Analysis to Aid Public Comment on Agreement Containing Consent Order
***In the Matter of* Libbey Inc. and Newell Rubbermaid Inc., Docket No. 9301**

I. Introduction

The Federal Trade Commission has accepted for public comment a Decision and Order ("Proposed Order"), pursuant to an Agreement Containing Consent Order ("Consent Agreement"), against Libbey Inc. and Newell Rubbermaid Inc. (collectively "Respondents"). The Proposed Order is intended to resolve anticompetitive effects in the United States food service glassware market stemming from the proposed acquisition by Libbey of Anchor Hocking Corporation, a wholly-owned subsidiary of Newell. Under the Proposed Order, Libbey cannot acquire any stock of Anchor or the assets of Anchor's food service glassware business without prior notice to the Commission. Additionally, Newell cannot sell or transfer all or a substantial part of the assets of Anchor's food service business without prior notice to the Commission.

II. The Parties, the Transaction and the History of the Litigation

Libbey is the largest maker and seller of food service glassware in the United States, with substantially more than half of the sales, and has plants located in Ohio, Louisiana and California. Libbey produces and sells food service glassware, a line of products that includes many different styles of tumblers and stemware for beverages. Libbey sells food service glassware to customers that use glassware in the course of serving or selling food or beverages to consumers, including distributors who resell glassware to restaurants, hotels and other such establishments. Besides food service glassware, Libbey produces and sells glassware products ranging from serving platters to candle holders for the retail and industrial segments.

Newell is a diversified company based in Illinois. Anchor is an indirect, wholly-owned subsidiary of Newell, with manufacturing facilities in Ohio and Pennsylvania. Anchor is the third largest maker and seller of food service glassware in the United States, and, as found by a District Court, is Libbey's most formidable competitor in food service. Besides food service glassware, Anchor produces and sells glassware products ranging from bakeware to candle holders for the retail and industrial segments.

Pursuant to an agreement dated June 17, 2001, Libbey proposed to acquire all of the stock of Anchor from Newell (the "acquisition"). On December 18, 2001, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the acquisition during the pendency of administrative proceedings. On January 14, 2002, the FTC commenced such an action against Respondents in the United States District Court for the District of Columbia.

Pursuant to an agreement dated January 21, 2002, after the preliminary injunction action was commenced and in response to the Commission's vote to challenge the acquisition, Libbey and Newell amended their merger agreement (the "amended merger agreement"). The amended merger agreement provided that Libbey would acquire all of the stock of Anchor, but prior to closing Anchor would transfer to Newell's Rubbermaid Commercial Products ("RCP") division less than 10

percent of the assets of Anchor, and the consideration to be paid by Libbey for Anchor would be reduced by less than 10 percent. Under the amended merger agreement, the assets to be transferred to RCP were most (not all) of the molds, customer relationships and certain other assets used in Anchor's food service glassware business. Anchor would have kept, and Libbey would still have acquired, key assets used by Anchor in the food service glassware business–most significantly, Anchor's two glassware manufacturing plants. Newell would not retain any capability to manufacture glassware.

In its Amended Complaint, filed February 22, 2002, the FTC alleged that the acquisition pursuant to the amended merger agreement would substantially lessen competition. The proposed merger would eliminate Anchor as a competitor from the food service glassware market and RCP would be unable to replace Anchor as a viable competitor. The Commission later issued a statement on April 2, 2002, in which it reaffirmed its position that the amended merger would result in a lessening of competition in violation of the Clayton and FTC Acts. Statement of the Federal Trade Commission Regarding *FTC v. Libbey Inc., et al.*, Apr. 2, 2002.

On April 22, 2002, the District Court granted the FTC's motion for a preliminary injunction pending the completion of administrative adjudication. Memorandum Opinion ("Op.") (*FTC v. Libbey Inc., et al.*, 2002 U.S. Dist. LEXIS 8867 (D.D.C., Apr. 22, 2002)).

In granting the FTC's motion, the Court found that Libbey dominates the food service glassware market with a 65 percent share, while Anchor, with seven percent of the market, has the third largest share. Op. at 3. Although Libbey's market share dwarfs Anchor's, the Court found that "Anchor is Libbey's most formidable competitor in the food service glassware market," because it is "the largest seller of Libbey look-alikes," id. at 18, and because its prices "are frequently 10 to 20 percent lower than Libbey's prices," id. at 5.

