

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

*In the Matter of The Procter & Gamble Company and The Gillette Company,
File No. 051-0115*

I. Introduction

The Procter & Gamble Company (“P&G”) and The Gillette Company (“Gillette”) are both leading suppliers of consumer products worldwide. P&G proposes to acquire Gillette. The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from P&G and Gillette. The purpose of the Consent Agreement is to remedy the anticompetitive effects that would otherwise result from P&G’s proposed acquisition. Under the terms of the Consent Agreement, the parties will be required to divest: (1) Gillette’s Rembrandt® at-home teeth whitening business; (2) P&G’s Crest® SpinBrush™ battery-powered and rechargeable toothbrush business; and (3) Gillette’s Right Guard® men’s antiperspirant/deodorant (“AP/DO”) business. In addition, P&G is required to amend its joint venture agreement with Philips Oral Healthcare, Inc. (“Philips”) regarding the Crest® Sonicare® IntelliClean System (“IntelliClean”) rechargeable toothbrush.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested people. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated January 27, 2005, P&G proposes to acquire 100 percent of the voting securities of Gillette in a transaction valued at approximately \$57 billion (“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 United States markets for the research, development, manufacture, distribution, and sale of at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and men’s AP/DOs.

Consistent with the well-established approach to merger analysis, we have determined the appropriate product markets in which to analyze the likely competitive effects of the proposed merger. Staff initially examined whether the combination of the two companies’ broad array of consumer products would be likely to have anticompetitive effects, including not only increased prices in the short term but also the creation of entry barriers that could affect price and innovation in the long term. In particular, staff investigated whether the combined entity would have an increased ability to exploit its position as a so-called “category manager” or “category captain,” in order to obtain premium retailer shelf space and potentially exclude or disadvantage competitors in various broad categories, like oral care or AP/DO.

The investigation has disclosed, however, that most retailers do not look at broad categories, like oral care and AP/DO, when they decide which products to stock and sell. They generally make decisions on individual products (e.g., men's AP/DO), that are perceived to be close substitutes within these broad categories. One supplier may be preferred for an individual product even though another supplier is preferred for other products in the broad category. Moreover, most retailers are likely to employ different category captains to assist them on a product-by-product basis within the broad categories. We have therefore concluded that the loss of competition between the merging parties in broad categories is unlikely to cause competitive harm. We have instead focused on individual products within the broad categories. These individual product markets include at-home teeth whitening, battery-powered toothbrushes, and men's AP/DO. The Commission has sought and obtained relief in these relevant markets.

II. The Parties

Headquartered in Cincinnati, Ohio, P&G is one of the largest and most diversified suppliers of consumer products in the world. In 2004, P&G had worldwide net sales of approximately \$51.4 billion. With its Crest® line of products, P&G is one of the leading suppliers of oral care products in the United States. The Crest family of products includes the Crest® Whitestrips™ and Crest® Night Effects™ lines of at-home teeth whitening products and the Crest® SpinBrush™ line of battery-powered toothbrushes. P&G is also a leading supplier of men's AP/DOs under its Old Spice® brand.

Gillette, based in Boston, Massachusetts, is also one of the world's leading suppliers of consumer products. Gillette had total worldwide net sales of approximately \$10.5 billion in its 2004 fiscal year. Like P&G, Gillette is one of the leading suppliers of oral care products in the United States with its Oral-B® and Oral-B® Braun® line of manual, battery-powered, and rechargeable toothbrushes, and its Oral-B® Rembrandt® and Rembrandt® line of at-home teeth whitening products. Gillette is also a leading supplier of men's AP/DOs under its Right Guard® and Gillette® Series brands.

III. At-Home Teeth Whitening Products

One of the relevant markets in which to assess the competitive effects of the Proposed Acquisition is the United States market for at-home teeth whitening products. At-home teeth whitening products whiten teeth by bleaching them with either hydrogen or carbamide peroxide. These products are typically sold over-the-counter through food, drug, club, and mass merchandise channels and are marketed to be used by the consumer at home. There are several different types of at-home teeth whitening products, including strips, gels, pens and sticks, although strip and gel products account for the vast majority of sales of at-home teeth whitening products in the United States.

The United States market for at-home teeth whitening products is highly concentrated, with P&G and Gillette as the two largest suppliers in this market and the only two significant

suppliers of branded strips. P&G is the market leader with its Crest Whitestrips® and Crest Night Effects® products, while Gillette is the second leading supplier with its Oral-B® Rembrandt® and Rembrandt® products. Together, the parties account for over 80% of the sales in this market.

The Proposed Acquisition would significantly increase concentration in the United States market for at-home teeth whitening products, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

IV. Adult Battery-Powered Toothbrushes

A second relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for adult battery-powered toothbrushes. Adult battery-powered toothbrushes are usually powered by AA or AAA batteries and either have oscillating or pulsating brush heads. The majority of adult battery-powered toothbrushes are sold at retail for between \$5 and \$8, and the batteries and brush heads can be replaced on some, but not all, products. Adult battery-powered toothbrushes are typically marketed as upgrades over manual toothbrushes and are more affordable than sophisticated rechargeable toothbrushes.

The United States market for adult battery-powered toothbrushes is highly concentrated. P&G and Gillette are the two largest suppliers in this market. P&G markets its adult battery-powered products under the Crest® SpinBrush™ brand name, while Gillette sells its adult battery-powered products under the Oral-B® brand name. Gillette also dominates the adult high-priced manual and low-priced rechargeable toothbrush segments, which are the segments most likely to capture any switching away from adult battery-powered toothbrushes in the face of a price increase. Together, the parties account for over 85% of the sales in the United States adult battery-powered toothbrush market.

The Proposed Acquisition would significantly increase concentration in the United States market for adult battery-powered toothbrush products, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

V. Rechargeable Toothbrushes

A third relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for rechargeable toothbrushes. Rechargeable toothbrushes contain a rechargeable battery that powers high-speed oscillating, pulsating, or vibrating brush heads. They have a separate recharging unit that plugs into an electrical outlet to recharge the battery contained in the toothbrush. Brush heads for these products are almost

always replaceable. Rechargeable toothbrushes typically are sold at retail for between \$20 and \$150, and are marketed as the premium brushing option for consumers.

The United States market for rechargeable toothbrushes is highly concentrated with only two suppliers, Gillette and Philips, accounting for virtually all of the sales of these products. Gillette markets a full line of rechargeable toothbrush products under the Oral-B® Braun® brand name, while Philips sells mostly mid- to high-end products under the Philips® Sonicare® brand name. Philips and P&G also have a joint venture to co-develop and co-market the IntelliClean product, the first integrated toothbrush/dentifrice product (*i.e.*, toothbrush that self dispenses toothpaste) sold in the United States. As a result, the Proposed Acquisition would allow P&G to acquire the only significant competitor to its joint venture partner, Philips, thereby reducing P&G's incentives to support the IntelliClean product. The agreement between Philips and P&G also contains non-compete provisions that, if the Proposed Acquisition were consummated, could harm consumers.

The Proposed Acquisition would eliminate P&G's incentive to fully support and promote the IntelliClean product and create a situation where the only two suppliers in the market are subject to non-compete provisions. Accordingly, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

VI. Men's AP/DOs

A fourth relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for men's AP/DOs. An antiperspirant is a substance that is used to prevent or reduce underarm sweating. A deodorant is a substance that is used to suppress underarm odor. These ingredients are typically combined together for complete underarm protection. AP/DOs are typically gender-specific and sold in various forms, including roll-ons, traditional solids, invisible solids, gels, and aerosols. Men's AP/DOs are unique in, among other things, their packaging, fragrances, marketing, formulations, and location on the shelf.

The United States market for men's AP/DOs is highly concentrated. P&G and Gillette are the two largest suppliers of men's AP/DOs in the United States. P&G markets its men's AP/DOs under the Old Spice® brand name, while Gillette sells its products under the Right Guard® and Gillette Series® brand names. Combined, the Respondents account for well over 50% of the sales in this highly concentrated market.

