Group to retain voting shares of Charlevoix First Corporation, and thereby indirectly retain voting shares of Charlevoix State Bank, both in Charlevoix, Michigan.

B. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. Thomas H. Brouster, Sr., St. Louis, Missouri, acting individually, and in concert with a control group which consists of Thomas H. Brouster Trust TTE; Thomas H. Brouster Family Trust and Meredith E. Brouster Trust, Brouster & Associates, LLC; Thomas H. Brouster Consulting Pension Trust; and Thomas H. Brouster Consulting Pension Trust II; Lawrence P. Keeley, Jr.; Allan D. Ivie, IV; Allan D. Ivie, IV Self Directed IRA; David Sindelar, all of St. Louis, Missouri; Gaines S. Dittrich Self Directed IRA; Gaines S. Dittrich, Trustee of The Gaines S. Dittrich Revocable Trust dated May 6, 1997, as amended; and Dittrich & Associates, all of Rogers, Arkansas; Robert M. Cox, Jr., Frontenac, Missouri; Dr. Richard M. Demko, Chesterfield, Missouri; Scott A. Sachtleben, Belleville, Illinois; Robert K. Jakel Living Trust; Robert Jakel Trustee; Eric K. Jakel as trustee of the Eric K. Jakel Living Trust u/a dated 6/6/85, all of Highland, Illinois; Sterling K. Jakel Living Trust dated 5/3/85, Sterling Jakel Trustee, Naples, Florida; Otto K. Jakel Living Trust dated 11/26/91; Otto K. Jakel Trustee, all of Clarmont, Georgia; Gordon Jakel, Scottsdale, Arizona; John W. Bradley Revocable Living Trust dated 2/19/92; John B. Bradley Revocable Living Trust dated 12/12/07, John Bradley, Trustee, all of Kirkwood, Missouri; and Ned Stanley, Ladue, Missouri; to acquire voting shares of Reliance Bancshares, Inc., Des Peres, Missouri, and thereby indirectly acquire voting shares of Reliance Bank, St. Louis, Missouri.

Board of Governors of the Federal Reserve System, November 28, 2012.

Michael J. Lewandowski,

Assistant Secretary of the Board.

[FR Doc. 2012–29110 Filed 11–30–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 17, 2012.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Stephen Wellington, Jr.,* Saint Paul, Minnesota; to acquire voting shares of Plato Holdings, Inc., and thereby indirectly acquire voting shares of Drake Bank, both in Saint Paul, Minnesota.

Board of Governors of the Federal Reserve System, November 27, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29049 Filed 11–30–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the HOLA (12 U.S.C. 1467a(e)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 27, 2012.

A. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Scottrade Financial Services, Inc.,* Town and Country, Missouri; to acquire 100 percent of the voting shares of Bunker Hill Bancorp, Inc., St. Louis, Missouri, and thereby indirectly acquire voting shares of Boulevard Bank, Neosho, Missouri.

Board of Governors of the Federal Reserve System, November 27, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29050 Filed 11–30–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 121 0081]

Robert Bosch GmbH; Analysis of Agreement Containing Consent Orders 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 December 26, 2012.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/boschspxconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Bosch, File No. 121 0081'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/boschspxconsent* 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: Jacqueline K. Mendel (202–326–2603), 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 November 26, 2012), 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 December 26, 2012. Write ''Bosch, File No. 121 0081'' 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 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/boschspxconsent* 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 ''Bosch, File No. 121 0081'' 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 December 26, 2012. 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.*

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

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted from Robert Bosch GmbH (''Bosch''), subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement''), which is designed to remedy the anticompetitive effects resulting from Bosch's acquisition of SPX Service Solutions U.S. LLC (''SPX Service Solutions'') from SPX Corporation (''SPX'') and to remedy anticompetitive conduct by SPX in violation of Section 5 of the FTC Act.

