President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Goering Management Company, L.L.C. and Goering Financial Holding Company Partnership, L.P.,* both in Moundridge, Kansas; to retain at least 43 percent of the voting shares of Bon, Inc., Moundridge, Kansas, and thereby indirectly retain voting shares of Home State Bank & Trust Co., McPherson, Kansas, and The Citizens State Bank, Moundridge, Kansas.

Board of Governors of the Federal Reserve System, April 19, 2013.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2013–09642 Filed 4–23–13; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 9, 2013.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

*1. One PacificCoast Foundation,* Oakland, California; to engage *de novo* in community development activities and nonbanking activities incidental to extending credit, pursuant to sections 225.28(b)(12)(i) and 225.28(b)(2)(i), respectively.

Board of Governors of the Federal Reserve System, April 19, 2013.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2013–09641 Filed 4–23–13; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL TRADE COMMISSION

**[File No. 101 0215]**

### Graco, Inc.; Analysis of Agreement Containing Consent Order 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 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 May 20, 2013.

**ADDRESSES:** Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/gracoconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Graco, File No. 101 0215'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/gracoconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Jackson (202–326–2193), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 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 April 18, 2013), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before May 20, 2013. Write ''Graco, File No. 101 0215'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which * * * is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept

[1] In particular, the written request for confidential treatment that accompanies the comment must

Continued

confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/gracoconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Graco, File No. 101 0215'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before May 20, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

**Analysis of Agreement Containing Consent Order To Aid Public Comment**

The Federal Trade Commission (''Commission'') has accepted for public comment an Agreement Containing Consent Order (''Consent Order'') with Graco, Inc. (''Graco'') to remedy the alleged anticompetitive effects resulting from Graco's acquisition of its most significant competitors, Gusmer Corp. (''Gusmer'') and GlasCraft, Inc. (''GlasCraft''). The Commission Complaint (''Complaint'') alleges that, at the time of the acquisitions, Graco, Gusmer, and GlasCraft each manufactured and sold equipment for the application of fast-set chemicals (''fast-set equipment''). Neither acquisition was reportable under the Hart-Scott-Rodino Act. The Consent Order seeks to restore competition lost through the acquisitions by requiring Graco to license certain technology to a small competitor to facilitate its entry and expansion, and to cease and desist from engaging in certain conduct that may delay or prevent entry and expansion of competing firms. The Complaint and Consent Order in this matter have been issued as final and the Consent Order is now effective.

The Complaint alleges that the acquisitions each violated 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.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the Consent Order. It is not intended to constitute an official interpretation of the Agreement and Consent Order or in any way to modify their terms.

The Consent Order is for settlement purposes only. The Commission has placed the Consent Order on the public record for thirty (30) days for the receipt of comments by interested persons.

**I. The Relevant Market and Market Structure**

The relevant market within which to analyze the competitive effects of these acquisitions is fast-set equipment used by contractors in North America. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings used for the application of insulation and protective coatings. The essential components of a fast-set equipment system are the proportioner, the heated hoses, and the spray gun.

Fast-set equipment manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. These independent distributors sell to end-users. End-users demand a proximate source of expertise, spare parts, and repair services. Therefore, a robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete effectively in the relevant market.

Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%, and left GlasCraft as Graco's only significant North American competitor. Graco's acquisition of GlasCraft in 2008 raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisitions of each of Gusmer and GlasCraft, Graco closed both firms' fast-set equipment manufacturing facilities and has fully assimilated or terminated all remaining assets, products, intellectual property, and personnel from both firms.

Prior to the acquisitions, fast-set equipment distributors typically carried products from multiple manufacturers. Distributors and end-users were able to mix and match the products from the different manufacturers to assemble a fast-set system that best satisfied end-users' demands. Further, manufacturers did not impose exclusive relationships on distributors—a distributor was free to make some or all of its fast-set equipment purchases from whichever manufacturers it chose. The Complaint alleges, among other effects, that the acquisitions of Gusmer and GlasCraft have removed the ability of distributors and end-users to select the equipment that best serves their, and their customers', interests and needs.

**II. Conditions of Entry and Expansion**

The Complaint alleges high entry barriers in the relevant market. The principal barrier to entry is the need for specialized third-party distribution. As a result of its acquisitions, Graco obtained substantial control over access to that distribution channel. Subsequent Graco practices have further heightened barriers to competitive entry and expansion, such that restoration of the competition lost as a result of Graco's acquisitions is unlikely to be restored unless Graco's continuation of those practices is enjoined.

Beginning in 2007, former employees of Gusmer began distributing fast-set equipment as Gama Machinery USA, Inc., now doing business as Polyurethane Machinery Corp. (''Gama/PMC''). In March 2008, Graco sued Gama/PMC and others alleging, among other things, breach of contract. The continuation of that litigation has reduced the willingness of distributors to purchase fast-set equipment from Gama/PMC, for fear that their supply of fast-set equipment might later be interrupted as a result of litigation. To reduce that barrier, an impending settlement of that litigation is incorporated in the Commission's Consent Order.

Like Gama/PMC, other prospective competitors—some of which presently offer only some components, rather than a full line of proportioners, hoses, and spray guns—have been unable to gain a meaningful foothold in the North American fast-set equipment market

include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

because of barriers to access to the required specialty distribution channel. Following its obtaining of market power through its acquisitions, Graco increased the discount and inventory thresholds it required of distributors, and threatened to cut off any distributor's access to needed Graco fast-set equipment if the distributor purchased fast-set equipment from any Graco rival. The reduction of barriers to entry and expansion by enjoining the continuation of this conduct is necessary to the restoration of competition lost as a result of Graco's acquisitions, and certain provisions of the Commission's cease and desist order are directed to that end.

**III. Effects of Graco's Acquisitions**

As a result of the acquisitions, Graco has eliminated head-to-head competition with Gusmer and GlasCraft. The Complaint alleges that concentration in the relevant market has increased substantially, and given Graco the ability to exercise market power unilaterally. The Complaint alleges that Graco has exercised that market power by raising prices, reducing product options and alternatives, and reducing innovation. The Complaint further alleges that Graco engaged in certain post-acquisition conduct that has raised barriers to entry and expansion such that the continuation of that conduct must be enjoined if the competition lost as a result of Graco's acquisitions is to be restored.

**IV. The Consent Agreement**

Since the acquisitions were completed some time ago, it is not practicable to recreate the acquired firms as independent going concerns. Instead, the purpose of the Consent Order is to ensure the restoration of the competitive conditions that existed before the acquisitions, to the extent possible, by facilitating Gama/PMC's entry and expansion and lowering barriers to entry. Therefore, the Consent Order requires Graco to enter into a settlement agreement with Gama/PMC within ten (10) days of the entry of the Order. In addition, Graco must grant to Gama/PMC an irrevocable license to certain Graco patents and other intellectual property in order to ensure that Graco cannot continue or renew its suit. In exchange, PMC will pay to Graco a sum of money for the settlement of the litigation and agree to a deferred license fee for the intellectual property. The settlement documents will be incorporated by reference into the Consent Order, and cannot be modified without the Commission's prior approval. Further, the Consent Order independently prohibits Graco from filing suit against Gama/PMC for infringing the licensed intellectual property.

In order to reduce barriers to competitor entry, the Consent Order directs Graco to cease and desist from imposing any conditions on its distributors that could, directly or indirectly, lead to exclusivity. The Consent Order also prohibits Graco from discriminating against, coercing, threatening, or in any other manner pressuring its distributors not to carry or service any competing fast-set equipment. The Consent Order does not mandate that any distributor carry competitive fast-set equipment; rather, it bars Graco from imposing exclusivity on its distributors.

