STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

***Alleghany Corporation*, Docket Nos. C-3218 and C-3335**

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.[1] On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act[2] and Rule 2.51 of the Commission's Rules of Practice.[3]

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to Paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing

---

[1] *Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

[2] 15 U.S.C. § 45(b).

[3] 16 C.F.R. § 2.51.

orders "will continue to be considered on a case-by-case basis *under the policy announced in this* [*i.e.*, the Prior Approval Policy] *Statement*"[4] -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.[5] The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.[6] If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

---

[4] Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (italics added).

[5] The standard for whether a newly-issued order should include a prior notice requirement is whether "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*.

[6] The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *id*., seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

Attachment

ATTACHMENT TO STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III: ALTERNATE VERSION OF COMMISSION ORDER

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, a corporation.	)	Docket Nos. C-3218 and C-3335

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), 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 Re-Open and Modify Consent 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 each Order to delete Paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of Paragraph VI of each Order or limit the prior notice provisions to the geographic markets alleged in the Complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions

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

so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For the 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 Commission's 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 Federal Trade Commission ("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. The 1987 Order required a divestiture in each market. In addition, Paragraph V of the 1987 Order requires Alleghany, for ten years, to obtain Commission approval before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant that services either Cook County, Illinois, or Los Angeles County, California, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, an existing title plant that services either 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 any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area, or acquiring from any concern any assets of, or ownership interest in, any existing title plant servicing any geographic area where Alleghany also has any ownership interest in a title plant servicing that area.

The Commission's Complaint in Docket No. C-3335 alleged that Alleghany's acquisition of most of the title-insurance-related assets of Westwood Equities Corporation, including Ticor Title Insurance Company of California ("Ticor"), 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 nine markets and back plant information in nine markets. The 1991 Order required Alleghany to divest, within twelve months, either its own or Ticor's back plant in nine specified counties, and either its own or Ticor's title plant in nine specified counties, to an acquirer or acquirers approved by the Commission. Paragraph V of the 1991 Order requires Alleghany, for ten years, to obtain Commission

approval before acquiring any stock, share capital, or equity interest in First American Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company, Commonwealth Land Title Insurance Company, Title Insurance Company of Minnesota, or TRW, Inc., or in any concern that in turn has any direct or indirect ownership interest in a title plant that services any county listed in ¶ IIA or in a back plant that services any county listed in ¶ IIB, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, a title plant that services any county listed in ¶ IIA or a back plant that services any county listed in ¶ IIB. Paragraph VI of the 1991 Order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring any stock, share capital, or equity interest in any concern that in turn has any direct or indirect ownership interest in a title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area, or acquiring from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant or back plant servicing any geographic area where Alleghany also has any ownership interest in a title plant or back plant servicing that area.

Consistent with 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 that the Statement identifies as appropriate for retaining narrow prior approval provisions because it has already consummated the transactions that led to the 1987 and 1991 Orders and could not attempt them again.

Moreover, although the records in these matters evidence a credible risk that Alleghany could engage in future unreportable, anticompetitive acquisitions now covered by prior approval, there is no need to substitute prior notice for prior approval in Paragraph V of the Orders. Paragraph VI of each Order already requires prior notice for any transaction for which there is a geographic overlap anywhere in the nation, including but not limited to the respective Complaint markets covered by the prior approval requirements of Paragraph V of each Order. Accordingly, the Commission has determined to reopen the proceedings and modify the Orders to delete Paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,[2] and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of Paragraph VI should be retained. The markets alleged in the Complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 Orders was valued above the $15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the Complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while 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 -- i.e., where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition 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 and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to Paragraph VI of each Order a proviso exempting the acquisition of copies.[3]

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

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

---

[2] Prior Approval Policy Statement at 4-5.

[3] Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

IT IS FURTHER ORDERED that Paragraph VI of each Order 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 that 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.

Donald S. Clark
Secretary

SEAL

ISSUED: