COMMENT No. 08

United States Senate

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

WASHINGTON, DC 20510-6075

October 25, 1988

Honorable Daniel Oliver
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Chairman:

I am writing concerning the Federal Trade Commission's proposed amendments to the premerger notification rules under the Hart-Scott-Rodino Act. As a member of the Securities Subcommittee of the Senate Banking Committee, I am strongly opposed to these amendments because they will seriously weaken antitrust law provisions that work side-by-side with securities law. The result of these amendments will be to make hostile takeovers much easier to accomplish. Although I recognize that securities issues such as those that arise in hostile takeovers are not the first concern of the Commission, the action that you are taking could indeed have a very significant impact on the conduct of tender offers. In view of the speculative frenzy, excessive leverage, and potentially massive restructurings that could result from current takeover bids, I believe that amendments to the premerger notification rules, which would significantly affect hostile takeovers, should be deliberated and made only by Congress.

Indeed, I find the rationale for the proposed amendments flawed. The premerger notification rules should not be relaxed because, as you say, there is too much incentive to avoid them; rather, they should be strengthened. The Congressional intent of the Hart-Scott-Rodino Act is unequivocally to create a program which assures that mergers can be evaluated before businesses become intertwined. Increasing the filing threshold to 10 percent of an issuer's outstanding securities from $15 million worth of shares, could mean -- contrary to Congressional intent -- that there would be absolutely no advance antitrust notification for major transactions with significant antitrust overtones. In most large publicly traded corporations, a 10 percent block of shares is an enormous stake that can easily confer control over the corporation.

It is certainly true that acquirors may seek to avoid their obligation to file under the Hart-Scott-Rodino Act in order to continue acquiring as much as possible of a target's shares secretly and cheaply. The longer the bidder waits to

disclose, the greater the profit and the less likely a target company will be able to mount a defense. Hence, relaxing the premerger notification rules will not only weaken antitrust enforcement but could assist the strategies of corporate raiders.

Lastly, by chosing a 10 percent threshold rather than seeking conformance with the 5 percent threshold provided for under securities law, I believe the Commission could exacerbate a loophole in securities law that has greatly assisted corporate raiders in secret acquisitions of stock and that nearly all securities commentators have said should be closed. As you well know, an acquiror of a company's shares is required to file under securities law when a threshold of 5 percent of outstanding shares is reached. However, many raiders, including Sir James Goldsmith and Carl Icahn, have actually acquired over 10 percent of the shares of companies by utilizing the so-called "10-day window."

The Securities and Exchange Commission, the Securities Industry Association, and all Congressional leaders on securities issues fully agree that the "10-day window" loophole should be closed -- by requiring disclosure immediately after stock purchases surpass the 5 percent level. I am very disturbed that you would point out the availability of the "10-day window" loophole in your proposed rulemaking as a justification for setting the Hart-Scott-Rodino Act threshold at 10 percent.

In sum, I urge the Commission to close loopholes in the prenotification rules rather than seek to weaken these rules. In recent days, the hostile takeover craze seems to have entered an even more extraordinary phase of massive highly leveraged deals that are causing great worry to economists and to the employees of the firms involved. In this atmosphere, any federal action that would serve to encourage takeovers should at the very least be approved by Congress. I hope that you will give this matter your immediate attention and I look forward to hearing from you in the near future.

Sincerely,

Jim Sasser
United States Senator