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INTRODUCTION

On their own, Kroger and Albertsons are massive national players in the grocery retail market. Kroger, as of November 2020, operates 2,750 grocery retail stores under a variety of banner names.[1] These include Kroger, Ralphs, City Market, Pay Less, and Chicago-familiar, Mariano's.[2] Albertsons operates about 2,273 retail food and drug stores under names such as Albertsons Safeway, Vons, as well as Chicago staple, Jewel-Osco.[3] Together the companies employ more than 710,000 employees among their 5,000 stores, and have more than 50 manufacturing plants and nearly 70 distribution centers.[4]

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[1] *Our Business and Operations*, KROGER CO. (Nov. 30, 2020), https://www.thekrogerco.com/about-kroger/our-business/.

[2] *Id.*

[3] *Kroger and Albertsons Companies Announce Definitive Merger Agreement*, CISION PR NEWSWIRE (Oct. 14, 2022), https://www.prnewswire.com/news-releases/kroger-and-albertsons-companies-announce-definitive-merger-agreement-301649531.html.

[4] Jaewon Kang, *A Supermarket Megamerger Will Redefine What You Buy at the Grocery Store*, WALL ST. J. (Mar. 11, 2023), https://www.wsj.com/articles/supermarket-future-kroger-albertsons-234bbb0d.

In October 2022, Kroger agreed to acquire all of the outstanding shares of Albertsons, in a deal totaling approximately $24.6 billion.[5] The combined grocery giant would control between 13%[6] to 17%[7] of the country's grocery market and would be second to only Walmart's 22.4%.[8] Kroger and Albertsons have a substantial presence in Chicago as the parent companies of Mariano's and Jewel-Osco, respectfully.[9] According to a 2021 study, within Chicago, Albertsons operates over 180 stores with a 22% market share, while Kroger operates about 44 stores.[10]

With such dominant market shares in an industry where increased prices have significant effects on consumers, the proposed merger has already invited regulatory scrutiny. Kroger and Albertson's CEOs testified before the Subcommittee on Competition Policy, Antitrust and Consumer Rights, where senators questioned whether the planned merger would reduce competition in the grocery sector, lead to higher prices, and eliminate stores and worker jobs.[11] Additionally, the Federal Trade Commission (FTC) has been gathering information about the deal in a potential effort to challenge the merger.[12]

This Note focuses primarily on the potential concerns of the FTC regarding the merger and how, or if, Kroger-Albertsons can alleviate these concerns. The first section will expand on the FTC's powers and processes for merger regulation, particularly under the Clayton Act and the Horizontal Merger Guidelines. The next portion of this Note will analyze the proposed efficiencies of the merger and whether regulators will accept these as valid justifications to possible

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[5] CISION PR NEWSWIRE, *supra* note 3.

[6] *What You Need to Know About the Kroger-Albertsons Merger And How Chicago-Area Residents Are Reacting*, NBC CHICAGO (Oct. 15, 2022), https://www.nbcchicago.com/news/local/what-you-need-to-know-about-the-kroger-albertsons-merger-and-how-chicago-area-residents-are-reacting/2968650/.

[7] Ally Marotti, *Merger Means Big Squeeze for Food Companies*, CRAIN'S CHICAGO BUS., Feb. 27, 2023, at 1.

[8] *Id.*

[9] *Id.*

[10] Monica Eng, *The Winners and Losers in Chicagoland's Grocery Wars*, AXIOS CHICAGO (Apr. 27, 2022), https://www.axios.com/local/chicago/2022/04/27/the-winners-and-losers-in-chicagolands-grocery-wars

[11] Jaewon Kang, *Kroger, Albertsons CEOs Defend Grocery Merger at Senate Hearing*, WALL ST. J. (Nov. 29, 2022), https://www.wsj.com/articles/kroger-albertsons-expected-to-defend-grocery-merger-at-senate-hearing-11669684382?mod=article_inline

[12] Dean Seal, *FTC Asks Kroger for More Information on Albertsons Deal*, WALL ST. J. (Dec. 6, 2022), https://www.wsj.com/articles/ftc-asks-kroger-for-more-information-on-albertsons-deal-11670334358

adverse anticompetitive effects. The final section discusses possible remedies if the FTC moves to block the merger, including divestitures of stores, in an effort to agree to a consent order and avoid litigation.

I. THE FTC AND MERGER REGULATION

Although the FTC and the U.S. Department of Justice (DOJ) Antitrust Division both enforce federal antitrust laws[13], the FTC will be the lead agency regarding the Kroger-Albertsons merger. As the agencies have developed expertise in certain markets, the FTC has typically been involved in segments where consumer spending is high, including the food industry.[14] Once an FTC investigation is triggered, a non-public investigation is conducted to determine if the merger violates antitrust law.[15] If the FTC believes that the merger may violate the law by harming competition and consumers, the agency can attempt to obtain voluntary compliance by entering into a consent order with Kroger-Albertsons.[16] According to the FTC, although there is no "magic formula" to come to a consent order agreement and to develop appropriate merger remedies in a very fact-specific inquiry, many provisions appear in almost every merger order.[17] Specifically, most orders relating to a horizontal merger will require a divestiture with a multitude of specific requirements.[18] If a consent agreement cannot be reached, the FTC may issue an administrative complaint and/or seek injunctive relief in federal court.[19] The FTC administrative complaint would initiate a proceeding similar to a federal court trial, but before an administrative judge.[20] If a law violation is found, a cease and desist order may be issued.[21]

The primary law governing proposed mergers is the Clayton Act, particularly Section 7.[22] Section 7 of the Clayton Act applies to

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[13] *Competition Guidance*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance (last visited May 8, 2023).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/frequently-asked-questions-about-merger-consent-order-provisions#Overview (last visited May 8, 2023).

[18] *Id.*

[19] FED. TRADE COMM'N, *supra* note 13.

[20] *Id.*

[21] *Id.*

[22] 15 U.S.C. § 18.

mergers "in any line of commerce" when their effect "may substantially lessen competition, or to tend to create a monopoly".[23] The Clayton Act aims to preserve, rather than enhance competition, and to protect overall market competition, rather than individual competitors, by prohibiting mergers that negatively affect competition.[24] Because Section 7 aims to prevent anticompetitive harms from occurring, it looks to the likelihood of future harm, where a transaction is likely, and not necessarily certain, to have an anticompetitive effect.[25] Additionally, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976 that created minimum dollar thresholds for mandatory premerger reporting.[26] For 2023, the threshold will be $111.4 million[27], which is clearly met by the Kroger-Albertsons $24.6 billion deal.[28]

After the initial, mandatory premerger reporting, the FTC has continued to investigate. At the end of 2022, Kroger announced the FTC has requested information about the planned merger.[29] This request extends the 30-day waiting period established under the Hart-Scott-Rodino Act that federal regulators have to challenge a merger.[30] The window will now stay open until 30 days after Kroger and Albertsons have complied with the agency's requests, unless the FTC decides otherwise.[31]

One of the greatest resources to determine whether the FTC will find the proposed merger in violation of Section 7 of the Clayton Act by substantially lessening competition is the Horizontal Merger Guidelines.[32] The Guidelines were developed by the FTC and DOJ to outline the principal analytical techniques, practices, and the

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[23] *Id.*

[24] Kathleen Ann Ruane, *Pre-Merger Rev. and Challenges Under the Clayton Act and the Fed. Trade Comm'n Act*, CONGRESSIONAL RESEARCH SERVICE (Sep. 27, 2017), https://crsreports.congress.gov/product/pdf/R/R44971.

[25] *Id.*

[26] Premerger Notification Office Staff, *HSR Threshold Adjustments and Reportability for 2023*, FED. TRADE COMM'N (Feb. 16 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023

[27] *Id.*

[28] Kang, *supra* note 4.

[29] Seal, *supra* note 12.

[30] *Id.*

[31] *Id.*

[32] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

enforcement of policy with respect to mergers involving competitors.[33] Unilateral effects are major, adverse, competitive effects analyzed in the Guidelines. [34]

Unilateral effects may be the greatest concern of the Kroger-Albertsons merger. These adverse effects are demonstrated by a merger enhancing market power simply by eliminating competition between the merging parties.[35] This effect can arise even if the merger causes no changes in the way other competing firms behave.[36] The Guidelines focus on pricing of differentiated products and warn against deals that allow merged firms to profit by unilaterally raising the price of their products above pre-merger level and not losing sales due to customers diverting to the other merger partner.[37] This could be a concerning issue in the Chicago market. Before the merger, if prices at a given Jewel-Osco were to be raised, an ordinary consumer shopping in that preferred market segment could reasonably shift their business to a close substitute, Mariano's. If the merger is successful, Jewel-Osco and Mariano's could potentially jointly raise prices with a lower risk of losing many customers that are unwilling to shift to a value chain, like Aldi's, or a premium and organic chain, like Whole Foods.

