ACTION: Notice of Meeting

SUMMARY: The Federal Reserve Board is announcing a series of public meetings in connection with the application of Fleet Financial Group Inc., Providence, Rhode Island, to acquire Shawmut National Corporation, Boston, Massachusetts, and Hartford, Connecticut, pursuant to sections 3 and 4 of the Bank Holding Company Act of 1956.


SUPPLEMENTARY INFORMATION:

Background and Public Meeting Notice

On July 7, 1995, Fleet Financial Group Inc., Providence, Rhode Island (Fleet), applied pursuant to sections 3 and 4 of the Bank Holding Company Act (12 U.S.C. §§ 1842, 1843) (BHC Act) to acquire Shawmut National Corporation, Boston, Massachusetts, and Hartford, Connecticut (Shawmut), and thereby acquire the banking and nonbanking subsidiaries of Shawmut. Under authority delegated by the Board of Governors of the Federal Reserve System (Board) in section 265.6(a)(2) of the Board’s Rules (12 C.F.R. Part 265), the Board, as a federal financial supervisory agency, is required to take this record into account in its evaluation of an application under section 3 of the BHC Act.

The public meetings are convened under the Board’s policy statement regarding informal meetings in section 262.25(d) of the Board’s Rules (12 C.F.R. Part 262). This policy statement provides that the purpose of a public meeting is to elicit information, to clarify factual issues related to an application, and to provide testimony. In contrast to a formal administrative hearing, the rules for taking evidence in an administrative proceeding will not apply to these public meetings.

Testimony at the public meetings will be presented to a panel consisting of a Presiding Officer, Griffith L. Garwood, Director of the Board’s Division of Consumer and Community Affairs, or his designee, and other panel members appointed by the Presiding Officer. These panel members may question witnesses, but no cross-examination of witnesses will be permitted.

In conducting each public meeting, the Presiding Officer will have the authority and discretion to ensure that the meeting proceeds in a fair and orderly manner. The public meetings will be transcribed and information regarding procedures for obtaining a copy of the transcripts will be announced at the public meetings.

All persons wishing to testify at the public meetings should submit a written request to William W. Wiles, Secretary of the Board, Board of Governors, effective, July 27, 1995.

FEDERAL TRADE COMMISSION

Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement

AGENCY: Federal Trade Commission.

ACTION: Policy statement, and accompanying Commission statement, with request for public comment.

SUMMARY: The Federal Trade Commission has adopted policies explaining how, after a court had denied preliminary injunctive relief to the Commission, the Commission decides whether administrative litigation should be commenced or, if it has already been commenced, should be continued.

While the policies are already in effect, the Commission will receive comment for thirty days, and will thereafter take
such further action as may be appropriate.

DATES: The policy statement was effective on June 21, 1995. Comments will be received until September 5, 1995.

ADDRESSES: Comments should be sent to the Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580. Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. until 5 p.m.

FOR FURTHER INFORMATION CONTACT: William Baer, Director, Bureau of Competition, (202) 326–2932, or Ernest Nagata, Deputy Assistant Director for Policy and Evaluation, Bureau of Competition, (202) 326–2714.

SUPPLEMENTARY INFORMATION: 1. On June 21, 1995, the Commission issued the following statement to accompany its policy statement:

Commission Statement to Accompany Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction

Introduction

The Federal Trade Commission is charged with ensuring that U.S. consumers are protected from higher prices, lower quality, and lessened innovation that could result from anti-competitive mergers. Historically, the Commission has resolved merger cases through administrative trials or consent orders. In recent times, most of the Commission’s anti-trust complaints have been settled through administrative consent orders. For those relatively few merger cases in which the Commission has litigated, the Commission’s usual practice in recent years has been first to seek a preliminary injunction in federal district court to prevent the consummation of the proposed transaction. The Commission has won most of its challenges at the federal district court level.

There have been five instances in the last ten years in which a federal district court has refused to grant a preliminary injunction sought by the Commission, and the Commission then proceeded with a challenge to the merger in administrative litigation. In such circumstances, the determination to continue a merger challenge in administrative litigation is not, and cannot be, either automatic or indiscriminate. In any given case, the evidence, arguments, and/or opinion from the preliminary injunction hearing may, or may not, suggest that further proceedings would be in the public interest. The Commission’s guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis.

The Commission is issuing the attached Statement to clarify the process it follows in deciding whether to pursue administrative litigation following denial of a preliminary injunction. The Statement also notes that, if necessary, the Commission will adopt certain procedures to ensure parties to a transaction the opportunity to have their views heard by the Commission before it makes its determination.

In order to place these issues in context, this Statement begins by addressing the value of administrative litigation and why a preliminary injunction proceeding, regardless of its outcome, may not in and of itself provide a sufficient basis for the resolution of complex merger litigation.

The Value of Administrative Litigation

The Federal Trade Commission was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions. Congress intended that the Commission would play a “leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission.” It was expected that an administrative agency was especially suited to resolving difficult antitrust questions, and that the FTC should be the principal fact finder in the process: it is “within the Commission’s primary responsibility” to draw inferences of competitive consequences from the underlying facts.

The Commission has fulfilled that special role in a number of important merger cases. Administrative cases provide valuable guidance on how the Commission applies the relevant legal standards and analytical principles as they evolve over time. Application of these standards and principles to concrete factual situations, developed in a full record, can provide insight into why certain mergers are likely to harm competition and result in consumer injury, and why others may not. Especially because the Supreme Court has addressed substantive issues of merger law only rarely in recent decades, and because antitrust law during that time has evolved in response to economic learning, the Commission’s opinions have been an important vehicle to provide guidance to the business community on how to analyze complex merger issues.

1 As used herein, the term “merger” includes mergers, acquisitions, joint ventures, and equivalent transactions.

2 For FY 1990 through FY 1994, the Commission resolved complaints through administrative consent orders, without authorizing either federal court or administrative litigation, in 67% of the merger enforcement actions that the Commission authorized.

3 For FY 1990 through FY 1994, the Commission authorized preliminary injunction actions in 29% of the merger enforcement actions that it authorized; in 4% of its merger enforcement actions, the Commission authorized administrative trials without first proceeding to federal court for a preliminary injunction.

4 During the five-year period covered by this policy statement, the Commission’s opinions on preliminary injunctions were granted: In re FTC v. University Health, Inc., 538 F.2d 1206 (11th Cir. 1976), the district court’s denial of a preliminary injunction was reversed on appeal. For fiscal years 1985–1989, the Commission was successful in six out of nine motions for a preliminary injunction.

5 R.R. Donnelley & Sons, Dkt. 9243, is currently before the Commission on respondents’ appeal from the initial decision of the administrative law judge. In Owens-Illinois, Inc., Dkt. No. 9212, the Administrative Law Judge (“ALJ”) found liability but the Commission reversed. 1038 F. 2d 1381, 1386 (7th Cir. 1987); cert. denied, 481 U.S. 1038 (1987) (“HCA”)

6 Hospital Corp. of America v. FTC, 807 F. 2d 1381, 1386 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987) (“HCA”)

7 HCA, 807 F. 2d at 1386.

8 For example, the Commission’s decision in Occidental Petroleum provided important guidance on supply side substitution and coordinated interactions in merger analysis. The Commission’s decision in HCA explained how coordination could occur in an industry with differentiated and non-homogeneous products. Judge Posner, writing for the Seventh Circuit affirming that decision, called it a “model of lucidity.” 807 F. 2d at 1385. The Commission’s decision in American Medical International, Inc., 104 F.T.C. 1 (1984) examined in detail the dimensions of price and non-price competition in the hospital industry and discussed efficiencies considerations in analyzing a merger.

