PrimeSouth Mortgage Company, Jessup, Georgia); to engage in making, acquiring, servicing loans, or other extensions of credit, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, August 19, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–19405 Filed 8–24–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies That are 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. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

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 September 9, 2004.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. MNB Holdings Corporation, San Francisco, California; to engage *de novo* in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, August 20, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–19463 Filed 8–24–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 041 0025]

Cephalon, Inc., 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 September 8, 2004.

ADDRESSES: Comments should refer to ''Cephalon, Inc., *et al.*, File No. 041 0025,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the **SUPPLEMENTARY INFORMATION** section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov*.

FOR FURTHER INFORMATION CONTACT: Elizabeth Jex, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3273.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), 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 August 9, 2004), on the World Wide Web, at ''*http://www.ftc.gov/os/2004/08/index.htm*.'' 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.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before September 8, 2004. Comments should refer to ''Cephalon, Inc., *et al.*, File No. 041 0025,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: *consentagreement@ftc.gov*.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Cephalon, Inc. and Cima Labs, Inc., which is designed to remedy the anticompetitive effects of the acquisition of Cima by Cephalon. Under the terms of the proposed Consent Agreement, Cephalon would be required to grant to a third party company, a fully paid-up, irrevocable license to make and sell a generic equivalent of its breakthrough cancer pain (''BTCP'') drug Actiq in the United States.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order (''Order'').

Pursuant to an Agreement and Plan of Merger dated November 3, 2003, between Cephalon and Cima, Cephalon proposes to acquire 100 percent of the issued and outstanding shares of Cima in a stock-for-stock transaction valued at approximately $515 million. Cephalon also intends to pay consideration such that each issued and outstanding share of Cima common stock will be converted into the right to receive $34.00 in cash. The Commission's Complaint alleges that the proposed acquisition, if consummated, would constitute 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, in the market for prescription drug products indicated for the treatment of BTCP. The proposed Consent Agreement will remedy the alleged violations by replacing the lost potential competition that would result from the merger in this market.

Drugs for the treatment of BTCP help to reduce or eliminate the spikes of intense pain experienced by patients receiving opioid therapy for their chronic pain. By providing a faster onset of pain relief than short-acting oral opioids, BTCP products allow patients to be more active. Because many patients with BTCP are not in hospitals, BTCP products are self-administered and produced in a convenient and portable dosage form. These characteristics of BTCP medications provide terminally ill cancer patients a significant improvement to the quality of their lives. Annual sales of BTCP drugs total more than $200 million in the United States, and the market is growing rapidly.

The U.S. market for drugs to treat BTCP is a monopoly. Cephalon markets Actiq, the only product currently indicated for the treatment of BTCP on the market. Actiq is a fentanyl-containing, berry-flavored lollipop. Cephalon is also developing a sugar free formulation of Actiq which it expects to launch in 2005. Cima is in Phase III of clinical development of its OraVescent fentanyl (''OVF'') product, which is a fast-dissolving, effervescent, sugar-free fentanyl tablet. Cima intends to seek approval from the Food and Drug Administration (''FDA'') by the end of 2004 or in the first quarter of 2005. OVF is expected to enter the U.S. market in 2006 or 2007 and is the product best-positioned to enter the U.S. market and compete with Cephalon's Actiq.

Both branded and generic entry into the market for BTCP products is difficult, time consuming, and costly. Cima is the firm best positioned to enter the market. Other firms that have undertaken efforts to develop BTCP products are well behind Cima. In fact, entry in the BTCP market by any other branded or generic firm is not expected to occur until at least 2008. Both generic and branded entry is delayed by numerous barriers, including intellectual property, regulatory, technological, manufacturing, and marketing. Entry, therefore, would not be likely, timely, or sufficient to counteract the anticompetitive effects of the acquisition.

The proposed acquisition would cause significant anticompetitive harm in the U.S. market for BTCP products by eliminating potential competition between Cephalon and Cima. With only one firm currently marketing a BTCP drug to customers in this market (Cephalon), the entry of Cima likely would increase competition and reduce prices for drugs indicated for the treatment of BTCP. Accordingly, allowing Cephalon to control both Cima's product and its own potentially competing product would reduce the number of rivals in the future from two to one and likely force customers to pay higher prices for their BTCP drugs. Moreover, Cephalon's ownership of both products will allow it to undermine generic entry by shifting patients to the patent-protected OVF product prior to generic launch, depriving consumers of the full benefits of generic competition.