II. EFFICIENCIES AND POTENTIAL JUSTIFICATIONS

Significant efficiencies gained through the merger must exist for Kroger and Albertsons to withstand the extensive regulatory scrutiny and costly process. The combined company expects to achieve about $1 billion of annual run-rate synergies within the first four years of combined operations with approximately 50% achieved within the first two years.[38] The company believes the merger will enable them to serve customers faster and with fresher food by expanding the network of stores, distribution centers, and having a broader supplier base.[39] Additionally, it is claimed that a broader selection of products will be offered at higher quality and better value, particularly through the combined portfolio of approximately 34,000 total private label products.[40] The combination will also power the continued progress towards shared ESG initiatives of the companies, including

[33] *Id.* at 1.
[34] *Id.* at 2.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 20.
[38] CISION PR NEWSWIRE, *supra* note 3.
[39] *Id.*
[40] *Id.*

responsible corporate stewardship, increasing workforce diversity, and fighting food insecurity.[41]

The combined repository of data is also one of the most important benefits for the merger. According to Ken Fenyo, president of research and advisory at Coresight Research, "data is the real gold in the deal."[42] Fenyo reports that Kroger has a large data set of national consumer behavior data to apply analytics, personalization, and expertise to drive retail media, personalized marketing, and better internal decision making.[43] Within deal's press release, the companies claim to reach an expanded national audience of approximately 85 million households, fueling growth in alternative profit businesses such as retail media.[44] Currently, Amazon dominates the retail media landscape, reporting $31 billion in advertising revenue in 2021, while Walmart finished in a distant second place at $2.1 billion.[45]

Within the Chicagoland area, some experts believe customers will benefit from the merger. Customers across Chicagoland could end up with more choices in stores and fewer shortages, which have been an issue since the beginning of the pandemic according to Purdue University Northwest professor Anthony Sindone.[46] Sindone recognizes that critics might argue that further concentration in the grocery industry will raise prices for consumers, but he believes there is "plenty of competition in this industry," and that upward pressure on prices would be curtailed by the nature of this competition.[47]

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[41] *Id.*

[42] Ken Fenyo, *Analaysis: Data is the Real Gold in the Kroger-Albertsons Deal*, CHAIN STORE AGE: EXPERT VIEWPOINTS (Oct. 13, 2022), https://chainstoreage.com/analysis-data-real-gold-kroger-albertsons-deal.

[43] *Id.*

[44] CISION PR NEWSWIRE, *supra* note 3.

[45] Vidhi Choudhary, *What the Kroger-Albertsons Merger Means for the Retail Media Landscape*, MODERNRETAIL (Oct. 18, 2022), https://www.modernretail.co/technology/what-the-kroger-albertsons-merger-means-for-the-retail-media-landscape/.

[46] Joseph S. Pete, *Kroger-Albertsons Merger would Reshape Grocery Landscape across Region and Chicagoland*, THE TIMES MEDIA CO. (Nov. 21, 2022), https://www.nwitimes.com/business/local/kroger-albertsons-merger-would-reshape-grocery-landscape-across-region-and-chicagoland/article_2c30af0f-0c7a-5845-bae4-341ae5bb5862.html.

[47] *Id.*

III. EFFICIENCY REQUIREMENTS IN THE EYES OF THE FTC

Not all claimed efficiencies will pull the same weight for the FTC in determining if these justifications outweigh potential adverse competitive effects. According to the Horizontal Merger Guidelines, efficiency claims will not be considered by the FTC if they are vague, speculative, or otherwise cannot be verified by reasonable means.[48] Cognizable efficiencies permitted are "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service."[49]

