

By Direction of the Commission.

Donald S. Clark,
Secretary.

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FEDERAL TRADE COMMISSION

[File No. 991 0308]

Etalissements Delhaize Freres et Cie "Le Lion" S.A., et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before August 24, 2000.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Richard Parker, FTC/H-374, 600 Pennsylvania Ave., NW, Washington, DC 20580. (202) 326-2574.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 25, 2000), on the World Wide Web, at "<http://www.ftc.gov/ftc/formal.htm>." A paper copy can be obtained from the FTC Public Reference Room, Room H-130, 600 Pennsylvania Avenue, NW, Washington, DC 20580, either in person or by calling (202) 326-3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania

Ave., NW, Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible by a 3½-inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of the Complaint and Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Etalissements Delhaize Freres et Cie "Le Lion" S.A. ("Delhaize"), Delhaize America, Inc. ("Delhaize America"), and Hannaford Bros. Co. ("Hannaford") (collectively "the Proposed Respondents"), an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from the proposed Agreement and Plan of Merger between Delhaize, Delhaize America, and Hannaford to acquire all of the outstanding voting stock of Hannaford.

II. Description of the Parties and the Proposed Acquisition

Delhaize America, a North Carolina corporation, which operates most of its stores under the names of "Food Lion" and "Kash N' Karry," has over 1,200 supermarkets in the Southeast and Mid-Atlantic regions of the United States. Food Lion stores are situated in Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, West Virginia, Pennsylvania, Delaware, and Maryland. Delhaize America's total sales for fiscal year 1999 were \$11 billion, with most generated by Food Lion stores' operations.

Hannaford, a publicly traded firm, is a Maine corporation with executive offices located in Scarborough, Maine. Approximately one-fourth of its common stock is owned by the Sobey family of Stellarton, Nova Scotia, Canada, and its various affiliated trusts and companies. Hannaford's total sales for fiscal year 1999 were \$3.46 billion. Hannaford operates about 100 stores under the "Hannaford" or "Shop 'N Save" banner in metropolitan New England and New York markets, plus about 50 stores under the "Hannford"

banner in Virginia and North Carolina markets. Hannaford entered the Southeast in the mid-1900's. The company's supermarkets are located in Maine, Massachusetts, New Hampshire, Vermont, New York, North Carolina, Virginia, and South Carolina.

Under the terms of the merger agreement, dated August 17, 1999, Delhaize America will acquire all of Hannaford's outstanding voting stock for approximately \$3.6 billion.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as a deep inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space. Supermarkets in North Carolina and Virginia, where the parties propose to divest supermarkets, tend to be at least 20,000 square feet, selling some 25,000-35,000 SKUs. So called "supercenters" operated by mass merchants such as WalMart, which have full-line supermarkets attached to general merchandise stores, are included in the product market.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores such as club stores or limited assortment stores, and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do

not effectively constrain most prices at supermarkets. These other stores operate significantly different retail formats and sell far more limited assortments of items or in the case of military commissaries are only open to a limited population base. None of these formats would constrain a price increase taken by supermarkets in the geographic markets.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the county or counties that include the following incorporated cities and towns. In Virginia the relevant geographic markets are: (a) a market consisting of the Richmond MSA; and (b) two markets that are part of the Norfolk-Virginia Beach-Newport News MSA (also known as the Tidewater area)—the Tidewater Peninsula (Newport News, Hampton and other portions of the peninsula north of the James River), and Southern Tidewater (including Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River). In North Carolina the relevant geographic markets are: (a) the Wilmington MSA; (b) Columbus County; (c) Duplin County; (d) Pender County; and (e) “greater Raleigh,” which includes Wake County, excluding the towns of Wake Forest, Rolesville, Zebulon, and Wendell.

Food Lion and Hannaford are actual and direct competitors in all of the above listed markets. The acquisition will eliminate that competition. The draft complaint alleges that each of the post merger markets would be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as “HHI”) or by two-firm and four-firm concentration ratios.¹ The acquisition would substantially increase concentration in each market. Delhaize America and Hannaford would have a combined market share that ranges from 35 percent to 94 percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2562 points to 8817 points.

Concentration levels in the geographic markets alleged in the draft complaint would not be materially different even if club stores and limited assortment stores were included in the product market. The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The draft complaint alleges that Delhaize America’s proposed acquisition of all of the outstanding voting stock of Hannaford, if consummated, may substantially lessen competition in the relevant markets in violation of 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 eliminating direct competition between supermarkets owned or controlled by Delhaize and supermarkets owned or controlled by Hannaford; by increasing the likelihood that Delhaize will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects raises the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order (“the proposed consent order”)

The proposed consent order will remedy the Commission’s competitive concerns about the proposed acquisition.² Under the terms of the proposed consent order, the Proposed Respondents must divest 37 identified Hannaford supermarkets and one identified Hannaford supermarket site in the relevant markets to three different up-front buyers. These buyers were selected by the parties and presented to the Commission for its review.

The Commission’s goal is evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is preliminarily satisfied that the purchasers presented by the parties are well qualified to run the divested stores and that divestiture to these purchasers poses no separate competitive issues. Public comments may address the suitability of the

designated acquirers to acquire the supermarkets at issue.

The three up-front buyers and the number of stores each is acquiring are as follows: Kroger Co. (20 stores in Virginia), Lowe’s Food Stores, Inc. (12 stores and one site in North Carolina), and the Sylvester Group (five stores in North Carolina). Kroger, headquartered in Ohio, operates 2,300 supermarkets in 31 states. Kroger is buying the stores in the Richmond and Tidewater areas where it does not currently operate supermarkets. Lowe’s, a North Carolina corporation, operates 86 supermarkets throughout North Carolina and Virginia. Lowe’s is buying supermarkets in Wilmington and Raleigh. Lowe’s has a small presence in Raleigh, operating two supermarkets in that market, but operates no supermarkets in Wilmington. The Sylvester Group, a family-owned firm, operates 26 “Piggly Wiggly” supermarkets in rural North Carolina and will acquire five stores. The Sylvester Group operates one store in Duplin County, but the Hannaford it is acquiring is 20 miles from that store. A list of the specific supermarkets that Delhaize America and Hannaford must divest to each of the up-front buyers is attached at the end of this Analysis of the Draft Complaint and Proposed Consent Order to Aid Public Comment.

The proposed consent order requires that, no later than 10 days after the date on which the consent order becomes final, the Proposed Respondents shall divest these assets pursuant to and in accordance with their agreements with the buyers. The amount of time required for the divestitures varies with each of the buyers, based on the buyer’s need to convert large numbers of new stores into its operations.

The proposed consent order also requires the Proposed Respondents to include rescission provisions in its up-front buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the up-front buyers. If, at the time the Commission decides to make the proposed consent order final, the Commission notifies the Proposed Respondents that any of the up-front buyers to which they have divested a supermarket or site is not an acceptable acquirer, or that any up-front buyer agreement is not an acceptable manner of divestiture, then the Proposed Respondents must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, the Proposed Respondents must divest those assets only to an acquirer that receives the prior approval of the

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

² Acceptance of the proposed consent order for public comment terminates the Hart-Scott-Rodino waiting period and enables Delhaize America to immediately acquire the Hannaford voting stock.

Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any additional ancillary assets and effect such arrangements as are necessary to satisfy the requirements of the proposed consent order.

The proposed consent order specifically requires the Proposed Respondents to: (1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice. The proposed consent order also contains more specific details relating to maintaining store operations.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or site identified in the order that Delhaize America and Hannaford have not divested to satisfy the requirements of the proposed consent order. The proposed consent order also enables the Commission to seek civil penalties against Delhaize or Delhaize America for non-compliance with the proposed consent order.

