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FEDERAL TRADE COMMISSION
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BY MESSENGER

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
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Washington, D.C. 20580

Director of Operations & Merger
Enforcement
Antitrust Division
Department of Justice
601 D Street, N.W., Room 10103
Washington, D.C. 20530

Re: Comment on Proposed Amendments to Hart-Scott-Rodino Rules

Dear Sir or Madam:

This comment is addressed to two proposals to amend sections 802.50 and 802.51 of the HSR rules. One change would use a new basis for measuring the value of assets located in the United States, and owned by foreign persons. The fair market value of the assets would replace their book value in determining whether the exemptions are available. The second amendment would expand the time for measuring sales in or into the United States. For the reasons set forth below, these amendments should not be adopted.

Value of Assets in the United States

The statement of basis and purpose accompanying the proposal states that this change is being made "for the sake of consistency with the rest of the rules," which, presumably, also utilize fair market value, rather than book value. I have two disagreements with this proposed change. First, the consistency justification appears to be without foundation. Second, the proposal, if implemented, will impose an unreasonable burden on acquiring persons seeking the benefit of these exemptions.

Under the present rules, the fair market value of assets is primarily of concern when attempting to value an asset acquisition, and certain acquisitions of voting securities, for which the purchase price is undetermined. *See,* 16 C.F.R. §§ 801.10(a)(2)(ii), 801.10(b). Elsewhere, the rules provide that when determining the total assets of a person, they are as shown on the person's last regularly prepared consolidated balance sheet, *i.e.,* book value. 16 C.F.R. §801.11(c)(2). Prior to the amendments of the HSR Act, the rules and the report form, which took effect on February 1st of this year, it was necessary to calculate the percentage of the acquired person's total assets to be held by the acquiring person. That percentage calculation was required by the Act's size-of-transaction test and by Item 3(a) of the form. The percentage of assets was determined by dividing the book value of the assets to be sold by the total assets of the acquired person as shown on its last regularly prepared consolidated balance sheet. 16 C.F.R. §801.12(d) (rule in effect prior to February 1, 2001). If there was a predominant method of valuing assets, it was book value, not fair market value. The stated justification for the proposed rule change appears to lack a factual foundation. Consistency throughout the rules, a laudable objective, requires that book value be retained as the measure of value.

Of greater consequence, however, is the burden that the proposed amendments will impose. At present, it is a relatively simple task to refer to the books of account to determine the book value of assets located in this country. However, consider the burden imposed. Rather than using the readily available book value of U.S. assets, the acquiring person will be obligated to determine the fair market value of the acquired person's, and in some cases its own, U.S. property. On its face, this change imposes an unreasonable new burden on persons subject to the Act.

In my view, these changes are unnecessary and unduly burdensome. The foreign exemptions have operated for more than twenty-two years without apparent difficulties traced directly to the use of book values. At least, no such problems were cited in the statement of basis and purpose to justify the proposed change. In the absence of compelling evidence that a significant number of anticompetitive transactions will escape premerger review without this change, the book value of the U.S. assets should continue to govern.

Determining Sales In or Into the United States

Throughout the rules, the determination of sales is always on an annual basis and is found in the reporting person's last year-end, consolidated statement of operations. The present proposal is to expand that one-year time frame to include sales in the current fiscal year. If last year's sales and sales in the current year exceed total more than $50 million.

The justification for this change is the possibility that sales may be "trending steeply upward prior to the acquisition." Again, there is no suggestion that anticompetitive mergers have escaped review because of sharp upward trends in U.S. sales related to foreign assets or issuers. In addition, the proposal could require filings of acquisitions where no upward -- or even a downward -- trend is present.

For example, consider the acquisition of foreign assets that accounted for $48 million in U.S. sales during the acquired person's last fiscal year. Assume a relatively stable pattern of sales on a monthly basis, *i.e.,* $4 million per month. Assume also that the parties plan to consummate in April, and that sales in the current year have continued at the rate of four million dollars per month. Under the proposed rule, the transaction would be reportable: the current year's $12 million of January, February and March sales would have to be added to last year's sales of $48 million, for a total of $60 million, even though there had been no steep upward trend in sales during the current year. And, if sales in the current year had *dropped* to a $1 million per month level, the exemption would not be available, because sales under the rule would be $51 million.

The example of dropping sales points out another flaw in the proposal: it is unfair due to its lack of symmetry. The proposed rules purport to recognize only rising sales (although, as noted, their application is not so limited), but do not take falling sales into account. To be fair -- and symmetrical -- if sales during the current year have fallen, they should be projected on a new annual basis; if the annualized sales level for the current year does not exceed $50 million, the logic of the proposal suggests that the transaction should be exempt. Alternatively, the sales included for the current year could be substituted for those months' sales in the last year to see whether the adjusted sales exceed $50 million. One might argue, of course, that short-term fluctuations in sales levels make such an approach unwise. I agree. But, that argument is equally applicable to the proposed amendments: short-term *increases* also may not accurately reflect long-term sales trends.

The amendments, as proposed, present a procedural issue that needs to be addressed. While the determination of sales in or into the United States must be made within sixty days of filing or consummation, there is no cutoff time for the inclusion of current year's sales. If the current proposal is adopted, the rules should also provide that current year's sales should include sales for all months of the current fiscal year for which sales data are available.

For these reasons, as well as consistency, sales in or into the United States should remain limited to those sales made during the last complete fiscal year.

Very truly yours,

Ronald A. Bloch