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 12, 2011.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *Timothy T. O'Dell IRA, Thad R. Perry, Susanne G. Perry, Marie-Luise Marx, and Richard M. Mershad, Trustee, for the Richard M. Mershad Revocable Trust, all of New Albany, Ohio; Robert E. Hoeweler IRA, Paula Hoeweler IRA, and Robert E. and Paula L. Hoeweler, all of Cincinnati, Ohio; Donal H. Malenick and Michael W. Lenhart, both of Naples, Florida; James H. Frauenberg, II, George K. Richards, Trustee of the George K. Richards Trust, Deborah Phillips Bower, MOCORP, LLC, Moberger LTD, and Ohio Indemnity Company of Columbus, all of Columbus, Ohio; Eric G. Leininger, Upper Arlington, Ohio; Robert C. Moberger, Dublin, Ohio; Dynalab, LLC, Reynoldsburg, Ohio; and Pozzolana Consulting, LLC, Gainesville, Florida;* to acquire voting shares of Central Federal Corporation, and thereby indirectly acquire voting share of CF Bank, both in Fairlawn, Ohio.

Board of Governors of the Federal Reserve System, November 22, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–30483 Filed 11–25–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 11–30105) published on page 72206 of the issue for Tuesday, November 22, 2011.

Under the Federal Reserve Bank of San Francisco heading, the entry for American Start-Up Financial Institutions Investments, I, L.P., and CKH Capital, Inc., both in Monterey Park, California, is revised to read as follows:

A. *Federal Reserve Bank of San Francisco* (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *America Start-Up Financial Institutions Investments, I, L.P., and CKH Capital, Inc.,* both in Monterey Park, California; to become bank holding companies by acquiring up to 62 percent of the voting shares of New Omni Bank, National Association, Alhambra, California.

In connection with this application, Applicants also have applied to retain 5.9 percent interest of the voting shares of First PacTrust Bancorp, Inc., and thereby indirectly retain Pacific Trust Bank, both in Chula Vista, California, and engage in operating as savings and loan association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, November 22, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–30482 Filed 11–25–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 101 0115]

Pool Corporation; 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 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 22, 2011.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''PoolCorp, File No. 101 0115'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/poolcorpconsent,* 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: Linda Holleran (202) 326–2267, FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 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 November 21, 2011), 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 22, 2011. Write ''PoolCorp, File No. 101 0115'' 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 obtained from any person and which is privileged or confidential,'' as provided 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/poolcorpconsent* 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 ''PoolCorp, File No. 101 0115'' 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 22, 2011. 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

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist (''Agreement'') with Pool Corporation (''PoolCorp''). PoolCorp is the world's largest distributor of products used in the construction, renovation, repair, service, and maintenance of residential and commercial swimming pools. The Agreement resolves charges that PoolCorp used exclusionary acts and practices to maintain its monopoly power in the pool product distribution market in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The administrative complaint that accompanies the Agreement (''Complaint'') alleges that PoolCorp used its monopoly power in local geographic markets to prevent manufacturers from supplying pool products to new entrants since at least 2003. As a result, PoolCorp foreclosed rival distributors from obtaining pool products—a necessary input to compete—and significantly raised its rivals' costs, thereby lowering output, increasing prices, and diminishing consumer choice.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed Order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

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

The Agreement is for settlement purposes only and does not constitute an admission by PoolCorp that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. Industry Background

This case involves wholesale distribution in the swimming pool industry. There are over nine million residential pools in the United States, and over 250,000 commercial pools operated by hotels, country clubs, apartment buildings, municipalities, and others. In 2010, the distribution of pool products was an estimated $3 billion industry in the United States. Manufacturers use distributors to sell the products used to build, repair, service, and maintain residential and commercial swimming pools (''pool products''). Pool products include, among others, pumps, filters, heaters, covers, cleaners, diving boards, steps, rails, pool liners, pool walls, and the parts necessary to maintain pool equipment. Distributors purchase pool products from manufacturers, warehouse them, and then resell the products to pool retail stores, pool service companies and pool builders (collectively, ''pool dealers'' or ''dealers''). Dealers, in turn, sell the pool products to the ultimate consumer: owners of residential and commercial swimming pools. The swimming pool industry is very fragmented and wholesale distributors make it more efficient for manufacturers and dealers to sell their products. Distributors purchase most, if not all, brands of pool products that are produced by manufacturers so that they can provide convenient one-stop shopping for their dealer customers. Distributors also extend credit and provide quick delivery of pool products to thousands of dealers. The vast majority of dealers are mom-and-pop operations that are too small to buy directly from manufacturers; for these dealers, distributors are their only source of pool products. Distributors also allow manufacturers to operate their factories year-round by purchasing large quantities of pool products throughout the year, even though the pool industry is seasonal.