Under the terms of the Consent Agreement, Bosch is required to (1) divest its air conditioning recycling, recovery, and recharge (''ACRRR'') business, including RTI Technologies, Inc. (''RTI''), to Mahle Clevite, Inc. (''Mahle'') by December 31, 2012; (2) terminate agreements with any persons that limit the ability of SPX's competitors, including Bosch, from advertising, servicing, distributing, or selling any ACRRR product in the U.S. market; and (3) make available for licensing certain patents which may be used in the implementation of two industry standards established by SAE International, an industry association responsible for setting standards for products so that they comply with regulations of the U.S. Environmental Agency (''EPA''). The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

On January 23, 2012, Bosch entered into an agreement to acquire the SPX Service Solutions business from SPX. The Commission's complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by lessening competition in the market for ACRRR devices.

II. The Parties

Bosch, headquartered in Stuttgart, Germany and with U.S. operations based in Broadview, Illinois, is a global supplier of automotive and industrial technology, consumer goods, and building technology. North American sales represent 18% of Bosch's revenues, and Automotive Technology is Bosch's largest business sector in North America. Bosch is the second leading U.S. supplier of ACRRR equipment. It acquired RTI in 2010, and sells ACRRR equipment under both the Bosch and RTI brand, which account for approximately 10% of the U.S. ACRRR market.

Headquartered in Warren, Michigan, SPX is a diversified global supplier of highly engineered products for the following industries: power and energy, food and beverage, vehicle and transit, infrastructure and industrial processes. SPX's Service Solutions business is a global supplier of automotive tools, equipment and services, for both original equipment manufacturers (''OEMs'') and aftermarket repair shops and technicians. SPX's Robinair brand is the leading supplier of ACRRR equipment in the United States, accounting for over 80% of sales in that market.

III. The Product and Structure of the Market

Bosch's proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle's on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system, adding more as necessary. These tools are required to repair or service motor vehicle air conditioning systems because no other equipment performs the removal, recycling, and recharging functions while staying compliant with EPA regulations prohibiting refrigerant from escaping into the atmosphere. Devices that only extract refrigerant from air conditioning systems but do not recycle or recharge them are not cost-effective alternatives because they do not store or dispose of extracted refrigerant as required. As a result, if the price of ACRRR equipment were to increase 5–10%, customers would not switch to extraction-only equipment or to equipment that flushes other fluids from vehicles, which cannot be used in its place.

The relevant geographic area in which to evaluate the market for ACRRR equipment is the United States. Environmental regulations vary by country, so ACRRR machines designed to adhere to the regulations of one country are not necessarily compatible with those of other countries. In addition, differing electrical power specifications across the world necessitate that the internal pumps and motors vary to meet differing specification. As a result, purchasers in the United States could not turn to suppliers in other countries for ACRRR equipment.

SPX's Robinair brand holds a dominant position in the ACRRR market, with a share of over 80%. Bosch's RTI and Bosch brands comprise approximately 10% of the market and are Robinair's most significant competition. Four other firms selling ACRRR equipment in the U.S. together account for the balance of ACRRR sales. Thus, the combination of Bosch and SPX would confer a virtual monopoly position on Bosch. The elimination of the direct competition between Robinair and Bosch would allow the combined entity to exercise market power by unilaterally increasing price, slowing innovation, or lowering its levels of service.

IV. Entry

Entry into the ACRRR market sufficient to deter the anticompetitive effects of this transaction is unlikely to occur in the next two years. While designing and engineering a system to work effectively and meet industry standards may be possible within a relatively short time frame, other barriers, including the challenges of obtaining effective distribution and developing a service network, make successful entry very difficult. Advertising through leading automotive wholesale distributors is the most effective means of promoting ACRRR to independent auto repair shops and rapid-turnaround repair of ACRRR equipment is critical because repair shops cannot provide air conditioning service without this equipment. Obtaining effective distribution and service networks has been especially challenging for competitors of SPX because of limitations SPX puts on distributors and service centers that sell and service Robinair-brand ACRRR. Another factor affecting the likelihood of significant new entry or expansion is the costs associated with meeting industry standards, which are established by SAE International, formerly the Society of Automotive Engineers.