9 The Supreme Court’s last opinion on substantive merger law was United States v. General Dynamics Corp., 415 U.S. 486 (1974).
The attached Statement of Policy is required to serve the public interest.

The business community would be subverted.

Indeed, there may be an inadequate basis for doing so. Because a preliminary injunction proceeding has a limited purpose: to determine whether to enjoin the consummation of a proposed transaction pending a full adjudication on the merits. Thus, the district overseeing a preliminary injunction hearing is not charged with making a final ruling on whether the acquisition in unlawful. Instead, there may be no reason to forego an administrative trial solely because a preliminary injunction has been denied.

The problem with such an approach is that the significant benefits of administrative litigation outlined above would be lost in such a change in enforcement policy. The business community would be denied the guidance provided by merger decisions based on a complete analysis of a full evidentiary record, and Congress' vision of the FTC's central role in merger enforcement would be subverted.

Nonetheless, the Commission recognizes that automatic pursuit of administrative litigation following denial of a preliminary injunction is not required to serve the public interest. The attached Statement of Policy is intended to clarify the process. The Commission follows in determining whether to pursue administrative litigation following denial of a preliminary injunction.

On June 21, 1995, the Commission issued the following policy statement:

**Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction**

The Commission will assess on a case-by-case basis whether to pursue administrative litigation following the denial of a preliminary injunction. If necessary, the Commission will amend its Rules of Practice in order to facilitate reconsideration of the public interest in continuing with an administrative case when an administrative complaint has already issued.

As discussed in the Commission Statement to Accompany Statement of Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, the Commission believes that it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied. Nor would it be in the public interest to require an administrative trial in every case in which a preliminary injunction has been denied. Thus, a case-by-case determination is appropriate. This approach gives the Commission the opportunity to assess such matters as (i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.

If necessary, the Commission will amend Part 3 of the Commission's Rules of Practice to expedite its review of the issues and determination immediately following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal. The issuance of an administrative complaint during the pendency of a preliminary injunction proceeding will affect only the nature of the procedures under which such considerations will be reviewed, not whether they will be reviewed.

If an administrative complaint has not been issued by the time of the district court's ruling on a preliminary injunction and the exhaustion or expiration of all avenues of appeal, the Commission's consideration of whether to issue an administrative complaint will be conducted under its normal procedures for non-adjudicatory matters. If an administrative complaint has already been issued, the Commission will make its determination within the procedural framework for adjudicatory proceedings under Part 3 of the Commission's Rules of Practice.

The policy articulated in this Statement is applicable to any current and future merger enforcement actions initiated by the Commission under Section 13(b) of the Federal Trade Commission Act. The Commission intends, however, to issue within thirty days a Federal Register notice soliciting public comment on the Commission's policy and, if necessary, setting forth any conforming amendments to Part 3 of its Rules of Practice.

3. The Commission has determined to adopt a new rule, 16 CFR § 3.26, to facilitate review of the public interest in continuing an adjudicatory proceeding when, after the adjudicative proceeding has begun, a court denies preliminary injunctive relief in a section 13(b) case brought in aid of the adjudication. Under rule 3.26, which is published elsewhere in this issue, respondents can choose to have such review conducted either within the framework for adjudicatory proceedings, or following withdrawal of the administrative case from adjudication.

Also, as noted in footnote 1 of the June 21 policy statement, the principles applicable to administrative merger litigation would apply in the context of non-merger competitive litigation. They are also applicable in the context of consumer protection litigation.

By direction of the Commission, Commissioner Azcuenaga concurring in part and dissenting in part.

