

Attn: Dan Ducore, Bureau of Competition
FTC Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Re: FTC File No. 141-0207, Docket No. C-4530

To The Commission:

I write in regards to the Application for Approval submitted by Sycamore Partners II, L.P., to sell 323 Family Dollar stores to Dollar General under expedited review by the FTC.¹ After a thorough analysis of the Statement of the Federal Trade Commission in response to Dollar Tree's acquisition of Family Dollar in July 2015, I have concluded that this application also warrants a similar procedure. Sycamore Partners petitioned the FTC to approve the assignment of the real property leases, certain liabilities, and the sale of Dollar Express stores to Dollar General. Furthermore, Sycamore Partners asked the FTC to waive the customary 30-day public comment period, citing concerns about Dollar Express's ability to fulfill its obligations to its constituencies in a prolonged process.² Despite Sycamore Partners' valid concerns behind its request for expedited review, the FTC should employ the same methods and analyze this transaction just as it had analyzed the merger of Dollar Tree and Family Dollar. The purpose of this comment letter is not to suggest that the transaction should or should not be permitted. The purpose is simply to convey the gravity of the transaction and ensure that proper procedure is applied. This will ensure that the FTC's mission of preventing anticompetitive, deceptive, unfair business practices and enhancing consumer choice and public understanding is properly fulfilled without unduly burdening legitimate business activity.³

In order to thoroughly evaluate the impact of this transaction, the FTC should examine its compliance under 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. Furthermore, the FTC should carefully review whether the proposed transaction aligns with the 2010 DOJ FTC Horizontal Merger Guidelines. For the purposes of this comment letter, I will briefly discuss the relevant sections of the Clayton Act and the Federal Trade Commission Act before delving into an analysis of the 2010 DOJ FTC Horizontal Merger Guidelines.

Compliance Under 15 U.S.C. § 18

In the acquisition of Family Dollar by Dollar Tree, 15 U.S.C. § 18 played a pivotal role.⁴ A preliminary reading of the statute may suggest that its role is diminished in the sale of Dollar Express to Dollar General, because the structure and nature of the transaction differs in a few

¹ *FTC Seeks Public Comment on Sycamore Partners II, L.P. Application for Approval to Sell 323 Family Dollar Stores to Dollar General*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-seeks-public-comment-sycamore-partners-ii-lp-application> (last visited April 18, 2017).

² FEDERAL TRADE COMMISSION, NO. C-4530, APPLICATION FOR APPROVAL OF PROPOSED SALE OF DOLLAR EXPRESS ASSETS AND REQUEST FOR EXPEDITED TREATMENT (2017).

³ *About the FTC*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/about-ftc> (last visited April 18, 2017).

⁴ Federal Trade Commission; Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders to Aid Public Comment, 80 Fed. Reg. 42,810 (July 20, 2015).

unique ways. The 2015 acquisition was accomplished by Dollar Tree acquiring Family Dollar's stock. The transaction in question here is governed by an Asset Purchase Agreement. In other words, Dollar General is not only purchasing Dollar Express's stock, but is specifically purchasing the assets that Sycamore Partners owns. 15 U.S.C. § 18 seems to apply only to the acquisition of one corporation's stock by another.

However, a more careful reading and an understanding of how the statute has historically been applied reveals that this is not the case. Rather than applying only to stock acquisitions, 15 U.S.C. § 18 applies to any mergers and acquisitions that may have the effect to substantially lessen competition or tend to create a monopoly.⁵ Because this transaction would effectively eliminate Dollar Express, currently operating as a separate entity in the market, it would have the effect of substantially lessening competition and should be evaluated accordingly.

Compliance Under 15 U.S.C. § 45

Compliance under 15 U.S.C. § 45 requires evaluation from two different perspectives. The language of the statute reads, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."⁶ The statute goes on to empower the FTC to prevent entities from using unfair methods or deceptive practices of effecting competition. Although the language is somewhat vague, leaving open to interpretation the definition of "unfair" and deceptive, the FTC may look toward previous case law to determine how the statute should be applied. Two potential instances of unfair competition exist. First, there may be unfair competition between the Family Dollar stores owned by Sycamore Partners and the alleged stores Dollar Tree has been opening in the same area. Second, competition may be limited if Dollar General purchases these stores.

In the complaint, Sycamore Partners alleges that Dollar Tree has opened 37 new stores since November 2013 in the same trade area as the Dollar Express stores. Both the Dollar Express stores and the new Dollar Tree stores operate under the Family Dollar banner, essentially eliminating the difference between the two different operating entities in the eyes of the consumers. Furthermore, Dollar Express has a reasonable belief based on "publicly available information, market research, and general industry knowledge, that Dollar Tree plans to open at least 70 other Family Dollar stores in the same trade area as a Dollar Express store and ... [that] Dollar Tree will almost certainly open many more."⁷ These actions by Dollar Tree are projected to result in an annual pro forma sales decline, while also potentially violating the unfair competition provision under 15 U.S.C. § 45.