IV. Effects of the Acquisition

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. ACRRR device market. The transaction would combine SPX's Robinair brand ACRRR, that already commands over 80% of the market with its leading competitor, Bosch, with its Bosch- and RTI ACRRR brands, with approximately 10% of the market, creating a near-monopolist with a share of over 90%. The impact of eliminating the competition between Bosch and SPX in the ACRRR market is highly likely to result in consumers, who are automotive repair shops and technicians, paying higher prices for ACRRR devices.

V. The Consent Agreement

A. The Merger Remedy

The proposed Consent Agreement eliminates the competitive concerns raised by Bosch's proposed acquisition of SPX Service Solutions by requiring the divestiture of Bosch's assets relating to the manufacture and sale of ACRRR devices in the United States, including the RTI business. Bosch and SPX have agreed to sell the U.S. ACRRR assets to Mahle Clevite, Inc. (''Mahle'') before December 31, 2012.

Mahle possesses the resources, industry experience, and financial viability to successfully purchase and manage the divestiture assets and continue as an effective competitor in the ACRRR market. Mahle, headquartered in Stuttgart, Germany with U.S. operations based in Farmington, Michigan, is a supplier and development partner to the automotive and engine industry. Mahle's diverse product lines include aftermarket parts and automotive equipment sold a similar customer base as RTI. Mahle's significant size and global presence will allow it to quickly support additional expansion in the ACRRR market and replace the loss of competition presented by Bosch's acquisition of SPX SS.

Pursuant to the Consent Agreement, Mahle would receive all the assets necessary to operate Bosch's current U.S. ACRRR business, including RTI's operations in York, Pennsylvania which include the RTI manufacturing plant, current inventory, and relevant intellectual property. In addition to ensuring that current RTI employees will continue their employment with Mahle, the Consent Agreement requires Bosch to provide access to certain key employees who may be necessary to help facilitate the transition and fully establish the Bosch ACRRR business within Mahle. The Consent Agreement also requires Bosch to transfer all relevant intellectual property and all contracts and confidential business information associated with the ACRRR business. In addition, the Consent Agreement requires Bosch to license, royalty-free, certain SPX patents that may be essential to the practice of two industry standards to Mahle.

B. The Conduct Remedy

In addition, the Consent Agreement includes a provision that requires Bosch to make certain patents available to its competitors in the ACRRR market. During its merger investigation, the Commission uncovered evidence that SPX holds certain potentially standard-essential patents necessary for implementing two SAE International ACRRR industry standards, J–2788 and J–2843, which govern the operation of ACRRR machines that handle the two most common types of air conditioning refrigerant in vehicles today. SAE International adopted J–2788 and J–2843 while SPX was a member of the SAE Interior Climate Control Committee, the committee responsible for developing the standards. SAE International's rules include an obligation by working group members to disclose any patents or patent applications that would be essential to the practice of a standard being developed, and to offer a license to such patents on either royalty-free or fair, reasonable, and non-discriminatory (''FRAND'') terms. After the standards were adopted, SPX issued a letter of assurance to SAE International acknowledging that it held patents that were potentially essential to both standards and committing to license them under FRAND terms. Following this letter of assurance, however, SPX continued to seek previously initiated injunction actions against competitors using those patents to implement the SAE International standards.

SPX's suit for injunctive relief against implementers of its standard essential patents constitutes a failure to license its standard-essential patents under the FRAND terms it agreed to while participating in the standard setting process, and is an unfair method of competition actionable under Section 5 of the FTC Act. Standard setting is ''widely acknowledged to be one of the engines driving the modern economy.'' Participants in the standard setting process rely on the licensing commitments made by patent holders during the standard setting process to protect them against patent hold-up. Patent hold-up can occur when, after an entire industry has become ''locked in'' to practicing a standard, a patent holder reneges on a licensing obligation and seeks to exercise the market power that accrues to a patent by virtue of being incorporated in the standard. FRAND commitments and licensing obligations, such as those at issue here, are an important way to mitigate the risk of patent hold-up, and are common in the standard setting process. Seeking injunctions against willing licensees of FRAND-encumbered standard essential patents, as SPX is alleged to have done here, is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate. As the Commission has previously explained, ''negotiation that occurs under threat of an [injunction] may be weighted heavily in favor of the patentee in a way that is in tension with the [F]RAND commitment. High switching costs combined with the threat of an [injunction] could allow a patentee to obtain unreasonable licensing terms despite its [F]RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard.''

Bosch has agreed in the Consent Order to resolve the violations committed by SPX. The Consent Order requires Bosch to offer a royalty-free license to all potential implementers for certain enumerated patents for the purpose of manufacturing ACRRR devices in the United States. While a royalty-free license may not be an appropriate remedy in every case involving evasion of a FRAND commitment, in this matter Bosch has chosen to license these patents to the buyer of its ACRRR business, Mahle, royalty-free, and a license to other market place participants on the same terms is necessary to ensure that the merger remedy is not inequitable in application. The Consent Order further requires Bosch to deliver to the SAE a letter of assurance that makes a binding, irrevocable commitment to license any additional patents that Bosch may acquire in the future that are essential to practicing the J–2788 or J–2843 standards on FRAND terms to any third party that wishes to use such patents to produce an ACRRR device for sale in the United States. Pursuant to its FRAND obligations, Bosch has agreed not seek injunctive relief against such third parties, unless the third party refuses in writing to license the patent consistent with the letter of assurance, or otherwise refuses to license the patent on terms that comply with the letter of assurance as determined by a process agreed upon by both parties (*e.g.,* arbitration) or a court.

The Consent Agreement also requires that Bosch discontinue its restrictive arrangements with wholesale distributors and independent service technicians. Bosch will be prevented from enforcing any agreement that restricts a distributor or repair service provider from advertising, servicing, distributing, or selling any ACRRR product from any third party in the United States. Bosch will be prevented from entering into such agreements for ten years after the date of the Order. This provision allows entry by other competitors, and will allow the existing competitors in the ACRRR market, including Mahle, to more easily have access to leading wholesale distributors and service providers to assemble repair networks to which customers can turn after they have purchased ACRRRs.

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

Statement of the Federal Trade Commission

The Federal Trade Commission (''Commission'') has voted to issue for public comment a Complaint and Order against Robert Bosch GmbH (''Bosch'') designed to remedy the allegedly anticompetitive effects of Bosch's acquisition of SPX Services (''SPX''), a division of SPX Corporation. The Commission has reason to believe that the proposed acquisition would cause significant anticompetitive harm to consumers by creating a virtual monopoly in the market for automobile air conditioning servicing equipment known as ''air conditioning recycling, recovery, and recharge devices'' or ''ACRRRs.'' The proposed Order eliminates the anticompetitive concerns raised by the proposed acquisition by requiring the divestiture of Bosch's assets relating to the manufacture and sale of ACRRRs to Mahle Clevite, Inc. The proposed Order further requires Bosch to discontinue restrictive arrangements SPX maintained with wholesale distributors and independent service technicians.

The Complaint also alleges that, before its acquisition by Bosch, SPX reneged on a licensing commitment made to two standard-setting bodies to license its standards-essential patents (''SEPs'') relating to ACRRRs on fair, reasonable and non-discriminatory terms (''FRAND'') by seeking injunctions against willing licensees of those SEPs.[2] We have reason to believe this conduct tended to impair competition in the market for these important automobile air conditioning servicing devices. To its credit, Bosch has abandoned these claims for

[2] The licensing obligation in this matter was a FRAND obligation, although RAND (reasonable and non-discriminatory) licensing obligations raise similar issues.

injunctive relief and agreed to license the SEPs at issue.

This case is another chapter in the Commission's longstanding commitment to safeguard the integrity of the standard-setting process.[3] Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting also risks harm to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring standard setting works to the benefit of, rather than against, consumers.[4] The Commission's action today does just that.

As explained in the Commission's unanimous filings before the United States International Trade Commission in June 2012, the threat of injunctive relief ''in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation.'' [5] By threatening to exclude standard-compliant products from the marketplace, a SEP holder can demand and realize royalty payments that reflect the investments firms make to develop and implement the standard, rather than the economic value of the technology itself.[6] This can harm incentives to develop standard-compliant products. The threat of an injunction can also lead to excessive royalties that can be passed along to consumers in the form of higher prices.

