

Board of Governors of the Federal Reserve System, November 17, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

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**BILLING CODE P**

## FEDERAL TRADE COMMISSION

[File No. 211 0002/Docket No. C-4753]

### The Golub Corporation and Tops Markets Corporation; Analysis of Agreement Containing Consent Orders To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement; request for comment.

**SUMMARY:** The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before December 22, 2021.

**ADDRESSES:** Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: “Golub Corporation and Tops Markets Corporation; File No. 211 0002” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Lindsey Bohl (202-326-2805), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final

approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 22, 2021. Write “Golub Corporation and Tops Markets Corporation; File No. 211 0002” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to protective actions in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Golub Corporation and Tops Markets Corporation; File No. 211 0002” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical

records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on <https://www.regulations.gov>—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at <https://www.ftc.gov> to read this Notice and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before December 22, 2021. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

### Analysis of Agreement Containing Consent Orders To Aid Public Comment

#### I. Introduction and Background

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from The Golub Corporation, which operates Price Chopper, Market 32, and Market Bistro stores (collectively, “Golub”) and Tops Markets Corporation (“Tops”) (collectively, the “Respondents”).

Pursuant to an Agreement and Plan of Merger dated February 8, 2021, Golub and Tops intend to combine their businesses through a merger (“the Merger”). The Merger will result in a combined company with nearly 300 supermarkets across six states. The purpose of the Consent Agreement is to remedy the anticompetitive effects that otherwise would result from the Merger. Under the terms of the proposed Decision and Order (“Order”), Respondents are required to divest twelve supermarkets and related assets in eleven local geographic markets (collectively, the “relevant markets”) in New York and Vermont to a Commission-approved buyer, C&S Wholesale Grocers (“C&S”). The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture store in the normal course of business through the date the store is ultimately divested to C&S. The Commission also issued the Order to Maintain Assets.

The Commission’s Complaint alleges that the Merger, 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, by removing a direct and substantial supermarket competitor in each of the eleven relevant markets. The elimination of this competition would result in significant competitive harm; specifically, absent a remedy, the Merger would allow the merged firm to increase prices above competitive levels, unilaterally or through coordinated interaction among the remaining market participants. Similarly, there is significant risk that the merged firm may decrease quality and service aspects of its stores below competitive levels. The proposed Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in the relevant markets because of the Merger.

The Consent Agreement 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 review the comments received and decide whether it should withdraw, modify, or finalize the proposed Order.

## II. The Respondents

Respondent Golub owns and operates 131 grocery stores under the Price Chopper, Market 32, and Market Bistro banners. The Golub stores are located in New York, Connecticut, Vermont,

Massachusetts, New Hampshire, and Pennsylvania.

Respondent Tops owns and operates a supermarket chain with 162 stores under the Tops banner in New York, Pennsylvania, and Vermont.

## III. Retail Sale of Food and Other Grocery Products in Supermarkets

The Merger presents substantial antitrust concerns for the retail sale of food and other grocery products in supermarkets. Supermarkets are traditional full-line retail grocery stores that sell food and non-food products that customers regularly consume at home—including, but not limited to, fresh produce and meat, dairy products, frozen foods, beverages, bakery goods, dry groceries, household products, detergents, and health and beauty products. Supermarkets also provide service options that enhance the shopping experience, including deli, butcher, seafood, bakery, and floral counters. This broad set of products and services provides consumers with a “one-stop shopping” experience by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is the critical difference between supermarkets and other food retailers.

The relevant product market includes supermarkets within “hypermarkets” such as Walmart Supercenters. Hypermarkets also sell an array of products not found in traditional supermarkets. Like conventional supermarkets, however, hypermarkets contain bakeries, delis, dairy, produce, fresh meat, and sufficient product offerings to enable customers to purchase all of their weekly grocery requirements in a single shopping visit.

Other types of retailers, such as hard discounters, limited assortment stores, natural and organic markets, ethnic specialty stores, and club stores, also sell food and grocery items. These types of retailers are not in the relevant product market because they offer a more limited range of products and services than supermarkets and because they appeal to a distinct customer type. Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets.<sup>1</sup> Consistent with prior Commission precedent, the Commission has

<sup>1</sup> That is, supermarket shoppers would be unlikely to switch to one of these other types of retailers in response to a small but significant nontransitory increase in price or “SSNIP” by a hypothetical supermarket monopolist. See U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

excluded these other types of retailers from the relevant product market.<sup>2</sup>

The relevant geographic markets in which to analyze the effects of the Merger are localized areas in which Respondents’ supermarkets compete. Most of Respondents’ overlapping supermarkets raising concerns are within approximately eight miles or less of each other. The contours of the relevant geographic markets depend on factors such as population density, traffic patterns, and other specific characteristics of each market. Where the Respondents’ supermarkets are located in rural areas, the relevant geographic areas are larger than areas where Respondents’ supermarkets are located in more densely populated cities.

Absent relief, of the eleven geographic markets, the Merger would result in a merger-to-monopoly in three markets and a merger-to-duopoly in four markets. In the remaining markets, the Merger would reduce the number of market participants from four to three in three markets and from five to four in one market.<sup>3</sup> Each relevant market would be highly concentrated following the Merger.

The Merger would also eliminate substantial competition between Golub and Tops and would increase the ability and incentive of the combined company to raise prices unilaterally after the Merger. The fact that few supermarket competitors will remain in each of these areas also increases the likelihood of competitive harm through coordinated interaction. The Merger would also decrease incentives to compete on non-price factors, such as service levels, convenience, and quality.

