

IN THE MATTER OF

B.A.T. INDUSTRIES P.L.C., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9271. Consent Order April 19, 1995--Set Aside Order, Aug. 12, 1999*

This order reopens a 1995 consent order -- which required the respondents to divest certain cigarette brands and a cigarette manufacturing facility -- and sets aside the prior approval provision pursuant to the Commission's Prior Approval Policy Statement. Thus the consent order is set aside in its entirety because no further obligation remains under the order, besides an annual reporting requirement.

ORDER SETTING ASIDE ORDER

On April 29, 1999, British American Tobacco p.l.c. ("BAT"), the successor to B.A.T. Industries p.l.c. and Brown & Williamson Tobacco Corporation, the respondents in the above-referenced order ("Order"), filed its Petition to Reopen and Modify Order ("Petition") in this matter. BAT asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Policy Statement").¹ The Petition requests that the Commission reopen and modify the Order to eliminate the prior approval provision in paragraph IV of the Order. The thirty-day comment period on the Petition ended June 29, 1999. No comments were received. For the reasons discussed below, the Commission has determined to grant BAT's Petition. Because there would remain no further affirmative obligations under the Order, besides an annual reporting requirement, the Commission has determined to set aside the Order in its entirety.

The complaint in this matter alleges that BAT's acquisition of the American Tobacco Company ("ATC") violated Section 5 of the FTC Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by lessening competition in the United States

¹ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

cigarette market. The Order required BAT to divest certain assets of ATC, as defined in the Order. The Commission approved BAT's application for approval to divest the assets to Commonwealth Brands, Inc., and BAT did so. Paragraph IV of the Order prohibits BAT for a ten-year period from acquiring, without the prior approval of the Commission, any stock, share capital, or other interest in any concern engaged in the manufacture in the United States of cigarettes for consumption in the United States; or from acquiring any assets used for the manufacture, distribution, or sale in the United States of cigarettes.

The Commission, in its 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.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."³

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 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."⁴ As explained in the Policy Statement, the need for a prior notification requirement will

² Policy Statement at 2.

³ *Id.*

⁴ *Id.* at 3.

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 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."⁵ The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to ... [the 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 Policy Statement.⁶

The presumption is that setting aside the general prior approval requirement of paragraph IV of the Order is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. BAT completed the divestiture required by the Order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the Order is the prior approval requirement in paragraph IV and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. 9271 and set aside the Order.

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on April 19, 1995, be, and it hereby is, set aside as of the effective date of this order.

⁵ *Id.* at 4.

⁶ *Id.*

Complaint

128 F.T.C.

IN THE MATTER OF

R. J. REYNOLDS TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3892. Complaint, Aug. 16, 1999--Decision, Aug. 16, 1999*

This consent order, among other things, prohibits R.J. Reynolds Tobacco Company, the North Carolina-based advertiser and distributor for Winston cigarettes, from making deceptive or unsubstantiated representations, and requires certain disclosures in the advertisements for cigarettes and other tobacco products.

Participants

For the Commission: *Beth Grossman, Lisa Kopchik, Joel Winston, C. Lee Peeler, Joseph Mulholland and Margaret Patterson.*

For the respondent: *Judith Oldham, Collier, Shannon, Rill & Scott, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that R.J. Reynolds Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent R.J. Reynolds Tobacco Company is a New Jersey corporation with its principal office or place of business at 401 North Main Street, P.O.B. 2959 Winston-Salem, North Carolina.

2. Respondent has advertised, promoted, offered for sale, sold and distributed tobacco products, including Winston cigarettes.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Winston cigarettes, including but not necessarily limited to the attached Exhibits A through F. These advertisements contain the following statements: