ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT
In the Matter of Tops Markets LLC, File No. 101-0074, Docket No. C-4295

I. Introduction and Background

The Federal Trade Commission ("Commission") has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), its subsidiary, Tops Markets LLC ("Tops"), and The Penn Traffic Company ("Penn Traffic"), (collectively "Respondents"), that is designed to remedy the anticompetitive effects that would otherwise result from Tops' acquisition of the supermarket assets of Penn Traffic. The proposed Consent Agreement requires divestiture of seven Penn Traffic supermarkets and related assets to a Commission-approved buyer.

On November 18, 2009, Penn Traffic filed for Chapter 11 bankruptcy. Through the expedited bankruptcy proceeding, Tops sought to acquire substantially all of Penn Traffic's assets, including its 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire (the "Acquisition"). The purchase price for the Acquisition was $85 million. In addition, Tops agreed to assume from Penn Traffic approximately $70 million in liabilities and claims. Because the only remaining bidder for the supermarkets was a liquidator, the Acquisition represented the only opportunity to avoid mass closing of the Penn Traffic supermarkets.

In light of the extremely tight deadlines inherent in the bankruptcy proceeding, and in an effort to avoid mass liquidation of 79 supermarkets in more than 50 metropolitan areas, Commission staff crafted a remedy that would permit timely consummation of the Acquisition while preserving the Commission's ability to obtain full relief to cure the anticompetitive harm that the Acquisition would otherwise cause in certain local areas where Tops and Penn Traffic operated competing supermarkets. In light of this extraordinary set of circumstances, the Commission determined that this unique remedy would best serve the interests of consumers.

In particular, before the Acquisition was consummated, Respondents agreed in writing to divest all of the Penn Traffic stores in each local geographic market in which the transaction presented potential competitive concerns. Respondents further agreed to maintain the viability of the acquired stores and to cooperate fully with staff's investigation, which continued after the Acquisition was consummated. As a result of this agreement, even before a meaningful investigation could be completed, Respondents had committed themselves in writing to the broadest relief that might ultimately be necessary, thereby preserving completely the Commission's ability to protect consumers through remedial action, while at the same time enabling Tops to consummate the Acquisition and prevent the mass shuttering of Penn Traffic stores.

In accordance with the agreement reached between Respondents and staff, early termination of the HSR waiting period was granted on January 25, 2010. A few days later, Respondents closed on the Acquisition.

The proposed Complaint alleges that the agreement among Respondents for the sale of the Penn Traffic assets to Tops constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the Acquisition constitutes a 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 lessening competition in connection with the retail sale of food and other grocery products in supermarkets.

II. The Parties

Tops is a New York limited liability company with its office and principal place of business in Williamsville, New York. Prior to the Acquisition, Tops owned and operated 71 supermarkets in New York and Pennsylvania, all under the Tops banner. In addition, five supermarkets are owned and operated by franchisees under the Tops banner. Tops is a subsidiary of Holdco, a Delaware limited liability company with its office and principal place of business in New York, New York.

Penn Traffic is a Delaware corporation headquartered in Syracuse, New York. Prior to the Acquisition, Penn Traffic operated 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire under the following banners: Bi-Lo, P&C Foods ("P&C"), and Quality Markets.

III. The Proposed Complaint

As outlined in the proposed Complaint, the relevant product market in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets. Supermarkets are full-line grocery stores that carry a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, shelf-stable food and beverage products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids. The hallmark of supermarkets is that they offer consumers the convenience of one-stop shopping for food and grocery products. To achieve this, supermarkets typically carry more than 10,000 different products and have at least 10,000 square feet of selling space.

As alleged in the proposed Complaint, supermarkets compete principally with other supermarkets and base their prices primarily on the prices of food and grocery products sold in other supermarkets. Other types of retail stores, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores (*e.g.*, ALDI, Save-A-Lot), and mass merchants, do not, individually or collectively, effectively constrain the prices of food and grocery products in supermarkets because they do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. Although stores such as limited assortment stores do sell food and certain other grocery items, they do not offer the breadth of services and products sold at supermarkets and thus do not provide an effective constraint on prices in supermarkets. The evidence and the Commission's conclusions on these issues are consistent with its prior supermarket investigations.

The relevant geographic markets in which to analyze the likely competitive effects of the Acquisition are: Bath, New York; Cortland, New York; Ithaca, New York; Lockport, New York; and Sayre, Pennsylvania. All of these relevant markets were already highly concentrated before the Acquisition, and the Acquisition has substantially increased concentration in each of these markets, as measured by the Herfindahl Hirschman Index ("HHI"). Post-Acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the Acquisition has increased HHI levels by between 1,145 and 4,996 points. The high concentration levels and staff's ultimate conclusions regarding the competitive harm likely to result from the acquisition are not sensitive to changes in the precise contours of the relevant geographic markets. Indeed, the transaction would be presumptively unlawful in the geographic areas at issue even if the relevant geographic markets were defined by radii as large as fifteen to twenty miles.

According to the proposed Complaint, the Acquisition has substantially lessened competition in the relevant markets by eliminating direct competition between Tops and Penn Traffic, by increasing the likelihood that Tops will unilaterally exercise market power, and by increasing the likelihood of successful coordinated interaction among the remaining firms. Absent relief, the ultimate effect of the Acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

For the entry of a new competitor or the expansion of an existing competitor to deter or counteract the anticompetitive effects of an acquisition, entry must be timely, likely, and sufficient. According to the proposed Complaint, new entry or expansion by supermarket competitors in the relevant geographic markets is unlikely to deter the alleged anticompetitive effects of the Acquisition. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market. Commission staff evaluated and considered pending and potential future entry by supermarket competitors in each of the affected geographic markets, as well as entry by other retailers such as mass merchants. In many of the markets, there is unlikely to be any entry in a time period that would prevent the anticompetitive effects. And, in those markets where entry may occur in the near future, the acquisition, despite new entry, still would result in highly concentrated markets, and that entry would not eliminate the anticompetitive harm of the acquisition.

IV. The Proposed Consent Agreement

The proposed Consent Agreement includes two proposed orders: a Decision and Order and an Order to Maintain Assets (collectively "Consent Orders"). The purpose of the proposed Consent Agreement is to: (1) ensure the continued use, and provide for the future use, of the Penn Traffic supermarket assets, subject to divestiture, in the operation of supermarkets at the respective locations; (2) create a viable and effective competitor that is independent of the Respondents in the operation of supermarkets in the relevant geographic markets; and (3) remedy the lessening of competition that has resulted from the Acquisition.

To achieve the above goals, the proposed Consent Agreement requires the divestiture of seven Penn Traffic supermarkets, together with their related assets, to a Commission-approved buyer at no minimum price within ninety (90) days of the Decision and Order becoming final. Tops and Holdco must secure all third-party consents and waivers necessary to facilitate the divestitures and to allow the Commission-approved buyer(s) to continue the operation of the Penn Traffic stores as supermarkets at their respective locations. As set forth in the Consent Orders, the stores to be divested are located in Bath, NY; Cortland, NY; Ithaca, NY (two stores); Lockport, NY; and Sayre, PA (two stores). In the event Respondents do not meet their obligations to divest the Penn Traffic assets, the Commission may appoint a divestiture trustee to divest the assets in a manner consistent with the Decision and Order and subject to Commission approval.

Until all of the Penn Traffic assets are divested, the Consent Orders further require Respondents to maintain the viability, competitiveness, and marketability of the seven Penn Traffic supermarkets and related assets. This includes keeping the supermarkets open for business, performing routine maintenance, providing appropriate marketing and advertising, maintaining inventory levels at the stores, and using best efforts to preserve relationships with suppliers, distributors, customers, and employees. The Consent Agreement provides that the Commission may appoint an interim monitor whose principal duties are to ensure that Tops complies with its obligations under the Consent Orders. The Commission has appointed John J. MacIntyre, a former Penn Traffic employee with more than thirty years of experience in the supermarket industry, as interim monitor.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether to withdraw its acceptance of the proposed Consent Agreement or issue its final Consent Orders.

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement, nor does it modify its terms in any way.