New entry or expansion in the relevant markets is unlikely to deter or counteract the anticompetitive effects of the Merger. Even if a prospective entrant existed, the entrant must secure an

<sup>2</sup> See, e.g., Koninklijke Ahold N.V./Delhaize Group, Docket C–4588 (Jul. 22, 2016); Cerberus Institutional Partners, L.P./Safeway, Inc., Docket C–4504 (Jul. 2, 2015); Bi-Lo Holdings, LLC/Delhaize America, LLC, Docket C–4440 (Feb. 25, 2014); AB Acquisition, LLC, Docket C–4424 (Dec. 23, 2013); Koninklijke Ahold N.V./Safeway Inc., Docket C–4367 (Aug. 17, 2012); Shaw’s/Star Markets, Docket C–3934 (Jun. 28, 1999); Kroger/Fred Meyer, Docket C–3917 (Jan. 10, 2000); Albertson’s/American Stores, Docket C–3986 (Jun. 22, 1999); Ahold/Giant, Docket C–3861 (Apr. 5, 1999); Albertson’s/Buttrey, Docket C–3838 (Dec. 8, 1998); Jitney-Jungle Stores of America, Inc., Docket C–3784 (Jan. 30, 1998). *But see* Wal-Mart/Supermercados Amigo, Docket C–4066 (Nov. 21, 2002) (the Commission’s complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

<sup>3</sup> See Exhibit A.

economically viable location, obtain the necessary permits and governmental approvals, build its retail establishment or renovate an existing building, and open to customers before it could begin operating and serve as a relevant competitive constraint. As a result, new entry sufficient to achieve a significant market impact and act as a competitive constraint is unlikely to occur in a timely manner.

**IV. The Proposed Order and the Order To Maintain Assets**

The proposed Order and the Order to Maintain Assets remedy the likely anticompetitive effects in the relevant markets. The proposed Order, which requires the divestiture of Tops supermarkets in each relevant market to a Commission-approved upfront buyer, C&S, will restore fully the competition that otherwise would be eliminated in these markets as a result of the Merger.

The proposed buyer appears to be a suitable purchaser well-positioned to enter the relevant markets through the divested stores and prevent the increase in market concentration and likely competitive harm that otherwise would have resulted from the Merger. The supermarkets currently owned by C&S are all located outside the relevant geographic markets in which it is purchasing divested stores.

C&S is the largest private wholesale grocery supply company and is the eleventh largest company in America. C&S has owned and operated retail stores in the past, including in certain of the relevant markets. C&S recently expanded its retail operations with the acquisition of eleven Piggly Wiggly

Midwest retail stores, and hired a former retail grocery executive with significant retail experience to lead retail efforts. C&S has sufficient financing to fund the acquisition and operate the business. C&S also has sufficient distribution and supply capabilities through its wholesale business, which can efficiently supply the twelve stores.

The proposed Order requires Respondents to divest the twelve Tops stores and related assets as ongoing businesses to C&S on a rolling basis, beginning by January 17, 2022, and continuing (two stores per week) for six weeks. The proposed Order also contains additional provisions designed to ensure the adequacy of the proposed relief. For example, the proposed Order and the Order to Maintain Assets require Respondents to continue operating and maintaining the divestiture stores in the normal course of business until the date that each store is sold to C&S. If, at the time before the proposed Order is made final, the Commission determines that C&S is not an acceptable buyer, Respondents must rescind the divestiture(s) and divest the assets to a different buyer that receives the Commission’s prior approval. The proposed Order imposes other terms, including the obligation to provide Transition Assistance to C&S as may be needed, an obligation to facilitate C&S’s interviewing and hiring of employees, and the appointment of a Monitor to oversee the Respondents’ compliance with the requirements of the proposed Order and Order to Maintain Assets. The proposed Order requires the Respondents to receive the

Commission’s prior approval, for a period of ten years, to acquire any interest in a supermarket that has operated or is operating in the counties in which the relevant markets are located. Finally, the proposed Order also prohibits the Respondents from entering into or enforcing agreements to restrict a new owner from operating a supermarket at any store Respondents may sell in these areas.

The proposed Order also contains a ten-year prior approval provision relating to C&S, which prohibits C&S from selling acquired stores for a period of three years after the Order is issued, except to an acquirer that receives the prior approval of the Commission. The initial three-year period is followed by an additional seven-year period during which C&S is required to receive prior approval from the Commission to sell an acquired store to a buyer that operates one or more supermarkets in the same county. Similar to the prohibition on Respondents, the proposed Order also prohibits C&S from entering into or enforcing certain restrictive covenants in any of relevant markets for the duration of the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

By direction of the Commission.

**April J. Tabor,**  
*Secretary.*

**EXHIBIT A**

State	City	Merger result	Divested store(s)
NY	Cooperstown (Otsego County)	2 to 1	Tops 568
NY	Cortland (Cortland County)	4 to 3	Tops 517
NY	Lake Placid/Saranac Lake (Franklin County)	3 to 2	Tops 707
NY	Norwich (Chenango County)	3 to 2	Tops 569
NY	Oneida/Sherrill (Oneida County)	3 to 2	Tops 364
NY	Owego (Tioga County)	2 to 1	Tops 579
NY	Plattsburgh/Peru (Clinton County)	5 to 4	Tops 713
NY	Rome (Oneida County)	4 to 3	Tops 587
NY	Warrensburg (Warren County)	2 to 1	Tops 701
NY	Watertown (Jefferson County)	4 to 3	Tops 597, Tops 589
VT	Rutland (Rutland County)	3 to 2	Tops 740