FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

# FTC Acts To Reduce Prior-Approval Burden on Companies in Merger Cases

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FOR RELEASE

The Federal Trade Commission has announced a new policy that will reduce the burden on companies involved in the merger cases the FTC brings, while still protecting consumers from transactions that could raise prices, reduce quality or stall innovation in violation of antitrust laws. The FTC said that, given how well the federal pre-merger notification law works as a tool for protecting consumers and the public from anticompetitive mergers, the agency no longer routinely will require parties to a merger it has challenged to obtain prior approval for future transactions in the same market. The Com- mission added, however, that it may continue to include narrow prior-approval or prior-notice provisions where there is credible risk that the parties will engage in another anticom- petitive transaction.

In addition today, the Commission reaffirmed the value of pursuing litigation of certain merger cases in an administra- tive trial after a federal district court judge has refused to bar the companies from merging pending the outcome of such a trial. The Commission issued a policy statement announcing that it will determine whether to pursue such litigation on a case-by-case basis, and clarifying the issues it considers in making that determination.

"Congress had a unique and critical role in mind when it created the Federal Trade Commission," said William J. Baer, Director of the FTC's Bureau of Competition. "As an inde- pendent agency with specialized antitrust expertise, the FTC is especially suited to resolving difficult and complex ques- tions about business alliances and how they will affect the range of product choices and prices for consumers. The Commission's goal is to protect consumers from anticompetitive conduct, but also to avoid overburdening of business. These new policies reflect that goal."

Prior Approval/Prior Notice Policy Statement:

The FTC said its general policy of including 10-year prior-approval requirements for future transactions in merger orders may save the Commission the cost of re-litigating certain issues in some cases, but such requirements also may impose costs on companies subject to the orders. Moreover, the policy no longer appears necessary, the Commission said. Since the passage of the 1976 amendments to the Hart-Scott- Rodino Act (HSR Act), which established prior notification and waiting requirements for parties contemplating large mergers and acquisitions, extensive Commission experience in reviewing reported mergers during the waiting period has shown the HSR Act to be an effective tool for investigating and challenging anticompetitive transactions before they occur. Thus, the Commission said it will rely on the HSR Act as its principal means of learning about and reviewing mergers by companies against which the Commission has taken prior law-enforcement action.

On the other hand, narrow prior-approval or prior- notification provisions may be necessary to protect the public interest in some instances, the Commission said. The policy statement announced today indicates that the Commission may include a prior-approval requirement limited to the proposed merger or another combination of essentially the same assets involved in a challenged transaction where there is credible risk that a company will attempt the transaction again. Similarly, the Commission said it may include a supplemental HSR-like prior-notification requirement where there is credi- ble risk that the respondent will attempt an anticompetitive transaction that does not meet HSR notification requirements.

The FTC also said that parties to existing FTC merger orders that include prior-approval provisions (there are approximately 90) can petition the agency to reopen the orders and delete those provisions. The FTC will presume that the public interest requires doing so, although that presumption is rebuttable.

Administrative Merger Litigation Policy:

In most cases, merger cases brought by the FTC are resolved through settlements that are designed to remedy the anticompetitive effects. When a matter cannot be settled, the Commission's usual practice is to seek a preliminary injunc- tion in federal district court to prevent consummation of the proposed transaction pending the outcome of a full adminis- trative trial and any appeals. The FTC won five of the seven motions for preliminary injunctions it has filed since 1990. In the statement announced today, the Commission said that pursuing administrative litigation even when a federal district court denies such a motion can be important to the interests of both business and the public. Therefore, the Commission said it will decide on a case-by-case basis whether pursuing administrative litigation would be in the public interest.

Among other reasons it cited for the policy, the FTC said that a relatively short district court proceeding held solely to determine whether to enjoin a transaction pending a full adjudication may not be a sufficient substitute for the full- scale administrative litigation on whether the acquisition or merger is unlawful and could harm consumers. In addition, the FTC said, Commission opinions resulting from administrative litigation are an important vehicle for providing business guidance based on a full evidentiary record on how to analyze complex merger issues.

In determining whether to pursue an administrative trial following denial of a preliminary injunction, the Commission said it may consider such matters as the factual findings and conclusions of the federal district court and any appellate court, any new evidence, whether the merger raises new issues of fact, law or merger policy that can be resolved in administrative litigation, an overall assessment of the costs and benefits of further proceedings, and any other matter that bears on whether it would be in the

public interest to proceed with the merger challenge.

The Commission vote to issue the prior-approval policy statement was 4-1, with Commissioner Mary L. Azcuenaga dissenting (a statement will follow). The vote to issue the merger litigation policy statement was 5-0. The policies are effective immediately, but the Commission will publish the statements along with proposed internal rule changes to implement the administrative litigation policy statement in the Federal Register shortly, and will seek public comment.

Copies of the two policy statements are available from the FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580. To find out the latest FTC news as it is announced, call the FTC's NewsPhone recording at 202-326-2710. FTC news releases and other materials also are available on the Internet at the FTC's World Wide Web Site at: http://www.ftc.gov

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