There is increasing judicial recognition, coinciding with the view of the Commission, of the tension between offering a FRAND commitment and seeking injunctive relief.[7] Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act.[8] Importantly, stopping this conduct using a stand-alone Section 5 unfair methods of competition claim, rather than one based on the Sherman Act, minimizes the possibility of follow-on treble damages claims. Violations of Section 5 that are not also violations of the antitrust laws do not support valid federal antitrust claims for treble damages. There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.

In her dissent, Commissioner Ohlhausen claims that today's decision imposes liability on protected petitioning activity and effectively undermines the role of federal courts and the ITC in the adjudication of SEP-related disputes. We respectfully disagree. As alleged in the Complaint, SPX committed to license its SEPs on FRAND terms. In doing so, we have reason to believe SPX voluntarily gave up the right to seek an injunction against a willing licensee. Moreover, the fact that both the federal courts and the ITC have the authority to deny injunctive relief where the SEP holder has broken its FRAND commitment does not mean that this conduct is not itself a violation of Section 5 or within our reach.

We also take issue with Commissioner Ohlhausen's suggestion that the Commission's action ''appears to lack regulatory humility.'' The Commission is first and foremost a law enforcement agency, and this consent decree, like all of our unfair methods of competition enforcement actions, is a fact-specific response to a very real problem that threatens competition and consumer welfare.

Indeed, we view this action as well within our Section 5 authority. The plain language of Section 5, the relevant legislative history, and a long line of Supreme Court cases all affirm that Section 5 extends beyond the Sherman Act.[9] Moreover, this is not a circumstance where, as Commissioner Ohlhausen contends, there are no discernible limiting principles. SPX's failure to abide by its commitment took place in the standard-setting context. In that setting, long an arena of concern to the Commission, a breach of contract risks substantial consumer injury. The standard setting context, together with the acknowledgment that a FRAND commitment also depends on the presence of a willing licensee, appropriately limit the Commission's enforcement policy and provide guidance to standard-setting participants.

For these reasons, we find Commissioner Ohlhausen's analogy of SPX's conduct to a ''garden variety breach-of-contract'' to be unpersuasive. While not every breach of a FRAND licensing obligation will give rise to Section 5 concerns, when such a breach tends to undermine the standard-setting process and risks harming American consumers, the public interest demands action rather than inaction from the Commission.

[3] *See In re Dell Computer Corp.,* 121 F.T.C. 616 (1996); *In re Union Oil Company of California,* 2004 FTC LEXIS 115 (July 7, 2004); *In re Rambus, Inc.,* Dkt. No. 9302, 2006 FTC LEXIS 101 (Aug. 20, 2006), *rev'd, Rambus Inc.* v. *F.T.C.,* 522 F.3d 456 (D.C. Cir. 2008); *In re Negotiated Data Solutions LLC,* FTC File No. 051–0094, Decision and Order (Jan. 23, 2008), *available at http://www.ftc.gov/os/caselist/0510094/080122do.pdf.*

[4] *See, e.g., Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 486 U.S. 492, 500–01 (1988) (noting that ''private standard-setting associations have traditionally been objects of antitrust scrutiny'' because of their potential use as a means for anticompetitive agreements among competitors).

[5] Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof,* Inv. No. 337–TA–745, *available at www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf* and in *In re Certain Gaming and Entertainment\Consoles, Related Software, and Components Thereof,* Inv. No. 337–TA–752, *available at http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.*

[6] *Id.* at 3–4 (''[A] royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process.'').

[7] *See, e.g., Microsoft Corp.* v. *Motorola, Inc.,* 696 F.3d 872, 885 (9th Cir. 2012) (''Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.''); *Apple, Inc.* v. *Motorola, Inc.,* No. 1:11–cv–08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation) (''I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the '898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?'').

[8] We have no reason to believe that, in this case, a monopolization count under the Sherman Act was appropriate. However, the Commission has reserved for another day the question whether, and under what circumstances, similar conduct might also be challenged as an unfair act or practice, or as monopolization.