Kroger-Albertsons may have a difficult time proving the efficiencies to as cognizable given the FTC's definition. Merger specific efficiencies are likely to be accomplished with the proposed merger, yet unlikely to be achieved without the deal or through another means having comparable anticompetitive effects.[50] Kroger-Albertsons may have a valid argument that several of the efficiencies that are achieved through sheer combination of power, size, and numbers, such as the combined data repository, may not be achievable through alternative means. Nonetheless, efficiencies claimed such as faster and fresher food may be argued to be achievable through internal means, innovation and investment into their supply chain. Putting the merger-specific requirement aside, verifying and quantifying efficiencies may be significantly more difficult for Kroger-Albertsons. As noted in the Guidelines, "efficiencies projected reasonably and in good faith by the merging firms may not be realized."[51] The companies may legitimately believe they will achieve approximately $1 billion of annual synergies, yet the FTC may not be convinced of this crystal-ball-like prediction given the unpredictability of the market.

The uphill battle that Kroger-Albertsons may face when using efficiency justifications is demonstrated in case law. In the most recent court of appeals decision regarding the efficiencies issue, the merging parties were two of the three major producers of baby food, Heinz and Beech-Nut.[52] Heinz possessed a market share of 17.4% and Beech-Nut with 15.4%.[53] These shares were dwarfed by the industry leader,

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[48] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 32, at 30.

[49] *Id.*

[50] *Id.* at 30.

[51] *Id.*

[52] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 711 (D.C. Cir. 2001).

[53] *Id.*

Gerber, with 65%.[54] The combining companies claimed substantial manufacturing cost savings by shifting production to Heinz's plant.[55] However, the court held that the parties failed to produce sufficient evidence to rebut the inference of anticompetitive effects.[56] Furthermore, the court held that the district court had committed error by failing to explain why the efficiencies were "merger specific" and why the parties could not achieve comparable efficiencies without a merger.[57]

The FTC also has a history of blocking megamergers. In 2015, the FTC filed an administrative complaint against the proposed merger of Sysco and US Foods, alleging that the deal would violate antitrust laws by significantly reducing competition nationwide and in 32 local markets for broadlines foodservice distribution services.[58] After a ruling by the U.S. District Court for the District of Columbia granted the FTC request for a preliminary injunction, Sysco and US Foods announced they were abandoning their proposed merger.[59] Moreover, in 2015, the FTC successfully blocked the merger of Staples and Office Depot, after the companies similarly abandoned their planned merger subsequent to a U.S. federal judge ordering a temporarily halt.[60] If a consent order is not reached between the FTC and Kroger-Albertsons and an injunction is granted, the companies may calculate the risk to be above the possible reward in continuing to pursue the deal.

IV. CAN THE CONFLICT BE REMEDIED?

The fate of the merger may boil down to whether the FTC is satisfied with proposed remedies from Kroger-Albertsons and if the two sides can come to a consent decree. As mentioned, for some deals, it is possible to resolve competitive concerns by consent agreement

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[54] *Id.*

[55] *Id.* at 721.

[56] *Id.*

[57] *Id.* at 721-22.

[58] *In the Matter of Sysco/USF Holding/US Foods,* FED. TRADE COMM'N (June 29. 2015), https://www.ftc.gov/legal-library/browse/cases-proceedings/141-0067-syscousf-holdingus-foods-matter.

[59] *Id.*

[60] Diane Bartz, *Staples, Office Depot to Scrap Merger Deal after Judge Rules for FTC*, REUTERS (May 10, 2016), https://www.reuters.com/article/us-officedepot-m-a-staples/staples-office-depot-to-scrap-merger-deal-after-judge-rules-for-ftc-idUSKCN0Y12SF.

with the parties, and divestitures are a commonly included provision.[61] Within the corporate press release, Albertsons is prepared to establish a subsidiary (SpinCo) which would then be spun-off to their shareholders prior to merger closing, operating as a stand-alone public company.[62] The two companies have agreed to work together to determine which stores would comprise SpinCo, with initial estimates between 100 and 375 stores.[63] Since the initial announcement of the deal, the companies have decided to sell up to 650 stores to capable third-parties to ensure competition.[64]

There are some officials that are critical of divestitures being an effective remedy, and with valid reasons. During the Senate subcommittee hearing in which the two companies' CEOs testified, senators brought up the 2015 merger between Albertsons and Safeway, in which the two companies divested stores to Haggen Holdings LLC to secure regulatory approval.[65] Haggen went bankrupt less than a year later, and Albertsons wound up buying back some of the stores.[66] Senator Mike Lee of Utah even went on to call that remedy an "embarrassing failure."[67] Senator Lee further questioned why the merger is necessary and whether various commitments on prices, wages, and stores will be fulfilled.[68] In addition to the divestitures, the companies have announced that they expect to invest $500 million in keeping prices low, along with spending $1 billion on preserving wages and benefits and $1.3 billion on improving Albertsons stores.[69]

Within markets like Chicago in which Kroger and Albertsons-owned supermarkets compete head-to-head for a shopper's dollar, regulators will pay extra special attention. According to Benjamin Dryden, a partner at Foley & Lardner LLP, the competition authorities have typically looked within a radius between two to ten miles to measure grocery markets and exclude discounters, such as dollar

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[61] *Mergers*, FED. TRADE COMM'N https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers (last visited May 8, 2023).

[62] CISION PR NEWSWIRE, *supra* note 3.

[63] *Id.*

[64] Jaewon Kang, *Kroger-Albertsons Antitrust Review Likely to Focus on Local Store Overlap*, WALL ST. J. (Oct. 21, 2022, 5:30 AM), https://www.wsj.com/articles/kroger-albertsons-antitrust-review-likely-to-focus-on-local-store-overlap-11666344601?mod=article_inline.

[65] Kang, *supra* note 11.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

stores, from their analysis.[70] According to a 2020 Grocery Store Status Map of Chicago, the city contained 183 Jewel-Oscos (Albertsons) and 44 Mariano's (Kroger).[71] Divestitures of many stores in Chicago are likely, as the antitrust enforcers are known to consider the overlaps in specific geographic regions and their given market share.[72] This could have a profound impact on Chicago consumers that depend on specific stores for their food, drug, and other necessities.

V. LOOKING FORWARD

The predictions are widely varied if the proposed merger will survive the costs of regulatory scrutiny. Critics, including antitrust lawyer Jim Burns with Williams Mullen, tend to point to the Biden administration and the FTC being "very aggressive, very interested in appearing to satisfy consumers' concerns."[73] Other critics point to the skyrocketing of current food prices and how the merger would further "squeeze consumers already struggling to afford food, crush workers for fighting for fair wages, and destroy independent, community stores," which was argued by Sarah Miller, executive director of the American Economic Liberties Project.[74] On the other end of the spectrum, there is belief the merger would be beneficial for consumers and the efficiencies outweigh the potential competitive effects. Ken Fenyo supports the deal as providing food pricing relief with consumers and driving the market forward with discount grocers coming in.[75] A stronger combined company might also help reduce food inflation as it would have more negotiating buying power to push back against producers' proposed price increases, according to Krisztina Katai from Deutsche Bank.[76]

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[70] Kang, *supra* note 64.

[71] *Grocery Store Status Map*, CHICAGO DATA PORTAL, https://data.cityofchicago.org/Health-Human-Services/Grocery-Store-Status-Map/rish-pa6g (last visited May 8, 2023).

[72] Kang, *supra* note 64.

[73] Jeff Wells, *Pardon the Disruption: The Digital Forces Driving the Kroger-Albertsons Merger*, GROCERY DIVE (Oct. 17, 2022), https://www.grocerydive.com/news/pardon-the-disruption-digital-forces-driving-kroger-albertsons-merger/634215/.

[74] Dee-Ann Durbin, *Kroger Seeks to Create Grocery Giant in $20B Albertsons Bid*, ABC NEWS (Oct. 14, 2022, 5:41 PM), https://abcnews.go.com/Business/wireStory/kroger-seeks-create-grocery-giant-20b-albertsons-91500903.

[75] *Support for the Merger*, KROGER-ALBERTSONS, https://www.krogeralbertsons.com/supporters (last visited May 8, 2023).

[76] *Id.*

Regardless of opinion, the FTC will certainty scrutinize this proposed merger due to the significant effects upon consumers across the country. As Kroger-Albertsons increases the number of stores they are willing to divest, it demonstrates an eagerness in which the agency must take advantage of for the benefit of the consumer. If Kroger and Albertsons are willing to do whatever it takes to complete the merger, the FTC must be entirely satisfied with the proposed consent order, or they should proceed to litigation to ensure the complete mitigation of adverse competitive effects.