**Dissenting Statement of Commissioner Mary L. Azcuenaga Concerning FTC's Adoption of Rule 3.26 Respecting Administrative Litigation Following Denial of a Preliminary Injunction**

On June 26, 1995, the Commission issued a Statement of Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction and an accompanying...
The Commission now adopts new Rule 3.26 to govern how the agency will proceed if a court denies a requested preliminary injunction pending completion of an administrative adjudication.2 A central feature of the new rule is that following the court’s action, the respondents may choose to have the administrative matter removed from adjudication to permit the parties to discuss with the Commission privately, off the record and “without the constraints of adjudicative rules;”3 the public interest in continuing the adjudication in light of the court’s action.4 Strictly speaking, no revision of the Rules is necessary because existing provisions of the Rules of Practice are sufficient to permit the Commission to address any effect the court’s action may have on the public interest.5

Nevertheless, I have no objection to adopting a new rule to provide specific procedures for reconsidering an administrative adjudication following denial of a preliminary injunction. My difference of opinion is this: I believe that a rule adopted to address this situation should provide that the matter be left in adjudication for any reconsideration by the Commission and that any communication between the parties and the Commission take place on the record.6

The Commission opines that complaint counsel will be more candid off the record because they “will be able to discuss the case without concern that their statements might compromise their litigation position if the case is returned to adjudication.”7 It also suggests that “the ex parte procedure will confer similar benefits on ‘respondents (and even third parties).’”8 It is unclear to me why all this candor cannot and should not take place on the public record.

Traditionally, the Commission acts as a prosecutor up to and including its decision to issue an administrative complaint. As soon as the vote to issue an administrative complaint is complete, the Commission assumes a judicial role with respect to that case, which then is said to be “in adjudication.”9 It should go without saying that the Commission must not allow its prosecutorial role to intrude in any respect in carrying out its deliberative role in the administrative adjudication. Removing a matter from adjudication to chat off the record suggests that there is something that the Commission would prefer that the world not know. It also suggests an unease on the part of the Commission in carrying out its judicial function and an unseemly reluctance to relinquish its prosecutorial role. Although the automatic withdrawal provision may not disadvantage the respondent in any given proceeding, it may well undermine public confidence in the integrity of the Commission’s adjudicative process.

Let us consider three scenarios following a court’s denial of a preliminary injunction: First, complaint counsel have a strong case, notwithstanding the court’s denial of a preliminary injunction. If this is so, complaint counsel can explain why on the record. After the case has been withdrawn from adjudication and reconsidered, presumably the Commission will return the case to adjudicative status. Even if the respondents initiated withdrawing the matter from adjudication, the procedure, in-and-out-and-in adjudication, may create a perception that complaint counsel, speaking off the record, had an unfair advantage. The respondents may believe that had they only known what the staff was saying to the Commission behind closed doors while the case was withdrawn from adjudication, they could have defended more effectively and won a dismissal. After all, the court gave the first round to the respondents on the record.

A second scenario is that the case is weak, and complaint counsel’s arguments in support of the complaint are correspondingly weak. The Commission suggests in its Federal Register notice that if discussion is held on the record, counsel will be inhibited from pointing to weaknesses in the case for fear that if the Commission disagrees and requires the adjudication to go forward, complaint counsel will be disadvantaged by having conceded the weaknesses of the case on the record. An underlying assumption here is that any weaknesses in the case will remain undiscovered (by the courts, by the respondent and by the administrative law judge), as long as complaint counsel can confide in the Commission off the record. Perhaps more serious, the assumption suggests an abiding lack of confidence in the administrative system of adjudication and the Commission’s place in it. Complaint counsel will not be able to avoid the weakness of the case by confiding what fact in secret to the Commission. At most, they might conceal the weakness for a time, a result that ultimately would be wasteful of both government and private resources. Regardless of when during an adjudicative proceeding complaint counsel or the Commission itself discovers a possible weakness in the case, the Commission should base its decision whether to continue the proceeding on publicly available information.