[9] *See, e.g., F.T.C.* v. *R.F. Keppel & Bros., Inc.,* 291 U.S. 304, 310–313 (1934); *F.T.C.* v. *Cement Inst.,* 333 U.S. 683, 693 & n.6 (1948); *F.T.C.* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 241–244 (1972).

By direction of the Commission, Commissioner Rosch and Commissioner Ohlhausen dissenting.

Donald S. Clark,

Secretary.

Statement of Commissioner Maureen K. Ohlhausen

I voted against accepting the proposed consent agreement in this matter because I strongly dissent from those portions of the consent that relate to alleged conduct by the respondent involving standard-essential patents, or SEPs.[10] Even if all of the SEP-related allegations in the complaint were proved—including the allegation that the patents at issue are standard-essential—I would not view such conduct as violating Section 5 of the FTC Act.[11] Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory (''FRAND'') license, without more,[12] even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5. The enforcement policy on the seeking of injunctive relief on FRAND-encumbered SEPs that the Commission has announced today suffers from several critical defects.

First, this enforcement policy raises significant issues of jurisdictional and institutional conflict. It is simply not in the public interest to effectively oust other institutions, including the federal courts and the International Trade Commission (''ITC'') from the important and complex area of SEPs through the use of our Section 5 authority. By imposing Section 5 liability on a firm that seeks injunctive relief on its SEPs, the Commission is doing exactly that. The FTC is not, nor should it be, the only institution acting in the SEPs space. Moreover, it is unclear how the seeking of injunctive relief, in either the courts or the ITC, on a patent—even a FRAND-encumbered SEP—would not be considered protected petitioning of the government under the *Noerr-Pennington* doctrine.[13] In fact, a court recently dismissed Sherman Act and state unfair competition claims grounded on the seeking of injunctive relief in the courts and the ITC on FRAND-encumbered SEPs, holding that such conduct was protected by *Noerr.*[14]

Second, this enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions. I agree that the FTC is well positioned to offer its views and to advocate on the important issue of patent hold-up using its policy tools. For that reason, I supported the Commission's June 2012 filing with the ITC.[15] However, as the Commission testified to Congress shortly after filing its statement with the ITC, ''Federal district courts have the tools to address this issue [hold-up], by balancing equitable factors or awarding money damages, and the FTC believes that the ITC likewise has the authority under its public interest obligations to address this concern and limit the potential for hold-up.'' [16] I see no reason why this unanimous statement no longer holds.[17]

Third, to the extent that the SEP allegations in the complaint aspire to the consent agreement reached in the Commission's *N-Data* [18] matter, I would submit that that consent is an ill-advised guidepost for this agency to use in its enforcement of Section 5 for several reasons. Most importantly, the *N-Data* consent fails to identify meaningful limiting principles that would govern the Commission's use of its Section 5 authority.[19] As former Chairman Majoras explained in her dissent, the *N-Data* consent was a material departure from the prior line of standard-setting organization (''SSO'') cases brought by the Commission, which were grounded in deceptive conduct in the standard-setting context that led to, or was likely to lead to, anticompetitive effects.[20] Then-Commissioner Kovacic also dissented, objecting to, among other things, the majority's assumption that a Section 5 action would have no spillover effects in terms of follow-on private litigation.[21]

The SEP allegations and consent in the instant matter suffer from many of the same deficiencies as the *N-Data* consent. I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement

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[10] I concur with the consent agreement reached in this matter insofar as it requires the divestiture of certain assets to remedy the Clayton Act Section 7 violation that likely would have resulted from the proposed transaction. I do have strong reservations, however, about the relatively broad fencing-in relief included in the proposed Decision and Order that requires the respondent to cancel the exclusivity provisions in its contracts with various distributors and equipment servicers. *See* Decision and Order ¶ III. Fencing-in relief that modifies contracts entered into by participants across an industry raises concerns for me about whether such relief goes beyond that which is necessary to protect the viability of the divestiture buyer and thus effectuate the legitimately pursued remedy in this matter.