While that analysis might drive one toward a conclusion favorable to the application put forth by Sycamore Partners, it is important to evaluate the unfair competition concerns that would emerge if this sale were allowed to go forward. Dollar stores are part of the "discount general merchandise retail stores", a characterization that also includes Wal-Mart. However, dollar stores typically compete most directly with other dollar stores that provide similarly convenient shopping experiences at low prices.⁸ Allowing the sale of 323 Family Dollar stores to

⁵ 15 U.S.C. § 18 (2015)

⁶ 15 U.S.C. § 45 (2015)

⁷ FEDERAL TRADE COMMISSION, NO. C-4530, APPLICATION FOR APPROVAL OF PROPOSED SALE OF DOLLAR EXPRESS ASSETS AND REQUEST FOR EXPEDITED TREATMENT (2017).

⁸ Federal Trade Commission; Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders to Aid Public Comment, 80 Fed. Reg. 42,810 (July 20, 2015).

Dollar General will essentially create two large players in the market—Dollar General and Dollar Tree. This scenario may be anticompetitive and the value of a third, albeit smaller player existing in the form of Dollar Express should be seriously considered.

2010 DOJ FTC Horizontal Merger Guidelines

The most effective and comprehensive method of evaluating the viability of a horizontal merger or acquisition is outlined in a set of guidelines issued by the U.S. DOJ and the FTC in August of 2010. The Guidelines describe specific analytical techniques and what evidence agencies may rely on during the decision-making process. In addition, the Guidelines are based off of existing federal antitrust laws, such as 15 U.S.C. § 18 and 15 U.S.C. § 45 discussed above.⁹ Taking into account the eagerness of Sycamore Partners to find a quick resolution, the Guidelines are the most appropriate view to conduct a complete review. The following sections are particularly crucial in this particular sale. However, this does not justify that other sections may be neglected. Consumers would be heavily impacted by a lack of sufficient competition between dollar stores in their regions.

Adverse Competitive Effects

Evidence of adverse competitive effects can emerge from several different sources. The FTC should consider the actual effects observed in consummated mergers, in this case the merger between Dollar Tree and Family Dollar, as well as the market share and concentration in relative markets. Furthermore, the agencies should look toward whether any substantial head-to-head competition exists.¹⁰ Based on the application put forth by Sycamore Partners, it appears that there is substantial, almost debilitating, competition between Dollar Express and Dollar Tree. Regardless, it is the responsibility of the agencies to evaluate the credibility and weight that should be afforded those claims, as they are only a portion of the overall investigation.

Market Definition

The way the market is defined substantially affects how a merger or acquisition is perceived. Much of this research and analysis has previously been conducted while the FTC was considering the acquisition of Family Dollar by Dollar Tree, and it has been preserved in the FTC's statement.¹¹ The locations and competition surrounding these particular stores was determined to be especially troublesome, providing support for the FTC's decision to require Dollar Tree and Family Dollar to divest 330 stores to Sycamore Partners.¹² Therefore, the FTC should approach these stores with a degree of cynicism.

⁹ FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, HORIZONTAL MERGER GUIDELINES (AUGUST 19, 2010).

¹⁰ *Id.* at 3.

¹¹ FEDERAL TRADE COMMISSION, NO. 141-0207, STATEMENT OF THE FEDERAL TRADE COMMISSION IN THE MATTER OF DOLLAR TREE, INC. AND FAMILY DOLLAR STORES, INC. (2015).

¹² *FTC Requires Dollar Tree and Family Dollar to Divest 330 Stores as Condition of Merger*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/press-releases/2015/07/ftc-requires-dollar-tree-family-dollar-divest-330-stores> (last visited April 18, 2017).

Failure and Exiting Assets

The Guidelines assert that if the competitive significance of one of the firms is declining, it is likely that the merger will not substantially enhance market power or cause competitive harm.¹³ The urgency with which the application was presented suggests that Dollar Express is currently failing and expedited review would allow Dollar Express to fulfill the majority of its commitments, including to its employees and customers. The application particularly asserts that “Dollar Express can no longer operate as a viable standalone business.”¹⁴ This provision should be balanced against the adverse competitive effects that may emerge. Although both seemed to be diametrically opposed, the FTC should evaluate the relative impact of these categories to the Guidelines and develop a solution that preserves overall consumer interests

Conclusion

The purpose of this letter is not to suggest that the FTC approve or deny the application by Sycamore Partners. Instead, the purpose is to convey the gravity of this acquisition and to advocate for the particular procedure that the FTC should follow to ensure that varying constituencies are being minimally harmed by the transaction.

Sincerely,

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Yale Law School Financial Markets and Corporate Law Clinic¹⁵

¹³ FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, HORIZONTAL MERGER GUIDELINES (AUGUST 19, 2010).

¹⁴ FEDERAL TRADE COMMISSION, NO. C-4530, APPLICATION FOR APPROVAL OF PROPOSED SALE OF DOLLAR EXPRESS ASSETS AND REQUEST FOR EXPEDITED TREATMENT (2017).

¹⁵ The views expressed are those of the author and do not reflect the views of any other individual or of Yale Law School.