establish new retailers in business. Wholesalers offer retailers many services, including: promotion, advertising, and merchandising programs; computerized ordering, receiving and scanning systems; retail accounting, budgeting, and payroll systems; management and employee training; consumer and market research; site selection and store development assistance; and insurance programs. Thus, the supposed advantages enjoyed by large chains, and the need for a big "footprint" in order to succeed in grocery retailing, are overstated.

If divestitures are allowed to more than one buyer, they can seed a market with several growing chains. Divesting to more than one buyer also avoids the "all eggs in one basket" problem. In the *Schnucks* matter, for example, if the respondent had been allowed to split the 24 stores among several buyers, more of the stores might have survived, instead of being dragged down when the single buyer failed. The Commission should reconsider the presumed significance of "critical mass." While size and scale may confer certain benefits, they should not automatically override all other considerations.

C. The Commission's Supermarket Divestiture Policies Should Be Even-Handed Towards Independents And Small Chains

The Commission professes to be agnostic regarding divestiture buyers, neither favoring nor disfavoring independents and small chains. In the *Analysis to Aid Public Comment* that accompanied a 1998 consent order, for example, the Commission said: "[a]lthough a supermarket chain is the proposed purchaser in many of the markets in this matter, this does not represent a Commission position that only large chains can be competitive in the supermarket business. Indeed, in several cases during the last few years, supermarkets required to be divested as a result of a Commission merger investigation have been sold to independent store operators (often with financial support from a wholesaler)."[13]

Nevertheless, independents and small chains, and the wholesalers who supply them, continue to believe they are disadvantaged, and perhaps disfavored, as potential buyers of stores that are required to be divested. The impression of bias against independents and small chains has several roots. As discussed above, the Commission's policies and practices regarding supermarket divestitures have made it harder for small retailers to buy stores that are being divested. The policy against divesting mixed store packages may prevent small retailers from assembling divestiture packages that best suit their needs, and the preference against divesting to in-market firms may prevent small firms that already have a presence in the market from expanding to provide increased competition for the merged firm. The *Consent Order FAQs* helpfully state that divestitures may be allowed to firms with a small presence in the market. In practice, though, this seldom occurs in supermarket divestitures because respondents are required to prove to the staff that no out-of-market firm is willing to buy the stores at any price. Respondents also may be dissuaded by warnings from the staff that in-market buyers are a "tough sell" to the Commission.

Independents and small firms believe they face closer scrutiny of their financial viability, experience, supply arrangements, and business plans than large chains. Such scrutiny takes time and brings added uncertainty to the process, usually at a late stage in the investigation, when the parties are becoming increasingly worried the merger may fall apart. Given the perception that independents and small chains have to jump through more hoops than large chains to be approved as divestiture buyers, merging

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13 Albertson's, Inc., FTC File No. 981-0134 (Aug. 21, 1998)(analysis of the draft complaint, proposed consent order, and asset maintenance agreement to aid public comment; citations omitted).

parties are likely to seek a buyer that is a "sure thing," *i.e.*, a well-established, out-of-market chain, rather than proposing divestiture to one or more independents.

The Commission could go a long way towards dispelling the perception of bias against independents and small chains by implementing some of the policies stated in the *Consent Order FAQs*; in particular, the Commission should be genuinely open to in-market divestiture buyers. They should not be treated as purchasers of last resort. In addition, the Commission should not insist on a single buyer for all stores in a market and should relax the "all of A or all of B" policy. These changes would give independents and small chains realistic opportunities to become stronger and larger competitors.

D. CONCLUSION

FMI agrees with a commentator who said: "it is important that in the desire to 'guarantee' the success of its remedies, the FTC does not rely on rote application of off-the-rack 'fixes.'"[14] In supermarket mergers, as perhaps in no other industry, the Commission in recent years has imposed, seemingly by rote, a series of increasingly inflexible divestiture policies. The underpinnings of these policies are questionable. Moreover, they put independents and small chains at a disadvantage in the divestiture process, to their detriment and the detriment of consumers.

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[14] Gotts, *supra* n.6, at 32.

APPENDIX

SELECTIONS FROM A SUPERMARKET SECOND REQUEST

2. List each Supermarket owned or operated by the Company in [ ] and within 30 miles of [ ], and for each Supermarket, state or provide:

(a) the current trade name, store number, telephone number, and full address, including zip code and county or other political subdivision; and all prior trade names, and the dates that the prior trade names were in use, since January 1, 1989, regardless of ownership;

(b) a description of the format of that Supermarket (*e.g.,* conventional Supermarket, combination Supermarket and drug store, warehouse Supermarket), a 5" x 7" color photograph of the front of the Supermarket, and a 5" x 7" color photograph showing the Supermarket in its shopping center or other immediate surroundings (all photographs must be identified with the store name and store number);

(c) for each year since 1990, a list of every department in that Supermarket, including but not limited to: frozen foods; refrigerated foods; produce; dairy; shelf-stable foods and beverages; fresh and prepared meat; fresh fish and poultry; self-service delicatessen; service delicatessen; prepackaged bakery products; in-store bakery; home meal replacement; health and beauty aids; florist; bank; video rental; dry cleaner; post office; pharmacy; fuel center; and food court;

(d) the month and year the store opened as a Supermarket regardless of ownership; the month and year the store opened as a Supermarket owned and operated by the Company; the month and year the Supermarket was remodeled or any expansion of the Supermarket's square footage greater than 5 percent, and if the store was expanded the square footage of that expansion; the month and year the Company first considered opening the Supermarket at its current location; and the month and year the Company first considered opening any Supermarket in or near the same city, town, or other political subdivision;

(e) the estimated current, and the actual 1998, 1997, 1996, and 1995 average weekly sales (i) in total, (ii) in total after subtracting any pharmacy sales, and (iii) in total after subtracting any wholesale sales; the estimated current, and the actual 1998, 1997, 1996, and 1995 average weekly sales (i) per square foot in total, (ii) per square foot in total after subtracting any pharmacy sales, and (iii) per square foot in total after subtracting any wholesale sales; and the actual weekly sales for each of the last 104 weeks prior to issuance of this Request (i) in total, (ii) in total subtracting any pharmacy sales, and (iii) in total after subtracting any wholesale sales;

(f) the current total square footage, the total selling space square footage, and the total square footage devoted to pharmacy sales;

(g) the current number of stock-keeping units in total, and the current number of non-pharmacy stock-keeping units in total and stated separately for each product line, including, but not limited to: frozen foods; refrigerated foods; produce, dairy; shelf-stable foods and beverages; fresh and prepared meat, fish and poultry; delicatessen; bakery; and health and beauty aids;

(h) the number of customer parking spaces in the parking lot;

(i) the number of check-out lines;

(j) the 1998 average dollar size of each non-pharmacy customer transaction;

(k) the number of times per week in 1998 the average customer purchased items in the Supermarket;

(l) the estimated current, and actual annual gross margin (gross sales revenue less costs of goods sold, as a percentage of gross sales revenue) and net profit margin (after tax, excluding any allocations of corporate level expenses) from January 1, 1995, to date, provided in total and after subtracting any pharmacy sales, and stated separately for each product line, including but not limited to (and provide the methodology for computing these figures): frozen foods; refrigerated foods; produce; dairy; shelf-stable foods and beverages; fresh and prepared meat, fish and poultry; delicatessen; bakery; and health and beauty aids;

(m) the estimated current and actual 1998, 1997, 1996, and 1995, total dollar amount of inventory shrinkage and expenditures for security, and as a percentage of gross revenue;

(n) the estimated current and actual EBIT (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation and amortization) from January 1, 1995, to date;

(o) whether the Supermarket premises are owned by the Company or leased, and if leased: the date the lease was entered into; the amount of time left on the current lease, including any optional extensions; from January ,1 1995, to date: (i) the annual rental rate on a square footage basis, as well as any other rent obligations (*e.g.,* rent as a percentage of sales volume) and (ii) the annual rental rate as a percentage of gross revenue based on the current year's sales; and a detailed summary of the terms of any noncompete agreement or restrictive covenant in the lease;

(p) for each month from January 1, 1995, to the present: total gross revenues; total wages of hourly-wage employees; average wage of hourly-wage employees; total number of hours of hourly-wage employees; total non-wage compensation of hourly-wage employees; total compensation of salaried employees; total utility costs; total advertising costs; the total local tax (*e.g.,* property taxes and business taxes, but not sales tax), and the total local tax as a percentage of gross revenue;

(q) the Supermarket's book value, liquidation value, and replacement cost; and

(r) all Documents relating to the condition, marketability, and viability of the Supermarket.