The proposed Consent Agreement therefore requires Cephalon to grant a license and transfer all of its technological know-how and intellectual property related to Actiq (''Actiq license assets'') to an upfront buyer no later than ten days after the acquisition is consummated. Cephalon has selected Barr Laboratories, Inc. (''Barr'') as the upfront buyer. Barr is a reputable generic manufacturer and is well-positioned to manufacture a generic version of Actiq. If the Commission determines that Barr is not an acceptable purchaser, or if the manner of the grant, license, delivery or conveyance is not acceptable, Cephalon and Cima must rescind the transaction with Barr and grant, license, deliver or otherwise convey the Actiq license assets to a Commission-approved buyer not later than six months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the Actiq license assets.

The proposed remedy contains several provisions designed to ensure the successful and timely development of OVF, sugar-free Actiq, and generic Actiq. Cephalon must transfer all of its technological know how and intellectual property related to both the sugar and sugar free formulations of Actiq to Barr immediately in accordance with the terms of the Cephalon/Barr License and Supply Agreement. In the event that Barr is not able to manufacture an FDA-approved generic version of Actiq by the date the licenses take effect, the Order requires Cephalon to supply Barr with Actiq to be marketed as a generic. The Order also contains date certain provisions that provide incentives for Cephalon not to delay the development and launch of OVF or sugar-free Actiq. The licenses for the marketing rights for sugar and sugar-free Actiq are triggered by dates certain. These dates certain triggers provide Cephalon with a strong incentive to launch OVF as soon as possible or risk Barr's launch of generic Actiq even before Cephalon's OVF. Further, the Order contains provisions that require Cephalon to timely develop the sugar free formulation by a date

certain, or if it fails to do so, to license Barr five months earlier. With the licenses and technology transfer provided by Cephalon, Barr will be able to compete aggressively in the BTCP market against Actiq. The proposed remedy also prohibits Cephalon from making certain regulatory filings that would delay FDA approval of Barr's generic Actiq. These provisions ensure that Barr will be in a position to launch a generic version of Actiq no later than OVF launch, eliminating the anticompetitive effects of the proposed acquisition and providing patients with earlier access to a lower priced generic product.

Normally a generic remedy would not be sufficient to solve the anticompetitive problems raised by a merger of two branded pharmaceutical competitors because it does not replace the lost promotion and innovation competition between branded companies. In this case, the evidence showed that there is not likely to be any further innovation competition between Cephalon and Cima because, among other things, Actiq is near the end of its patent life. Moreover, Actiq and OVF are both formulations of fentanyl, a readily-available, non-patented active ingredient. The facts showed that an important anticompetitive effect of the merger was to defeat generic competition. The evidence in this case also suggests that, regardless of the merger, Cephalon will no longer promote the sugar-based Actiq formulation after OVF's launch. Finally, any lost brand-to-brand price competition which would have occurred between Cephalon and Cima is more than restored by the early entry of lower priced generic versions of sugar and sugar-free Actiq. As a result, the generic remedy replaces the lost price competition that likely would have occurred. The proposed remedy would bring significant benefits to patients and would reverse the anticompetitive effects of the proposed acquisition.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission, Commissioner Thompson dissenting, and Commissioner Harbor recused.

Donald S. Clark,

Secretary.

Statement of the Commission

Today, the Commission released a proposed complaint and accepted for public comment a proposed consent order that obtains significant relief regarding Cephalon Inc.'s proposed acquisition of Cima Labs, Inc. The complaint alleges that the acquisition may substantially lessen competition in the market for the manufacture and sale of prescription drug products to treat breakthrough cancer pain (BTCP). These medications bring many cancer patients significant improvement in the quality of their lives. Cephalon's product Actiq is the only treatment on the market indicated for BTCP. Cima Labs is developing oravescent fentanyl (OVF), which is in Phase III clinical trials and is the product best positioned to enter the market.

To address potential anticompetitive effects that may arise from the transaction as originally contemplated, the Commission has required the merging parties to grant a license and transfer all of the technological know-how for Actiq to Barr Laboratories, Inc., a leading generic drug manufacturer. This transfer will significantly expedite the entry of a generic BTCP product. Our experience and the empirical literature [1] demonstrate that the entry of a generic BTCP product will provide a substantially lower-priced alternative to consumers and thereby significantly lower the average price of BTCP medication. The availability of a substantially lower-priced BTCP medication will be particularly important for patients on limited budgets or without insurance.

