confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at :// . . / / by following the instructions on the web-based form. If this Notice appears at :// . . /#! , you also may file a comment through that Web site.

If you file your comment on paper, write ''Graco, File No. 101 0215'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at :// . . 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 May 20, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at :// . . / / . .

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted for public comment an Agreement Containing Consent Order (''Consent Order'') with Graco, Inc. (''Graco'') to remedy the alleged anticompetitive effects resulting from Graco's acquisition of its most significant competitors, Gusmer Corp. (''Gusmer'') and GlasCraft, Inc. (''GlasCraft''). The Commission Complaint (''Complaint'') alleges that, at the time of the acquisitions, Graco, Gusmer, and GlasCraft each manufactured and sold equipment for the application of fast-set chemicals (''fast-set equipment''). Neither acquisition was reportable under the Hart-Scott-Rodino Act. The Consent Order seeks to restore competition lost through the acquisitions by requiring Graco to license certain technology to a small competitor to facilitate its entry and expansion, and to cease and desist from engaging in certain conduct that may delay or prevent entry and expansion of competing firms. The Complaint and Consent Order in this matter have been issued as final and the Consent Order is now effective.

The Complaint alleges that the acquisitions each violated 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.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the Consent Order. It is not intended to constitute an official interpretation of the Agreement and Consent Order or in any way to modify their terms.

The Consent Order is for settlement purposes only. The Commission has placed the Consent Order on the public record for thirty (30) days for the receipt of comments by interested persons.

I. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of these acquisitions is fast-set equipment used by contractors in North America. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings used for the application of insulation and protective coatings. The essential components of a fast-set equipment system are the proportioner, the heated hoses, and the spray gun.

Fast-set equipment manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. These independent distributors sell to end-users. End-users demand a proximate source of expertise, spare parts, and repair services. Therefore, a robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete effectively in the relevant market.

Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%, and left GlasCraft as Graco's only significant North American competitor. Graco's acquisition of GlasCraft in 2008 raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisitions of each of Gusmer and GlasCraft, Graco closed both firms' fast-set equipment manufacturing facilities and has fully assimilated or terminated all remaining assets, products, intellectual property, and personnel from both firms.

Prior to the acquisitions, fast-set equipment distributors typically carried products from multiple manufacturers. Distributors and end-users were able to mix and match the products from the different manufacturers to assemble a fast-set system that best satisfied end-users' demands. Further, manufacturers did not impose exclusive relationships on distributors—a distributor was free to make some or all of its fast-set equipment purchases from whichever manufacturers it chose. The Complaint alleges, among other effects, that the acquisitions of Gusmer and GlasCraft have removed the ability of distributors and end-users to select the equipment that best serves their, and their customers', interests and needs.

II. Conditions of Entry and Expansion

The Complaint alleges high entry barriers in the relevant market. The principal barrier to entry is the need for specialized third-party distribution. As a result of its acquisitions, Graco obtained substantial control over access to that distribution channel. Subsequent Graco practices have further heightened barriers to competitive entry and expansion, such that restoration of the competition lost as a result of Graco's acquisitions is unlikely to be restored unless Graco's continuation of those practices is enjoined.

Beginning in 2007, former employees of Gusmer began distributing fast-set equipment as Gama Machinery USA, Inc., now doing business as Polyurethane Machinery Corp. (''Gama/PMC''). In March 2008, Graco sued Gama/PMC and others alleging, among other things, breach of contract. The continuation of that litigation has reduced the willingness of distributors to purchase fast-set equipment from Gama/PMC, for fear that their supply of fast-set equipment might later be interrupted as a result of litigation. To reduce that barrier, an impending settlement of that litigation is incorporated in the Commission's Consent Order.

Like Gama/PMC, other prospective competitors—some of which presently offer only some components, rather than a full line of proportioners, hoses, and spray guns—have been unable to gain a meaningful foothold in the North American fast-set equipment market

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. FTC Rule 4.9(c), 16 CFR 4.9(c).

By direction of the Commission.

Donald S. Clark,

Statement of the Federal Trade Commission

Today the Commission has voted unanimously to approve the Complaint and Decision & Order (''Order'') against Graco, Inc. (''Graco'') to resolve allegations that it violated Section 7 of the Clayton Act when it acquired Gusmer Corp. (''Gusmer'') in 2005 and Glascraft, Inc. (''Glascraft'') in 2008. At the time of the acquisitions, Gusmer and Glascraft were Graco's two closest competitors in the market for fast-set
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competitors in

[3] v. ., 253 F.3d 34, 71–72, 74 (D.C. Cir. 2001) (holding that Microsoft's exclusive dealing arrangements with Internet access providers, independent software vendors, and Apple violated Sherman Act § 2).

[4] ., Fed. Trade Comm'n, Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 5 (2012), :// . . / / / . (stating the Commission favors structural relief, such as divestitures, in horizontal mergers, but that behavioral relief may be appropriate in some cases).

product lines, divestiture is not an option and the Commission should rightly consider whether behavioral remedies in this case would protect consumers.

As with merger remedies generally, when deciding whether and what behavioral remedy to impose, the Commission must ultimately be guided by its mission of protecting consumers.[5] Because behavioral remedies displace normal competitive decision-making in a market, they pose a particularly high risk of inadvertently reducing consumer welfare and should be examined closely prior to adoption to ensure consumers' interests are best served. In particular, effective behavioral remedies must be ''tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process.'' [6] Merely showing high market shares and the unavailability of structural remedies does not justify restricting conduct that typically is procompetitive because these conditions do not make the conduct any more likely, much less generally likely, to be anticompetitive.[7] A minimum safeguard to ensure remedial provisions—whether described as fencing-in relief or otherwise—restore competition rather than inadvertently reduce it is to require evidence that the type of conduct being restricted has been, or is likely to be, used anticompetitively to harm consumers.

With this analytical framework in mind, I support those remedies in the Order that seek to restore pre-merger competition by imposing restrictions closely linked to the evidence of anticompetitive harm in this case. For instance, staff uncovered evidence Graco threatened distributors that considered carrying fast-set equipment sold by competing manufacturers, and that these threats actually led to distributors not purchasing the competing products. Staff also learned that distributors refused to purchase fast-set equipment from Gama/PMC, one of the few fringe competitors remaining after Graco's acquisitions, because of the uncertainty resulting from Graco's lawsuit against Gama/PMC. The Order thus appropriately prohibits Graco from retaliating against distributors that consider purchasing fast-set equipment from other manufacturers [8] and requires Graco to settle its lawsuit against Gama/PMC.

In contrast, and as is discussed in more detail below, there is insufficient evidence linking the remedial provisions in the Order prohibiting exclusive dealing contracts and regulating loyalty discounts to the anticompetitive harm in this case.

II. Prohibitions on Exclusive Dealing

It is widely accepted that exclusive dealing and exclusive contracts—while generally efficiency enhancing—can lead to anticompetitive results when certain conditions are satisfied. The primary competitive concern is that exclusive dealing may be used by a monopolist to raise rivals' costs of distribution by depriving them the opportunity to compete for distribution sufficient to achieve efficient scale, and ultimately harm consumers by putting competitors out of business.[9] On the other hand, the economic literature is replete with procompetitive justifications for exclusive dealing, including aligning the incentives of manufacturers and distributors, preventing free-riding, and facilitating relationship-specific investments.[10] In fact, the empirical

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[5] The Commission should keep in mind that ours is not a binary choice simply between imposing a structural or a behavioral remedy. The most attractive option from a consumer welfare point of view for any given circumstance may be to block the merger in its entirety, allow the merger to proceed without any remedy, or a hybrid solution combining some aspects of each of these options. Having ruled out structural remedies in this case, the question is which, if any, of the non-structural alternatives best improves consumer welfare. Ken Heyer, , 26 ANTITRUST 27 (2012) (arguing behavioral remedies are not justified simply because structural remedies are unavailable, and that an agency should weigh the economic costs and benefits of each non-structural alternative, including doing nothing).

[6] U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, at 7 n.12 (June 2011), ://. . / / / /272350. ; , Heyer, note 2, at 27–28 (''[A]mong the most important considerations in devising a behavioral remedy is that there be a close nexus between the remedy imposed and the theory of harm motivating its use.'').

[7] In fact, efficiencies justifications for exclusive dealing contracts apply, and some even more strongly, when a firm has market power.

[8] Such retaliatory conduct alone is outside the normal competitive process and has no plausible procompetitive benefit. Its proscription therefore is unlikely to harm consumers. Of course, a decision by Graco to refuse to sell to distributors who do not enter into an exclusive contract should not itself be proscribed as illegitimate retaliation.

[9] ., Alden F. Abbott & Joshua D. Wright, , ANTITRUST LAW AND ECONOMICS 183, 194–96 (Keith N. Hylton ed., 2d ed. 2010). There also are novel theories of anticompetitive harm, including models exploring the possibility that certain types of discount programs effectively impose a tax upon distributors' choice to expand rivals' sales and thereby potentially prevent rivals from acquiring a sufficient number of retailers to cover the fixed costs of entry. ., Joe Farrell, et al., , 37 (4) REV. INDUS. ORG. 263 (2010).

[10] ., Abbott & Wright, note 6, at 200–01; Francine Lafontaine & Margaret Slade, , HANDBOOK OF ANTITRUST ECONOMICS, 393–94 (Paolo Buccirossi, ed., 2008); Benjamin Klein & Kevin Murphy, , 75 ANTITRUST L. J. 433, 465 (2008).

[11] ., Abbott & Wright, note 6, at 200–01; Lafontaine & Slade, note 7, at 393–94.

[12] Complaint ¶ 24, Graco, Inc., FTC File No.101–0215, (April 17, 2013).

[13] Bruce H. Kobayashi, , 1 COMP. POL'Y INT'L 115 (2005). 220