[11] *See* Complaint ¶¶ 11–20, 23. *See also* Decision and Order ¶ IV; Analysis of Agreement Containing Consent Order to Aid Public Comment § V.B.

[12] *See, e.g., In re Rambus, Inc.,* Dkt. No. 9302 (FTC Aug. 2, 2006) (Commission opinion) (finding deception that undermined the standard-setting process), *rev'd, Rambus Inc.* v. *FTC,* 522 F.3d 456 (DC Cir. 2008); *In re Union Oil Co. of Cal.,* 138 F.T.C. 1 (2003) (Commission opinion) (same); *In re Dell Computer Corp.,* 121 F.T.C. 616 (1996) (consent order) (alleging same).

[13] *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight,* 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington,* 381 U.S. 657 (1965); *California Motor Transp. Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) (applying *Noerr-Pennington* doctrine to petitioning of judicial branch).

[14] *See Apple, Inc.* v. *Motorola Mobility, Inc.,* No. 3:11–cv–00178–BBC, 2012 WL 3289835, at *12–14 (W.D. Wis. Aug. 10, 2012) (dismissing Apple's Sherman Act and state unfair competition claims and holding that Motorola's filing of litigation in the federal courts and ITC on its FRAND-encumbered SEPs was immune under *Noerr*).

[15] Third Party United States Federal Trade Commission's Statement on the Public Interest, *In re Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Inv. No. 337–TA–745 (Int'l Trade Comm'n June 6, 2012), *available at http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.*

[16] *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the S. Comm. on the Judiciary,* 112th Cong. 1–2 (2012) (statement of the Federal Trade Commission), *available at http://www.ftc.gov/os/testimony/120711standardpatents.pdf.*

[17] The cases cited in the Commission's statement for the proposition that there is an ''increasing judicial recognition'' on the tension between FRAND commitments and injunctive relief, to the extent that they reveal anything, show that the courts are not freely issuing injunctions against willing licensees of FRAND-encumbered SEPs. *See* Statement of the Commission, at 2 n.6. Thus, far from supporting the position that the FTC should block access to other institutions, these cases clearly demonstrate that the courts are well equipped to address issues involving injunctions on FRAND-encumbered SEPs.

[18] *In re Negotiated Data Solutions LLC,* FTC File No. 051–0094, Decision and Order (Jan. 23, 2008), *available at http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.*

[19] *See, e.g., E.I. du Pont de Nemours & Co.* v. *FTC,* 729 F.2d 128, 139 (2d Cir. 1984) (''*Ethyl*''); (''[T]he Commission owes a duty to define the conditions under which conduct * * * would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.''); *FTC* v. *Abbott Labs.,* 853 F. Supp. 526, 535–36 (D.D.C. 1994) (''The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.''') (quoting *Ethyl,* 729 F.2d at 139); ABA Section of Antitrust Law, Antitrust Law Developments 661 (7th ed. 2012) (''FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.'').

[20] *See In re Negotiated Data Solutions LLC,* FTC File No. 051–0094, Dissenting Statement of Chairman Majoras, at 1–2 (Jan. 23, 2008), *available at http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.*

[21] *See id.,* Dissenting Statement of Commissioner William E. Kovacic, at 1–2, *available at http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.*

emphasizes the context here (*i.e.* standard setting); however, it is not clear why the type of conduct that is targeted here (*i.e.* a breach of an allegedly implied contract term with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result. If the Commission continues on the path begun in *N-Data* and extended here, we will be policing garden variety breach-of-contract and other business disputes between private parties. Mere breaches of FRAND commitments, including potentially the seeking of injunctions if proscribed by SSO rules,[22] are better addressed by the relevant SSOs or by the affected parties via contract and/or patent claims resolved by the courts or through arbitration.

It is important that government strive for transparency and predictability. Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition, including the general parameters of unfair conduct and where Section 5 overlaps and does not overlap with the antitrust laws, and how the Commission will exercise its enforcement discretion under Section 5. Otherwise, the Commission runs a serious risk of failure in the courts[23] and a possible hostile legislative reaction,[24] both of which have accompanied previous FTC attempts to use Section 5 more expansively.