The Company must define gross margin as used in subpart (l) and to provide the Company accounting methodology used to determine cost of goods sold. Subparts (a)-(q) must be submitted in a spreadsheet table format both on paper and on machine-readable diskettes and the Commission representatives must agree prior to submission that the machine-readable tables are in a format that allows the agency to use the computer files.

3. Submit separately for each Supermarket owned or operated by the Company located in any Relevant Area:

(a) on a map showing the names and borders of all cities, towns and other political subdivisions, and the names of all streets and highways, show: (i) the location of the Company's Supermarket (identified on the map by its store number); (ii) the trade or draw area (the geographic area closest to the Company Supermarket where customers representing approximately 85% of the Company Supermarket's customers reside); (iii) all other Supermarkets located within the Company Supermarket's trade or draw area (identified on the map by trade name and either a store number or map number); and (iv) provide the methodology used for determining where the Company's Supermarket customers reside;

(b) for each Supermarket that is identified in response to subpart (a), including the Company's Supermarket and all other identified

Supermarkets, provide on a separate table the store number or map number, trade name, full address (including zip code, county, or other political subdivision), type of Supermarket (*e.g.,* conventional Supermarket, combination Supermarket and drug store, warehouse Supermarket), ultimate parent entity, the age of the store (when the store was first opened as a Supermarket and when the store was first opened under the current trade name), estimated store size (total and selling space), estimated current average weekly sales, and estimated number of stock-keeping units;

(c) provide another map [identical to the map submitted in response to subpart (a)] showing the location of the Company Supermarket (identified on the map by its store number) and all other Supermarkets (identified on the map by trade name and either store or map number) located within the Company Supermarket's trade or draw area identified in response to subpart (a), and identify on the map the location of each retail store that the Company contends competes for any significant portion of the Company Supermarket's sales, and for each such retail store identified by the Company, provide on a separate table the store or map number, trade name, full address (including zip code and county or other political subdivision), age of the store, whether the store has been renovated within the last five years, type of store (*e.g.,* shoe store), list of all departments, ultimate parent entity, estimated store size (total and selling space), estimated current average weekly sales, estimated number of stock-keeping units for products or items typically sold in a Supermarket (regardless of package size), estimated number of identical stock-keeping units that are carried in both the Company's Supermarket and the identified retail store, percent of the Company Supermarket's estimated current average weekly sales the identical stock-keeping units represent, estimated number of the Company Supermarket's stock-keeping units that are substantially similar to the identified retail store's stock-keeping units (*e.g.,* canned cut green beans regardless of the vendor or package size), and percent of the Company Supermarket's estimated current average weekly sales the substantially similar stock-keeping units represent; and, for every such competing retail store, provide a 5" x 7" color photograph of the front of the competing retail store and a 5" x 7" color photograph showing the Supermarket in its shopping center or other immediate surroundings (identifying the store by name and store number associated map number on the photographs);

(d) for each retail store identified in response to subpart (c), state whether, and the extent to which, the Company monitors and responds to the prices of that identified retail store by price-checking, monitoring, or changing its own prices; and provide any price-checking information obtained;

(e) maps that show the following demographic data or the trade or draw area: total population, population density, income levels, and any other criteria used by the Company in evaluating the actual or potential sale of the Company's Supermarket in all or any part of the trade or draw area.

All data must be submitted in a spreadsheet format both on paper and on machine-readable diskettes and the Commission representatives must agree prior to submission that the machine-readable forms are in a format that allows the agency to use the computer files.

