Comments of Whole Foods Market, Inc.
Parts 3 and 4 Rules of Practice Rulemaking – P072104

Whole Foods Market, Inc. respectfully submits the following preliminary comments on new and amended regulations proposed by the Federal Trade Commission ("Commission" or "FTC"), 73 Fed. Reg. 58832 (October 7, 2008).

Summary

The FTC's proposals are egregious government regulation that should not be adopted. The proposed regulations are unnecessary, ill-advised, and unfair. If adopted, the proposed regulations would create administrative procedures that are unjust and deprive parties litigating before the Commission of their due process rights.

Both the regulations and the process by which they are proposed reflect a rush to judgment mentality that ill-serves the public interest, as well as a hostility to the open adversarial process that is fundamental to the American legal system. Given the importance of the issues at stake, the Commission immediately should extend the deadline for comment on the proposed regulations to no earlier than January 6, 2009. A thirty-day comment period is wholly inadequate to deal with changes in the number and of the magnitude proposed.

Analysis

Whole Foods Market continues to work on more detailed comments on the proposed regulations. In order to underscore the need for a lengthened comment period and a more considered review

of the issues raised by the proposal, Whole Foods Market offers the following preliminary comments:

The proposed regulations attempt a radical restructuring of FTC administrative litigation. If adopted, these regulations would be fundamentally unfair to respondents and deprive them of their due process right to "fair and impartial hearings." 16 C.F.R § 3.42 (c).

Many of the proposed regulations were adopted by Commission order in *In the Matter of Whole Foods Market, Inc. and Wild Oats Market, Inc.* (Docket No. 9324) ("*Whole Foods Market*") or *In the Matter of Inova Health System Foundation* (Docket No. 9326) ("*Inova*"). The ability of a duly appointed Administrative Law Judge ("ALJ"), operating under existing regulations, to adopt by order the concepts embodied in the proposed regulations demonstrates that the inflexible tool of additional regulation is unnecessary. If there are net benefits to these regulations, something the Commission has failed to demonstrate in its proposal, those benefits can be achieved without the rigidity and permanence of regulation. The application of many of the proposed regulations in *Whole Foods Market* and *Inova* demonstrates that these regulations, in practice, can be fundamentally unfair and a violation of due process.

Proposed Regulation 3.11 requires that the evidentiary hearing in merger cases must commence five months from issuance of the complaint, even though the hearing in other proceedings need only commence within eight months. Leave from this regulation can only be granted by the Commission. Current practice is for the ALJ to determine, based on the circumstances of a

particular case, the time necessary for discovery and, therefore, the appropriate date on which to commence the evidentiary hearing.

As the Commission and the Department of Justice observed in the introduction to the *Commentary on the Horizontal Merger Guidelines,* merger investigations are "intensely fact driven" and "merger analysis depends heavily on the specific facts of each case."[1] The proposed regulation, by truncating fact discovery, would create a distinct litigation advantage to complaint counsel, since respondents do not share the Commission's power to obtain facts via broad, pre-complaint, compulsory process.

Moreover, the proposed regulation adopts an unfair "one-size fits all" approach, regardless of a particular matter's complexity. *Whole Foods Market* is a prime example of this unfairness. The complaint in *Whole Foods Market* refers to 29 distinct "geographic markets" across the country. By contrast, *Inova* involved only a single relevant market. Nonetheless, the Commission in *Whole Foods Market*, and Commissioner Rosch, acting as ALJ in *Inova*, imposed nearly identical five-month periods for discovery and other pretrial activities in the two cases. Requiring respondents to file a motion with the Commission to secure a scheduling order that fairly provides an opportunity to defend against claims in the administrative complaint, as the

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[1] Federal Trade Commission and U.S. Department of Justice, *Commentary on the Horizontal Merger Guidelines* 3 (March 2006) available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf. *See also* U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* §0 (1992 rev. 1997) (merger analysis must be applied "reasonably and flexibly to the particular facts and circumstances of each proposed merger") available at http://www.ftc.gov/bc/docs/horizmer.htm.

proposed regulation would do, is a costly and ineffective solution to the systemic infringement of fundamental due process that the regulation itself creates.

