Analysis of the Complaint and
Proposed Consent Order to Aid Public Comment
In the Matter of The Great Atlantic & Pacific Tea Company, Inc., and Pathmark Stores, Inc., File No. 071 0120, Docket No. C-4209

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and Pathmark Stores, Inc. ("Pathmark"). The purpose of the Consent Agreement is to remedy the anticompetitive effects that likely would result from A&P's proposed $1.3 billion acquisition (a figure that includes the assumption of debt by A&P) of Pathmark, as alleged in the Complaint the Commission has issued.

The Consent Agreement provides for relief in two markets where the Commission believes the proposed acquisition is anticompetitive. Under the terms of the Consent Agreement, A&P must divest four Waldbaum's supermarkets and one Pathmark supermarket in Staten Island, New York, and one Waldbaum's supermarket in Shirley, Long Island, New York.

The Commission, A&P, and Pathmark have also agreed to an Order to Maintain Assets. This order requires A&P and Pathmark to maintain the assets required by the Consent Agreement to be divested, pending their divestiture.

The investigation and settlement negotiations were conducted in close cooperation with the Office of the New York State Attorney General, which anticipates entering into an agreement with the parties that mirrors the proposed consent order divestitures.

II. The Parties and the Transaction

A&P is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645. The company owns and operates about 316 supermarkets in the States of Connecticut, Delaware, Maryland, New York, New Jersey, and in the District of Columbia. A&P operates its supermarkets under the A&P, A&P Super Foodmart, Food Basics, Food Emporium, Super Fresh and Waldbaum's banners. A&P had revenues from all operations in 2006 of about $6.9 billion.

Pathmark is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 Milik Street, Carteret, New Jersey 07008. The company owns and operates about 141 supermarkets in the States of Delaware, New York, New Jersey, and Pennsylvania, all operating under the Pathmark banner. Pathmark had revenues in 2006 of about $4.1 billion.

Under the terms of their March 4, 2007, agreement, A&P will acquire all of the voting securities of Pathmark for approximately $1.3 billion, including the assumption of debt.

III. The Complaint

According to the Commission's Complaint, A&P and Pathmark compete in the retail sale of grocery products from supermarkets. Supermarkets are stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their food and other grocery shopping requirements in a single shopping visit.

The Complaint alleges that the acquisition by A&P of Pathmark would be competitively problematic in Staten Island, New York, and Shirley, Long Island, New York, both of which are highly concentrated geographic markets. As alleged in the Complaint, the proposed acquisition may increase opportunities for all firms in these markets to engage in coordinated interaction or for A&P to exercise unilateral market power, leading to higher prices or decreases in services. The Complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the geographic markets.

The Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in connection with the retail sale of grocery products from supermarkets.

IV. The Proposed Consent Order

Under the terms of the proposed Consent Order, Respondent A&P must sell four Waldbaum's supermarket stores and one Pathmark supermarket store in Staten Island and a Waldbaum's store in Shirley, Long Island, together with their related assets. The addresses of the Waldbaum's stores required to be divested are as follows:

1. 3251 Richmond Ave. South
   Staten Island, NY

2. 778 Manor Road
   Staten Island, NY

3. 4343 Amboy Road
   Staten Island, NY

4. 1441 Richmond Ave.
   Staten Island, NY

5. 999 Montauk Hwy.
Shirley, NY

The address of the one Pathmark store required to be divested is:

1. 2660 Hylan Blvd.
Staten Island, NY

The one Pathmark store and four Waldbaum's stores in Staten Island are required to be divested to King Kullen Grocery Co., Inc., headquartered in Bethpage, New York, and the Waldbaum's store in Shirley is required to be divested to The Stop & Shop Supermarket Company LLC ("Stop & Shop"). Stop & Shop is a subsidiary of Koninklijke Ahold NV, a Dutch corporation. The Commission evaluated these prospective acquirers and determined that they are well qualified to operate the divested supermarkets.

The proposed Consent Order requires that the divestitures occur no later than January 10, 2008. If Respondents consummate the divestitures to the purchasers during the public comment period, and if, at the time the Commission determines whether to make the proposed Consent Order final, the Commission notifies Respondents that the purchasers are not acceptable acquirers, or that the asset purchase agreements with those acquirers are not acceptable manners of divestiture, then Respondents must immediately rescind those transactions and divest the five Waldbaum's stores and one Pathmark store (and their related assets) to other buyers, within three (3) months of the date the Consent Order becomes final. Under those circumstances, Respondents must divest those stores and related assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event Respondents have not divested the supermarkets in a manner that satisfies the requirements of the Consent Order, the Commission may appoint a trustee to divest those assets.

The Commission has also issued an Order to Maintain Assets. Under its terms, Respondents are required to maintain the viability of the six supermarkets and their related assets pending their divestiture. More specifically, Respondents must: (1) maintain the viability, competitiveness, and marketability of the assets; (2) not cause the wasting or deterioration of those assets; (3) not sell, transfer, encumber, or otherwise impair the marketability of the assets; (4) maintain the supermarkets consistent with the parties' past practices; (5) use best efforts to preserve the supermarkets' existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain inventories at levels consistent with past practices.

The proposed Consent Order prohibits Respondents, for a period of ten years, from acquiring, without providing the Commission with prior notice, any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months prior to the date of such proposed acquisition, in Staten Island, New York, and the Shirley, Long Island, New

York area. The proposed Consent Order also prohibits Respondents, for a period of ten (10) years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any interest in any location formerly used by Respondents as a supermarket in Staten Island or the Shirley area to operate that location as a supermarket. The proposed Consent Order does not prohibit Respondents from building new supermarkets, or leasing a facility not operated as a supermarket within the preceding six (6) months.

Under the terms of the proposed Consent Order, A&P is also required to provide the Commission with regular compliance reports demonstrating how it is complying with the terms of the Consent Agreement until it is in full compliance with that Agreement.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for the purpose of soliciting comments from the public. All comments received during this period will become part of the public record. After the thirty (30) day comment period, the Commission will again consider the Consent Agreement, together with all comments received. After that second review, the Commission may either withdraw from the Consent Agreement or make its Order final.

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the Consent Order, including the proposed divestitures, to aid the Commission in its determination whether it should make final the Consent Agreement. This analysis is not an official interpretation of the Consent Agreement nor does it modify any of its terms.