The Consent Order further obligates Graco to waive or modify any policies or contracts that would violate the Consent Order. Graco will have thirty (30) days after the Consent Order is final to negotiate changes in the contracts with its distributors to comply with the Consent Order. Graco must provide all of its distributors, employees and agents with a copy of the Consent Order and a plain-language explanation of what is says and requires.

The Consent Order further requires Graco to provide the Commission with prior notice: (1) If it intends to make another acquisition of fast-set equipment (after an appropriate waiting period); or (2) if it intends, within thirty (30) days, to institute a lawsuit or similar legal action against a distributor or end-user with regard to a claimed violation of Graco's trade secrets or other intellectual property covering fast-set equipment. The Consent Order will remain in effect for ten (10) years, and contains standard compliance and reporting requirements.

**V. Effective Date of the Consent Order and Opportunity for Public Comment**

In this instance, the Commission issued the Complaint and the Consent Order as final, and served them upon Graco at the same time it accepted the Consent Agreement for public comment. As a result of this action, the Consent Order has become effective. The Commission adopted procedures in August 1999 to allow for immediate implementation of an order prior to the public comment period. The Commission announced that it ''contemplates doing so only in exceptional cases where, for example, it believes that the allegedly unlawful conduct to be prohibited threatens substantial and imminent public harm.'' 64 FR 46,267, 46,268 (1999).

This is an appropriate case in which to issue a final order before receiving public comment because the effectiveness of the remedy depends on the timeliness of the private settlement agreement between Graco and Gama/PMC, which only becomes effective when the Consent Order becomes final. Both Graco and Gama/PMC have made initial efforts to address distributor concerns about possible Graco retribution by separately sending letters to distributors assuring them that preliminary discussions of business relations with Gama/PMC would not have any adverse consequences on the distributors' relationship with Graco. However, the protections of the applicable license and covenants, as well as those included in the Consent Order, are needed to provide distributors reasonable assurances that buying from Gama/PMC will not jeopardize the distributors' relationship with Graco. As a result, any delay in the effectiveness of the Consent Order and the associated private settlement will prevent Gama/PMC from finalizing relationships with distributors in time for the current construction season—and this will have a significant and meaningful impact on competition in the fast-set equipment market that the Consent Order is intended to foster.

The Commission anticipates that the competitive problems alleged in the Complaint will be remedied by the Consent Order, as issued. Nonetheless, public comments are encouraged and will be considered by the Commission. The purpose of this analysis is to invite and facilitate such comments concerning the Consent Order and to aid the Commission in determining whether to modify the Consent Order in any respect. Therefore, the Complaint and Consent Order have 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 comments received, and may determine that the Consent Order should be modified in response to the comments.[2]

[2] If the Respondent does not agree to any such modifications, the Commission may (1) initiate a proceeding to reopen and modify the Consent Order in accordance with Rule 3.72(b), 16 CFR 3.72(b), or (2) commence a new administrative proceeding by issuing an administrative complaint in accordance with Rule 3.11. *See* 16 CFR 2.34(e)(2).

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

## Statement of the Federal Trade Commission

Today the Commission has voted unanimously to approve the Complaint and Decision & Order (''Order'') against Graco, Inc. (''Graco'') to resolve allegations that it violated Section 7 of the Clayton Act when it acquired Gusmer Corp. (''Gusmer'') in 2005 and Glascraft, Inc. (''Glascraft'') in 2008. At the time of the acquisitions, Gusmer and Glascraft were Graco's two closest competitors in the market for fast-set equipment (''FSE'') used to apply polyurethane and polyurea coatings. The acquisitions eliminated the only significant competition in the market, and resulted in Graco holding a monopoly position as the only full-line FSE manufacturer. The Order contains provisions, including prohibitions on discriminating against distributors selling competitors' FSE products, that are intended to constrain Graco's ability to exclude prospective entrants into the FSE market by establishing and/or maintaining exclusive relationships with its third-party distributors. Commissioner Wright voted in favor of the Complaint and Order, but also issued a statement outlining his disagreement with these portions of the Order. We respectfully disagree with Commissioner Wright, and believe that these specific provisions are necessary to remediate the anticompetitive impact of the two mergers in this case.

The typical remedy for the Commission in a Section 7 matter is a divestiture of the illegally acquired assets (and any other assets necessary to make the divestiture buyer a viable competitor). Pursuing such a remedy in this matter, however, would be difficult, if not impossible, because Graco had long ago integrated or discontinued the product lines it acquired from Gusmer and Glascraft. There was no easily severable package of assets that could be divested to recreate one—much less two—viable competitors to replace Gusmer and Glascraft. As a result, the most effective relief available was a behavioral remedy intended to facilitate entry into the FSE market, which, of course, includes addressing the post-acquisition conduct described in the Complaint that had precluded entry into the relevant market. Specifically, after the acquisitions Graco solidified its market share by locking up third-party distributors through a series of purchase and inventory threshold requirements, as well as threats of retaliation and termination if distributors carried the products of any remaining or newly entering FSE manufacturers.

The evidence gathered in the course of the Commission's investigation demonstrates that Graco's efforts were successful; no other firm gained more than five percent of the North American FSE market and Graco's market share of between 90 and 95 percent has remained intact since its 2008 acquisition of Glascraft. Further, the investigation uncovered no evidence that Graco's post-acquisition conduct provided any cognizable efficiency that would benefit consumers. A remedy that does not address Graco's ability to raise and maintain nearly insurmountable entry barriers is substantially less likely to return competition to the FSE market. The Order provisions that Commissioner Wright criticizes, in our view, are integral to achieving that goal but will not cause market inefficiencies.

We believe that exclusive dealing relationships can have procompetitive benefits and that such relationships should not be condemned in the absence of a thorough factual and economic assessment of the circumstances surrounding such conduct. But it is equally important to recognize that, when employed by a competitor that has acquired significant market power or monopoly power, exclusive dealing arrangements have the potential to cement such power and prevent or deter entry that would lead to lower prices, higher quality, and better service for consumers.[3] In any event, regardless of how one views exclusive dealing arrangements generally, there is ample support for the fencing-in relief prescribed in this merger settlement, which is designed to restore competition in the FSE market lost as a result of Graco's illegal acquisitions.

We join Commissioner Wright in commending the Commission staff for their hard work in this matter. They have done an excellent job in investigating the market involved and the issues raised during the course of this investigation.

By direction of the Commission, Commissioner Wright abstaining.

Donald S. Clark,

*Secretary.*

[3] *See, e.g., United States* v. *Microsoft Corp.,* 253 F.3d 34, 71–72, 74 (D.C. Cir. 2001) (holding that Microsoft's exclusive dealing arrangements with Internet access providers, independent software vendors, and Apple violated Sherman Act § 2).

## Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Order against Graco, Inc. (''Graco'') to remedy the allegedly anticompetitive effects of Graco's acquisition of Gusmer Corp. (''Gusmer'') in 2005 and GlasCraft, Inc. (''GlasCraft'') in 2008. I supported the Commission's decision because there is reason to believe Graco's acquisitions substantially lessened competition in the market for fast-set equipment in violation of Section 7 of the Clayton Act. I want to commend staff for their hard work in this matter. Staff has conducted a thorough investigation and developed strong evidence that Graco's acquisition of Gusmer and GlasCraft likely resulted in higher prices and fewer choices for consumers.

I write separately to discuss two aspects of the Order with which I respectfully disagree, namely the provisions prohibiting Graco from entering into exclusive dealing contracts with distributors and establishing purchase and inventory thresholds that must be satisfied in order for distributors to obtain discounts. Both provisions are aimed at prohibiting exclusivity or, in the case of purchase and inventory thresholds, loyalty discounts that might be viewed as *de facto* exclusive arrangements. I am not persuaded in this case that prohibiting exclusive dealing contracts and regulating loyalty discounts will make consumers better off. To the contrary, these provisions may lead to reduced output or higher prices for consumers. I therefore do not believe the limitations on such arrangements imposed by the Order are in the public interest.