In general, manufacturers are willing to sell their products to any credit-worthy distributor that has a physical warehouse and personnel with knowledge of the pool industry. Manufacturers typically prefer to have two or more distributors selling their products in a local geographic market in order to ensure that the distributors compete and give competitive service and prices to their dealer customers.

To compete effectively as a distributor, a firm must be able to buy pool products directly from manufacturers. There are no cost-effective alternatives. While there are

over 100 manufacturers of pool products, there are only three full-line manufacturers that produce almost all of the products used to operate or repair swimming pools: Pentair Water Pool & Spa; Zodiac Pool Systems, Inc.; and Hayward Pool Products. Collectively, these manufacturers represent more than 50 percent of all pool product sales. To be successful, a distributor must sell the products of at least one of these manufacturers. As recognized by PoolCorp, a positive relationship with these and other manufacturers is ''critical'' to the success of a distributor.

B. PoolCorp's Monopoly Power

The relevant market is no broader than the wholesale distribution of pool products in the United States and numerous local geographic markets. With the exception of large national retail chains that purchase pool products for their retail centers located throughout the United States, competition among distributors for sales to dealers occurs locally. PoolCorp has monopoly power in numerous local markets, as evidenced by a persistently high market share of 80 percent or more for the past five years. PoolCorp's conduct of foreclosing new distributor entrants from obtaining pool products directly from manufacturers represents a significant barrier to entry.

C. PoolCorp's Conduct

Beginning in 2003 and continuing to today, PoolCorp has implemented an exclusionary policy that effectively impeded entry by new distributors by preventing them from being able to purchase pool products directly from manufacturers. Specifically, when a new distributor attempted to enter a local geographic market, PoolCorp threatened manufacturers that it would not deal with them if they also supplied the new entrant. PoolCorp threatened to terminate the purchase and sale of the manufacturer's pool products for all 200+ PoolCorp distribution centers located throughout the United States. PoolCorp's policy did not exclude existing rivals from obtaining pool products from manufacturers.

PoolCorp's threat was significant. The loss of sales to PoolCorp could be ''catastrophic'' to the financial viability of even major manufacturers. No other distributor could replace the large volume of potential lost sales to PoolCorp, particularly in markets where PoolCorp is the only distributor. New entrants could not offer any economic incentive to manufacturers that would offset the risks imposed by PoolCorp's threats.

After receiving these threats, manufacturers, including the three ''must-have'' manufacturers, refused to sell pool products to the new distributors and canceled any pre-existing orders. PoolCorp thus effectively foreclosed new distributors from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales.

In some cases, the new distributors were able to purchase pool products from other distributors. This counterstrategy, however, did not mitigate the effects of PoolCorp's conduct. As a general rule, distributors do not sell pool products to other distributors. Even when possible, this alternative is not a viable long-term strategy because it substantially increases the entrant's costs and lessens its quality of service. For example, buying pool products from a distributor forces the new distributor entrant to pay transportation costs from the distributor's location rather than receiving free shipping under manufacturer programs. The purchases are also at a marked-up price and do not qualify for key manufacturer year-end rebates.

By effectively increasing its rivals' costs, PoolCorp's exclusionary policy prevented the new distributor entrants from being able to compete aggressively on price. Additionally, without full control of their inventory, the entrants' ability to provide quality service to their dealer customers was diminished. PoolCorp specifically targeted new entrants, rather than established rivals, because the new distributors represented a significant competitive threat due to their likelihood to compete aggressively on price in order to earn new business. PoolCorp's conduct, therefore, had the purpose and effect of maintaining and enhancing PoolCorp's monopoly power in numerous local markets where its dominance would otherwise be threatened by new entrants. PoolCorp's exclusionary policy, therefore, has likely resulted in higher prices and reduced output. There are no procompetitive efficiencies that justify PoolCorp's conduct.

