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

In the Matter of	)	
ALLEGHANY CORPORATION,	)	**Docket Nos. C-3218**
a corporation.	)	**C-3335**

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "Respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 Order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 Order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 Orders 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").[1] Alleghany's Petition requests that the Commission reopen and modify the Orders to remove Paragraph V of the 1987 and 1991 Orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of Paragraph VI of the 1987 and 1991 Orders. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For the

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

reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

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 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 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 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. However, the Commission also stated that "[n]o

presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The Complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 Order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 Order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's Complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 Order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 Order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these Orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the Orders to delete Paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.[2] Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.[3] As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the Orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 Orders modified in this limited manner. In addition, the balance favors modifying the Orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.[4]

Accordingly, IT IS ORDERED that these matters be, and they hereby are, reopened; and

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2. Policy Statement at 4-5.

3. See Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (“Damon Letter”), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

4. Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

IT IS FURTHER ORDERED that Paragraph V of the Orders be, and it hereby is, deleted in its entirety; and

IT IS FURTHER ORDERED that Paragraph VI of the Orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the Paragraph:

> Notification is not required to be made pursuant to this Paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity which thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

By the Commission, Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in Paragraph VI, and Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

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ISSUED: June 27, 1996