### I. Appropriate Use of Behavioral Remedies

The majority and I agree that although the most suitable remedy for an anticompetitive merger usually is a divestiture of assets, under certain circumstances behavioral remedies may be appropriate.[4] One scenario in which behavioral remedies may be appropriate is when the challenged merger has long since been consummated and divestiture or other structural remedies are not a viable option for restoring competition to pre-merger levels. Given that Graco has fully integrated Gusmer and Glascraft and discontinued their

[4] *See e.g.,* Fed. Trade Comm'n, Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 5 (2012), *available at http://www.ftc.gov/bc/bestpractices/merger-remediesstmt.pdf* (stating the Commission favors structural relief, such as divestitures, in horizontal mergers, but that behavioral relief may be appropriate in some cases).

product lines, divestiture is not an option and the Commission should rightly consider whether behavioral remedies in this case would protect consumers.

As with merger remedies generally, when deciding whether and what behavioral remedy to impose, the Commission must ultimately be guided by its mission of protecting consumers.[5] Because behavioral remedies displace normal competitive decision-making in a market, they pose a particularly high risk of inadvertently reducing consumer welfare and should be examined closely prior to adoption to ensure consumers' interests are best served. In particular, effective behavioral remedies must be ''tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process.'' [6] Merely showing high market shares and the unavailability of structural remedies does not justify restricting conduct that typically is procompetitive because these conditions do not make the conduct any more likely, much less generally likely, to be anticompetitive.[7] A minimum safeguard to ensure remedial provisions—whether described as fencing-in relief or otherwise—restore competition rather than inadvertently reduce it is to require evidence that the type of conduct being restricted has been, or is likely to be, used anticompetitively to harm consumers.

With this analytical framework in mind, I support those remedies in the Order that seek to restore pre-merger competition by imposing restrictions closely linked to the evidence of anticompetitive harm in this case. For instance, staff uncovered evidence Graco threatened distributors that considered carrying fast-set equipment sold by competing manufacturers, and that these threats actually led to distributors not purchasing the competing products. Staff also learned that distributors refused to purchase fast-set equipment from Gama/PMC, one of the few fringe competitors remaining after Graco's acquisitions, because of the uncertainty resulting from Graco's lawsuit against Gama/PMC. The Order thus appropriately prohibits Graco from retaliating against distributors that consider purchasing fast-set equipment from other manufacturers [8] and requires Graco to settle its lawsuit against Gama/PMC.

In contrast, and as is discussed in more detail below, there is insufficient evidence linking the remedial provisions in the Order prohibiting exclusive dealing contracts and regulating loyalty discounts to the anticompetitive harm in this case.

## II. Prohibitions on Exclusive Dealing

It is widely accepted that exclusive dealing and *de facto* exclusive contracts—while generally efficiency enhancing—can lead to anticompetitive results when certain conditions are satisfied. The primary competitive concern is that exclusive dealing may be used by a monopolist to raise rivals' costs of distribution by depriving them the opportunity to compete for distribution sufficient to achieve efficient scale, and ultimately harm consumers by putting competitors out of business.[9] On the other hand, the economic literature is replete with procompetitive justifications for exclusive dealing, including aligning the incentives of manufacturers and distributors, preventing free-riding, and facilitating relationship-specific investments.[10] In fact, the empirical evidence substantially supports the view that exclusive dealing arrangements are much more likely to be procompetitive than anticompetitive.[11]

Because exclusive dealing contracts typically are procompetitive and a part of the normal competitive process, the Commission should only restrict the use of such arrangements when there is sufficient evidence that they have or are likely to decrease consumer welfare. This ensures consumers the merger remedy does not deprive them the fruits of the competitive process. The evidence in this case is insufficient to conclude that Graco has used, or intends to use, exclusive dealing or *de facto* exclusive contracts to foreclose rivals and ultimately harm consumers. To the contrary, the Commission's Complaint describes the fast-set equipment market as one particularly well suited for exclusive arrangements. Specifically, the Complaint acknowledges the sale of fast-set equipment demands specialized third party distributors that possess the technical expertise to teach consumers how to use and maintain the manufacturer's equipment.[12] One could therefore easily imagine that manufacturers might only be willing to provide training to distributors if they have some assurance that current or future competitors will be unable to free ride on their investments in the distributors' technical expertise. Exclusive dealing arrangements with distributors are one well-known and common method of preventing such free riding.

