STATEMENT OF THE COMMISSION

Concerning

FEDERATED DEPARTMENT STORES, INC./THE MAY DEPARTMENT STORES COMPANY
FTC File No. 051-0111

I. INTRODUCTION

The Federal Trade Commission has closed its investigation of the proposed acquisition by Federated Department Stores, Inc. ("Federated") of The May Department Stores Company ("May"). This acquisition, valued at approximately $17 billion, combines two large chains of department stores. Federated owns or operates 456 department stores – either under the name Macy's or Bloomingdale's – with reported annual sales in 2003 of about $15 billion. May owns or operates 491 department stores with sales in 2003 of about $13 billion, under names that include Marshall Field's, Lord & Taylor, Filene's, Kaufmann's, Hecht's, Strawbridge's, Foley's, Famous-Barr and Robinsons-May.

The combination of these two chains, each of which is the product of multiple earlier combinations, will create by far the largest chain of so-called "traditional" or "conventional" department stores in the country. Conventional department stores are understood in the industry to be large stores that typically anchor enclosed shopping malls, feature products of mid-range price and quality, and sell a wide range of product lines. This transaction will create high levels of concentration among conventional department stores in many areas of the country, and thus facially might appear to raise issues of competitive concern.

In light of these potential concerns, the Commission has conducted an exhaustive six-month investigation of the proposed acquisition. We ultimately have decided to close the investigation without enforcement action, and we believe it is important to explain this decision.

We began our investigation by defining provisional antitrust markets. At the outset, the investigation focused on whether conventional department stores were a relevant product market, and whether malls or Metropolitan Statistical Areas ("MSAs") were relevant geographic markets.

II. THE PRODUCT MARKET

At first glance, it appears that the department stores operated by Federated and May might differ fundamentally from other retail outlets. There is precedent for treating these stores as a separate market for purposes of merger analysis. *See The Bon-Ton Stores, Inc. v. The May Department Stores Company,* 881 F. Supp. 860 (W.D.N.Y. 1994). The *Bon-Ton* court noted: "Anyone who has ever shopped in a department store, specialty store or discounter certainly knows that there is a difference . . . ." *Id.* at 870.

But when an industry is changing rapidly, merger cases cannot be decided solely on the basis of historical precedents in that industry – even when the precedents are from the relatively recent past. As the U.S. Supreme Court recognized in its landmark merger opinion, *United States v. General Dynamics Corp.*, 415 U.S. 486, 500 (1974), it is necessary to take account of "fundamental changes in the structure of the market."

A. The Rapid Evolution of Retail Markets

Fifty years ago, many individual department stores were freestanding in cities, rather than suburban malls, and they offered consumers the convenience of one-stop shopping, particularly for home furnishings or clothing. There were few discount department store chains of the kind we have today (like Kohl's) or vertically integrated sellers of clothing (like The Gap). There were no consumer electronics chains (like Circuit City); no mass-marketers (like Wal-Mart); and, of course, no Internet outlets (like Amazon.com). As alternative outlets have proliferated, the wide array of products in department stores has dwindled.

The *Bon-Ton* opinion itself recognized this trend in 1994: "Many goods and services formerly offered by department stores are no longer available there or are sold at a much reduced level. For example, toys, books, and most large appliances have virtually vanished from the shelves of most traditional department stores." *Bon-Ton Stores*, 881 F. Supp. at 871. In the eleven years since *Bon-Ton* was published, the retail evolution has, if anything, accelerated. Studies show that conventional department stores today sell mostly apparel, accessories, cosmetics and housewares. Meanwhile, although items have migrated away from department stores, shoppers can buy them in more specialized stores in the same shopping mall – a new kind of one-stop shopping.

The overwhelming majority of department stores today are located in some 1200 enclosed suburban shopping malls. These malls have largely replaced flagship downtown department stores as shopping destinations. Department stores serve as "anchors" with separate entrances that bring additional traffic into the mall itself, which typically consists of a collection of specialty shops connected by internal corridors. In many respects, today's mall is itself a real competitor against traditional department stores.

We have also considered the potential impact of the Federated/May transaction on discrete categories of merchandise. The evidence demonstrates that the conventional department stores operated by Federated and May (and their competitors) no longer occupy the unique position they once held, even for the more limited range of products that they sell. While department stores once were a distinctive niche market, they now face pressures both from "above" and "below" even in the same mall, not to mention mass market, mail order, and Internet alternatives. Stores reposition their offerings continually, to take account of shifting competitive pressures.