For a period of 10 years from the date the proposed consent order becomes final, the Proposed Respondents are required to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in the county or counties that include the relevant geographic areas. Proposed Respondents may not complete such an acquisition until they have provided information requested by the Commission. This provision does not restrict the Proposed Respondents from constructing new supermarket facilities on their own; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

For a period of 10 years, the proposed consent order also prohibits the Proposed Respondents from entering into or enforcing any agreement that restricts the ability of any person that

acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by the Proposed Respondents in the county or counties that include the relevant geographic areas. In addition, the Proposed Respondents may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy, or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondents.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within 30 days following the date on which they signed the proposed consent, every 30 days thereafter until the divestitures are completed, and annually for a period of 10 years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order 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 proposed consent order, including the proposed sale of supermarkets to the various independent buyers listed below, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Attachment—To Analysis of the Complaint and Proposed Consent Order to Aid Public Comment

Supermarkets Divested to Kroger

Hannaford Store No. 427, located at 9480 W. Broad St., Richmond, VA
Hannaford Store No. 474, located at 2738

Hannaford Plaza, Richmond, VA
Hannaford Store No. 477, located at 4816 S. Laburnum, Richmond, VA
Hannaford Store No. 478, located at 1356 Gaskins Rd., Richmond, VA
Hannaford Store No. 479, located at 3507 W. Cary St., Richmond, VA
Hannaford Store No. 480, located at 11400 Huguenot Rd., Midlothian, VA
Hannaford Store No. 481, located at 10921 Hull St., Midlothian, VA
Hannaford Store No. 484, located at 7951 Brook Rd., Richmond, VA
Hannaford Store No. 486, located at 12201 So. Chalkley, Chester, VA
Hannaford Store No. 490, located at 1601 Willow Lawn Dr., Richmond, VA
Hannaford Store No. 481, located at 14246 Warwick Blvd., Newport News, VA
Hannaford Store No. 432, located at 4692 Columbus St., Virginia Beach, VA
Hannaford Store No. 483, located at 4625 Shore Dr., Virginia Beach, VA
Hannaford Store No. 487, located at 1800 Republic Dr., Virginia Beach, VA
Hannaford Store No. 488, located at 101 Village Ave., York Co., VA
Hannaford Store No. 491, located at 2029 Lynnhaven Pkwy., Virginia Beach, VA
Hannaford Store No. 492, located at 205 East Little Creek Rd., Norfolk, VA
Hannaford Store No. 493, located at 5237 Providence Rd., Virginia Beach, VA
Hannaford Store No. 494, located at 5601 High St., Portsmouth, VA
Hannaford Store No. 496, located at King Richard Dr., Virginia Beach, VA

Supermarkets and Unbuilt Site Divested to Lowe's

Hannaford Store No. 410, located at 341 South College Rd., Wilmington, NC
Hannaford Store No. 415, located at 2316 North College Rd., Wilmington, NC
Hannaford Store No. 424, located at 930 High House Rd., Cary, NC
Hannaford Store No. 425, located at 9600 Strickland Rd., Raleigh, NC
Hannaford Store No. 426, located at 5309 Carolina Beach Rd., Wilmington, NC
Hannaford Store No. 428, located at 2900 Millbrook Rd., Raleigh, NC
Hannaford Store No. 436, located at 2900 Wake Forest Rd., Raleigh, NC
Hannaford Store No. 439, located at 1741 Walnut St., Cary, NC
Hannaford Store No. 441, located at 5051-3 Main St., Shallotte, NC
Hannaford Store No. 442, located at 4821 Long Beach Rd., S.E., Southport, NC
Hannaford Store No. 444, located at 3804 Oleander Dr., Wilmington, NC
Hannaford Store No. 455, located at 1405 W. Williams St., Suite A, Apex, NC Unbuilt Site, located at Ten Ten Road, Cary, NC

Supermarkets Divested to Ward Sylvester

Hannaford Store No. 402, located at 103 South Dudley Street, Burgaw, NC
Hannaford Store No. 408, located at 112A Village Road, Leland, NC
Hannaford Store No. 403, located at 107 South Pine Street, Warsaw, NC
Hannaford Store No. 420, located at 701B White's Crossing Shopping Center, Whiteville, NC
Hannaford Store No. 414, located at 604

Jefferson Street, Whiteville, NC

By direction of the Commission.