The provisions in the Order prohibiting exclusive contracts therefore may needlessly harm consumers by deterring potentially procompetitive arrangements. For that reason, I do not believe that provision is in the public interest.

## III. Restrictions on Loyalty Discounts

The primary anticompetitive concerns with loyalty discounts are analytically similar to those associated with exclusive dealing and *de facto* exclusive

[5] The Commission should keep in mind that ours is not a binary choice simply between imposing a structural or a behavioral remedy. The most attractive option from a consumer welfare point of view for any given circumstance may be to block the merger in its entirety, allow the merger to proceed without any remedy, or a hybrid solution combining some aspects of each of these options. Having ruled out structural remedies in this case, the question is which, if any, of the non-structural alternatives best improves consumer welfare. *See* Ken Heyer, *Optimal Remedies for Anticompetitive Mergers,* 26 Antitrust 27 (2012) (arguing behavioral remedies are not justified simply because structural remedies are unavailable, and that an agency should weigh the economic costs and benefits of each non-structural alternative, including doing nothing).

[6] U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, at 7 n.12 (June 2011), *available at http://www.justice.gov/atr/public/guidelines/272350.pdf; see also,* Heyer, *supra* note 2, at 27–28 (''[A]mong the most important considerations in devising a behavioral remedy is that there be a close nexus between the remedy imposed and the theory of harm motivating its use.'').

[7] In fact, efficiencies justifications for exclusive dealing contracts apply, and some even more strongly, when a firm has market power.

[8] Such retaliatory conduct alone is outside the normal competitive process and has no plausible procompetitive benefit. Its proscription therefore is unlikely to harm consumers. Of course, a decision by Graco to refuse to sell to distributors who do not enter into an exclusive contract should not itself be proscribed as illegitimate retaliation.

[9] *See e.g.,* Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing, in* Antitrust Law and Economics 183, 194–96 (Keith N. Hylton ed., 2d ed. 2010). There also are novel theories of anticompetitive harm, including models exploring the possibility that certain types of discount programs effectively impose a tax upon distributors' choice to expand rivals' sales and thereby potentially prevent rivals from acquiring a sufficient number of retailers to cover the fixed costs of entry. *See e.g.,* Joe Farrell, et al., *Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior,* 37 (4) Rev. Indus. Org. 263 (2010).

[10] *See e.g.,* Abbott & Wright, *supra* note 6, at 200–01; Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in* Handbook of Antitrust Economics, 393–94 (Paolo Buccirossi, ed., 2008); Benjamin Klein & Kevin Murphy, *Exclusive Dealing Intensifies Competition for Distribution,* 75 Antitrust L. J. 433, 465 (2008).

[11] *See e.g.,* Abbott & Wright, *supra* note 6, at 200–01; Lafontaine & Slade, *supra* note 7, at 393–94.

[12] Complaint ¶ 24, Graco, Inc., FTC File No.101–0215, (April 17, 2013).

contracts.[13] As with exclusive dealing, the economic literature also supports the view that loyalty discounts more often than not are procompetitive.[14] The Commission's competition mission therefore is best served by an approach that counsels against imposing restrictions on loyalty discounts unless there is sufficient evidence to establish that such arrangements have or are likely to harm competition and consumers.

