ACTION: Notice of Meeting

SUMMARY: The Federal Reserve Board is announcing a series of public meeting 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.

FOR FURTHER INFORMATION CONTACT: Diane A. Koonjy, Senior Attorney, Legal Division (202-452-3274), or Patricia A. Robinson, Attorney, Legal Division (202-452-3005), or Kathleen Conley, Review Examiner, Division of Consumer and Community Affairs (202-452-2389), Board of Governors of the Federal Reserve System, Washington, D.C. 20551. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), Dorthea Thompson (202-452-3344), Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551.

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, the General Counsel of the Board hereby orders that public meetings on the applications be held in Boston, Massachusetts; Hartford, Connecticut, and Albany, New York, beginning August 26, 1995, to collect information on the convenience and needs of the communities to be served by this proposal, including the records of performance of these institutions under the Community Reinvestment Act (CRA).

The public meetings well be held at the following locations:

Boston-Saturday, August 26, 1995, at the Federal Reserve Bank of Boston, 600 Atlantic Avenue, Boston, Massachusetts 02106. The meeting will begin at 9:00 a.m.

Hartford-Monday, August 28, at the Wild Auditorium, Gray Conference Center, University of Hartford, 200 Bloomfield Avenue, West Hartford, Connecticut 06117. The meeting will begin at 12:00 noon, E.D.T.

Albany-Tuesday, August 29, at the New York State Museum, Museum Theater, West Gallery, Cultural Education Center, Empire State Plaza, Madison Avenue, Albany, New York 12230. The meeting will begin at 12:00 noon, E.D.T.

To accommodate interested persons, the public meetings in Hartford, Connecticut, and Albany, New York, will include evening hours scheduled for testimony.

Purpose and Procedures

The purpose of the public meetings is to receive information regarding the convenience and needs of the communities to be served by this proposal, including the records of performance of Fleet and Shawmut under the CRA. The CRA requires the appropriate federal financial supervisory agency to ''assess [an] institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of [the] institution.'' 12 U.S.C. § 2903. 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. 225.25(d)). 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 of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 (facsimile: 202-452-3819), not later than August 16, 1995, providing the following information:

(i) identification of which meeting they wish to attend,

(ii) a brief statement of the nature of the expected testimony and the estimated time required for the presentation,

(iii) address and telephone number (and facsimile number, if available), and

(iv) identification of any special needs, such as persons desiring translation services, persons with a physical disability who may need assistance, or persons using visual aids for their presentation. To the extent available, translators will be provided to persons wishing to present their views in a language other than English if they include this information in their request to testify.

Persons interested only in attending a meeting do not need to submit a written request to attend.

On the basis of the requests received, the Presiding Officer will prepare a schedule for persons wishing to testify. Persons not listed on the schedule may be permitted to speak at the public meetings at the discretion of the Presiding Officer if time permits at the conclusion of the schedule of witnesses. Copies of testimony may, but need not, be filed with the Presiding Officer before a person's presentation.

By order of the General Counsel of the Board of Governors, acting pursuant to authority delegated by the Board of Governors, effective, July 27, 1995.

William W. Wiles,

Secretary of the Board.

[FR Doc. 95–19105 Filed 8–2–95; 8:45am]

BILLING CODE 6210–01–F

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 anticompetitive mergers.[1] Historically, the Commission has resolved merger cases through administrative trials or consent orders. In recent times, most of the Commission's antitrust complaints have been settled through administrative consent orders.[2] 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.[3] The Commission has won most of its challenges at the federal district court level.[4]

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.[5] 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.'' [6] 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.[7]

The Commission has fulfilled that special role in a number of important merger cases.[8] 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,[9] 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.

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[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 fiscal years 1990–1994, five out of seven of the Commission's motions for a preliminary injunction were granted. In one case, *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), 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. 1987–1993 Transfer Binder (CCH) ¶ 22,731 (Sept. 11, 1989) (Initial Decision), *rev.d*, 1987–1993 Transfer Binder (CCH) ¶ 23,162 (Feb. 26, 1992). In *Promodes, S.A.*, Dkt. No. 9928, the administrative complaint was settled. 113 F.T.C. 372 (1990). In *Occidental Petroleum Co.*, Dkt. No. 9205, both the ALJ and the Commission found liability. 1987–1993 Transfer Binder (CCH) ¶ 22,603 (Sept. 30, 1988) (Initial Decision), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 23,370 (Dec. 22, 1992), *appeal dismissed pursuant to stipulation and modified order*, 5 Trade Reg. Rep. (CCH) ¶ 23,531 (Jan. 14, 1994). In a fifth case, *Lee Memorial Hospital*, Dkt. No. 9265, the administrative proceeding, which was filed prior to the district court's denial of a preliminary injunction, has been stayed pending appeal.

[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).

