

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2012, TO JUNE 30, 2012

PUBLISHED BY THE COMMISSION

VOLUME 153



Compiled by
The Office of the Secretary
Robert F. Swenson, Editor

**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2012 TO JUNE 30, 2012**

JON LEIBOWITZ, *Chairman*
Took oath of office September 3, 2004.

J. THOMAS ROSCH, *Commissioner*
Took oath of office January 5, 2006.

EDITH RAMIREZ, *Commissioner*
Took oath of office April 5, 2010.

JULIE BRILL, *Commissioner*
Took oath of office April 6, 2010.

MAUREEN K. OHLHAUSEN, *Commissioner*
Took oath of office April 4, 2012

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2012, TO JUNE 30, 2012

IN THE MATTER OF

HEALTHCARE TECHNOLOGY HOLDINGS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket No. C-4340; File No. 111 0097
Complaint, October 28, 2011 – Decision, January 9, 2012

This consent order addresses the \$340 million acquisition by Healthcare Technology Holdings, Inc. of SDI Health LLC (“SDI”) from SDI Health Holdings LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the U.S. markets for promotional audits and medical audits. The consent order requires Healthcare Technology, among other things, to divest SDI’s promotional audits and medical audits business.

Participants

For the *Commission*: Jordan S. Andrew, Erin L. Craig, Karen Espaldon, Lynda Lao, Gregory P. Luib, Stephen A. Mohr, Christine Palumbo, Mark Silvia, and Priya Viswanath.

For the *Respondent*: Leah Brannon and David I. Gelfand, Cleary Gottlieb Steen & Hamilton LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Healthcare Technology Holdings, Inc. (“Healthcare Technology”), a corporation subject to the

Complaint

jurisdiction of the Commission, has entered into an agreement to acquire, through its wholly owned subsidiary IMS Health Incorporated (“IMS”), all of the membership interests in SDI Health LLC (“SDI”) from SDI Health Holdings LLC (“SDI Holdings”), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Healthcare Technology is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 83 Wooster Heights Road, Danbury, CT 06810. Respondent Healthcare Technology, through its wholly owned subsidiary, IMS, is engaged in the research, development, production, and sale of healthcare data and analytics.

2. Respondent Healthcare Technology is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. SDI Holdings is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 1 SDI Drive, Plymouth Meeting, PA 19462. SDI Holdings, through its wholly owned subsidiary, SDI, is engaged in the research, development, production, and sale of healthcare data and analytics.

4. SDI Holdings is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of

Complaint

the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. Pursuant to a Membership Interest Purchase Agreement (“Acquisition Agreement”) dated January 13, 2011, Healthcare Technology, through its wholly owned subsidiary, IMS, proposes to acquire all of the membership interests in SDI from SDI Holdings (the “Acquisition”).

IV. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the production and sale of:

- a. promotional audits; and
- b. medical audits.

7. For the purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

8. Promotional audits provide estimates of pharmaceutical promotional activities for individual branded drugs in areas such as physician detailing, product sampling, and advertising. Pharmaceutical manufacturers and other customers use promotional audits to assess their promotional share of voice, or their share of spending in various promotional categories, which in turn helps such customers to determine their promotional budgets. The \$16 million market for promotional audits is highly concentrated; only IMS, SDI, and Cegedim S.A. offer promotional audits in the United States. IMS has a 30 percent share of this market, SDI has a 68 percent market share, and Cegedim has a 2 percent market share.

9. Medical audits provide estimates of disease-specific diagnoses made and therapies prescribed by physicians.

Complaint

Customers use medical audits to assess, among other things, the size of therapeutic areas, which products are used to treat particular diseases, and prescribing and treatment trends. The \$9 million market for medical audits is highly concentrated, with IMS accounting for 53 percent and SDI accounting for the remaining 47 percent of the market.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because of the significant time and expense required to recruit panels of physicians to provide the data underlying the estimates included in promotional and medical audits. In addition, entry is not likely because the sales opportunities available for any potential new entrant are likely too small to justify the cost of entering the markets.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of 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 eliminating actual, direct, and substantial competition between IMS and SDI in the markets for promotional audits and medical audits and producing a virtual monopoly in these two markets, thereby: (1) increasing the likelihood that IMS would unilaterally exercise market power in these markets; and (2) increasing the likelihood that consumers would be forced to pay higher prices for these products.

VIII. VIOLATIONS CHARGED

12. The Acquisition Agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

13. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Order to Hold Separate

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-eighth day of October, 2011, issues its Complaint against said Respondent.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Healthcare Technology Holdings, Inc. (“Respondent Healthcare Technology”) through its wholly owned subsidiary, IMS Health Incorporated (“IMS”), of SDI Health LLC, and Respondent having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent

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Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets:

1. Respondent Healthcare Technology is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 83 Wooster Heights Road, Danbury, CT 06810.
2. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Hold Separate and Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Healthcare Technology” means Healthcare Technology Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Healthcare Technology Holdings, Inc. (including SDI Health LLC, after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “SDI” means SDI Health LLC, a limited liability corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 SDI Drive, Plymouth Meeting, PA 19462.

Order to Hold Separate

- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the:
1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- E. “Effective Date” means the date on which the divestitures and assignments pursuant to Paragraph II or VII of the Decision and Order are consummated.
- F. “Held Separate Business” means the SDI Audit Business, SDI SFSS, SDI OSA, SDI Report Generator (including all development and maintenance thereof), and the Held Separate Business Employees.
- Provided, however,* Respondent Healthcare Technology may use SDI Report Generator as allowed under the license described in Paragraph II.A. of the Order.
- G. “Held Separate Business Employees” means the Designated Audit Employees and any full-time, part-time, or contract employee of SDI who devoted more than 50% of his or her time to the SDI Audit Business, SDI SFSS, SDI OSA, or SDI Report Generator.
- H. “Hold Separate” means this Order to Hold Separate and Maintain Assets.
- I. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph VII hereof.

Order to Hold Separate

- J. “Monitor” means any monitor appointed pursuant to Paragraph III of this Hold Separate or Paragraph VI of the Decision and Order.
- K. “Orders” means the Decision and Order and this Hold Separate.

II.**IT IS FURTHER ORDERED** that:

- A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Monitor, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Decision and Order, and all applicable laws.
- B. Until the Effective Date, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the SDI Audit Business, to minimize any risk of loss of competitive potential for the SDI Audit Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the SDI Audit Business except for ordinary wear and tear. Respondent shall not sell, transfer, encumber, or otherwise impair the SDI Audit Business (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the SDI Audit Business.
- C. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the

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extent that such employees leave or have left the Held Separate Business prior to the Effective Date, the Manager, with the approval of the Monitor, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

1. In connection with support services or products not included within the Held Separate Business, Respondent shall continue to provide, or offer to provide, the same support services to the Held Separate Business as customarily have been or are being provided to such businesses by SDI as of the date of the Acquisition. Respondent's personnel providing such services or products must retain and maintain all Confidential Business Information of or pertaining to the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Held Separate Business.
- D. Respondent shall offer to the Held Separate Business any services and products that Respondent provides, in the ordinary course of its business, to their other businesses directly or through third party contracts, or that it has provided in the ordinary course of its business directly or through third party contracts to the Held Separate Business at any time since before the Acquisition Date. The Held Separate Business may, at the option of the Manager and with the approval of the Monitor, obtain such services and products from Respondent. Subject to the foregoing, the services and products that Respondent shall offer the Held Separate

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Business shall include, but shall not be limited to, the following:

1. human resources and administrative services, including but not limited to payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits;
 - a. federal and state regulatory compliance and policy development services;
 - b. environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - c. financial accounting services;
 - d. preparation of tax returns;
 - e. audit services;
 - f. information technology support services;
 - g. processing of accounts payable and accounts receivable;
 - h. technical support;
 - i. procurement of supplies;
 - j. maintenance and repair of facilities;
 - k. procurement of goods and services utilized in the ordinary course of business by the Held Separate Business; and
 - l. legal services.
2. The Held Separate Business shall have, at the option of the Manager and with the approval of the Monitor, the ability to acquire services and

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products from third parties unaffiliated with Respondent.

III.**IT IS FURTHER ORDERED** that:

- A. Respondent shall hold the Held Separate Business separate, apart, and independent of Healthcare Technology on the following terms and conditions:
1. Stuart A. Samuels shall serve as the Monitor, pursuant to the agreement executed by the Monitor and Respondent and attached as Exhibit C to the Decision and Order (“Monitor Agreement”).
 - a. Respondent shall, no later than one (1) day after the Acquisition Date, pursuant to the Monitor Agreement, transfer to and confer upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order and in consultation with Commission staff, and shall include in the Monitor Agreement all provisions necessary to effectuate this requirement.
 - b. The Monitor Agreement shall require that the Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - c. The Monitor shall have the responsibility for monitoring the organization of the Held Separate Business; supervising the management of the Held Separate Business by the Manager; maintaining the independence of the Held Separate Business; and monitoring Respondent’s compliance with its obligations pursuant to the Orders, including maintaining the viability, marketability, and

Order to Hold Separate

competitiveness of the SDI Audit Business pending divestiture.

- d. Subject to all applicable laws and regulations, the Monitor shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business, and to any other relevant information as the Monitor may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Monitor may reasonably request and shall cooperate with the Monitor. Respondent shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with this Hold Separate or the Decision and Order or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- e. The Monitor shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
- f. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Monitor's duties.

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- g. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- h. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate terminates, the Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Monitor's assessment of the extent to which the SDI Audit Business is meeting (or exceeding) its projected goals as reflected in operating plans, budgets, projections, or any other regularly prepared financial statements.
- i. If the Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Monitor consistent with the terms of this Hold Separate, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor. Respondent and the substitute Monitor shall execute a Monitor Agreement, subject to the approval of the Commission, consistent with this paragraph.
- j. The Monitor shall serve until the day after the Effective Date; *provided, however*, that the Commission may extend or modify this period

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as may be necessary or appropriate to accomplish the purposes of the Orders.