This consent does nothing either to legitimize the creative, yet questionable application of Section 5 to these types of cases or to provide guidance to standard-setting participants or the business community at large as to what does and does not constitute a Section 5 violation. Rather, it raises more questions about what limits the majority of the Commission would place on its expansive use of Section 5 authority.

[22] The instant matter also raises concerns about the Commission imposing requirements on the respondent that go beyond those it agreed to as part of the SSO at issue here, which does not appear to ban the seeking of injunctions on SEPs included in its standards. *See* SAE International, Technical Standards Board Governance Policy § 1.14 (Nov. 2008), *available at http://www.sae.org/standardsdev/tsb/tsbpolicy.pdf.* Even more troublesome, it is an open question whether the patents at issue are even standard-essential. *See, e.g.,* Complaint ¶ 16 (''After the adoption of SAE J–2788, SPX Corporation sued certain competitors, including Bosch, for infringing patents that may be essential to the practice of SAE J–2788.'').

[23] *See Ethyl,* 729 F.2d 128; *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp.* v. *FTC,* 637 F.2d 573 (9th Cir. 1980); *Abbott Labs.,* 853 F. Supp. 526.

[24] *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act,* 76 Antitrust L.J. 929, 943 (2010) (''In the 1950s and the 1970s, Commission efforts to use Section 5 litigation to reach beyond prevailing interpretations of Sections 1 and 2 of the Sherman Act elicited strong political backlash from the Congress.'').

[FR Doc. 2012–29031 Filed 11–30–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10143 and CMS–R–284]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection. *Title of Information Collection:* Monthly State File of Medicaid/Medicare Dual Eligible Enrollees. *Use:* The monthly data file is provided to CMS by states on dually eligible Medicaid and Medicare beneficiaries, listing the individuals on the Medicaid eligibility file, their Medicare status and other information needed to establish subsidy level, such as income and institutional status. The file will be used to count the exact number of individuals who should be included in the phased-down state contribution calculation that month. CMS will be able to merge the data with other data files and establish Part D enrollment for those individuals on the file. The file may be used by CMS partners to obtain accurate counts of duals on a current basis. *Form Number:* CMS–10143 (OCN 0938–0958). *Frequency:* Monthly. *Affected Public:* State, Local, or Tribal Governments. *Number of Respondents:* 51. *Total Annual Responses:* 612. *Total Annual Hours:* 6,120. (For policy questions regarding this collection contact Goldy Austen at 410–786–6450. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection. *Title of Information Collection:* Medicaid Statistical Information System (MSIS). *Use:* CMS requests OMB approval of the Medicaid Statistical Information System (MSIS, IBC Form R–284) and allow additional data collection of MSIS data for what CMS now refers to as the Transformed Medicaid Statistical Information System (T–MSIS) data collection. This approval would enable states to continue to fulfill their Medicaid data reporting requirements in parallel from 2013 through 2016 and reduce the burden on states by: eliminating multiple disparate requests for data, allowing states to have one consolidated reporting requirement, and to better perform its responsibilities of Medicaid and CHIP program oversight, administration, and program integrity.

Subsequent to the publication of the 60-day **Federal Register** notice (August 15, 2012; 77 FR 48987), T–MSIS has been added to the corresponding PRA package to offer CMS and state partners robust, up-to-date, and current information to be able to:

- View how each state and the district implements their programs.
- Compare the delivery of programs across authorities/states.
- Assess the impact of service options on beneficiary outcomes and expenditures.
- Examine the enrollment, service provision, and expenditure experience of providers who participate in our programs (as well as in Medicare).
- Examine beneficiary activity such as application and enrollment history, services received, appropriateness of services received based on enrollment status and applicable statutory authority.
- Use informatics to improve program oversight and inform future policy and operational decisions.
- Answer key Medicaid and CHIP program questions.

Importantly, there is no duplication of effort or information associated with this request. MSIS provides complete Medicaid and CHIP program statistics on a national scale and there is no other