

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

July 17, 2001

The Honorable John Ashcroft  
Attorney General of the United States  
United States Department of Justice  
Washington, D.C. 20530-0001

The Honorable Timothy Muris  
Chairman  
Federal Trade Commission  
Washington, D.C. 20580

Dear General Ashcroft and Chairman Muris:

I am writing to express my views concerning the interim rules that the Federal Trade Commission (the "Commission") has issued to implement the amendments that Congress made last year to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The amendments, as you know, raised the size of transaction threshold in the HSR Act from \$15 million to \$50 million, the first time the threshold had been increased in 25 years. They also raised the filing fees that must be paid in connection with certain transactions to assure adequate funding for the Antitrust Division and the Commission.

Commission staff has provided my staff with a comprehensive and instructive briefing clarifying and explaining the interim rules. I was pleased to learn that, in considering whether the interim rules need to be modified or refined, the antitrust agencies have been soliciting and considering the views of the business community and the antitrust bar.

Prior to the recent amendments to the HSR Act, the law had become a costly regulatory and financial burden upon companies. Congress therefore changed the law to increase the size of transaction threshold from \$15 million to \$50 million, thus reducing the number of transactions for which filings and fees are required. This change provided significant regulatory and financial relief for businesses, while ensuring that pre-merger filings would continue to be made for larger transactions with the greatest economic impact.

Congress recognized that removing smaller transactions from filing and fee requirements would reduce the total amount that the antitrust agencies receive in filing fees. We therefore increased the filing fee for certain transactions. Specifically, Congress mandated that the filing fee would be \$45,000 for transactions valued between \$50 million and \$100 million, \$125,000 for transactions valued between \$100 million and \$500 million, and \$280,000 for transactions valued at more than \$500 million. The sole purpose of this new multi-tiered filing fee system was to offset the decrease in the total amount of filing fees the agencies would receive as a result of eliminating filing and fee requirements for smaller transactions.

As you know, the FTC has issued interim rules under which intermediate reporting thresholds based on percentage of shares acquired have been replaced by intermediate reporting thresholds based on the dollar values used in the new multi-tiered fee system. The Commission explained this change as appearing to be "consistent with congressional intent." The Commission reasoned that Congress adopted a tiered filing fee structure because "large dollar value transactions are more likely to require more antitrust review [and more agency resources] than smaller ones." The Commission concluded that Congress thought that "there is some significance" to the particular dollar value thresholds used to determine fee amounts, and, therefore, they also should be used as intermediate reporting thresholds.

As the primary author of the amendments to the HSR Act, I can assure you that Congress did not intend for the dollar values used in the multi-tiered filing system to create new filing or fee obligations. Indeed, as explained above, the dollar values used were chosen simply to adjust for the fact that the amendments would eliminate filing and fee requirements for numerous smaller transactions. These amounts were definitely not selected because they were closely correlated with either increased competitive concerns or increased investigative costs.

In addition, the use of the dollar values as intermediate reporting thresholds may require merging parties to pay higher filing fees than Congress anticipated. The highest stated filing fee on the face of the amended HSR Act is \$280,000. But if an acquirer buys an acquired firm through separate purchases which

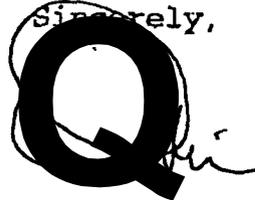
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cross each of the new intermediate reporting thresholds, then the acquirer must pay a total of \$450,000. Congress did not intend that its amendments to the HSR Act to be used to require such high filing fees and to increase the revenue to the antitrust agencies from such fees. Indeed, I have long held the view that the antitrust agencies should not be funded by filing fees at all, but instead should be funded by direct appropriation from the general treasury. I believe that such fee requirements could cause an unfortunate conflict of interest where proper antitrust policy might be affected by budgetary concerns.

As your agencies move forward to transform the interim rules into final rules, I ask that serious consideration be given to alternatives to using the dollar values in the new multi-tiered fee system as intermediate reporting thresholds, as well as to the concerns that the business community and the antitrust bar have with other aspects of the interim rules.

Sincerely,



Orrin G. Hatch  
Ranking Republican Member

OGH/tpp

cc: Assistant Attorney General Charles James  
Commissioner Sheila F. Anthony  
Commissioner Mozelle W. Thompson  
Commissioner Orson Swindle  
Commissioner Thomas B. Leary