



William J. Fitzpatrick
Executive Vice President,
General Counsel and Secretary



October 25, 1988

Secretary
Federal Trade Commission
Room 136
Washington, D.C. 20580

Assistant Attorney General
Antitrust Division
Department of Justice
Room 3214
Washington, D.C. 20530

Re: Premerger Notification; Reporting and Waiting Period Requirements; Federal Register, Volume 53, Number 184, page 36831, September 22, 1988

Dear Sirs:

We are pleased to comment on the Commission's proposal to amend 12 CFR Parts 801, 802 and 803 for the purpose of modifying the premerger notification and reporting requirements under Section 7A of the Clayton Act.

At the outset, we must express our surprise and disappointment that the Commission would seek to eliminate the current reporting requirements on the grounds that deliberate violations have become the norm. Notwithstanding the disclaimer in the Commission's announcement of its proposal, it is apparent that the only justification and motivation for the amendments is to accommodate those who have chosen to ignore their legal obligations.

As stated in the announcement: "Experience with the premerger notification program demonstrates a persistent problem in obtaining full compliance with notification obligations for acquisitions of 10 percent or less of an issuer's voting securities"; "... it appears that some purchasers have used various techniques to avoid their antitrust notification obligation."; "These acquirors have an incentive not to comply with the premerger notification rules ..."; "The Commission's experience ... suggests that acquiring persons have sought ... to avoid filing premerger notifications."

Secretary, Federal Trade Commission
Assistant Attorney General,
Antitrust Division, Department of Justice
October 25, 1988
Page Two

In light of these conclusions, have the Commission and the Division determined that increased enforcement is required? To the contrary, the Commission's staff asserts that "the question raised ... is whether the Commission can alter its premerger notification rules in a way that will reduce this incentive ..." By the same logic, the Securities and Exchange Commission would seek to repeal its Rule 10b-5 because too many insider trading violations have occurred and the Federal Communications Commission would repeal its foreign ownership rule because too many instances of noncompliance have been discovered.

We suggest that the Commission and the Division look instead to the original purpose and intent of the Act. The \$15 million reporting and notification threshold was not selected without considerable debate. It reflects a conscious determination by Congress of the appropriate point for anti-trust scrutiny. If the Commission and the Division believe that Congress was mistaken in its judgment or that circumstances have changed, the only appropriate course is to recommend that Congress amend Section 7A. For the Commission to suggest that a statutory threshold specified by Congress be eliminated through regulatory pronouncement is not appropriate.

Moreover, the Commission's proposal would deny it and the Division access to information which may be critical to a premerger evaluation. By promoting the goal of "secrecy", a goal which is nowhere advanced in either the securities laws or the antitrust laws, valuable input concerning the possible anticompetitive consequences of the acquisition from the target company, its customers and suppliers, consumer groups, state regulatory authorities and others would be effectively foreclosed. The Commission and the Division cannot fulfill their statutory responsibilities on the basis of self-serving information provided solely by the acquiror.

Most importantly, the Commission must take into account the real world in which publically traded corporations exist. It is often in the interests of acquirors to voluntarily publicize small ownership interests in target companies. Secrecy is not an objective, it can be a hindrance. The true objective is to set in motion a course of events leading to the rapid accumulation of large blocks of voting securities of the target by arbitrageurs, hedge funds, offshore funds and other speculators. The question then becomes not whether the target will be merged but with whom. There can be no question that these tactics, which have been prevalent in recent years,

Secretary, Federal Trade Commission
Assistant Attorney General,
Antitrust Division, Department of Justice
October 25, 1988
Page Three

can and do have significant effects on interstate commerce and on the competitive environment. By encouraging such transactions, the Commission's proposal threatens further disruption of established supply and distribution systems, the further deterioration of the equity base of American industry, and increased concentration in vital areas of our economy.

As but one example, assume a highly concentrated industry in which Company A secretly purchases 4% of the voting securities of Company B and announces its desire to merge. Of course, Company A could not succeed in its plan because of antitrust considerations. Nonetheless, it hopes to force the sale of B, its ultimate breakup, or a crippling recapitalization. At a minimum, A will have diverted B's attention and resources from the competitive arena. The current \$15 million reporting and notification threshold deters such actions because acquirors know, if they comply, that the Commission or the Division will oppose the proposed transaction.

We believe that the proposed amendments are ill conceived and should be withdrawn. The Commission's efforts should instead be focused upon enforcing compliance with the existing threshold. Only when acquirors have demonstrated their willingness to comply with their existing legal obligations should the Commission consider recommending modifications therein to Congress.

Very truly yours,

A handwritten signature in cursive script, appearing to read "William J. Fisher". The signature is written in dark ink and is positioned below the typed name "William J. Fisher".

WJF/ob