Proposed Regulation 3.22 gives the Commission the authority to decide all dispositive prehearing motions. Under the proposed regulation, the same Commission members who voted to charge the respondent with a legal violations would also rule on pre-trial motions to terminate the charges. In this critical, outcome determinative aspect of the case, the role of the ALJ, including his or her ability *independently* to assess the merits of the FTC's case, would be eviscerated. This is especially unfair in regard to rulings on motions for summary judgment, which are based in significant part on interpretation of the facts – a core function of the ALJ.

Proposed Regulation 3.42 expressly provides "authority for the Commission or an individual Commissioner to preside over discovery and other prehearing proceedings before transferring the matter to the ALJ." This would curtail the ALJ's independence and greatly risk depriving litigants of a fair trial. Discovery and other pre-hearing proceedings can be outcome-determinative if the scheduling of them denies respondents' due process rights. For example, though an independent ALJ was recently appointed in *Whole Foods Market*, the ALJ's independence has been compromised because the Commission issued a scheduling order that, by rushing to trial, will deeply compromise Whole Foods Market's ability to mount an adequate defense. Whole Foods Market cannot even ask the ALJ to amend the scheduling order, because the Commission dictated that only it can modify the order. When an ALJ cannot exercise basic

adjudicative functions such as scheduling (Proposed Regulation 3.11) or ruling on dispositive pre-hearing motions (Proposed Regulation 3.42), any appearance of independence is illusory.

Proposed Regulation 3.26 provides that "the norm should be that the Part 3 case can proceed even if a [federal] court denies preliminary relief." This is a stark about-face from the Commission's longstanding position that "the determination to continue a merger challenge in administrative litigation [after a federal district court has refused to grant a preliminary injunction sought by the Commission] is not, and cannot be, either automatic or indiscriminate." 60 Fed. Reg. 39741, 39742 (Aug. 3, 1995). Since that statement, the Commission had never elected to proceed in administrative litigation in any merger case after it lost in the preliminary injunction action until the 2007 case of *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company* (Docket 9322) (transaction abandoned by the parties) and then *Whole Foods Market* in 2008.

Collective Effect - The proposed regulatory changes collectively will create an antitrust double standard by exacerbating the procedural differences between the Department of Justice and the FTC. If a company happens to be under FTC jurisdiction, it will face a rushed administrative hearing, without a truly independent ALJ, that carries serious risks of due process violations. Companies under Department of Justice jurisdiction will get a completely independent trial on the merits, conducted according to a reasonable schedule tailored to the circumstances o f the case, presided over by an independent federal judge, and guided by the Federal Rules of Evidence. Why should unmitigated due process rights be afforded to companies in the airline,

financial institution, steel and other industries that are subject to DOJ merger review, but not to supermarkets and companies in other industries subject to FTC merger review?

Timing - The Commission is correct that the adjudicatory process should be subject to periodic review and improvement. But, given the importance of the issues raised by the proposal, far more time than 30 days should be provided for public comment to changes as radical as those proposed in this instance. If it is appropriate for 180 days to be provided for public comment to an amendment to the platinum section of the Guides for the Jewelry, Precious Metals, and Pewter Industries, 73 Fed. Reg. 22848 (April 28, 2008) and 75 days to the energy labeling requirements for ceiling fans, 71 Fed. Reg. 35584 (June 21, 2006), then the fundamental changes to the process of administrative litigation contemplated by the proposed regulations should require at least a 90-day comment period to ensure thoughtful and useful comments.

Conclusion

The proposed regulations should not be adopted. If the Commission is inclined to adopt these regulations, either in whole or in part, it should act only after a more extensive comment period than contemplated in the proposal. A deadline for comments of no earlier than January 6, 2009 is required to ensure proper consideration of the important issues implicated by the proposal.

October 27, 2008

Respectfully submitted,

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