

Modifying Order

120 F.T.C.

IN THE MATTER OF

AMERICAN STORES COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3238. Consent Order, Aug. 31, 1988--Modifying Order, Dec. 1, 1995*

This order reopens a 1988 consent order that required American Stores to divest certain retail grocery stores in parts of California and Nevada and to obtain Commission approval before acquiring certain grocery stores. This order modifies the consent order by deleting the prior-approval requirements in paragraph VIII of the consent order pursuant to the Commission's Prior Approval Policy -- under which the Commission presumes that the public interest requires reopening and setting aside the prior-approval provisions in outstanding merger orders, making them consistent with the policy -- and by replacing that provision with a prior notification provision.

ORDER REOPENING AND MODIFYING ORDER

On November 20, 1995, American Stores Company ("ASC") filed its Petition To Reopen and Vacate or Modify Consent Order ("November Petition") in this matter. Respondent asks that the Commission reopen this 1988 consent order¹ pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").² The Petition requests that the Commission reopen and vacate the order in Docket No. C-3238, or in the alternative, reopen and modify the order by deleting the prior approval provisions of paragraph VIII.

The November Petition is identical to the Petition to reopen previously filed by ASC on July 28, 1995 ("July Petition"). Since the July Petition was subject to a thirty-day public comment period, which expired on September 8, 1995, and no comments were received, the Commission waived the public comment period for the November Petition.

¹ *American Stores Company, et al.*, 111 FTC 80 (1988) ("American Stores").

² 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH), ¶ 13,241, at 20,991 (June 21, 1995).

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.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some 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.

The Commission in its Prior Approval Policy Statement announced 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.*

Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in paragraph VIII of this order should be reopened. There is nothing in the record to suggest that the respondent would engage in the same acquisition as alleged in the complaint. Accordingly, the

Commission has determined to modify the order in Docket No. C-3238 to set aside the prior approval requirement.

The Commission also stated in the Prior Approval Policy Statement that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of the HSR Act. 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 has determined that the record in this case evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3238 charged that respondent's proposed acquisition of Lucky would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially reducing competition in the retail sale and distribution of food and grocery store items in supermarkets in thirteen separate relevant geographic markets consisting of states, cities, areas and towns. Complaint, ¶¶ 8 and 9. Paragraph VIII of the order required respondent to obtain prior Commission approval before certain acquisitions of a retail grocery store or any interest in a retail grocery store in forty towns or areas in California and Nevada.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3238 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph VIII of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act.³ Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph VIII of the order to substitute a prior

³ See Order Reopening and Modifying Order, Supermarket Development Corporation, Docket No. C-3224 (September 5, 1995) (Commission substituted a prior notification provision in an order based on similar complaint allegations).

notification requirement for the prior approval requirement. ASC does not object to the substitution of prior notification for prior approval. *See* Letter of Christopher J. MacAvoy to Donald C. Clark, November 20, 1995.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph VIII of the order in Docket No. C-3238, issued on August 11, 1988, be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, American shall cease and desist from acquiring, without prior notification to the Commission, directly or indirectly, through subsidiaries or otherwise, (i) five or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in five or more retail grocery stores or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates five or more retail grocery stores, in Los Angeles and Orange Counties, California (excluding those cities and towns identified in subsection (iii) of this Part VIII), or (ii) two or more retail grocery stores, within any one year period from the date this order becomes final, including any facilities that have been operated as a retail grocery store(s) within six months of the date of the offer to purchase the facilities, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates two or more retail grocery stores, in the Bay Area comprised of the following cities or towns:

Alameda, California
Albany, California
Belmont, California
Benicia, California
Berkeley, California
Burlingame, California
Campbell, California
Castro Valley, California
Cupertino, California

Newark, California
Oakland, California
Pacifica, California
Palo Alto, California
Pinole, California
Redwood City, California
Richmond, California
San Bruno, California
San Carlos, California