II. Legal Analysis

The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, enhancement or maintenance of that power through exclusionary conduct.[2] A monopolist's refusal to deal with a firm if that firm also deals with a rival has long been recognized as exclusionary conduct. Exclusionary practices violate Section 2 of the Sherman Act when the challenged conduct significantly impairs the ability of rivals to compete effectively with the respondent and thus to constrain its exercise of monopoly power.[3]

The factual allegations in the complaint regarding market structure support a finding of monopoly power and competitive harm. PoolCorp's ''all or nothing'' threats acted as a powerful deterrent to manufacturers against dealing with new distributor entrants by jeopardizing a large and irreplaceable percentage of the manufacturer's sales. PoolCorp's conduct effectively foreclosed new entrants from manufacturers representing more than 70 percent of pool product sales. New entrants were unable to provide any economic incentive to manufacturers that could offset the risk posed by PoolCorp's threats. Raising rivals' costs by restraining their supply of inputs can be a ''particularly effective method of anticompetitive exclusion.'' [4]

Additionally, the work-around strategy employed by some new entrants of purchasing pool products from other distributors significantly raised their costs and reduced their ability to provide quality service. PoolCorp's exclusionary policy therefore prevented these firms from providing a meaningful

[2] *Verizon Commun's.* v. *Law Offices of Curtis V. Trinko LLP.,* 540 U.S. 398, 407 (2004); *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570–71 (1966).

[3] *E.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 605 & n. 32 (1985) (exclusionary conduct ''tends to impair the opportunities of rivals'' but ''either does not further competition on the merits or does so in an unnecessarily restrictive way'') (citations omitted); see also *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 151–54 (1951) (condemning newspaper's refusal to deal with customers that also advertised on rival radio station because it harmed the radio station's ability to compete); *United States* v. *Microsoft,* 253 F.3d 34, 68–71 (D.C. Cir. 2001) (condemning exclusive agreements that prevented rivals from ''pos[ing] a real threat to Microsoft's monopoly''); *United States* v. *Dentsply,* 399 F.3d 181, 191 (3d Cir. 2005) (condemning policy that kept competitors below ''the critical level necessary for any rival to pose a real threat to Dentsply's market share'').

[4] See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 224 (1986) (explaining that this method of exclusion allows a dominant firm to use its vertical relationships to create additional horizontal market power); *see also Dentsply,* 399 F.3d at 195 (holding ''all or nothing'' ultimatum exclusionary when it ''created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth.''); *In re Transitions Optical, Inc.,* 75 FR 10799 (Mar. 2010) (proposed complaint and analysis to aid public comment).

constraint on PoolCorp's monopoly prices.

Notably, PoolCorp's conduct targeted new entry and did not exclude existing rivals. The test for exclusionary conduct, however, is not total foreclosure, but ''whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.'' [5] New entrants may have a more disruptive impact on the market than established firms because they may have an increased incentive to compete aggressively on price in order to win business. Conduct that artificially raises entry barriers by increasing the scale, cost or time of entry harms consumers by providing a greater opportunity for monopoly pricing.[6]

A monopolist may rebut a *prima facie* showing of competitive harm by showing that the challenged conduct is reasonably necessary to achieve a procompetitive benefit. Any efficiency benefit, if proven, must be balanced against the harm caused by the challenged conduct.

There are no procompetitive efficiencies that justify PoolCorp's conduct. In some cases, for example, exclusive arrangements with suppliers could be necessary to prevent free-riding or to secure adequate supply. Here, however, PoolCorp did not offer any services upon which a new entrant could free-ride. Further, the pool industry is not subject to product shortfalls that could justify exclusive arrangements with suppliers. In short, PoolCorp's practice of foreclosing new entrants from supply did not help PoolCorp compete on the merits by improving its efficiency, quality or prices.

III. The Order

The proposed Consent Order remedies PoolCorp's anticompetitive conduct. Paragraph II of the Order addresses the core of PoolCorp's conduct. Specifically, Paragraph II of the proposed Consent Order prohibits PoolCorp from:

- Conditioning the sale or purchase of pool products, or membership in PoolCorp's preferred vendor programs, on the intended or actual sale of pool products by a manufacturer to any distributor other than PoolCorp;
- Pressuring, urging or otherwise coercing manufacturers to refrain from selling, or to limit their sales, to any distributors other than PoolCorp; and
- Discriminating or retaliating against a manufacturer for selling, or intending to sell, pool products to any distributor other than PoolCorp.

The definition of ''distributor'' includes any entity that buys pool products directly from manufacturers and resells those products to dealers or others. The Order explicitly allows PoolCorp to enter into exclusive agreements with manufacturers to purchase private-label pool products.

Paragraph III of the Proposed Order requires PoolCorp to implement an antitrust compliance program. Paragraph IV–VI impose reporting and other compliance requirements. The Order will expire in 20 years.

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

Statement of Commissioners Julie Brill, Jon Leibowitz and Edith Ramirez Regarding the Complaint and Proposed Consent Order in *In Re Pool Corporation*

November 21, 2011

The Commission is today issuing for public comment a Complaint and Order that would resolve allegations that Pool Corporation (''PoolCorp'') used anticompetitive acts and practices to exclude rivals from, and to maintain its monopoly power in, several local pool product distribution markets, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

On the basis of staff's investigation and as outlined in the Complaint, we have reason to believe that a violation of the antitrust laws has occurred—and that Commission action is in the public interest. 15 U.S.C. 45(b). Specifically, the Complaint alleges that PoolCorp, which possesses monopoly power in many local distribution markets, threatened its suppliers (*i.e.,* pool product manufacturers) that it would no longer distribute a manufacturer's products on a nationwide basis if that manufacturer sold its products to a new distributor that was attempting to enter a local market. Although these manufacturers preferred to have a broad and diverse distribution network, they declined to add distributors because they feared retribution from PoolCorp. These decisions were not made for independent business reasons.[7]

As alleged in the Complaint, PoolCorp's actions foreclosed new entrants from obtaining pool products from manufacturers representing more than 70 percent of sales. Significantly, there is no efficiency justification for PoolCorp's conduct. That is, without any legitimate justification, PoolCorp dictated whether new competitors could access the full range of merchandise needed to compete effectively in the market. *Cf. Toys ''R'' Us, Inc.* v. *FTC,* 221 F.3d 928, 930 (7th Cir. 2000) (actions by dominant toy retailer to prevent would-be entrants from obtaining access to toys judged to be anticompetitive). Some of PoolCorp's targets were able to survive by purchasing pool products from other distributors rather than directly from the manufacturers. However, we assess consumer harm relative to market conditions that would have existed but for the respondent's allegedly unlawful conduct. Here, PoolCorp's strategy significantly increased a new entrant's costs of obtaining pool products. Conduct by a monopolist that raises rivals' costs can harm competition by creating an artificial price floor or deterring investments in quality, service and innovation.[8] The higher cost structure PoolCorp imposed on new entrants prevented them from providing a competitive constraint to PoolCorp's alleged monopoly prices. And without full control of their inventory, the new distributors' ability to provide high quality service to their dealer customers was diminished. The harm to consumers that occurred as a result was substantial. In the end, consumers had fewer choices and were forced to pay higher prices for pool products.

Although we recognize that PoolCorp's alleged conduct did not target incumbent distributors, we nevertheless have reason to believe that the conduct harmed competition and consumers. Separate from PoolCorp,

[5] *LePage's, Inc.* v. *3M,* 324 F.3d 141, 159 (3d Cir. 2003); *see also Dentsply,* 399 F.3d at 190 (explaining that ''it is not necessary that all competition be removed from the market'').

[6] Herbert Hovenkamp, Antitrust Law ¶ 1802c, at 64 (2d ed. 2002) (''Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth''); *see also Microsoft,* 253 F.3d at 79 (''it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will''); *LePage's,* 324 F.3d at 159 (''When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, *i.e.,* predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general.'').

[7] We disagree with Commissioner Rosch's conclusion that manufacturers refused to deal with new entrants for independent business reasons. In our view, the evidence demonstrates a causal relationship between the manufacturers' decisions and PoolCorp's alleged conduct.

[8] *See, e.g.,* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 224 (1986) (finding that a dominant firm's strategy of restraining rivals' access to supply can be a ''particularly effective method of anticompetitive exclusion'' because it allows the dominant firm to use its vertical relationships to create additional horizontal market power).

there are few, if any, incumbent distributors in the local markets at issue here. By targeting new distributor entrants, PoolCorp's conduct harmed the very companies that were most likely to compete aggressively on price and to introduce innovative services or ways of doing business.[9] The Commission has seen this pattern before. The targets of anticompetitive exclusion are often the new rivals that incumbents foresee as most likely to shake up the market and benefit consumers at the expense of incumbents.[10] We fail to do our job if we permit a monopolist to decide, without sufficient efficiency justification, whether or on what terms a rival will be permitted to enter the market.

Because we have reason to believe that PoolCorp's conduct had the purpose and effect of maintaining PoolCorp's monopoly power in numerous local markets where its dominance was threatened by new distributor entrants, we support the attached Complaint and Order.

Dissenting Statement of J. Thomas Rosch In the Matter of Pool Corporation, FTC File No. 101–0115

November 21, 2011

This case presents the novel situation of a company willing to enter into a consent decree notwithstanding a lack of evidence indicating that a violation has occurred. The FTC Act requires that the Commission find a ''reason to believe'' that a violation has occurred and determine that Commission action would be in the public interest any time it issues a complaint. 15 U.S.C. 45(b). In my view, the same standard applies regardless of whether the Commission is seeking a litigated decree or a consent decree for the charged violation. Accordingly, I would reject the proposed consent decree and close the investigation.

After a year and a half of investigation, we have not been able to identify any harm to consumers or competition as a result of actions by Pool Corporation, Inc. (''PoolCorp''), and further investigation appears unlikely to uncover such effects. As an initial matter, it is important to note that, even accepting the allegations in the complaint, PoolCorp did not engage in a general pattern of exclusionary conduct. Rather, the complaint alleges that PoolCorp threatened manufacturers not to supply an entering distributor in various local markets. There is no allegation that PoolCorp sought to restrict supply to (1) incumbents in any of these local markets, (2) established distributors seeking to expand into markets dominated by PoolCorp, or (3) established distributors in any of the dozens of other local markets across the country.

The limited scope of PoolCorp's alleged exclusionary conduct is, of course, no defense. PoolCorp's alleged threats to manufacturers, had they been successful, may well have violated the antitrust laws. But that is not what happened. The investigation revealed that PoolCorp's demands were not honored by manufacturers. Instead, the evidence showed that manufacturers made unilateral decisions not to supply the de novo entrants in the various local markets.

There were legitimate reasons for pool equipment manufacturers not to sell to these entrants. A manufacturer will typically accept a new distributor only if the distributor will add to the value of the distribution network by, for example, improving growth opportunities or increasing promotional activities. Manufacturers often require a de novo entrant to have adequate facilities, a history of successful operations, and a favorable credit history before supporting it. In this case, many of the allegedly excluded de novo entrants did not satisfy these requirements. The lack of evidence establishing causation between PoolCorp's requests and action by the manufacturers, combined with plausible justifications for the manufacturers' actions, should be fatal to this case.

Another problem with this case is that no entrants were actually excluded.[11] That is because the entrants were able to obtain supplies from other manufacturers or distributors. The only claim to the contrary is in Paragraph 28 of the complaint, which alleges that in Baton Rouge, ''the new entrant's business ultimately failed in 2005'' because of the lack of ''direct access to the manufacturers' pool products.'' The complaint neglects to mention that this entrant was able to secure supplies from other sources and later sold itself to an established out-of-state distributor. Since then, that distributor, which has had full access to supplies, has been a highly effective rival to PoolCorp. Thus, to the extent PoolCorp's threats had an effect in Baton Rouge, they may have led to *more,* not less, competition.