Accordingly, the Proposed Acquisition would significantly increase concentration in the United States market for men's AP/DOs, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed Acquisition would likely result in higher prices and fewer product choices for consumers in this market.

VII. Entry

Entry into the United States at-home teeth whitening, adult battery-powered toothbrush, rechargeable toothbrush, and men's AP/DO markets is unlikely to deter or counteract the anticompetitive effects of the Proposed Acquisition. Entry into these markets is difficult and time-consuming and would require the investment of extremely high sunk costs to, among other things, develop products, provide advertising and promotional funding, establish a strong brand name, and create a distribution network. A new entrant also faces the difficult task of convincing retailers to carry their products.

VIII. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets discussed above. The Consent Agreement preserves competition in these markets by requiring the divestiture of: (1) the Rembrandt at-home teeth whitening business to a Commission-approved acquirer; (2) the Crest SpinBrush battery-powered business to Church & Dwight Company, Inc. ("Church & Dwight"); and (3) the Right Guard business to a Commission-approved acquirer.¹ In addition, the Consent Agreement requires P&G to amend its joint venture agreement to allow Philips to independently market and sell the IntelliClean product.

The divestiture of the Rembrandt business must take place within three (3) months and the Right Guard business within four (4) months after the date the order becomes final. The Commission's goal in evaluating possible purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems. Should the parties fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within one year of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires the parties to provide the trustee with access to information related to, among other things, the Rembrandt and Right Guard businesses as necessary to fulfill his or her obligations.

The Order to Maintain Assets that is included in the Consent Agreement requires that P&G and Gillette maintain the viability of the Rembrandt and Right Guard businesses as

¹ The Rembrandt business that will be divested includes all of Gillette's existing and future teeth whitening products. For viability reasons, the purchaser of the Right Guard business will have the option of acquiring certain manufacturing assets and/or Gillette's Soft & Dri® and Dry Idea® assets.

competitive operations until the businesses are transferred to Commission-approved acquirers.² The Commission has approved Edward Gold of PricewaterhouseCoopers as the Interim Monitor pursuant to the Consent Agreement to ensure that P&G and Gillette comply with the provisions of the Order.

There are also several provisions of the Consent Agreement designed to ensure the success of the divestiture of the Crest SpinBrush business to Church & Dwight. First, the Consent Agreement requires P&G to divest its rights and assets relating to adult battery-powered toothbrushes, including all research and development data, sales and marketing materials, and intellectual property. Second, P&G will provide Church & Dwight with a license to the Crest trademark, subject to minimum protections under trademark law, for use with the SpinBrush brand name that will be acquired outright by Church & Dwight. These provisions are designed to ensure that Church & Dwight can successfully transition the Crest SpinBrush family of products to a brand name of its choosing. Third, the Consent Agreement allows, and provides incentives for, P&G to render transitional services to Church & Dwight and retailers for a period of time to ensure the continuity and competitive viability of the products.

The Commission is satisfied that Church & Dwight is a well-qualified acquirer of the Crest SpinBrush business. Church & Dwight sells a variety of consumer products throughout the world, including oral care, personal care, and household products, and had total worldwide net sales of approximately \$1.5 billion in 2004. The company owns several well-known oral care brands, such as Arm & Hammer®, Aim®, and Mentadent™, and currently sells a variety of oral care products, including toothpaste and manual toothbrushes. Because of its existing business, Church & Dwight already has an experienced sales force that has relationships with major retailers and dental professionals, thereby enabling it to be a successful acquirer of the SpinBrush assets.

The Consent Agreement also requires P&G to amend its joint venture agreement with Philips regarding IntelliClean. The amended agreement, which is an attachment to the order, allows Philips to independently market and sell IntelliClean. The amended agreement also eliminates all non-compete provisions allowing both P&G and Philips to develop and sell future rechargeable toothbrush products.

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

² The Order to Maintain Assets also requires that P&G and Gillette maintain the viability of the Soft & Dri and Dry Idea businesses.