Daly City, California	San Francisco, California
El Cerrito, California	San Jose, California
El Sobrante, California	San Leandro, California
Emeryville, California	San Lorenzo, California
Foster City, California	San Mateo, California
Fremont, California	San Pablo, California
Hayward, California	Santa Clara, California
Hercules, California	Saratoga, California
Los Altos, California	South San Francisco,
Los Gatos, California	California
Menlo Park, California	Sunnyvale, California
Millbrae, California	Union City, California
Milpitas, California	Vallejo, California
Mountain View, California	

or (iii) any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Bakersfield, California	Riverside, California
Camarillo, California	Salinas, California
Canyon Country, Newhall,	San Bernardino, California
Saugus or Valencia, California	San Diego County, California
Capitola, California	South of the Miramar
Cathedral City, Coachella, Indio,	Naval Air Station,
Palm Desert, Palm Springs or	San Juan Capistrano or
Rancho Mirage, California	San Clemente, California
Concord, California	San Marcos, California
Danville, California	San Rafael, Mill Valley,
Encinitas, California	Fairfax, Greenbrae, Larkspur,
Escondido, California	San Anselmo, or Sausalito,
Fallbrook, California	Tiburon, California
Fontana, California	San Ramon, California
Las Vegas, Nevada	Santa Barbara, Montecito or
Napa, California	Goleta, California
Novato, California	Santa Maria, California
Ontario, California	Santa Rosa, California

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Oxnard, California	Simi Valley, California
Palmdale or Lancaster, California	Thousand Oaks, California
Petaluma, California	Upland, California
Pleasanton, California	Vacaville, California
Redlands, California	Vista, California
Rialto, California	Walnut Creek, California

The prior notification required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of American and not of any other party to the transaction. American shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, American shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by American or the leasing by American of facilities not presently operated as a retail grocery store in those locations.

One year from the date this order becomes final and annually thereafter for nine (9) more years, American shall file with the Commission a verified written report of its compliance with this paragraph. Such reports shall include a listing of all acquisitions made by American without prior notification to the Commission in any area listed in this Part VIII.

Complaint

120 F.T.C.

IN THE MATTER OF

HOECHST AG

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3629. Complaint, Dec. 5, 1995--Decision, Dec. 5, 1995

This consent order settles alleged violations of federal law prohibiting unfair or deceptive acts and practices and unfair methods of competition arising from the \$7.1 billion merger of Hoechst AG and Marion Merrell Dow Inc. The consent order, among other things, requires Hoechst -- a pharmaceutical firm -- to provide Biovail Corporation International with a letter of access to the toxicology data necessary to secure additional FDA approvals for a hypertension and cardiac drug called Tiazac (diltiazem). It also requires Hoechst to return any confidential information obtained from Biovail; to refrain from using the information; to dismiss a patent infringement lawsuit filed by Marion Merrell Dow regarding Tiazac; to withdraw a citizen petition Marion Merrell Dow filed with the Food and Drug Administration relating to Tiazac; and to agree not to file any subsequent litigation against Biovail regarding diltiazem. In addition, the consent order requires Hoechst to divest the rights to either Trental or Beraprost (two drugs intended to treat intermittent claudication, a painful leg cramping condition); to divest the rights to Pentasa (or the generic formulation), which is one of two oral forms of mesalamine used to treat ulcerative colitis and Crohn's Disease; and to divest the rights to Rifadin (or the generic formulation), which is used to treat tuberculosis. The required divestitures have to be made to Commission-approved entities, within nine months of the date of the order.

Appearances

For the Commission: *Laura A. Wilkinson, Elizabeth A. Jex, David L. Inglefield and Pamela L. Taylor.*

For the respondent: *William C. Pelster, Skadden, Arps, Slate, Meagher & Flom and Bruce H. Kublik, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Hoechst AG ("Hoechst"), a German corporation subject to the jurisdiction of the Commission, has acquired all of the voting securities of Marion Merrell Dow Inc.