Donald S. Clark,
Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.13 of the Department of Health and Human Services claims collection regulations (45 CFR Part 30) provides that the Secretary shall charge an annual rate of interest as fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date that HHS becomes entitled to recovery. The rate generally cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the "Schedule of Certified Interest Rates with Range of Maturities." This rate may be revised quarterly by the Secretary of the Treasury and shall be published quarterly by the Department of Health and Human Services in the **Federal Register**.

The Secretary of the Treasury has certified a rate of 13⁷/₈% for the quarter ended June 30, 2000. This interest rate will remain in effect until such time as the Secretary of the Treasury notifies HHS of any change.

Dated: July 25, 2000.

George Strader,

Deputy Assistant Secretary, Finance.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY-54-00]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the

Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639-7090. Send written comments to CDC, Desk Officer; Human Resources and Housing Branch, New Executive Office Building, Room 10235; Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Projects

Interstate Control of Communicable Diseases—New—The Food and Drug Administration (FDA) and Centers for Disease Control and Prevention (CDC) are planning to consolidate regulations related to controlling the spread of communicable diseases, thereby increasing their efficiency and effectiveness. Currently, the regulations contained in Part 1240 of Title 21, Code of Federal Regulations, which pertain to interstate control of communicable diseases, are administered by FDA. Regulations to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States are separately promulgated in Part 71 of Title 42, Code of Federal Regulations and are administered by the CDC. FDA is transferring to CDC certain sections of 21 CFR Part 1240 that relate to restrictions on interstate travel of any person who is in the communicable period of cholera, plague, smallpox, typhus, or yellow fever, or who, having been exposed to any such disease, is in the incubation period thereof.

Of the regulations being transferred, 21 CFR 1240.50 (Certain communicable diseases; special requirements), contains a requirement for reporting certain information to the Federal government. Specifically, this regulation requires any person who is in the communicable period of cholera, plague, smallpox, typhus or yellow fever, or who, having been exposed to any such disease, is in the incubation period thereof, to apply for and receive a permit from the Surgeon General or his authorized representative in order to travel from one State or possession to another.

Control of disease transmission within the States is considered to be the province of State and Local health authorities, with Federal assistance being sought by those authorities on a cooperative basis, without application of Federal regulations. The regulations formerly administered by FDA and being assumed by CDC were developed to facilitate Federal action in the event

of large outbreaks of disease requiring a coordinated effort involving several States, or in the event of inadequate local control. While it is not known whether, or to what extent, situations may arise in which these regulations would be invoked, contingency planning for domestic emergency preparedness is not uncommon. Should this occur, the reporting and record keeping requirements contained in the regulations will be used by CDC to carry out quarantine responsibilities as required by law.

Because of the uncertainty about whether a situation will ever arise precipitating CDC's enforcement of this rule, the following data collection burden estimate was prepared using the article Smallpox: An Attack Scenario, Tara O'Toole; Emerging Infectious Diseases, Vol. 5, No. 4, Jul-Aug 1999. This article describes the aftermath of a hypothetical domestic public health emergency situation involving smallpox virus. Of the potentially 15,000 persons infected with smallpox, the data collection assumes that one-fourth of these would apply for a permit to move from one state to another while in the communicable period of or having been exposed to smallpox, under the requirements set forth in 42 CFR 70.5. During such an event, it is assumed that an additional 2,000 persons not infected with smallpox may, as a precautionary measure, be required to obtain a State permit in order to move from one State to another, and that 8 States would be involved, under the requirements set forth in 42 CFR 70.3.

Further, it is assumed that during such an event, the master of a vessel or person in charge of a conveyance may be required to notify a local health authority of as many as 1,500 suspected cases of communicable disease developed and/or observed during transit, involving as many as 20 State or local jurisdictions, under the requirements set forth in 42 CFR 70.4.

In such a scenario, it would be likely that CDC would obtain for followup and analysis any information it requires to be delivered to a State or local health authority. Accordingly, an additional burden may be imposed upon said authority to copy and transmit that information. We assume that the burden would apply to 100% of the information submitted under both 42 CFR 70.3 and 42 CFR 70.4.

The annualized burden is estimated to be 3,600 hours.