2. No later than one (1) day after the Acquisition Date, Respondent shall enter into a management agreement with, and shall transfer all rights, powers, and authority necessary to manage and maintain the Held Separate Business, to Kelly M. Sborlini (“Manager”).
 - a. In the event that the aforementioned individual declines an offer to act as a Manager, or accepts the position of Manager and subsequently ceases to act as a Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers, and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate. The Manager named under this Paragraph may be the same person named as Monitor in Paragraph III.A.1.
 - b. The Manager shall report directly and exclusively to the Monitor and shall manage the Held Separate Business independently of the management of Respondent. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.
 - c. The management agreement between Respondent and the Manager shall provide that:
 - i. Respondent shall provide the individual who agrees to serve as Manager with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits,

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including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Held Separate Business's viability, marketability, and competitiveness until the Effective Date has occurred, and as may otherwise be necessary to achieve the purposes of this Hold Separate; and

- ii. Respondent shall, at the option of the Manager, offer to continue the Manager's employment for a period of no less than one (1) year following the Manager's acceptable completion of service as a Manager at terms no less favorable than those pursuant to which the Manager was employed prior to the Acquisition; *provided, however*, this requirement shall not apply if the Manager was removed from service for cause.

- d. The Manager shall make no material changes in the ongoing operations of the Held Separate Business except with the approval of the Monitor, in consultation with the Commission staff.

- e. The Manager shall have the authority, with the approval of the Monitor, to remove Held Separate Business employees and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Monitor, may request Respondent to, and Respondent shall, appoint a substitute Person, which Person the Manager shall have the right to approve.

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- f. In addition to Held Separate Business employees, the Manager may, with the approval of the Monitor, employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
 - g. The Monitor shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in this paragraph.
3. The Monitor and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
 4. Respondent shall indemnify the Monitor and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor or the Manager.
 5. Respondent shall cause the Monitor, the Manager, the Held Separate Business Employees, and each of Respondent's employees having access to Confidential Business Information of or pertaining to the Held Separate Business to submit to the Commission a signed statement that the individual

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will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Confidential Business Information of or pertaining to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such Persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other Person whose employment involves any of Respondent's businesses or activities other than the Held Separate Business.

6. Except for the Manager, Held Separate Business Employees, and support services employees involved in providing services to the Held Separate Business pursuant to this Hold Separate, and except to the extent provided in this Hold Separate, Respondent shall not permit any other of its employees, officers, directors, agents, or representatives to be involved in the operations of the Held Separate Business.
7. Respondent's employees (excluding the Held Separate Business employees and employees involved in providing support services to the Held Separate Business pursuant to Paragraph II.C.6) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Held Separate Business not in the public domain except:
 - a. as required by law; and
 - b. to the extent that necessary information is exchanged:
 - i. in the course of consummating the Acquisition;

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- ii. in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
- iii. in complying with this Hold Separate or the Consent Agreement;
- iv. in overseeing compliance with policies and standards concerning the safety, health, and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;
- v. in defending legal claims, investigations, or enforcement actions threatened or brought against or related to the Held Separate Business; or
- vi. in obtaining legal advice.

Nor shall the Manager or any Held Separate Business Employees receive or have access to, or use or continue to use, any Confidential Business Information not in the public domain relating to Respondent or its businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

8. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as

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approved by the Monitor, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Held Separate Business, including, but not limited to, the opportunity by the Monitor, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.

9. No later than five (5) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Monitor, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
 10. No later than five (5) days after the date this Hold Separate becomes final, Respondent shall circulate to employees of the Held Separate Business, and to Persons who develop, produce, market, or sell IMS Medical Audit Products or IMS Promotional Audit Products, a notice of this Hold Separate and the Consent Agreement.
- B. The purpose of this Hold Separate Order is to maintain the full economic viability, marketability, and competitiveness of the SDI Audit Business through the divestiture, transfer, and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the SDI Audit Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any assets of the SDI Audit Business except for ordinary wear and tear.

IV.

IT IS FURTHER ORDERED that not later than thirty (30) days after the Respondent signs the Agreement Containing Consent Order, and every thirty (30) days thereafter until Respondent Healthcare Technology has fully complied with its

Order to Hold Separate

obligations to divest, assign, grant, license, transfer, deliver, or otherwise convey the SDI Audit Business as required by Paragraph II or Paragraph VII of the Decision and Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Hold Separate Order and the related Decision and Order;

Provided, however, that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph IX of the Decision and Order.

V.

IT IS FURTHER ORDERED that Respondent Healthcare Technology shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of the Respondent;
- B. any proposed acquisition, merger, or consolidation of Respondent; or
- C. any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Healthcare Technology made to its principal United States offices or headquarters' address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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- A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request of an authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
 - 1. The later of:
 - a. The day after the divestiture of the SDI Audit Business, as required by and described in the Decision and Order, has been completed and the Monitor, in consultation with Commission staff and the Acquirer, notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to such divestiture are complete, or the Commission otherwise directs that this Hold Separate is terminated; or
 - b. Three (3) days after the related Decision and Order becomes final.

By the Commission.

Decision and Order

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Healthcare Technology Holdings, Inc. ("Respondent Healthcare Technology") through its wholly owned subsidiary, IMS Health Incorporated ("IMS"), of SDI Health LLC and Respondent Healthcare Technology having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Healthcare Technology with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent Healthcare Technology, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent Healthcare Technology of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Healthcare Technology that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Healthcare Technology has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

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1. Respondent Healthcare Technology is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 83 Wooster Heights Road, Danbury, CT 06810.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Healthcare Technology” means Healthcare Technology Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Healthcare Technology Holdings, Inc. (including SDI Health LLC, after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “SDI Holdings” means SDI Health Holdings LLC, a limited liability corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 SDI Drive, Plymouth Meeting, PA 19462.
- C. “SDI” means SDI Health LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1 SDI Drive, Plymouth Meeting, PA 19462.
- D. “Commission” means the Federal Trade Commission.

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- E. “Acquirer” means the Person approved by the Commission to acquire the SDI Audit Business pursuant to Paragraph II.A or Paragraph VIII of this Order.
- F. “Acquirer Audit Employee” means any person employed by the Acquirer who has devoted any of his or her time to SDI Medical Audit Products or SDI Promotional Audit Products after the Effective Date.
- G. “Acquisition” means Respondent Healthcare Technology’s acquisition of SDI Holding’s membership interests in SDI.
- H. “Acquisition Date” means the date on which the Acquisition is consummated.
- I. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, technologies, processes, or other trade secrets.
- J. “Copyrights” means rights to all original works of authorship of any kind Related To the SDI Audit Business, and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports Relating To the SDI Medical Audit Products or the SDI Promotional Audit Products, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer

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information; all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists.

- K. “Designated Employee” means:
1. any employee or person filling the job descriptions listed in Confidential Exhibit A to this Order; and
 2. any other person who has been identified by the Acquirer and the Monitor, and determined by Commission staff to have devoted more than 50% of his/her time to SDI Medical Audit Products or SDI Promotional Audit Products in the twelve (12) months preceding the Acquisition Date.
- Provided, however,* that the employees named in Confidential Exhibit A-1 to this Order are not Designated Employees.
- L. “Divestiture Agreement” means any agreement that receives the prior approval of the Commission between Respondent Healthcare Technology (or a Divestiture Trustee appointed pursuant to Paragraph VII of this Order) and an Acquirer to purchase the SDI Audit Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.
- M. “Effective Date” means the date on which the divestitures and assignments pursuant to Paragraph II or Paragraph VII of this Order are consummated.
- N. “Hold Separate” means the Order to Hold Separate and Maintain Assets, with Paragraphs I.F and I.G now superseded by the following:
1. Paragraph I.F.: “Held Separate Business” means the SDI Audit Business, SDI OSA, SDI Report Generator (including all development and maintenance thereof), and the Held Separate Business Employees.

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Provided, however, Respondent Healthcare Technology may use SDI Report Generator as allowed under the license described in Paragraph II.A. of the Order

2. Paragraph I.G: “Held Separate Business Employees” means the Designated Employees and any full-time, part-time, or contract employee of SDI who devoted more than 50% of his or her time to the SDI Audit Business, SDI OSA, or SDI Report Generator.
- O. “IMS Medical Audit Products” means products developed and sold by Respondent Healthcare Technology that contain estimates of disease-specific diagnoses made, and therapies prescribed by, physicians in the United States, including, but not limited to, the product known and sold as National Disease and Therapeutic Index.
- P. “IMS Promotional Audit Products” means products developed and sold by Respondent Healthcare Technology that contain estimates of pharmaceutical promotional activities in the United States, including but not limited to products known and sold as Integrated Promotional Services and IMS Promo 360, and any and all components thereto.
- Q. “Kantar License” means the February 26, 2010, license agreement between Competitive Media Report, LLC (d/b/a Kantar Media Intelligence) and SDI.
- R. “Medical Audits” means products developed, produced, and sold that contain estimates of disease-specific diagnoses made, and therapies prescribed by, physicians in the United States, other than IMS Medical Audit Products and SDI Medical Audit Products.
- S. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention

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registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, Related To any product of or owned by Respondent Healthcare Technology as of the Acquisition Date.