The new rule may lend itself to a public perception that the staff of the Commission has an advantage over targets of enforcement actions because the staff has the secret ear of the Commission. If the staff is permitted secret access to the Commission, a decision to continue an adjudication, particularly one that, based on publicly available information, appears weak, likely would suggest that complaint counsel were able to persuade the Commission to proceed only by “hiding the ball” from the record. A similar concern is that off the record communications between parties (complaint counsel and the respondents) are on the record with certain specified exemptions. Rule 4.7, 16 CFR § 4.7.
In such an instance, the Commission may agree with the respondents and dismiss the adjudication, or it may disagree and order that the proceeding continue. There seems no good reason not to have this occur on the public record. Again, private discussions between the Commission and its staff can create a public perception of unfairness to the respondents arising from apparent complicity between the prosecuting attorneys and the purportedly impartial adjudicators—the very danger the separation of functions requirements of the Administrative Procedure Act and the Commission’s ex parte rule are designed to avoid.12

In addition to undermining the separation of functions at the Commission, the new rule limits the Commission’s discretion to decide when individual cases should be in adjudication and remain on the public record. The exercise of discretion in an adjudicative matter is a responsibility of the Commission, not an occasion for apology. This responsibility, which must be carried out consistent with the law and with fundamental fairness, should not be ceded without a reason for doing so. Here, I see none. Both the policy to maintain the separation of deliberative and prosecutorial functions and the appearance of having done so are enhanced when the Commission retains its discretion to determine the appropriate basis of a motion to withdraw from adjudication. The shifting of a portion of that discretion in favor of the respondents may appear open-minded, but, in the long term, it will disserve the Commission and the public interest.

On balance, the Commission and the public would be better served if the Commission retained its discretion to decide which, if any, cases should be withdrawn from adjudication following denial of a preliminary injunction. The new rule is likely to undermine the integrity of the Commission and its adjudicative process by breaking down the wall between the Commission’s prosecutorial and adjudicatory roles in a manner inconsistent with the separation of functions requirement of the Administrative Procedure Act and its own ex parte rule. I dissent.

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Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases

AGENCY: Federal Trade Commission.

ACTION: Notice of policy statement and request for public comment.

SUMMARY: The Federal Trade Commission has adopted a policy statement regarding the use of prior approval and prior notice provisions in Commission orders entered in merger cases. Under the policy, the Commission will no longer require prior approval of certain future acquisitions in such orders as a routine matter. The Commission will henceforth rely on the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act, as the principal means of learning about and reviewing mergers proposed by such companies. Narrow prior notice or approval requirements will be retained for certain limited situations described in the Commission’s Statement of Policy. The Commission also stated that it would initiate a process for reviewing the retention or modification of prior approval requirements in existing Commission orders.

Although these policies are already in effect, the Commission is soliciting comment from interested persons.

DATES: The policy statement was effective on June 21, 1995. Comments will be received until September 5, 1995.

ADDRESSES: Comments should be sent to the Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580. Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. until 5 p.m.

FOR FURTHER INFORMATION CONTACT: Daniel P. Ducore, Assistant Director for Compliance, Bureau of Competition, (202) 326–2526.

SUPPLEMENTARY INFORMATION: Under previous Commission policy, Commission orders entered in merger cases generally have required that the respondent obtain the Commission’s prior approval for certain future acquisitions in the same market. The Commission has reassessed that policy and has determined that prior approval of future acquisitions by a respondent should no longer be required as a routine matter. The Commission has issued the following Policy Statement as an exercise of its discretion.

The Commission invites comments on the issues discussed in this notice, in the Policy Statement and in the separate statement of Commissioner Azcuenaga.


Introduction

Under longstanding Commission policy, Commission orders entered in merger cases generally have contained a requirement that the respondent seek the Commission’s prior approval for any future acquisition over a de minimis threshold within certain markets for a ten-year period.1 In a few cases, the Commission also has required prior notice of intended transactions that would not be subject to the premerger notification and waiting period requirements of section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act.2 Prior approval and notice requirements are imposed pursuant to the Commission’s broad authority to fashion remedies to prevent the recurrence of anticompetitive conduct.

In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.

1 As used herein, the term “merger” includes mergers, acquisitions, joint ventures, and equivalent transactions.