4. Submit separately for each Relevant Area:

(a) on a map showing the names and borders of all cities, towns and other political subdivisions, and the names of all streets and highways within the Relevant Area, show: (i) the location of each Company Supermarket(s) identified by its trade name and store number; and (ii) all other Supermarkets identified by trade name and either a store number or map number;

(b) for each Supermarket that is identified in response to subpart (a), provide on a separate table the store or map number, trade name, full address (including zip code and county or other political subdivision), type of Supermarket (*e.g.,* conventional Supermarket, combination Supermarket and drug store, warehouse Supermarket), ultimate parent entity, estimated store size (total and selling space), estimated current average weekly sales, and estimated number of all stock-keeping units;

(c) provide another map [identical to the map submitted in response to subpart (a)] showing the location of the Company Supermarket(s) (identified on the map by store number) and all other Supermarkets located within the Relevant Area identified in response to subpart (a) (identified on the map by trade name and either a store or map number), and identify on the map the location of each retail store that the Company contends competes for any significant portion to the Company Supermarket's(s') sales, and for each such retail store identified by the Company, provide on a separate table the store or map number, trade name, full address (including zip code and county), age of the store, type of store (*e.g.,* shoe store), ultimate parent entity, estimated store size (total and selling space), estimated current average weekly sales, estimated number of stock-keeping units, estimated number of identical stock-keeping units that are carried in both the Company Supermarket(s) and the identified retail store, percent of the Company Supermarket's(s') estimated current average weekly sales the identical stock-keeping units represent, estimated number of the Company Supermarket's(s') stock-keeping units that are substantially similar to the competing retail store's stock-keeping units (*e.g.,* canned cut green beans regardless of the vendor or package size), and percent of the Company Supermarket's(s') estimated current average weekly sales the substantially similar stock-keeping units represent;

(d) for each retail store identified in response to subpart (c), state whether, and the extent to which, the Company monitors and responds to the prices of that identified retail store by price-checking, monitoring, or changing its own prices; and

(e) maps that show the following demographic data: total population, population density, income levels, and any other criteria used by the Company in evaluating the actual or potential sale for the Company's Supermarket products in all or any part of each Relevant Area.

All data must be submitted in a spreadsheet format both on paper and on machine-readable diskettes and the Commission representatives must agree prior to submission that the machine-readable forms are in a format that allows the agency to use the computer files.

19. State separately for each Supermarket owned or operated by the Company in each Relevant Area, the retail shelf price charged (1) by the Company and (2) by each of the Company's competitors listed in response to Specification 4(a) and 4(c), for each of the items listed below, on each Friday, from January 1, 1990, to the present:

(a) T-bone steak, beef loin, (1) store brand and (2) generic or unbranded, price per pound;

(b) fresh ground beef or hamburger, 15% fat, (1) store brand and (2) generic or unbranded, price per pound;

(c) fresh sausage, 100% pork, 12 ounce package, (1) Jimmy Dean and (2) store brand;

(d) fresh whole frying chicken, (1) store brand, (2) generic or unbranded, and (3) Tyson's, price per pound;

(e) fresh boneless, skinless chicken breasts, (1) store brand, (2) generic or unbranded, and (3) Tyson's, price per pound;

(f) fresh chicken drumsticks, (1) store brand, (2) generic or unbranded, and (3) Tyson's, price per pound;

(g) chunk light tuna in pure vegetable oil, 6 ounce can, (1) Star K and (2) Chicken of the Sea;

(h) milk, store brand, ½ gallon; (1) 2% reduced fat and (2) whole milk;

(i) eggs, store brand, grade a large, dozen;

(j) margarine, 1 pound, 4 sticks, (1) Blue Bonnet and (2) Parkay;

(k) 100% grated Parmesan cheese, 8 ounces, (1) Kraft and (2) store brand;

(l) potatoes, Russet, 10 pound bag;

(m) bananas, loose, price per pound;

(n) iceberg lettuce, head;

(o) white bread, 24 ounces, (1) store brand and (2) Wonder;

(p) coffee, 13 ounce can, (1) Folgers and (2) Maxwell House;

(q) granulated can sugar, store brand, 5 pounds;