Normally, creation of a generic competitor would be insufficient to solve the anticompetitive problems raised by a merger of two branded pharmaceutical competitors. In the usual case, such a remedy would not replace the lost promotion and innovation competition between the branded companies regarding the particular illness the companies competed to treat. In this case, however, the facts showed that an important anticompetitive effect of the merger was to defeat generic competition. The facts further showed that there is not likely to be any further innovation competition between Cephalon and Cima for BTCP products because, among other things, Actiq is near the end of its patent life and neither Cephalon nor Cima has any other BTCP products in the pipeline. Moreover, Actiq and OVF are both formulations of fentanyl, a readily-available, non-patented active ingredient.

The earlier entry of lower-priced generic Actiq, made possible by the remedy, will more than restore any loss in brand-to-brand price competition that would have occurred between Cephalon and Cima. The average price that consumers will pay for BTCP medication will be lower after the merger and the proposed remedy than it would have been without the merger and remedy. In addition, the consent order ensures that the competition between Actiq and its generic equivalent will be robust. Because the generic product should be on the market no later than the launch of OVF,[2] Cephalon will be unable to shift patients preemptively to OVF to undermine generic competition. Thus, the proposed remedy would bring significant benefits to patients and would reverse the anticompetitive effects of the proposed acquisition.

Commissioner Thompson has dissented, arguing that the Commission should have sought a preliminary injunction to block this transaction on the grounds that there is a group of consumers who would purchase a branded BTCP product and would thus face higher prices. However, the evidence is not clear that this will happen. Even if it were to happen, this outcome would be a well-recognized result of the introduction of generic competition.[3] In the past, the Commission has recognized and resolved the particular tradeoff that concerns Commissioner Thompson today. The Commission, including Commissioner Thompson, has recognized the net benefits that arise from the entry of generic pharmaceutical products and consequently has devoted substantial resources to identify and prohibit anticompetitive practices that have made the entry of generic drugs more difficult.[4] As in our earlier cases, the

[1] This literature is reviewed at Generic Drug Entry Prior to Patent Expiration: An FTC Study 9 (July 2002).

[2] The license to Barr provided by the order enables Barr to begin marketing the generic versions of Actiq at the earliest of final FDA approval of OVF or various specified dates. If Cephalon delays the introduction of OVF, the license allows Barr to market the generic products at specific dates that approximate the time that the parties' premerger documents predict OVF would have been launched.

[3] In the face of generic entry, branded companies frequently raise the price for branded products that did not previously face such competition. *See* supra note 1.

[4] *See, e.g.*, Schering-Plough Corp., Dkt. No. 9297, available at *http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf* (agreement between branded and generic manufacturers to delay entry of generic); Biovail Corp., Dkt. No. C–4060 (consent order); available at *http://www.ftc.gov/os/2002/04/biovailcomplaint.htm* (wrongful Orange Book listing for Tiazac); Biovail Corp. and Elan Corp., Dkt. No. C–4057 (consent order), available at *http://www.ftc.gov/os/2002/06/biovailelancmp.pdf*

benefits that earlier generic entry will bring to consumers of BTCP treatment in terms of lower average prices greatly exceed any price increases to the less price-sensitive patients who may continue to choose branded products.[5] Contrary to Commissioner Thompson's claim, the underlying rationale for the relief mandated in this case is supported by unanimous Commission precedent.

Dissenting Statement of Commissioner Mozelle W. Thompson

The Commission today accepted, subject to public comment and final approval, a proposed settlement from Cephalon, Inc., and Cima Labs, Inc. This settlement is intended to remedy the likely anticompetitive effects of Cephalon's $515 million acquisition of Cima in the $200 million market for drugs that treat terminally ill patients for sporadic breakthrough cancer pain (''BTCP''). I must dissent from the Commission's acceptance of the unprecedented proposed remedy because neither the merging parties nor the investigation have demonstrated that the remedy would substantially restore the lost competition between Cephalon and Cima.

I strongly concur with the allegations in the Commission's complaint, which correctly alleges that Cephalon is a monopolist in the BTCP drug market. It also alleges that Cephalon unlawfully proposes to acquire Cima, the best-positioned potential competitor who would otherwise have likely entered the market within the next several years—well ahead of other potential entrants.

''Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets.'' [1] The proposed settlement in this case—which seeks to restore the lost branded competition from Cima by facilitating the entry of a generic product—fails because it cannot meet this goal. Accordingly, the Commission should have rejected the proposed settlement. Further, because the Cephalon/Cima merger in substance appears to be for the primary purpose of allowing Cephalon to gain control of Cima's new BTCP product,[2] I believe that the Commission should have sought to block this merger in court.

The Commission may challenge a proposed transaction that it believes will lessen competition, or it may take a settlement that restores the competition lost. Historically, the Commission has been extraordinarily successful in identifying and blocking proposed mergers that are likely anticompetitive. In a case such as this one, which involves a monopolist's acquiring the best-positioned potential entrant, I am confident that the Commission would be able to successfully block the proposed merger and preserve competition. Indeed, I found the evidence supporting the Commission's complaint against Cephalon and Cima particularly compelling and sufficient to demonstrate that the proposed combination would eliminate the expected future competition between the two companies. This elimination of future competition would allow Cephalon to keep BTCP drug prices at monopoly levels, which would harm cancer patients—a particularly vulnerable group of consumers. Litigation and a district court's entry of a ''full-stop'' injunction would have been warranted because of the unusual strength of this antitrust case.

I recognize that in many Commission merger investigations, merging parties offer a settlement to avoid a Commission challenge to their proposed transaction. In such cases, ''the burden of coming forward with adequate restructure proposals should be on the sponsors of the merger.'' [3] Furthermore, divestiture is typically employed where selling the assets used to manufacture and sell one company's competing product to a qualified new competitor can effectively replace the lost competition.[4] Perhaps because divesting one of the merging companies' branded products is the most effective and efficient means of restoring lost competition, the Commission has never taken a settlement for a pharmaceutical merger that requires a respondent to take measures to facilitate generic entry where companies are marketing (or here, where one is marketing and the other likely soon will also be selling) branded products. I understand the argument that by requiring Cephalon to license generic entry, such entry is more certain and more quickly achieved, thus assuring that some customers would gain significant savings. However, while generic products and branded products are interchangeable to some extent, they are not necessarily considered reasonable substitutes by a significant segment of consumers in the typical pharmaceutical market. As a result, the Commission historically has been unwilling to trade away a branded product for a generic one in a Commission merger settlement.

I acknowledge the argument in this case that some end-stage cancer patients who buy BTCP drug products may be more price sensitive than customers in typical pharmaceutical markets because they do not have sufficient insurance coverage. But the investigation failed to develop any empirical or other compelling evidence substantiating that this particular market has such exceptional characteristics that a generic product could serve as a substitute for a branded product. Without such compelling evidence, the Commission should not accept a proposed settlement because ''(t)he risk of inadequate relief * * * should not be borne by consumers.'' [5] The parties likewise failed to present evidence that shows that facilitating generic entry in the BTCP drug market will substantially replace the competition lost between Cephalon and Cima. By contrast, I found it particularly troubling that based on a range of economically reasonable assumptions about this pharmaceutical market, the Commission could have concluded just as easily that less price-sensitive patients could well suffer price increases that may possibly amount to tens of millions of dollars,

(agreement among generic drug companies to divide market for generic Adalat CC); Abbott Labs., Dkt. No. C–3945 (consent order), complaint available at *http://www.ftc.gov/os/2000/05/c3945complaint.htm*; Geneva Pharm., Inc., Dkt. No. C–3946 (consent order), complaint available at *http://www.ftc.gov/os/2000/05/c3946complaint.htm*; Hoechst Marion Roussel, Inc., Dkt. No. 9293 (consent order), complaint available at *http://www.ftc.gov/os/2000/03/hoechstandrxcomplaint.htm*.

[5] In his dissent, Commissioner Thompson relies on a statement in the old case of *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371 (1963), that anticompetitive mergers cannot be justified by some ''ultimate reckoning of social or economic debits and credits.'' We support this general principle. The issue here, however, is whether the transaction, as modified by the Order, can be considered anticompetitive in the first place when possible price increases are weighed against more likely and much larger price decreases to the same group of customers. In any merger case, predictions of procompetitive and anticompetitive effects are inherently uncertain, and—whether we choose to challenge or to pass—there often is a risk that one set of consumers will benefit and another set will lose. We are choosing between probabilities rather than sets of consumers.

[1] Staff of the Bureau of Competition, ''Frequently Asked Questions About Merger Consent Order Provisions,'' (Answer to Question 1.), available at *http://www.ftc.gov/bc/mergerfaq.htm*.

[2] Cephalon outbid several alternative suitors, whose deals with Cima would not likely have raised antitrust concerns.

[3] Robert Pitofsky, ''The Nature and Limits of Restructuring in Merger Review,'' February 17, 2000, available at *http://www.ftc.gov/speeches/pitofsky/restruct.htm*.

[4] Staff of the Bureau of Competition, ''Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies,'' (In discussion under ''The Assets to Be Divested''), available at *http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm*.

[5] Richard G. Parker and David A. Balto, ''The Evolving Approach to Merger Remedies,'' at 2, available at *http://www.ftc.gov/speeches/other/remedies.htm*.

notwithstanding the licensing of generic entry following the merger.

The majority statement cites other Commission challenges to restraints as support for picking which consumers will win and which will lose in pharmaceutical markets. However, these challenged restraints were intended to, and did, hinder generic entry, and the thrust in our remedies in these cases is to allow free competition to work. A subtle but important policy perspective is that the free market picked the winners and losers; we only allowed the market to work. The Commission did not manipulate the outcome of these markets.

In reading the majority's statement, I observe though that the majority unfortunately compares market outcomes in its statement instead of evaluating the Commission's appropriate role in providing antitrust protection in American markets. Our Clayton Act, Section 7 mandate is simple: protect markets so that the competitive process provides the market outcomes, such as quantity produced, prices charged, and who wins and loses financially. I disagree with a merger remedy policy that instead embraces manipulating the structure of market competition and trades off recognized (or probable) benefits for one segment of consumers for recognized (or probable) harm to another. As the Supreme Court over 40 years ago established, antitrust policy does not countenance mergers that are anticompetitive but are, ''on some ultimate reckoning of social or economic debits and credits, * * * deemed beneficial.'' [6] This policy principle equally—if not even more so—applies to government-imposed restructurings in merger remedies. Accordingly, I believe that the Commission should refrain from accepting settlements that expressly contemplate benefitting one group of customers at the expense of other customers, especially where challenging a merger would likely be successful and the Commission is able to fulfill its mandate to protect all consumers from antitrust harm. For all of these reasons, I believe that the Commission should have rejected the proposed settlement and challenged this transaction.

As a final note, I recognize that the pharmaceutical industry over the recent past has transformed itself to an industry where larger, established companies refrain from developing the bulk of their products internally and instead often acquire smaller R&D companies as a means of stocking their portfolio of products. This transaction provides the Commission with the opportunity to demonstrate its commitment to aggressively protect pharmaceutical consumers under these changed market dynamics. Instead, I fear that the Commission today may be signaling the industry that dominant firms in pharmaceutical markets now have the antitrust ''green light'' to acquire competitors or potential entrants in exchange for a remedy that restructures markets in ways that trumps the free market decision as to who will benefit from the market and who will be harmed, as well as the extent of these effects on different groups. Accordingly, I believe that the Commission should have rejected the proposed settlement and challenged the transaction in order to protect fully consumers in the BTCP drug market and to signal the Commission's antitrust resolve in both challenging anticompetitive mergers and only accepting remedies that minimize consumer exposure to anticompetitive risk.

[FR Doc. 04–19443 Filed 8–24–04; 8:45 am]

BILLING CODE 6750–01–P

[6] Setting out the bounds of Section 7 enforcement, the Court further cautions decision makers: ''A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7.'' *United States* v. *Philadelphia National Bank,* 83 S.Ct. 1715, 1745 (1963). The majority statement strains in a failed attempt to distinguish away this Supreme Court case. Regardless of whether customers are within different geographic markets or within different segments of a relevant product market, a reasonable reading of the case is that the Supreme Court does not condone the type of consumer welfare tradeoffs that the majority statement endorses.

FEDERAL TRADE COMMISSION

[Docket No. 9314]

Piedmont Health Alliance, Inc., 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 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 September 10, 2004.

ADDRESSES: Comments should refer to ''Piedmont Health Alliance, Inc., *et al.*, Docket No. 9314,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov*.

FOR FURTHER INFORMATION CONTACT: David Narrow, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2744.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 3.25(f) of the Commission's Rules of Practice, 16 CFR 3.25(f), 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 August 11, 2004), on the World Wide Web, at *http://www.ftc.gov/os/2004/08/index.htm.* 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.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before September 10, 2004. Comments should refer to ''Piedmont Health Alliance, Inc., *et al.*, Docket No. 9314,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary,