

Analysis of Proposed Consent Order  
to Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Johnson & Johnson Consumer Products, Inc. Its parent corporation, Johnson and Johnson, although not a respondent, also agreed to be bound by the terms of the consent order. Both parent and subsidiary are New Jersey corporations.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

Johnson & Johnson Consumer Products, Inc., manufactures and sells baby care products, personal care products for adults, and bandages. This matter concerns this company's "Condom Insurance" advertisements for its "K-Y Plus Brand Spermicidal Lubricant with NonOxynol-9" ("K-Y Plus"). In these advertisements, Johnson & Johnson CPI promoted the use of K-Y Plus with condoms as "insurance" to protect against unwanted pregnancies, and HIV and other sexually transmitted diseases ("STDs") in case of condom failure. The ads warn consumers to use K-Y Plus because one in six condoms allegedly fails.

The Commission's complaint charges that respondent's advertising contained false and/or unsubstantiated representations regarding the failure rate of condoms and the effectiveness of K-Y Plus. Specifically, the complaint alleges that the respondent falsely represented that scientific tests or studies show that up to eighteen and one half percent of condoms will fail, leaving users vulnerable to pregnancy and sexually transmitted diseases. The complaint also alleges that the respondent made unsubstantiated claims that: (1) one out of six condoms develops tiny holes during use which are big enough for sperm, HIV and other viruses to pass through; (2) one out of six condoms fails due to mistakes in using condoms or through the development of tiny holes during use; (3) K-Y Plus provides protection against the development of tiny holes in condoms during use; and (4) K-Y Plus provides protection against HIV and other viruses.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent the respondent or its parent corporation from engaging in similar acts and practices in the future. Part I of the proposed order would prohibit the companies from making any of the unsubstantiated claims delineated above, or any other claims of a health-related benefit, for K-Y Plus or any other spermicide and/or lubricant,

unless at the time of making them, they possess and rely upon competent and reliable scientific evidence.

Part II of the proposed order includes fencing-in relief, prohibiting the companies from representing, in any manner, directly or by implication, the efficacy of any over-the-counter product as a contraceptive or as a method of protection against the transmission of any sexually-transmitted disease, unless, at the time of making any such representation, the companies possess and rely upon competent and reliable scientific evidence that substantiates such representation.

Part III of the proposed order prohibits the companies from misrepresenting in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study relating to any over-the-counter product with a use relating to human reproduction, reproductive organs or sexually-transmitted diseases.

The proposed order also requires the companies to maintain materials relied upon to substantiate claims covered by the order; to provide a copy of the consent agreement to all employees or representatives involved in the preparation and placement of the company's advertisements, as well as to all company executives and marketing and sales managers; to notify the Commission of any changes in corporate structure that might affect compliance with the order; and to file one or more reports detailing compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.