

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman  
Mary L. Azcuenaga  
Janet D. Steiger  
Roscoe B. Starek, III  
Christine A. Varney

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In the Matter of )  
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IVAX Corporation, ) Docket No. C-3565  
a corporation. )  
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ORDER REOPENING AND MODIFYING ORDER

On February 14, 1996, IVAX Corporation ("IVAX" or "Respondent"), the respondent named in the consent order issued by the Commission on March 27, 1995, in Docket No. C-3565 ("Order"), filed its Request To Reopen and Modify Consent Order ("Request") in this matter. IVAX asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").<sup>1</sup> IVAX's Request asks that the Commission "reopen the order issued on March 27, 1995, in this proceeding and modify the Order by deleting Paragraph III." Request at 1. The thirty-day public comment period on IVAX's Request ended on March 25, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant IVAX's Request.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the

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<sup>1</sup> 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." Id.

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." Id. at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." Id. at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. Id.

The Complaint in this case charged that IVAX's proposed acquisition of all of the voting securities of Zenith Laboratories, Inc. ("Zenith"), if consummated, would constitute a violation of Section 5 of the FTC Act and Section 7 of the Clayton Act by substantially lessening competition and tending to create a monopoly in the relevant market. Complaint ¶¶ 16, 18-19. The Complaint alleged the sale of generic verapamil as the relevant product market and alleged the United States as the relevant geographic market. Complaint ¶¶ 11-12.

The Complaint alleged that the acquisition would eliminate direct and actual competition between IVAX and Zenith; increase the likelihood that IVAX will unilaterally exercise market power; and increase the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase. Complaint ¶ 16.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that IVAX would engage in the same acquisition as alleged in the complaint. Accordingly, the Commission has determined to reopen the proceedings and modify the Order by deleting Paragraph III which contains the prior approval provision.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened; and that the Commission's order issued on March 27, 1995, be, and it hereby is, modified by deleting Paragraph III, as of the effective date of this order.

By the Commission.

Donald S. Clark  
Secretary

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ISSUED: June 17, 1996