B. Pricing Patterns

Staff found no evidence that Federated and May have priced their goods strategically in relationship to each other. The absence of such pricing patterns provides the most compelling, objective demonstration that these conventional department stores are not in a distinct product market. Even within the malls where Federated and May department stores are located, these anchor stores face competition from other retailers offering close substitutes for, if not duplicates of, the merchandise they sell. These department stores must, therefore, consider prices and selections at a wide range of other retailers when they make inventory and pricing decisions.

Equally compelling is the fact that Federated and May, like other department store chains, set prices that are uniform over very broad geographic areas – typically, multi-state regions. These firms do not appear to vary local prices based on the number or identity of conventional department stores in malls or metropolitan areas. This fact distinguishes the Federated/May acquisition from *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 (D.D.C. 1997), where a narrow "office superstore" market definition was buttressed by proof of differential prices, depending on the number of superstores in a particular city or MSA.

In summary, we do not believe that the product market in this matter realistically could be limited to conventional department stores. Based on the evidence gathered in this investigation, the Commission has concluded that the product market must be defined to include, at the very least, all department stores and all specialty stores that collectively sell substantially similar products to those offered by Federated and May.

III. THE GEOGRAPHIC MARKET

In the course of the investigation, staff evaluated several possible geographic markets, ranging in size from an individual mall, to a town or MSA, to a region delineated on the basis of media advertising coverage, to broader multi-state regions where prices seem to be uniform.

The geographic market definition is complicated. The distance consumers are willing to travel depends heavily on the merchandise they want to buy. For inexpensive items of apparel, for example, the cost in time and gasoline may outweigh any possible savings from a trip to a mall outside an MSA. On the other hand, the cost/benefit tradeoff might be very different for more expensive items. This phenomenon means that there is an interrelationship between product market definition and geographic market definition. A consumer may not be willing to travel a long way to save money on inexpensive items, but may be willing to buy them at a lower-end store that would not be an acceptable alternative for a high-fashion purchase. The evidence supports a conclusion that the relevant geographic market in this matter is at least as large as an MSA, but may be larger in some areas of the country.

IV. NON-PRICE COMPETITION

We are aware that many of the products now sold in department stores – most particularly, women's apparel – have non-price attributes that are also important to consumers. Staff therefore carefully reviewed the voluminous investigative record to look for indications of potential effects in non-price competition, *e.g.*, reductions in merchandise assortment or new product introductions, reductions in store service and assistance, or reductions in store improvement and innovations.

We found no reason to believe that Federated is likely to be able to reduce non-price competition as a result of the proposed combination with May. To the contrary, after the acquisition, Federated will continue to compete against a large and diverse group of rivals that are regularly attempting to create innovative non-price methods to attract consumers. This conclusion is consistent with, and supported by, Federated documents prepared in the normal course of its business over the past several years.

This conclusion also is consistent with information obtained from third parties. Staff's analysis included many interviews with interested vendors and mall owners. These firms were knowledgeable about the likely competitive effects of the proposed transaction and, in many instances, appeared to have the incentive to complain if they believed the transaction was problematic. Indeed, in light of their interest in maximizing consumer traffic within the mall, mall owners may be viewed as particularly useful surrogates for consumers in evaluating whether Federated's acquisition of May is likely to lead to a reduction in non-price competition. The information gleaned during these interviews supports a conclusion that Federated and May department stores compete against many other retail formats in an intensely competitive retail environment, and that the proposed acquisition therefore is unlikely to lead to reduced non-price competition.

V. SELECTIVE DIVESTITURES

This acquisition involves multiple diverse geographic areas, and there are different sets of competitors for the various products sold by Federated and May stores. In cases like this, participation by state agencies, which are familiar with specific local conditions, may be particularly helpful. We note that Federated has announced plans to divest 75 stores in 72 mall locations in which there currently are both a Federated and a May Department store, and we also note that inquiries by various individual state antitrust agencies are ongoing.

The Commission nevertheless believes that it is appropriate to close its investigation without enforcement action. The evidence shows that the parties' conventional department stores do not comprise a separate relevant product market, and that an individual mall does not constitute a relevant geographic market.

VI. CONCLUSION

We recognize that many individual consumers mourn the gradual disappearance of individual department stores in their hometowns. Traditional department stores seemed to stock the kinds of merchandise that best suited their personal tastes, and the stores also provided a particular ambiance that they found congenial. Consumers may be uncomfortable with the impersonality of the large shopping malls, mass merchandisers, and Internet outlets that we see today. These changes, however, have been ongoing for many years. We have not been able to uncover any evidence that this particular merger will have any adverse effect on consumers.