Why A Preliminary Injunction Proceeding May Not Be A Sufficient Substitute for Administrative Litigation

If the same value could be achieved through a preliminary injunction proceeding as through administrative litigation, then there would be no reason for the Commission ever to proceed past the preliminary injunction phase. The differences between the two types of proceedings, however, mean that one does not equate with the other.

A preliminary injunction hearing 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.

Indeed, there may be an inadequate basis for doing so. Because a preliminary injunction proceeding has a limited purpose, the evidentiary record produced is often limited in scope. A court may not hear any witnesses, but instead may rule solely on the basis of the papers filed by the parties. A preliminary injunction proceeding is generally much shorter in duration than a full trial, and, because of its expedited nature, the thoroughness of the evidentiary presentation and analysis may be less than would be expected in a full trial. Since merger analysis can be a highly complex, fact-intensive undertaking, it may be particularly ill-suited for final resolution on the merits in the abbreviated forum of a preliminary injunction proceeding.

Some commentators have suggested that because the Department of Justice lacks the ability to challenge mergers in the administrative process, the Commission's litigation should be confined to the federal courts in order to bring the two agency's enforcement powers in line with one another. 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.

2. 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.[1] If necessary, the Commission will amend its Rules of Practice [2] in order to facilitate the 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 injuction 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 adjudicative 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 adjudicative 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.

Donald S. Clark,

Secretary.

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

[1] Although the focus of this policy statement is merger litigation, similar principles would apply following the denial of a preliminary injunction in the context of non-merger competition litigation.

[2] 16 CFR 3.1 *et seq.*

explanation.[1] These documents reaffirm the Commission's longstanding policy, consistent with Section 5 of the FTC Act, 15 U.S.C. § 45(b), of reconsidering whether to pursue administrative litigation following the denial of preliminary relief by the courts. Section 5 requires that the Commission premise issuance of an adjudicative complaint on finding reason to believe that the law has been violated and that enforcement would be in the public interest. This obligation continues implicitly throughout the proceeding, requiring the Commission to take all reasonable steps to assure itself that an enforcement action, once begun, remains in the public interest. I joined in that Statement.

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 in continuing the adjudication.[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 an 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, complaint 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 that 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 respondents. Such a message hardly is consistent with fairness to the respondent or with the

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[1] These materials appear again in this volume of the **Federal Register.**

[2] *See* 15 U.S.C. § 53(b).

[3] Notice of Final Rule with Request for Public Comment, 60 Fed. Reg._____, Slip Notice at 2–3.

[4] I do not oppose the alternative procedure included in the new rule, which expressly authorizes a motion by any respondent to dismiss the complaint in the public interest. Although the alternative procedure is redundant in light of existing Rules 3.22 and 3.23, 16 CFR §§ 3.22 and 3.23 (1995), I do not find it objectionable because the arguments would be presented on the record unless the Commission directs otherwise.

[5] *See, e.g.*, Rule 3.22 governing adjudicative motions and Rule 3.23 governing interlocutory appeals. The Commission also, of course, may act *sua sponte* to seek briefing from the parties or to dismiss the complaint.

[6] Confidential communications between the Commission and its staff before a matter enters adjudication and when the Commission is still carrying out its prosecutorial responsibility make sense. In our system of law, investigational and prosecutorial decisions are protected from public scrutiny. *See* 5 U.S.C. § 552(b)(5). Such confidential communications after the prosecutorial function has concluded with the issuance of a complaint, however, raise issues concerning the exercise by the Commission of its quasi-judicial function.

[7] 60 Fed. Reg. _____, Slip Notice at 4.

[8] *Id.*

[9] At this point, all further communications between the parties (complaint counsel and the respondent(s) are on the record with certain specified exemptions. Rule 4.7, 16 CFR § 4.7.

role of the Commission as an unbiased decisionmaker.[10]

A third scenario is that the case is weak, respondents move to withdraw the matter from adjudication, and complaint counsel file nothing in support of the complaint.[11] 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 disposition 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.

[10] Off-the-record discussions with the respondents, followed by dismissal of the complaint, also may create misperceptions of unfairness and favoritism, with the implication that nonpublic communications that could not bear the light of day influenced the Commission's decision.

[11] This assumes that complaint counsel find themselves unable to make a principled argument in support of the complaint. *See* Jose Calimlin, M.D., Dkt. No. 9199 (June 24, 1986) (''complaint counsel represent the Commission's prosecutorial decision as embodied in the allegations of complaint and in the notice of contemplated relief''); *accord* R.J. Reynolds Tobacco Co., Dkt. No. 9206 (interlocutory order, Dec. 1, 1986); *see also* R.J. Reynolds Tobacco Co. (interlocutory order, Dec. 10, 1986) (purpose of adjudication is ''to subject the Commission's complaint to an adversarial test'').

[12] *See* 5 U.S.C. § 552(d); 16 C.F.R. § 4.7.

[FR Doc. 95–19110 Filed 8–2–95; 8:45 am]
BILLING CODE 6750–01–M

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.

Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions

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.

[2] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.