(r) cereal, 18 ounce box, (1) Kellogg's Corn Flakes and (2) Post Toasties;

(s) young tender sweet peas, 15 ounce can, (1) Green Giant and (2) Del Monte;

(t) whole peeled tomatoes, 14.5 ounce can, (1) Hunt's and (2) Del Monte;

(u) yellow cling peach halves in heavy syrup, 15.25 ounce can, (1) Del Monte and (2) Libby's;

(v) unscented white facial tissues, 175 2-ply tissues, (1) Kleenex and (2) Scott;

(w) dishwashing powder (regular), 50 ounce container, (1) Cascade and (2) store brand;

(x) all-vegetable shortening, 48 ounce container, (1) Crisco and (2) store brand;

(y) premium frozen concentrated orange juice, 12 ounce container, (1) Minute Maid and (2) Tropicana;

(z) frozen whole kernel corn, 1 pound package, (1) store brand and (2) Del Monte;

(aa) baby food carrots, 4 ounce jar, (1) Gerber and (2) Heinz;

(bb) cola, 2 liter bottle, (1) Coca Cola Classic and (2) Pepsi;

(cc) cigarettes, king size, carton, (1) Winston and (2) Marlboro;

(dd) fluoride toothpaste, 6 ounce tube, (1) Crest and (2) Colgate;

(ee) shampoo, 15 ounce bottle, (1) Alberto VO5 and (2) store label;

(ff) beer, 6-pack, 12 ounce containers, excluding any deposit, (1) Budweiser and (2) Miller Lite; and

(gg) wine, 1.5 liter bottle, (1) Livingston Cellars and (2) Gallo Chablis Blanc.

If information is not available for each Friday, but is nevertheless available for other days of the week, or days of the month, provide such specific information as is available, and indicate exactly what is being provided and what cannot be provided. Items exclude distressed or subpar merchandise, such as bruised produce, dented cans or nearly expired items. For any item not stocked by the Company, or the Company's competitors, contact Commission representatives for a substitute item. All data must be submitted in a spreadsheet format both on paper and on machine-readable tapes or CD ROM format and the Commission representatives must agree prior to submission that the machine readable forms are in a format that allows the agency to use the computer files.

28. (a) Identify and describe every plan by the Company relating to any contemplated, conjectured, attempted or accomplished cost savings, production increase, synergy or efficiency *not* relating to the proposed acquisition of [ ] by [ ], including without limitation any action the Company might have taken alone or any action that the Company might have taken with any other person, and state:

(i) whether the Company will or will not pursue the plan if the proposed acquisition is consummated, and the reasons why the plan will or will not be pursued; and

(ii) the benefits (in dollars and in narrative) that the plan was contemplated to achieve, and the costs necessary to achieve the plan.

(b) Submit each Document relating to any plan by the Company relating to any contemplated, conjectured, attempted or accomplished cost savings, production increase, synergy or efficiency *not* relating to the proposed acquisition of [ ] by [ ], including without limitation any action the Company might have taken alone or any action that the Company might have taken with any other person.

29. Describe each efficiency (including cost savings, new product or service introductions, and product or service improvements) that was derived from each of the Company's prior acquisitions that included the acquisition of one or more supermarkets, including in the description:

(a) the steps that the Company took to achieve the efficiency and the time and costs required to achieve it;

(b) the dollar value of the efficiency and a detailed explanation of how that was calculated;

(c) an explanation of how each prior acquisition helped the Company achieve the efficiency;

(d) the reason(s) why the Company could not have achieved the efficiency without the prior acquisition;

(e) the proportion of the dollar value of the efficiency that the Company passed on to consumers and the manner and form (*e.g.,* lower prices, better service) in which the Company passed on the efficiency;

(f) the identity of each person (including the person's title and business address) employed or retained by the Company (including the Company's counsel) with any responsibility for achieving, analyzing or quantifying any efficiency described;

(g) for each efficiency that involved cost savings, state separately (i) the one time fixed cost savings and (ii) the variable cost savings (in dollars per unit and dollars per year); and

(h) submit all Documents (including all Documents previously submitted to the Commission) relating to any efficiency described above.