A third problem with this case is that there was no consumer injury. The investigation did not uncover price increases, service degradation, or other anticompetitive effects in any local markets.[12] Economic analysis corroborated these results and suggested that even if PoolCorp had completely foreclosed its rivals, the pricing effects would have been minimal. The lack of consumer harm should not be surprising given that PoolCorp's actions, at most, raised the costs of a single competitor in each local market, without affecting other incumbents or the entry prospects of established, out-of-market dealers.

The lack of consumer injury is also corroborated by the very low entry barriers in this industry. Opening a pool supply distributorship requires access to one or more of the major equipment suppliers, a few trucks, a medium-sized warehouse, access to credit, and no more than ten employees. There are hundreds of profitable pool supply distributors, and entry and expansion are frequent events. Thus, any effort to exclude a competitor would become a game of whack-a-mole: As soon as one competitor is driven from the market, another would pop up.

Accordingly, I cannot find that there is a ''reason to believe'' that a violation occurred or that accepting the proposed consent decree would be in the public

[9] *See id.* at 246 (explaining that potential competition by new entrants can provide a ''significant competitive check'' distinct from established firms).

[10] *See, e.g., Allied Tube & Conduit Corp.* v. *Indian Head,* Inc., 486 U.S. 492, 499–500 (1988) (condemning association action to prevent inclusion of plastic conduits in relevant standard); *Realcomp II, LTD.* v. *FTC,* 635 F.3d 815 (6th Cir. 2011) (condemning Multiple Listing Service rules that disadvantaged new brokerage model), cert. denied, 2011 U.S. Lexis 7292 (Oct. 11, 2011); *Toys ''R'' Us, Inc.* v. *FTC,* 221 F.3d 928 (7th Cir. 2000) (condemning dominant toy company's actions that limited sources of toys available to new warehouse clubs).

[11] The majority statement purports to be based on the Complaint. However, the majority statement ignores the central theory of the Complaint—exclusion of rivals through foreclosure of supply (Complaint ¶¶ 18–28)—and does not assert that any rivals were actually excluded. Instead, the majority statement focuses on an alternative theory of competitive harm—raising rivals' costs—on which the Complaint offers scant details. (Complaint ¶¶ 29–31.) As support for this theory, the majority statement relies on an article by Krattenmaker and Salop. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209, 224 (1986). As these authors note, however, a raising rivals' costs strategy is unlikely to be successful in a market with low entry barriers. Id. at 225 (entry must ''be difficult''), 236 n.85 (''Obviously, some barriers to entry and expansion must exist for price to rise.''). Here, neither the complaint nor the majority statement alleges that there are any significant barriers to entry in this industry.

[12] The basis for the majority statement's claim that there was ''substantial'' consumer harm resulting from the alleged conduct of Respondent is a mystery. The complaint contains no factual allegations of any harm to consumers, much less ''substantial'' harm. Likewise, there are no factual allegations in the complaint corroborating the majority's claim that consumers ''had fewer choices and were forced to pay higher prices for pool products.''

interest. 15 U.S.C. 45(b). Furthermore, I question whether this investigation represented a wise use of Commission resources, particularly given the austere climate in which we are operating. Even accepting all of the allegations in the complaint as true, the likely consumer injury would have amounted to just a few thousand dollars.

[FR Doc. 2011–30435 Filed 11–25–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from Vitro Manufacturing in Canonsburg, Pennsylvania, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 18, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employees who worked at Vitro Manufacturing in Canonsburg, Pennsylvania, from January 1, 1960 through September 30, 1965, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on November 17, 2011, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on November 17, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone (877) 222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2011–30586 Filed 11–25–11; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from W.R. Grace and Company in Curtis Bay, Maryland, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 18, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employees who worked at any building or area at the facility owned by W.R. Grace and Company in Curtis Bay, Maryland, for the operational period from May 1, 1956 through January 31, 1958, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on November 17, 2011, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on November 17, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone (877) 222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Y–12 facility in Oak Ridge, Tennessee, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 18, 2011, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and their contractors and subcontractors who worked at the Y–12 facility in Oak Ridge, Tennessee, during the period from January 1, 1948 through December 31, 1957, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on November 17, 2011, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on November 17, 2011, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone (877) 222–7570. Information requests can also be submitted by email to DCAS@CDC.GOV.

John Howard,

Director, National Institute for Occupational Safety and Health.

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