- T. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- U. “Promotional Audits” means products developed, produced, and sold that contain estimates of pharmaceutical promotional activities in the United States, other than IMS Promotional Audit Products and SDI Promotional Audit Products.
- V. “Recently Signed Customer” means any third party that entered into a new contract for the purchase of any IMS Medical Audit Product or IMS Promotional Audit Product from IMS any time during the period beginning ninety (90) days before the Acquisition Date and ending the day after the Effective Date.
- Provided, however,* any third party that renews a contract for an IMS Medical Audit Product or IMS Promotional Audit Product that was in existence prior to 90 days before the Acquisition Date is not a Recently Signed Customer.
- W. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- X. “SDI Audit Business” means all assets Relating To the SDI Medical Audit Products and the SDI Promotional Audit Products, including but not limited to:

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1. all information owned by, or in the possession or control of, SDI, that is not in the public domain and that is Related To the research, development, marketing, commercialization, cost, supply, sales, sales support, or use of the SDI Medical Audit Products or the SDI Promotional Audit Products, including, but not limited to, all past and present lists of physician survey participants (including name, address, and relevant contact information), customer lists, current and historical customer purchases and data, historical data, complaints, vendor lists (including the name, address, and relevant contact person for each past and present vendor for a period of the past three (3) years) and any other information possessed by SDI in any location Relating To the SDI Medical Audit Products or the SDI Promotional Audit Products.
2. all of the following Related To: (1) each SDI Medical Audit Product owned by SDI or for which SDI has the right to sub-license to third parties as of the Acquisition Date, (2) each SDI Promotional Audit Product owned by SDI or for which SDI has the right to sub-license to third parties as of the Acquisition Date and (3) the SDI Report Generator:
 - a. Copyrights;
 - b. Patents;
 - c. Software;
 - d. Trademarks;
 - e. Trade Dress;
 - f. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any

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jurisdiction to limit the use or disclosure thereof;

- g. rights to obtain and file for Patents and Copyrights and registrations thereof;
 - h. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;
 - i. the exclusive right to all intellectual property used in the research, development, and sale of SDI Medical Audit Products, SDI Promotional Audit Products, and the SDI Report Generator, including, but not limited to, Software, computer programs, Patents, licenses (including licenses to third-party software if transferable and sub-licenses to software modified by SDI), know-how, risk analysis, certificates of analysis, goodwill, technology, trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property; and
3. all of SDI's rights, title, and interest in all physical assets Relating To the development, manufacture, sale, and distribution of the SDI Medical Audit Products and the SDI Promotional Audit Products including, without limitation, the following:
- a. all equipment, supplies, computer hardware, and other tangible personal property Relating To the production, development, and sale of SDI Medical Audit Products and SDI Promotional Audit Products.

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Provided, however, that SDI Audit Business does not include any real property, plant facilities, or buildings.

Provided, further, however, that SDI Audit Business does not include any products that are developed, produced, or sold by SDI as, or assets or employees used exclusively for, SDI SFSS, SDI OSA, or SDI Vector One.

- Y. “SDI Audit Customer Contracts” means the customer contracts for the purchase and sale of SDI Medical Audit Products and SDI Promotional Audit Products, including but not limited to, the contracts identified in Exhibit B. SDI Audit Customer Contracts includes contracts between SDI and a customer that are not exclusively for SDI Medical Audit Products or SDI Promotional Audit Products, but include other SDI products, to the extent that such contracts pertain to the purchase and sale of SDI Medical Audit Products or the purchase and sale of SDI Promotional Audit Products.
- Z. “SDI DC Middleware” means the source code and the object code of those software components and data modules that host or support the execution and required data movements for the SDI DC Software and all corresponding documentation.
- AA. “SDI DC Software” means the software program used to collect, enter, and maintain all data Relating To the SDI Medical Audit Products and the SDI Promotional Audit Products, including the SDI DC Middleware and the SDI DC User Interface.
- BB. “SDI DC User Interface” means the source code and object code of the user interface programs for the SDI DC Software and all corresponding documentation.
- CC. “SDI Medical Audit Products” means the products developed, produced, and sold by SDI that contain estimates of disease-specific diagnoses made and therapies prescribed by physicians. SDI Medical Audit Products include but are not limited to the audit

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products known as Physician Drug and Diagnosis Audit (PDDA) and Physician Drug and Diagnosis Audit (including Pain Panel).

- DD. “SDI OSA” means the audit product developed, produced, and sold by SDI under the name Oncology Selling Audit.
- EE. “SDI PR Middleware” means the source code and the object code of those software components and data modules that host or support the execution and required data movements for the SDI Partner Rewards System, and all corresponding documentation.
- FF. “SDI PR User Interface” means the source code and the object code of the user interface programs for the SDI Partner Rewards System and all corresponding documentation.
- GG. “SDI Partner Rewards System” means the software program used by SDI to manage the physician panels Relating To the SDI Medical Audit Products and the SDI Promotional Audit Products, including the SDI PR Middleware and the SDI PR User Interface.
- HH. “SDI Promotional Audit Products” means the products developed, produced, and sold by SDI that contain estimates of pharmaceutical promotional activities, including all historical data associated with those products. SDI Promotional Audit Products include but are not limited to the audit products known as: Personal Selling Audit (PSA); Hospital Selling Audit (HPSA); Nurse Practitioner/Physician Assistant Promotion Audit (NPPA); Physician Meeting and Event Audit (PMEA); Direct to Consumer Advertising Audit (DTCA); Professional Journal Advertising Audit (PJA); Sample Distribution Audit (SDA); ePromotion Audit (ePromo); and Managed Care Promotional Audit (MCPA).
- II. “SDI Report Generator” means the software program used in conjunction with the SDI Medical Audit

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Products and the SDI Promotional Audit Products for the preparation and display of audit data and known as Report Generator Delivery (RG) Tool, including the RG Middleware and RG User Interface, and all corresponding documentation.

- JJ. “SDI RG Middleware” means the source code and the object code of those software components and data modules that host or support the execution and required data movements for the SDI Report Generator and all corresponding documentation.
- KK. “SDI RG User Interface” means the source code and the object code of the user interface programs for the SDI Report Generator and all corresponding documentation.
- LL. “SDI SFSS” means the audit product developed, produced, and sold by SDI under the name Sales Force Structures and Strategies.
- MM. “SDI Vector One” means the suite of products developed, produced, and sold by SDI under the Vector One name that rely on longitudinal anonymized patient level prescription data and other data sources to provide information on prescriptions, procedures, prescribers, payers, pharmacies, and other aspects of healthcare, including all historical data associated with those products. SDI Vector One includes the products known as Vector One: National (VONA), Vector One: Payer (VOPA), Vector One: Payer Dynamics (VOPD), Vector One: InSite Comprehensive Experience (VOICE), Vector One: Consumer Analytics (VOCA), Vector One: Market Pharmacy (VOMP), Vector One: Prescriber Extract (VOPEX), and Vector One: Prescriber (Provider Targeting) (VOPT).
- NN. “Software” means computer programs Related To the production and use of SDI Medical Audit Products or SDI Promotional Audit Products, including all software implementations of algorithms, models, and methodologies whether in source code or object code

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form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, Related To any of the foregoing and the content and information contained on any website; *Provided, however,* that Software does not include software that can readily be purchased or licensed from sources other than Respondent Healthcare Technology and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

- OO. “Trade Dress” means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.

Provided, however, that Trade Dress does not include the name SDI or any manifestations thereof, except that (1) Respondent Healthcare Technology will not market a Medical Audit Product or Promotional Audit Product using the name SDI; and (2) Acquirer may reference that the SDI Medical Audits Products and SDI Promotional Audits Products were previously sold by SDI Health LLC.

- PP. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the SDI Medical Audit Products or the SDI Promotional Audit Products.

Provided, however, that Trademark does not include the name SDI, except that (1) Respondent Healthcare Technology will not market a Medical Audit Product or Promotional Audit Product using the name SDI; and (2) Acquirer may reference that the SDI Medical Audit

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Products and SDI Promotional Audit Products were previously sold by SDI Health LLC.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest the SDI Audit Business and assign the SDI Audit Customer Contracts absolutely and in good faith, as an on-going business, no later than 90 days from the Acquisition Date, to an Acquirer that receives the prior approval of the Commission and in a manner (including execution of a Divestiture Agreement with the Acquirer) that receives the prior approval of the Commission.

Provided, however, that if any of the SDI Audit Customer Contracts are not assignable or the contracting Person refuses to accept the Acquirer, Respondent Healthcare Technology shall use reasonable best efforts to facilitate the Acquirer's acquisition of a similar contract with similar terms from the customer.

Provided, however, that Respondent Healthcare Technology may retain a two-year, non-exclusive, fully paid-up and royalty-free license, solely to support SDI OSA and SDI Vector One, including the right to sub-license the SDI Report Generator to existing and new SDI OSA and SDI Vector One customers, to provide customer support to sublicensees, and to update the software as needed to support SDI OSA and SDI Vector One.

Provided, further, however, that Respondent Healthcare Technology may, at the end of the initial two-year license term, seek a two-year, non-exclusive license on terms negotiated with the Acquirer. Such license shall be limited solely to the provision of customer and technical support to the Respondent's sublicensees existing at the expiration of the initial two-year license term as needed to support solely SDI OSA and SDI Vector One.

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- B. At the Acquirer's option, Respondent Healthcare Technology shall assign to the Acquirer all intellectual property Relating To the SDI Medical Audit Products and the SDI Promotional Audit Products licensed to SDI and used with the SDI Audit Business, to the extent the licensor will agree to the transfer, including the Kantar License, absolutely and in good faith and at no minimum price.
- C. The Divestiture Agreement shall include, at the Acquirer's option, one or more transition services agreements for the provision of services to be provided by Respondent Healthcare Technology to the Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Divestiture Agreement.
1. Such agreements may include, among other things:
 - a. an agreement for sales training and support;
 - b. an agreement for technical assistance. Such technical assistance agreement may include, among other things, training in the maintenance and troubleshooting of the SDI Report Generator software, including its source code; and
 - c. an agreement for information technology services, including but not limited to, data migration services.
 2. Respondent Healthcare Technology shall not terminate any transition services agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Healthcare Technology due to

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an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination.

Provided, however, such sixty (60) days notice shall be given only after the parties have:

- i. attempted to settle the dispute between themselves, and
 - ii. engaged in arbitration and received an arbitrator's decision, or
 - iii. received a final court decision after all appeals.
- D. Any Divestiture Agreement that has been approved by the Commission between Respondent Healthcare Technology (or a Divestiture Trustee) and a Commission-approved Acquirer shall be deemed incorporated into this Order, and failure by Respondents to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- E. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the SDI Audit Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Respondent Healthcare Technology shall, within five (5) days after the Effective Date, notify each Recently Signed Customer of its right to terminate its current contract for the purchase of IMS Medical Audit Products or IMS Promotional Audit Products. Such

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notification shall be in the form of the notification attached as Exhibit D to this Order.

- B. Respondent Healthcare Technology shall terminate the relevant contract within thirty (30) days of receiving a Recently Signed Customer's request to terminate. The Recently Signed Customer's right to terminate shall continue for six (6) months from the date the Recently Signed Customer receives notice pursuant to Paragraph III.A. Termination of the relevant contract shall be without penalty or charge, and shall be effective immediately upon request of the Recently Signed Customer.

IV.

IT IS FURTHER ORDERED that:

- A. Respondent Healthcare Technology shall allow the Acquirer an opportunity to recruit and employ any Designated Employee(s) under the following terms and conditions:
1. No later than seven (7) days after execution of a Divestiture Agreement, Respondent Healthcare Technology shall facilitate employment interviews between each Designated Employee and the Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer, and shall not discourage such employee from participating in such interviews;
 2. Respondent Healthcare Technology shall not interfere in employment negotiations between each Designated Employee and the Acquirer;
 3. With respect to each Designated Employee who receives an offer of employment from the Acquirer, Respondent shall:
 - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated

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Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer;

- b. cooperate with the Acquirer in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts an offer of employment from the Acquirer;
 - c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent Healthcare Technology that would otherwise prevent the Designated Employee from being employed by the Acquirer;
 - d. eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information Relating To the operation of the SDI Audit Business; and
 - e. unless alternative arrangements are agreed upon with the Acquirer, retain the obligation to pay for the benefit of any Designated Employee who accepts employment with the Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.
- B. Respondent Healthcare Technology shall not, for a period of two (2) years following the Effective Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Designated Employee who is employed by the Acquirer, any Acquirer Medical Audit Employee, or any Acquirer Promotional Audit Employee to terminate his or her employment relationship with the Acquirer;

Provided, however, Respondent Healthcare Technology may place general advertisements for employees including, but not limited to, in

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newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's employees;

Provided, further, however, Respondent Healthcare Technology may hire Designated Employees or Acquirer Audit Employees who apply for employment with Respondent Healthcare Technology as long as such employees were not solicited by Respondent Healthcare Technology in violation of this Paragraph.

- C. For a period of two (2) years from the Acquisition Date (hereinafter "Restricted Period"), Respondent Healthcare Technology shall not solicit, induce, or attempt to induce any Person to transfer to Respondent Healthcare Technology any business Relating to the SDI Audit Customer Contracts assigned, transferred, or acquired pursuant to Paragraph II of this Order.

Provided, however, that nothing in this paragraph shall prevent Respondent Healthcare Technology from responding to an unsolicited invitation to bid on a contract from any Person during the Restricted Period.

V.**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under the Divestiture Agreement, or as expressly allowed pursuant to this Order:
1. Respondent Healthcare Technology shall not provide, disclose or otherwise make available any Confidential Business Information Relating To the SDI Audit Business to any Person;
 2. Respondent Healthcare Technology shall not use any Confidential Business Information Relating To the SDI Audit Business for any reason or purpose. Among other things, Respondent Healthcare Technology shall not use such Confidential Business Information:

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- a. to assist or inform Respondent Healthcare Technology employees who develop, solicit for sale, sell, or service Respondent Healthcare Technology products that compete with the products divested pursuant to this Order. For example, Respondent Healthcare Technology employees who had positions Related To the sale of SDI Medical Audit Products shall not be allowed to use any Confidential Business Information they may have about customers or the SDI Medical Audit Products to assist Respondent Healthcare Technology in the sale of the IMS Medical Audit Products;
 - b. to interfere with any suppliers, distributors, resellers, or customers of the Persons who acquired the SDI Audit Business;
 - c. to interfere with any contracts divested or assigned pursuant to this Order; or
 - d. to interfere in any other way with the Acquirer of the SDI Audit Business pursuant to this Order.
3. From the time of the Acquisition until the Effective Date:
 - a. Respondent Healthcare Technology shall not provide, disclose or otherwise make available any Confidential Business Information Relating to SDI OSA or SDI Report Generator to any Person; and
 - b. Respondent Healthcare Technology shall not use any Confidential Business Information Relating To SDI OSA or SDI Report Generator for any reason or purpose. Among other things, Respondent Healthcare Technology shall not use such Confidential Business Information:

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- i. to assist or inform Respondent Healthcare Technology employees who develop, solicit for sale, sell, or service Respondent Healthcare Technology products that compete with the products divested pursuant to this Order.
 - ii. to interfere with any suppliers, distributors, resellers, or customers of the Persons who acquired the SDI Audit Business;
 - iii. to interfere with any contracts divested or assigned pursuant to this Order; or
 - iv. to interfere in any other way with the Acquirer of the SDI Audit Business pursuant to this Order.
- B. The requirements of this Paragraph V do not apply to Confidential Business Information that Respondent Healthcare Technology demonstrates:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent Healthcare Technology, or
 2. was available, or becomes available, to Respondent Healthcare Technology on a non-confidential basis, but only if, to the knowledge of Respondent Healthcare Technology, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

VI.**IT IS FURTHER ORDERED** that:

- A. Stuart A. Samuels shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Healthcare Technology and attached as Exhibit C (“Monitor Agreement”) and Confidential Exhibit C-1 (“Monitor Compensation”). The Monitor

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is appointed to assure that Respondent Healthcare Technology expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the Hold Separate.

- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent Healthcare Technology transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Hold Separate, and consistent with the purposes of this Order.
- C. No later than one (1) day after the Acquisition Date, Respondent Healthcare Technology shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Hold Separate, and consistent with the purposes of this Order.
- D. Respondent Healthcare Technology shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent Healthcare Technology's compliance with the terms of the Order and the Hold Separate, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent Healthcare Technology expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the Hold Separate; and

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- b. Monitoring any agreements between Respondent Healthcare Technology and the Acquirer.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Healthcare Technology's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent Healthcare Technology's compliance with its obligations under the Order. Respondent Healthcare Technology shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Healthcare Technology's compliance with the Order.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent Healthcare Technology on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Healthcare Technology, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent Healthcare Technology shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and

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other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every thirty (30) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Healthcare Technology of its obligations under the Order.
 7. Respondent Healthcare Technology may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Healthcare Technology, which consent shall not be unreasonably withheld. If Respondent Healthcare Technology has not opposed, in writing, including the reasons for opposing, the selection of a

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proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Healthcare Technology of the identity of any proposed Monitor, Respondent Healthcare Technology shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Healthcare Technology shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Healthcare Technology's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order and may also be the same person appointed as the Manager pursuant to the Hold Separate.

VII.**IT IS FURTHER ORDERED** that:

- A. If Respondent Healthcare Technology has not fully complied with the obligations as required by Paragraphs II, III, and IV of this Order, the Commission may appoint a Divestiture Trustee to divest the SDI Audit Business and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or

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any other statute enforced by the Commission, Respondent Healthcare Technology shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II, III, and IV. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Healthcare Technology to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Healthcare Technology, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Healthcare Technology has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Healthcare Technology of the identity of any proposed Divestiture Trustee, Respondent Healthcare Technology shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Healthcare Technology shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, Respondent Healthcare Technology shall consent to the following terms and conditions regarding the

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Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the SDI Audit Business and enter into all agreements, licenses and assignments as described in Paragraph II of this Order.
2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the SDI Audit Business and enter into all agreements, licenses and assignments as described in Paragraph II of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *Provided, however,* the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Healthcare Technology shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Healthcare Technology shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent

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Healthcare Technology shall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Healthcare Technology's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order.

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Healthcare Technology from among those approved by the Commission;

Provided, further, however, that Respondent Healthcare Technology shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Healthcare Technology, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Healthcare Technology, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall

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account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent Healthcare Technology, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Healthcare Technology shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. The Divestiture Trustee shall report in writing to Respondent Healthcare Technology and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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10. Respondent Healthcare Technology may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
 11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII.
 - F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the obligations under Paragraph II of this Order.
 - G. The Divestiture Trustee(s) appointed pursuant to Paragraph VII of this Order may be the same Person appointed as the Monitor pursuant to Paragraph VI of this Order and may also be the same person appointed as the Manager pursuant to the Hold Separate.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

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- A. Respondent Healthcare Technology shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order; and
- B. Respondent Healthcare Technology shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII.B, directly or indirectly, acquire:
 - 1. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces, designs, manufactures, or sells Promotional Audit Products or Medical Audit Products in or into the United States; or
 - 2. any assets used at the time of the acquisition, or during the six (6) month period prior to the acquisition, in the design, manufacture, production, or sale of Promotional Audit Products or Medical Audit Products in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Healthcare Technology and not of any other party to the transaction. Respondent Healthcare Technology shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Healthcare Technology shall not

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consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Provided, further, however, that prior notification shall not be required by this Paragraph VIII.B for any acquisition after which Respondent Healthcare Technology would hold not more than one percent of the outstanding securities or other equity interest in any Person described in this Paragraph VIII.B.

IX.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Healthcare Technology has fully complied with Paragraphs II, III, and IV of this Order, Respondent Healthcare Technology shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Healthcare Technology shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent Healthcare Technology shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations

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related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent Healthcare Technology shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent Healthcare Technology shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent Healthcare Technology shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons Relating To this Order. Additionally, Respondent Healthcare Technology shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph VIII. Respondent Healthcare Technology shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its Medical Audit or Promotional Audit sales or development.

X.**IT IS FURTHER ORDERED** that:

- A. Until the Effective Date, Respondent Healthcare Technology shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the SDI Audit Business to minimize any risk of loss of competitive potential for the SDI Audit Business, and to prevent the destruction,

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removal, wasting, deterioration, or impairment of the SDI Audit Business, except for ordinary wear and tear. Respondent Healthcare Technology shall not sell, transfer, encumber or otherwise impair the SDI Audit Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the SDI Audit Business.

- B. Respondent Healthcare Technology shall retain all of Respondent Healthcare Technology's rights, title, and interest in the SDI Audit Business until the Effective Date.
- C. Until the Effective Date, Respondent Healthcare Technology shall maintain the operations of the SDI Audit Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the SDI Audit Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the SDI Audit Business. Respondent Healthcare Technology's responsibilities shall include, but are not limited to, the following:
 - 1. providing the SDI Audit Business with sufficient working capital to operate at least at current rates of operation and to meet all capital calls with respect to such business to carry on, at least at their scheduled pace, all planned maintenance and ordinary course activities for the SDI Audit Business;
 - 2. providing such resources as may be necessary to respond to competition and/or to prevent any diminution in sales of the SDI Audit Business after the Acquisition and prior to the complete

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divestiture, transfer and delivery of the SDI Audit Business to an Acquirer;

3. providing such resources and funding as may be necessary to maintain the competitive strength and positioning of the SDI Audit Business including such funds as are sufficient to:
 - a. perform all routine maintenance and all other maintenance as may be necessary to maintain or replace the assets related to the SDI Audit Business; and
 - b. provide appropriate levels of distribution, advertising, marketing, promotion, and sales expenditures for the SDI Audit Business;
 4. providing such support services to the SDI Audit Business as were being provided to such business by SDI as of the date the Consent Agreement was signed by Respondent;
 5. making any payment required to be paid under any contract, license, or lease when due, and otherwise paying all liabilities and satisfying all obligations, for the SDI Audit Business; and
 6. maintaining the books and records of the SDI Audit Business.
- D. Until the Effective Date, Respondent Healthcare Technology shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the SDI Audit Business as of the Effective Date.
- E. Until the Effective Date, Respondent Healthcare Technology shall provide Designated Employees with reasonable financial incentives to continue in their positions and to develop and sell the SDI Audit Business consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the SDI Audit Business

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pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Healthcare Technology until the Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the SDI Audit Business.

- F. The purpose of this Paragraph X is to maintain the full economic viability, marketability, and competitiveness of the SDI Audit Business until its Effective Date, to minimize any risk of loss of competitive potential for the SDI Audit Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the SDI Audit Business, except for ordinary wear and tear.

XI.

IT IS FURTHER ORDERED that Respondent Healthcare Technology shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent Healthcare Technology;
- B. acquisition of, merger with, or consolidation by Respondent Healthcare Technology; or
- C. other change in the Respondent Healthcare Technology, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Healthcare Technology, Respondent Healthcare Technology shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

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- A. access, during business office hours of Respondent Healthcare Technology and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent Healthcare Technology related to compliance with this Order, which copying services shall be provided by Respondent Healthcare Technology at its expense; and
- B. to interview officers, directors, or employees of Respondent Healthcare Technology, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on January 9, 2022.

By the Commission.

CONFIDENTIAL EXHIBIT A**DESIGNATED EMPLOYEES**

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

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CONFIDENTIAL EXHIBIT A-1

EXCLUDED EMPLOYEES

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

CONFIDENTIAL EXHIBIT B

AUDIT CUSTOMER CONTRACTS

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

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EXHIBIT C**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement") entered into this 18th day of October 2011 by and between Stuart Samuels (the "Monitor") and Healthcare Technology Holdings, Inc., ("Healthcare Technology" or "Respondent") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for Public Comment an Agreement Containing Consent Orders incorporated a Decision and Order ("Decision and Order"), which, among other things, requires Healthcare Technologies to divest the medial and promotional audits business, as defined in the Decision and Order, of SDI Health LLC and contemplates the appointment of a Monitor to monitor Healthcare Technology's compliance with its obligations under the Decision and Order;

WHEREAS, the Commission has appointed Stuart Samuels as Monitor pursuant to the Decision and Order, and Stuart Samuels has consented to such appointment;

WHEREAS, the Decision and Order further provides that Respondent shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of the Decision and Order as described in more detail in this Agreement; and

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Decision and Order.

ARTICLE I

1.1 Monitor's Areas of Responsibilities. The Monitor shall be responsible for monitoring Respondent's compliance with the Decision and Order, the Order to Hold Separate and Maintain Assets, and the Divestiture Agreement, as defined in the Decision and Order (together, the "Monitor's Areas of Responsibilities").

1.2 Access to Relevant Information and Facilities. The Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondent related to Respondent's obligations under the Decision and Order and Divestiture Agreements, as the Monitor may reasonably request. Respondent shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondent reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations. At the request of the Monitor, Respondent shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of

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Respondent who have knowledge relevant to the proper discharge of his responsibilities under the Decision and Order.

1.3 Compliance Reports. Respondent shall provide the Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) days after the date on which Respondents file such report with the Commission;

1.4 Monitor's Obligations. The Monitor shall:

- a. carry out the Monitor's duties and responsibilities within the Monitor's Areas of Responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondent's compliance with the Decision and Order;
- b. maintain the confidentiality of all confidential information, including Confidential Business Information, and any other information provided to the Monitor by Respondent, the Acquirers of the Divested Businesses, any supplier or customer of Respondent or the Divested Businesses, or the Commission, and shall use such information only for the purpose of discharging his obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential information only to:
 - i. persons employed by or working with the Monitor under this Agreement; and
 - ii. persons employed at the Commission.
- c. require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the duties and responsibilities of the Monitor to execute a confidentiality agreement, which Respondent will provide if requested, that requires such third parties to treat confidential or proprietary information, including Confidential Business Information, with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;
- d. maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of his duties under this Agreement and shall not disclose any confidential or proprietary information, including Confidential Business Information, relating thereto; and
- e. upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that

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relate to the performance of the Monitor's responsibilities under this Agreement.

1.5 Monitor Payment. Respondents will pay the Monitor the hourly fee specified in the attached fee schedule ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder; however, all such out-of-pocket expenses and fees and disbursements shall be pre-approved by IMS, which shall not withhold approval unreasonably. The Monitor shall invoice Respondent on a monthly basis, within seven (7) days of the conclusion of the month, including details and an explanation of all matters for which the Monitor submits an invoice to Respondent. Respondent shall pay such invoices within 30 days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to Respondent for payment. At its own expense, Respondent may retain an independent auditor to verify such invoices. The Monitor and Respondent shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

1.6 Monitor's Indemnification. Respondent shall be liable to indemnify and hold harmless the Monitor against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties hereunder, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

1.7 Disputes. In the event of a disagreement or dispute between Respondent and the Monitor concerning Respondent's obligations under the Decision and Order, and, in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

1.8 Conflicts of Interest. If the Monitor becomes aware during the term of this Agreement that he has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of his duties under this Agreement, the Monitor shall promptly inform Respondent and the Commission of any such conflict.

ARTICLE II

2.1 Termination. This Agreement shall terminate upon the earlier of: (a) the expiration or termination of the Decision and Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Stuart Samuels has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; and (c) with at least thirty (30) days advance notice to be provided by the Monitor to Respondent and to the

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Commission, upon resignation of the Monitor. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.3 above will remain in force.

2.2 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of Pennsylvania, including all matters of construction, validity and performance. The Decision and Order shall govern this Agreement and any provisions herein which conflict or are inconsistent with it may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

2.3 Disclosure of Information. Nothing in this Agreement shall require Respondent to disclose any material information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law or an agreement with a third party.

2.4 Assignment. This Agreement may not be assigned or otherwise transferred by Respondent or the Monitor without the consent of Respondent and the Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Decision and Order.

2.5 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Decision and Order.

2.6 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission.

2.7 Entire Agreement. This Agreement, and those portions of the Decision and Order incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the parties, written or oral, with respect to the subject matter hereof.

2.8 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.9 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.


MONITOR

RESPONDENT


Healthcare Technology Holdings Inc.
83 Wooster Heights Road

Decision and Order

Danbury, CT 06810



Stuart Samuels



By: Harvey Aspin
Title: Senior Vice President, General
Counsel and External Affairs

CONFIDENTIAL EXHIBIT C-1

MONITOR FEE SCHEDULE

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Decision and Order

EXHIBIT D
Customer Notification Letter

On Official IMS Letterhead
Certified Mail, Return Receipt Requested

[Date]

Name
Company Name
Address
City, State ZIP

Re: Notification of Your Right to Terminate IMS Medical and Promotional Audits Contract

Dear [IMS Customer]:

This letter is to inform you that pursuant to an agreement with the Federal Trade Commission ("FTC"), you have the right to terminate, without penalty or charge, your existing contract with IMS for medical or promotional audits that report on the United States pharmaceutical market (including NDTI, IPS, and Promo 360), unless your contract was a renewal.

Background - In October 2011, IMS acquired SDI Health LLC. IMS entered into an agreement with the FTC to resolve the FTC's competitive concerns with the acquisition in medical and promotional audits products. Without acknowledging that there was any problem with the acquisition, IMS agreed to an FTC Order requiring IMS to divest SDI's medical and promotional audits products, save those sold as SDI OSA and SDI SFSS. A copy of the Order is attached. The Order and related documents are also available at [insert url], if you would like more details about the settlement. [Insert name of relevant acquirer] was approved as the purchaser and will offer the SDI audit products going forward. IMS will also continue to offer its audits.

Right to terminate - details - Pursuant to the FTC Order, any customer that entered into a new contract with IMS for its medical and promotional audits offerings that report information on the United States pharmaceutical market between [insert relevant start date] and [insert date of divestiture] has the right to terminate, without penalty or charge, its existing contract for those audits. Please note that this right to terminate does not apply to renewal contracts for these audits and does not apply to any portion of IMS's contract other than the medical and promotional audits. Any time before [insert relevant date], you may exercise this termination right by notifying IMS. This termination right does not apply if, after receipt of this letter, you enter into a new medical or promotional audit contract with IMS. Nor does this termination right apply if, after receipt of this letter, you renew, extend, or materially modify your existing contract through agreement with IMS. Material modifications to your existing contract include changes you negotiate with IMS to the price, scope, or duration of your existing contract. Within thirty (30) days of receiving your request to terminate, IMS will terminate your contract. You must return any data received from IMS under that contract within thirty (30) days of termination. You should direct your request to terminate to [fill in IMS contact person name and address].

Decision and Order

The FTC has appointed Stuart Samuels to monitor IMS's compliance with its obligations under the Order. We encourage you to raise any questions you may have with us by calling your IMS sales representative or me directly at _____. You may also contact the monitor, who may be reached by telephone at _____ or by e-mail at _____. In addition you may contact Karen Espaldon at the FTC at (202) 326-3726.

Sincerely,

Name

Title

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from Healthcare Technology Holdings, Inc. (“Healthcare Technology”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects of Healthcare Technology’s proposed acquisition of SDI Health LLC (“SDI”) from SDI Health Holdings LLC (“SDI Holdings”). Under the terms of the proposed Consent Agreement, Healthcare Technology would be required, among other things, to divest SDI’s promotional audits and medical audits business.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments; any comments received will also become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Pursuant to an agreement dated January 13, 2011, Healthcare Technology, through its wholly owned subsidiary, IMS Health Incorporated (“IMS”), proposes to acquire all of the membership interests in SDI (“Proposed Acquisition”). The Commission’s Complaint alleges 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for promotional audits and medical audits. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the acquisition.

II. The Parties

Healthcare Technology is the private holding company of IMS. IMS produces and sells healthcare data and analytics to pharmaceutical, biotechnology, and other customers. IMS

Analysis to Aid Public Comment

maintains its headquarters in Danbury, Connecticut and has operations in over 100 countries.

SDI Holdings is the private holding company of SDI, which offers many of the same healthcare data and analytics products and services as IMS, and is headquartered in Plymouth Meeting, Pennsylvania.

III. The Products and Structure of the Markets

Promotional audits provide estimates (based on data from physician panels) of pharmaceutical promotional activities for individual branded drugs in areas such as physician detailing, product sampling, and advertising. Pharmaceutical manufacturers and other customers use promotional audits to assess their “share of voice,” or their share of spending in various promotional categories, which helps them to determine their promotional budgets. The promotional audit market, however, does not include products that gauge physician reactions to promotional efforts or otherwise assess the effectiveness of promotional activities.

Medical audits provide estimates of disease-specific diagnoses made and therapies prescribed by physicians. The data underlying medical audits are also collected from panels of physicians. Customers use medical audits to assess, among other things, the size of therapeutic areas, which products are used to treat particular diseases, and prescribing and treatment trends.

The United States is the relevant geographic area in which to analyze the effects of the Proposed Acquisition in both the promotional audits and medical audits markets.

The \$16 million market for promotional audits is highly concentrated. Only IMS, SDI, and Cegedim S.A. offer promotional audits in the United States. IMS has a 30 percent share of the market, while SDI and Cegedim have shares of 68 percent and 2 percent, respectively. The \$9 million market for medical audits is also highly concentrated, with IMS accounting for 53 percent and SDI accounting for the remaining 47 percent of the market.

Analysis to Aid Public Comment

IV. Effects of the Acquisition

The Proposed Acquisition would eliminate actual, direct, and substantial competition between IMS and SDI in the markets for promotional audits and medical audits. By increasing IMS's share in each market, while at the same time eliminating its only significant competitor, an acquisition of SDI likely would allow IMS to unilaterally charge significantly higher prices for promotional and medical audits. The Proposed Acquisition would also likely lead to a decrease in quality for such audits, resulting in substantial anticompetitive harm to consumers in the U.S. markets for promotional and medical audits.

V. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to prevent the anticompetitive effects of the Proposed Acquisition. Entry would not take place in a timely manner because of the significant time required to recruit panels of physicians to provide the data underlying the estimates included in promotional and medical audits. In addition, the relevant markets are relatively small and mature, limiting sales opportunities for any potential new entrant. Given the size of the investment and the time needed to enter the relevant markets, relative to the sizes of those markets, it is unlikely that an entrant could obtain sufficient sales to make the investment profitable. As a result, new entry or repositioning by other firms sufficient to ameliorate the competitive harm from the Proposed Acquisition likely would not occur.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the markets for promotional and medical audits. Pursuant to the Consent Agreement, Healthcare Technology will divest all of SDI's business relating to the production or sale of promotional and medical audits. The Consent Agreement provides that Healthcare Technology must find a buyer for the SDI audits business that is acceptable to the Commission (with no minimum price), no later than three months from the date on which Healthcare Technology consummates its acquisition of SDI.

Analysis to Aid Public Comment

Any acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not present competitive problems. There are a number of parties interested in purchasing SDI's promotional and medical audits business, several of which appear to have the expertise, experience, and financial viability to successfully retain the current level of competition in the relevant markets.

If the Commission determines that Healthcare Technology has not provided an acceptable buyer for SDI's promotional and medical audits business within the required time period, or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee would have the exclusive power and authority to accomplish the divestiture, and would divest the business for no minimum price.

The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until the assets are divested to a buyer approved by the Commission.

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

Complaint

IN THE MATTER OF

POOL CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4345; File No. 101 0115
Complaint, January 10, 2012 – Decision, January 10, 2012

This consent order addresses Pool Corporation's threats to manufacturers that it would not deal with them if they also supplied new entrants in the pool product distribution market. The complaint alleges that PoolCorp effectively foreclosed new distributors from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales in violation of Section 5 of the Federal Trade Commission Act. The consent order prohibits PoolCorp from (1) 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; (2) pressuring, urging or otherwise coercing manufacturers to refrain from selling, or to limit their sales, to any distributors other than PoolCorp; and (3) discriminating or retaliating against a manufacturer for selling, or intending to sell, pool products to any distributor other than PoolCorp.

Participants

For the *Commission: Matthew P. Accornero, Linda M. Holleran and Benjamin W. Jackson.*

For the *Respondent: Mark Cunningham, Jones Walker; and Cliff Aronson, Skadden, Arps, Slate, Meagher, and Flom LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Pool Corporation, Inc. ("PoolCorp" or "Respondent") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

Complaint

NATURE OF THE CASE

1. This action addresses PoolCorp's exclusionary acts and practices in the market for the distribution of residential and commercial swimming pool products. PoolCorp has unlawfully maintained its monopoly power by threatening to refuse to deal with any manufacturer that sells its pool products to a new distributor entering the market, thereby foreclosing potential rivals from an input necessary to compete. PoolCorp's conduct deters and impedes entry, raises its rivals' costs, and results in higher prices, reduced output and less consumer choice.

RESPONDENT

2. Respondent PoolCorp is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 109 Northpark Boulevard, Covington, Louisiana 70433.

3. Respondent distributes pool products through two distribution networks: SCP Distributors, LLC, formerly known as South Central Pools; and Superior Pool Products, LLC. Both distribution networks operate throughout the United States and distribute similar product lines.

JURISDICTION

4. At all times relevant herein, Respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

5. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

RELEVANT MARKET

6. 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

Complaint

2010, the distribution of pool products was an estimated \$3 billion industry in the United States.

7. The relevant product market is no broader than the wholesale distribution of residential and commercial swimming pool products. Pool products are the equipment, products, parts or materials used for the construction, renovation, maintenance, repair or service of residential and commercial swimming pools.

8. Pool products include, among others, pumps, filters, heaters, covers, cleaners, steps, rails, diving boards, pool liners, pool walls, and the “white goods” or parts necessary to maintain pool equipment. Pool products do not include pool toys or games, or products used solely for landscaping or irrigation, Olympic-style pools, or pools used in commercial water parks.

9. Pool products are designed and manufactured specifically for residential and commercial swimming pools. There are no close substitutes for pool products, and no other products significantly constrain their pricing.

10. Pool distributors purchase pool products from manufacturers, warehouse them, and then resell those products to pool builders, pool retail stores and pool service and repair companies (collectively, “pool dealers” or “dealers”). Pool dealers then sell the pool products to the ultimate consumer: owners of residential and commercial pools.

11. Pool product manufacturers consider wholesale distributors to be a unique and essential channel for the efficient distribution of their products. Distributors purchase and warehouse significant volumes of pool products throughout the year, allowing manufacturers to operate their factories year-round notwithstanding the seasonal nature of the pool industry. Distributors also provide one-stop shopping, timely delivery and the extension of credit to thousands of dealers, thereby providing dealers and manufacturers with significant transactional efficiencies. Additionally, distributors often help manufacturers administer their dealer rebate and warranty programs, and provide expertise to answer dealers’ product-related questions.

Complaint

12. While manufacturers make some direct sales to larger dealers, they cannot easily expand their operations into distribution because of the costs, their lack of expertise in distribution, and the difficulty of obtaining products to distribute from competing manufacturers. Distributors are the only available source of pool products for the vast majority of dealers, which are small mom-and-pop operations that do not have the inventory size or resources to purchase pool products directly from manufacturers. Dealers that buy direct from manufacturers are not permitted by the manufacturers to participate more broadly in the wholesale distribution market and sell pool products to other dealers.