The Court concluded that both the acquisition and the amended merger likely would reduce competition in the food service glassware market; the food service glassware market was highly concentrated, and, "if what is now Anchor were eliminated from the market, there are no other viable alternatives to Libbey's food service glassware that consumers could [rely] upon to acquire their glassware at the lower prices now offered by Anchor." Id. at 28. Moreover, the Court held that RCP would not replace Anchor as an effective competitor. Because RCP would not retain important assets, such as Anchor's manufacturing plants, brand name, customer relationships, and key employees, the Court held that the amended merger would have the same anti-competitive effect as if Libbey had acquired all of Anchor. Id. at 23.

On May 2, 2002, Respondents moved to vacate the preliminary injunction order on the ground that Newell and a third party supplier had modified the price term under a glassware supply agreement for RCP. On May 17, 2002, the District Court denied Respondents' motion because of the numerous other cost components that would likely make RCP's costs substantially higher than Anchor's costs and, therefore, not a viable competitive alternative to Anchor. *FTC v. Libbey Inc.*, Order Denying Defendants' Motion to Vacate, May 17, 2002. Reiterating the reasons in its earlier opinion, the Court stated that "the FTC's concerns remain[ed] plausible" and noted that the appropriate venue to fully evaluate the amended merger was at a full administrative hearing before

the FTC. Id. at 3.

Following the District Court's preliminary injunction order, on May 9, 2002, the Commission issued its complaint against Respondents. Shortly after answering the complaint, on June 10, 2002, Respondents announced that they had withdrawn plans for Libbey to acquire Anchor from Newell. On July 23, 2002, Respondents entered into the Consent Agreement. Pursuant to Rule 3.25 of the Commission's Rules of Practice, 16 C.F.R. § 3.25, a motion was filed to withdraw the matter from adjudication, and on July 25, 2002, the matter was withdrawn from adjudication for the purpose of considering the Consent Agreement.

III. The Complaint

In its administrative complaint, the FTC charged that both the acquisition and the amended merger violated the Clayton and FTC Acts. The complaint alleges that the acquisition and the amended merger would eliminate competition between Libbey and Anchor, increase market concentration, and increase barriers to entry. The complaint also alleges that the amended merger would impair the viability of Newell as a competitor in the sale of food service glassware.

IV. Terms of the Proposed Order

The Proposed Order ("Order") is effective for 10 years and requires Libbey and Newell to provide the Commission with written notice prior to the acquisition, sale, transfer, or other conveyance of all or part of Anchor or Anchor's Food Service Business. Under the terms of the Order, Libbey is required to provide the Commission with prior written notice of its acquisition of any interest in Anchor's stock or in the assets of Anchor's Food Service Business. Order ¶ II. In addition, Newell must provide the Commission with prior written notice if it sells, transfers, or otherwise conveys any part of Anchor's Food Service Business to any entity not included within Newell. Order ¶ III. If Newell sells, transfers or otherwise conveys Anchor's Food Service Business to Libbey or Vitrocrisa, Newell's obligation to notify the Commission extends for 10 years. Id. In all other circumstances, Newell is obligated to provide notice for five years. Id.

Anchor's Food Service Business is defined as "all of Anchor's rights, title, and interest in and to all assets and businesses, tangible or intangible, anywhere in the world, used in the research, development, manufacture, distribution, licensing, marketing, or sale of glassware products to Food Service Customers in the United States," and expressly includes assets that Newell may have internally transferred to other divisions on or after June 10, 2002. Order ¶ I.G. Anchor's Food Service Business does not include items that are generally available, are not unique to the glassware industry, or are minimally used in the production of food service glassware, such as sand, scrap metal, and office equipment. Id.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for 30 days for receipt of

comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received and will decide whether to make the Proposed Order final. By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved.

The Commission invites public comment to aid the Commission in determining whether it should make final the Proposed Order contained in the Consent Agreement. The Commission does not intend this analysis to constitute an official interpretation of the Proposed Order, nor does this analysis modify in any way the terms of the Proposed Order.