The Order permits Graco to enter into certain loyalty discount agreements that require distributors to meet annual purchase and inventory thresholds to qualify for discounted prices.[15] The Order, however, restricts the scope of these loyalty discounts by prescribing the maximum threshold levels Graco may set in 2013 and by only allowing those maximums to increase by 5 percent year to year. Although there is evidence that Graco in some instances increased the inventory and purchase thresholds it required distributors to meet to receive discounts on fast-set equipment following its acquisitions, I have not seen evidence sufficient to link these increases to the anticompetitive effects of the mergers alleged in the Commission's Complaint. For example, I have seen no evidence that a distributor dropped Gama/PMC or any other fringe competitor in response to Graco's increased thresholds. Further, although there appears to be evidence that at least some distributors are unable to both meet the thresholds necessary to receive Graco's discounts and carry competing manufacturers' products, there is nothing barring these distributors from forgoing those discounts in order to carry multiple products lines. It has been several years since Graco increased the thresholds. In the absence of evidence this change harmed competition, the fact that some distributors prefer to take the discounts is not a sufficient reason to believe that prohibiting these contracts will protect consumers. Moreover, it is unlikely that the Commission is best positioned to gauge what the appropriate threshold should be for each distributor over time and as market conditions change.

As a result, based upon the available evidence, I am concerned the restrictions on loyalty discounts in the Order ultimately may reduce consumer welfare rather than protect competition. Thus, I do not believe this aspect of the Order is in the public interest.

* * * * *

For these reasons, I voted in favor of the Commission's Complaint and Order, but respectfully disagree with the Order provisions prohibiting exclusive contracts and restricting loyalty discounts. To the extent the majority believes Graco may use such arrangements to engage in anticompetitive conduct in the future, the Commission's willingness and ability to bring a monopolization claim where the evidence indicates it is appropriate would protect consumers against the competitive risks posed by these arrangements without depriving consumers of their potential benefits.

[13] *See generally* Bruce H. Kobayashi, *The Economics of Loyalty Discount and Antitrust Law in the United States,* 1 COMP. POL'Y INT'L 115 (2005).

[14] *Id.*

[15] Decision & Order § III(6)(c), Graco, Inc., FTC File No.101–0215, (April 17, 2013).

[FR Doc. 2013–09673 Filed 4–23–13; 8:45 am]

**BILLING CODE 6750–01–P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–00xx; Docket 2013–0001; Sequence 5]**

## Agency Information Collection Activities; Information Collection; USA Spending

**AGENCY:** Interagency Policy and Management Division, Office of Governmentwide Policy, U.S. General Services Administration (GSA).

**ACTION:** Notice of request for public comments regarding a new OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement regarding USA Spending.

**DATES:** Submit comments on or before June 24, 2013.

**ADDRESSES:** Submit comments identified by Information Collection 3090–00xx, USA Spending, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–00xx, USA Spending.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–00xx, USA Spending'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 3090–00xx, USA Spending.

*Instructions:* Please submit comments only and cite Information Collection 3090–00xx, USA Spending, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mary Searcy, Acquisition Systems for Award Management Division, Office of Governmentwide Policy, General Services Administration, 1275 First Street NE., Washington, DC 20417; telephone number: 703–603–8132; or email address *Mary.Searcy@gsa.gov*.

**SUPPLEMENTARY INFORMATION:**

### A. Purpose

USASpending.gov is required by the Federal Funding Accountability and Transparency Act (Transparency Act). The site provides the public with information about how tax dollars are spent. The site provides data about the various types of contracts, grants, loans and other types of spending in the federal government.

### B. Annual Reporting Burden

*Number of Respondents:* 5,000.

*Responses per Respondent:* 1.

*Total Responses:* 5,000.

*Average Burden Hours per Response:* .25.

*Total Burden Hours:* 1250.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control Number 3090–00xx, USA Spending, in all correspondence.

Dated: April 17, 2013.

**Casey Coleman,**

*Chief Information Officer.*

[FR Doc. 2013–09573 Filed 4–23–13; 8:45 am]

**BILLING CODE 6820–WY–P**