13. The relevant geographic markets are no larger than the United States, and numerous local geographic markets contained therein. With the exception of a few large national pool retail chains that purchase products for their retail centers throughout the United States, competition among distributors for sales to dealers occurs locally. The high cost of transportation and the general need for same-day or next-day delivery of pool products typically limits local geographic markets to 50 to 100 square miles, depending on the concentration of the population and pools in the local area.

RESPONDENT HAS MONOPOLY POWER

14. Respondent is the world's largest distributor of pool products, and operates approximately half of all pool distribution facilities in the United States. Unlike other distributors that operate in a few local markets or a specific region, Respondent is the only U.S. distributor to operate nationwide. Through a series of acquisitions, Respondent has grown to operate over 200 distribution centers throughout the United States. By way of comparison, the next largest U.S. distributor operates less than 40 centers. In 2010, Respondent earned roughly \$1.5 billion in net sales.

15. Respondent has monopoly power in numerous local geographic markets across the country, including, among others, Austin TX, Baton Rouge LA, Mobile AL, Nashville TN, Oklahoma City OK, and Springfield MO. In these local markets, Respondent is the only or dominant distributor in the local

Complaint

market, and has maintained a market share of approximately 80 percent or higher for at least the past five years.

16. Respondent's dominance in local markets is enhanced by its status as the largest nationwide buyer of pool products, commonly representing 30 to 50 percent of a manufacturer's total sales. Respondent obtains a significant competitive advantage in the downstream market by qualifying for large volume discounts from manufacturers that are not available to any other distributor.

17. Respondent's conduct of foreclosing new entrants from obtaining pool products directly from manufacturers, which is a necessary input to compete, represents a significant barrier to entering the pool distribution market.

**RESPONDENT EMPLOYED UNFAIR METHODS OF
COMPETITION IN ORDER TO MAINTAIN ITS
MONOPOLY**

18. Beginning in at least 2003 and continuing through to today, Respondent has engaged in unfair methods of competition by foreclosing access to essential inputs and impeding market entry by potential rivals. Respondent's conduct has the tendency and effect of improperly maintaining and enhancing Respondent's monopoly power. Respondent's conduct has caused injury to competition and to consumers. Respondent's conduct is likely to continue to harm competition absent the relief requested herein, and violates Section 5 of the FTC Act, as amended.

A. The Wholesale Pool Product Distribution Industry

19. The swimming pool industry is generally very fragmented. There are over 100 manufacturers that produce a small number of product lines, such as pool heaters or diving boards and rails. However, there are only three manufacturers that sell nearly all the pool products necessary to operate and maintain a pool: Pentair Water Pool and Spa, Inc.; Hayward Pool Products, Inc.; and Zodiac Pool Systems, Inc. Collectively, these three full-line manufacturers represent more than 50 percent of sales at the wholesale level.

20. Distributors generally carry all brands of pool products across all manufacturers in order to satisfy any and all orders from

Complaint

their dealer customers. It is necessary to sell the products of at least one of the three full-line manufacturers in order to be able to compete effectively as a distributor. The products of the full-line manufacturers are “must have” products for wholesale distributors because of the volume of products they represent and the considerable consumer demand for their products. A positive relationship with these and other manufacturers is “critical” to the success of a pool distributor.

21. In general, manufacturers are willing to sell their products through 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 their dealer customers receive competitive service and prices.

22. Manufacturers market their products directly to dealers in order to create pull-through demand at the distribution level, but also offer year-end rebates to distributors based on the volume of a distributors’ purchases. These year-end rebates represent a significant component of the ultimate price paid by distributors for pool products. Failure to qualify for these rebates can have a significant detrimental impact on a distributor’s ability to compete on price.

23. Dealers select a local distributor based on its level of service and the prices it offers. When a distributor increases its prices, dealers typically pass those increases on to their customers. Thus, the ultimate price paid by end consumers for pool products depends heavily on the prices that distributors charge to dealers.

B. Respondent’s Exclusionary Practices

24. In August 2002, Respondent acquired Fort Wayne Pools, Inc. (“FWP”), a large regional pool distributor with operations in 16 states. FWP was Respondent’s then-largest, and sometimes only, competitor in numerous local markets.

25. Soon thereafter, Respondent closed a FWP distribution facility in Baton Rouge, LA. This left Respondent as the only

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remaining distributor in the area, and it implemented a five percent price increase. In Spring 2003, a former dealer with almost 20 years of experience in the industry opened a distribution business in Baton Rouge, LA to compete with Respondent.

26. Respondent responded to this new competition by notifying all major manufacturers that it would stop dealing with any manufacturer that sold any of its products to the new entrant. Respondent threatened to terminate not only its purchases and sales in the local Baton Rouge area, but across the entire country.

27. As the manufacturers' largest customer, Respondent's threat was significant. No other distributor could replace the large volume of potential lost sales to Respondent, particularly in those markets where Respondent was the only distributor. The loss of sales to Respondent could be "catastrophic" to the financial viability of even major manufacturers. Without expending tens of millions of dollars to enter dozens of markets simultaneously, it was impossible for the new entrant to offer any economic incentive to manufacturers that would offset the risks imposed by Respondent's threats.

28. The manufacturers, including the three "must-have" manufacturers, refused to sell pool products to the new entrant and canceled any pre-existing orders. Respondent effectively foreclosed the new entrant from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales. Without direct access to the manufacturers' pool products, the new entrant's business ultimately failed in 2005.

29. A new entrant cannot avoid the effects of Respondent's conduct by purchasing pool products from other distributors, rather than directly from manufacturers. 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 a distributor's costs and lessens its quality of service.

30. For example, buying from a distributor forces the new entrant to pay transportation costs from the distributor's location rather than receiving free shipping under manufacturer programs.

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The purchases are also at a marked-up price and do not qualify for key manufacturer year-end rebates. These higher costs would prevent the new entrant from being able to compete aggressively on price. Additionally, without full control of its inventory, this work-around hampers the entrant's ability to provide timely and quality service to its dealer customers.

31. Respondent has employed similar exclusionary strategies in other local markets, including against distributors that have entered the market since 2008, with the purpose and effect of excluding rivals, raising its rivals' costs, and maintaining its monopoly power. Respondent's exclusionary practices and policies target new entrants, rather than established rivals, because new entrants represent a unique competitive threat due to their likelihood to compete aggressively on price in order to earn new business.

ANTICOMPETITIVE EFFECTS OF RESPONDENT'S CONDUCT

32. The acts and practices of Respondent as alleged herein have had the purpose, capacity, tendency, and effect of impairing the competitive effectiveness of Respondent's rivals, raising its rivals costs, and deterring and impeding entry. Respondent's conduct has contributed significantly to the enhancement and maintenance of Respondent's monopoly power.

33. Respondent's conduct adversely affects competition and consumers by:

- a. increasing the prices and reducing the output of pool products;
- b. deterring, delaying and impeding the ability of Respondent's actual or potential competitors to enter or to expand their sales in the wholesale distribution market; and
- c. reducing the choice of suppliers available to pool dealers.

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34. There are no legitimate procompetitive efficiencies that justify Respondent's conduct or outweigh its substantial anticompetitive effects.

VIOLATION ALLEGED

35. The acts and practices of Respondent, as alleged herein, constitute monopolization and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of January, 2012, issues its complaint against Respondent.

By the Commission, Commissioner Rosch dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Pool Corporation (hereinafter "PoolCorp" or Respondent), and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute

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an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent PoolCorp is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 109 Northpark Blvd, Covington, Louisiana 70433-5521.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

THE PARTIES

- A. "Respondent" or "PoolCorp" means Pool Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups

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and affiliates controlled by PoolCorp; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “Analysis to Aid Public Comment” means the public statement provided by the Commission that describes the allegations in the Complaint in FTC File No. 101-0115 and the terms of this Order.
- D. “Antitrust Compliance Program” means the program to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph III of this Order.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*
- F. “Business Segment” means, separately, pool builders; pool retailers; and pool service companies.
- G. “Confidentially” means that any documents or data that are produced by a Manufacturer to a third party are in an aggregated or other form such that the documents or data could not be used to identify the specific pricing or sales to any individual Distributor(s), and that will not be provided to or otherwise shared with Respondent.
- H. “Dealer” means any Person (*e.g.*, pool builders, pool service companies, and pool retail stores) that sells Pool Products directly to owners of residential or commercial pools.
- I. “Delivery Services” means all terms and services associated with a Distributor delivering Pool Products

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to a specified location on behalf of a Manufacturer, Dealer or other Person, including but not limited to, delivery of Pool Products via truck or common carrier, delivery directly to a consumer's home or job site, the timely scheduling of the delivery, and the extension of credit to eligible Dealers.

- J. "Distribute" or "Distribution" means the wholesale purchase of Pool Products from a Manufacturer and the re-sale of those Pool Products to Dealers or others.
- K. "Distributor" means a Person that Distributes, or intends to Distribute, Pool Products.
- L. "Document" means all written, recorded, or graphic materials of every kind, prepared by any Person, that are in the possession, custody, or control of Respondent, and includes but is not limited to, letters, reports, memoranda, e-mails, notes, and presentations.
- M. "Executive Staff" means all Directors on the Board of Directors, the President, all Vice-Presidents, the Chief Financial Officer, Senior Directors, General Managers, and Regional Managers of Respondent, or their equivalent positions regardless of job title.
- N. "Favorable" means more economically advantageous Price Terms or Product Support, or more effective Delivery Services, to Dealers or to Manufacturers than Respondent makes Generally Available to other Dealers or to other Manufacturers.
- O. "Generally Available" means the standard or typical terms and conditions, including but not limited to Price Terms, Product Support and Delivery Services, that Respondent offers or provides on like grade, quality and quantity of goods to most, if not all, Manufacturers based on their designation as a Preferred Vendor, or to most, if not all, Dealers in the same Business Segment(s) in the local geographic market.

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- P. “In-Person Training” means any educational session, seminar, or other meeting whereby individuals participate on a face-to-face basis or through a live, two-way video-conference feed as part of the Antitrust Compliance Program required in Paragraph III of this Order.
- Q. “Less Favorable” means economically disadvantageous Price Terms or Product Support or less effective Delivery Services, to Dealers or to Manufacturers than Respondent makes Generally Available to other Dealers or to other Manufacturers.
- R. “Manufacturer” means any Person that manufactures, develops, or produces one or more Pool Products.
- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiary, division, group or affiliate thereof.
- T. “Pool Product” means any equipment, product, part or material used for the construction, renovation, maintenance, repair or service of residential or commercial swimming pools (*e.g.*, pumps, filters, heaters, cleaners, covers, drains, fittings, diving boards, steps, rails, pool liners, pool walls, chemicals, and cleaning tools). This definition does not include: pool toys or games; generic building materials (*i.e.*, concrete, salt, sand, rebar, tiles, pavers, and electrical and plumbing products); or any equipment, product, part or material that is used solely for landscaping or irrigation, Olympic-style pools, or pools used in commercial water parks.
- U. “Preferred Vendor” means a Manufacturer that has been designated by Respondent as being eligible for favorable or preferential treatment by Respondent in connection with the sale, promotion, marketing, or purchase of the Manufacturer’s Pool Product(s).

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- V. “Price Term” means the wholesale price, resale price, purchase price, price list, credit term, delivery term, service term, or any other term defining, setting forth, or relating to the money, compensation, or service paid by or received by a Manufacturer in connection with the sale of its Pool Products to Respondent.
- W. “Product Support” means any service, assistance or other support related to a Manufacturer’s Pool Product(s), including but not limited to, the processing or administration of Manufacturer warranties, Manufacturer rebates to Dealers, and training on the features of a Manufacturer’s Pool Product.
- X. “Sales Staff” means the officers, directors, employees, and contractors of Respondent whose duties primarily relate to the marketing, promotion, sale, or purchase of Pool Products.

II.

IT IS ORDERED that Respondent, acting directly or indirectly, or through any corporate or other device, in connection with the actual or potential purchase, sale, or Distribution of Pool Products, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, shall cease and desist from:

- A. Conditioning the sale, purchase, or Distribution of Pool Products by Respondent, or a Manufacturer’s Preferred Vendor status, based on a Manufacturer’s sale, or an intention to sell, Pool Products to any Distributor other than Respondent;
- B. Urging, inducing, coercing, threatening, or pressuring, or attempting thereto, a Manufacturer to refuse to sell Pool Products, or limit its sales of Pool Products, to any Distributor other than Respondent; and
- C. Discriminating against, penalizing, or otherwise retaliating against a Manufacturer because the Manufacturer sells, or intends to sell, Pool Products to any Distributor other than Respondent. Examples of

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prohibited retaliation shall include, but not be limited to, the following when the conduct is substantially caused by the fact that the Manufacturer sells, or intends to sell, Pool Products to any Distributor other than Respondent:

1. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, purchases of a Manufacturer's Pool Products;
2. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, the sales or promotion of a Manufacturer's Pool Products to Dealers;
3. Increasing Respondent's sales price of a Manufacturer's Pool Product(s) to Dealers, provided there has been no corresponding increase in costs for Distributing such Pool Products;
4. Requiring, soliciting, requesting, or encouraging a Manufacturer to furnish information to Respondent relating to the price or quantity of any sales by the Manufacturer to any specific Distributor other than Respondent, provided that information that is provided Confidentially by a Manufacturer to a third party for compliance or audit purposes shall not be prohibited;
5. Withdrawing, terminating, or modifying, or threatening or proposing thereto, Favorable Price Terms, Product Support, or Preferred Vendor status for a Manufacturer that is otherwise eligible;
6. Providing, or threatening or proposing thereto, Less Favorable Price Terms or Product Support; and
7. Refusing to deal with a Manufacturer, or with Dealers of a Manufacturer's Pool Products, on terms and conditions that are Generally Available

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from Respondent to other Manufacturers or to other Dealers.

Provided, however, that nothing in this Order requires Respondent to continue purchasing the same volume of Pool Products from any Manufacturer as in previous years if there is a reduced demand for such Pool Products from Respondent's customers at Respondent's then current prices or margins in any local geographic market(s) where entry has occurred.

- D. Notwithstanding any provision of this Order, the following will not constitute, in and of itself, a violation of this Order:
1. Respondent's refusal to deal with a Manufacturer, or Respondent's engagement in any of the conduct described above in Paragraph II.C (1-7), when substantially caused by independent and verifiable business reasons unrelated to whether the Manufacturer sells, or intends to sell, Pool Products to any Distributor(s) other than Respondent; or
 2. Respondent's agreement(s) with a Manufacturer to be an exclusive Distributor of private-label Pool Products.
- E. Respondent, within ninety (90) days after the date this Order becomes final, shall waive or modify any condition, requirement, policy, agreement, contract, or understanding with any Manufacturer that is inconsistent with the terms of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an Antitrust Compliance Program to assure compliance with this Order and with the Antitrust Laws. This program shall include, but not be limited to:

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- A. Respondent's designation of an officer or director to supervise personally the design, maintenance, and operation of this program, and to be available on an ongoing basis to respond to any questions by employees of Respondent;
- B. Distribution of a copy of this Order to all Executive Staff and Sales Staff:
 - 1. Within thirty (30) days of the date this Order becomes final; and,
 - 2. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
- C. In-Person Training on the requirements of this Order and the Antitrust Laws for Respondent's Executive Staff to occur annually at either of Respondent's bi-annual management meetings;
- D. Training on the requirements of this Order and the Antitrust Laws for Respondent's Sales Staff to occur annually;
- E. Distribution within thirty (30) days after this Order becomes final of a copy of this Order and the Analysis to Aid Public Comment to all Manufacturers that have sold Pool Products to Respondent within twelve (12) months prior to the date this Order becomes final; and
- F. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order.

IV.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent

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has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:

1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
 2. The name, title, business address, e-mail address, and business phone number of each Person to whom Respondent distributed a copy of this Order, and the date and manner of distribution to each; and
 3. The name, title, business address, e-mail address, and business phone number of each Person who received In-Person Training on the requirements of this Order and the Antitrust Laws; the date and location at which each Person was trained; the name, title, business address, e-mail address, and business phone number of the Person who conducted the training; and a description in reasonable detail of the In-Person Training.
- B. One (1) year after the date this Order becomes final, and annually for the following nine (9) years on the anniversary of the date this Order becomes final, as well as at any other such times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;

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2. The name, title, business address, e-mail address, and business phone number of each Person to whom Respondent distributed a copy of this Order, and the date and manner of distribution to each;
3. The name, title, business address, e-mail address, and business phone number of each Person within Respondent's Executive Staff who received a copy of this Order and In-Person Training on the requirements of this Order and the Antitrust Laws during the reporting period, the date each Person received a copy of this Order and In-Person Training, and a description in reasonable detail of the In-Person Training;
4. The name, business address, e-mail address, and business phone number of each Person to whom Respondent required, solicited, requested or encouraged any Manufacturer to furnish information relating to the price or quantity of any sales by the Manufacturer to any Distributor other than Respondent;
5. The name, title, business address, e-mail address, and business phone number of each Person who has complained or alleged, orally or in writing (including, but not limited to, pleadings filed in any state or federal court), that Respondent has violated this Order or the Antitrust Laws, a description in reasonable detail of the complaint or allegation, and a description of any action or conduct by Respondent taken or proposed in response to the complaint or allegation; and
6. The names, business addresses, business phone numbers, and email addresses of the top ten Manufacturers that sold to Respondent the greatest dollar amounts of Pool Products in the United States in each of the following categories: pumps and filters, heaters, cleaners, covers, drains, fittings, diving boards, steps, rails, pool liners, and pool walls, during the most recently concluded

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fiscal year and during the prior fiscal year; and for each such Person:

- a. State the total dollar amount of the Pool Products purchased by Respondent from the Manufacturer;
- b. Provide copies of all written agreements between Respondent and such Person in effect at any time during the most recently concluded fiscal year; and
- c. Provide copies of any Document that summarizes, memorializes, or otherwise reflects the terms of any oral agreement between Respondent and such Person that directly or indirectly require such Person to refrain from selling, limit its sales of, or delay its sales of, Pool Products to any other Distributor in effect at any time during the most recently concluded fiscal year.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent, including but not limited to, assignment, the creation or dissolution of subsidiaries, or if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

Concurring Statement

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on January 10, 2032.

By the Commission, Commissioner Rosch dissenting.

STATEMENT OF**COMMISSIONERS JULIE BRILL, JON LEIBOWITZ
AND EDITH RAMIREZ**

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

Concurring Statement

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.¹

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.² The higher cost

1 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.

2 *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).

Concurring Statement

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, 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.³ 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.⁴ 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.

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

4 *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).

Analysis to Aid Public Comment

ANALYSIS OF 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

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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.

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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

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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

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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.¹ 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.²

The factual allegations in the complaint regarding market structure support a finding of monopoly power and competitive

1 *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).

2 *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").

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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."³

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 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."⁴ 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

3 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 Fed. Reg. 10799 (Mar. 2010) (proposed complaint and analysis to aid public comment).

4 *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").

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consumers by providing a greater opportunity for monopoly pricing.⁵

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:

- A. 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;

⁵ 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.").

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- B. Pressuring, urging or otherwise coercing manufacturers to refrain from selling, or to limit their sales, to any distributors other than PoolCorp; and
- C. 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.

* * *