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November 21, 1988

Secretary
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Room 136
Washington, D.C. 20580

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

Re: Comments Submitted by Wilmer, Cutler & Pickering Regarding Proposed Amendments to the Hart-Scott-Rodino Improvements Act of 1976, 53 Fed. Reg. 36,831 (September 22, 1988)

Dear Sir or Madam:

On September 22, 1988, the Federal Trade Commission (the "FTC" or the "Commission") issued a Notice of Proposed Rulemaking (the "Notice") concerning the premerger notification rules. In that Notice, the Commission invited comment on one principal proposal and two alternative proposals:

-- The Commission's principal proposal would exempt from the premerger notification requirements all acquisitions of less than ten percent of an issuer's outstanding voting securities.

-- The first alternative proposal would permit the purchase of such securities without prior notification only if the securities were held in escrow pending antitrust review.

-- The second alternative would continue to require the acquiring person to file a premerger notification before making such acquisitions, but would give the acquiring person the option of filing an "optional report form," in which case the acquiring person would not be required to notify the acquired person of its intended acquisition.

Wilmer, Cutler & Pickering fully supports the Commission's principal proposal. We believe that this proposal would significantly improve the administration of the premerger notification program and would not, in any way, impair the ability of the Commission or the Department of Justice to review acquisitions that may have anticompetitive implications. If the

Commission for any reason does not adopt that proposal, we would support the escrow alternative, although we regard that alternative as considerably less satisfactory. We do not support the optional report form alternative, which we believe would not offer a practical answer to the problems identified in the Commission's Notice.

I. The Need for Change

Under the current rules, an acquiring person must notify the target company of its intentions, file a premerger notification with the FTC and the Justice Department, and comply with the statutory waiting period before acquiring $15 million or more of the voting securities of any issuer. In the case of large, publicly traded companies, this frequently means that premerger notification is required before an acquiring person may acquire as little as a fraction of one percent of the target's stock.

By contrast, the securities laws do not require public disclosure of an acquisition until the acquiring person holds five percent of an issuer's voting securities, and even then provides a ten-day window during which the acquiring person may continue to buy before disclosing its purchases. The current premerger notification rules thus require notification both to the antitrust authorities and to the target management long before public disclosure is required under the securities laws.

It has become evident over the last several years that these differences create a substantial incentive to structure transactions in such a fashion that premerger notification is not required. As the Commission recognizes, premature disclosure of the acquiring person's intentions can be very costly, both in terms of driving up the price of the stock and in enabling the target's management to undertake defensive measures. It is not surprising, therefore, to find an increasing number of acquiring firms structuring their transactions in such a way that premerger reporting is not required.

The Commission has devoted an increasingly substantial portion of its limited enforcement resources to investigating alleged violations of the HSR reporting requirements. Many of these investigations have focussed on questions of subjective intent -- for example, whether the acquisition was solely for purposes of investment or whether the transaction was structured as it was "for purposes of avoidance." Such investigations are extremely costly and yield, at best, uncertain results. Moreover, they have diverted attention from substantial antitrust enforcement by focussing on transactions, and preliminary steps in larger transactions, that are free of antitrust concern.

Apart from the resulting strain on the Commission's resources, the current situation makes counseling in this area difficult. It is very hard for a lawyer to advise his client whether it meets the requirements of the "solely for purposes of investment" exemption or whether it is likely to run afoul of section 801.90, when in both cases the answer may turn in part on questions of subjective intent.

More seriously, the current rules interfere with the efficient functioning of the capital markets. First of all, as already noted, they create incentives that may cause parties to structure their transactions in less than optimal ways so as not to be forced prematurely to disclose their plans. Second, the rules provide target company management an additional weapon for defending themselves against unwanted takeovers. They serve, therefore, to tilt the playing field in the favor of incumbent management, an outcome which not only interferes with the free operation of the capital markets but is also directly contrary to Congress' stated objectives.

Finally, the current rules lend themselves to abuse by corporate raiders who use them as a device for putting "companies into play". The mere filing of a premerger notification form by a corporate raider may trigger disclosure obligations for the target company. The resulting public announcement that a well known corporate raider is seeking approval from the antitrust authorities for the acquisition of shares of a target company causes arbitrageurs to begin purchasing shares of the target. Once this process begins, the target company management often has no choice but to seek another buyer or to otherwise re-structure the company. This creates instability, in both capital markets and corporate management.

None of these problems would be a sufficient reason for change if the reporting of such small acquisitions of the voting stock of large issuers were necessary in order for the premerger notification procedures to achieve the purposes that Congress intended. But, as the Commission shows in its Notice, that is not the case.

It is clear from the Act itself and from its legislative history that the sole purpose of the premerger notification requirements was to provide the antitrust agencies an adequate opportunity to review potentially anticompetitive mergers before they were consummated. The Act then enables the agencies to seek a court order to enjoin those mergers that may substantially lessen competition before they are completed and the assets scrambled together. It is also clear from the legislative history that Congress was concerned that the Act's reporting requirements not interfere unnecessarily with the operation of the market for corporate control. It was for this reason that Congress, for example, established a shorter waiting period for cash tender offers than for other acquisitions. It was also for this reason that Congress gave the agencies broad authority to exempt classes of "transactions that are not likely to violate the antitrust laws." 15 U.S.C. § 18A(d)(2)(B).

As the Commission demonstrates effectively in its Notice, the Act's objectives do not require the reporting of acquisitions of less than ten percent of the voting stock of any issuer. The Commission's experience shows that such acquisitions rarely, if ever, raise competitive problems. As the Commission notes, neither agency has ever challenged such an acquisition under section 7. Indeed, apparently the only two second requests issued in such situations involved acquisitions of voting securities that were related to much more substantial acquisitions and would have been reported even if the proposed exemption had existed.

In virtually all cases where such small investments are not solely for purpose of investment, they are the first step toward the acquisition of a more substantial stake -- either by tender offer or otherwise. In such cases, under any of the proposals offered, the agencies will have a full opportunity to review the antitrust merits of the transaction before the acquiring person goes over ten percent.

II. The Specific Proposals

This brings us to the Commission's three specific proposals. As we indicated at the outset, we favor the Commission's principal proposal. The escrow alternative -- while better than the current situation -- would provide a less complete, and an administratively more awkward, solution. The optional report form alternative, in our judgment, would be unworkable.

A. The Principal Proposal

The principal proposal would exempt all acquisitions of less than ten percent of any issuer's outstanding voting shares. We believe this would be a direct, and fully satisfactory, solution to the problems that exist under the current rules.

By exempting all acquisitions of less than ten percent, this proposal would exempt only those transactions which pose no serious antitrust issue. At the same time, the exemption would eliminate the time-consuming and often fruitless inquiries into subjective intent now required under the investment only exemption.

A ten percent reporting threshold would, furthermore, be fully consistent with the securities law disclosure requirements. While it is theoretically possible for a purchaser to acquire more than ten percent of the voting securities of an issuer during the ten-day window, in our experience, that rarely happens. A ten percent rule would, therefore, virtually eliminate the current incentives to avoid reporting, since reporting would no longer be required before disclosure is required under the securities laws.

We would not, on the other hand, support reducing the threshold to five percent. While facially consistent with the securities law threshold, a five percent requirement would -- as a matter of practice -- require reporting well before disclosure is required under the securities laws. A five percent threshold, therefore, would not eliminate the incentives for noncompliance. Acquiring persons would have to continue to rely, for example, on the investment only exemption for purchases between five and ten percent, thus requiring the Commission to continue to inquire into questions of subjective intent. A five percent threshold would simply further complicate the premerger rules, without achieving the objectives outlined in the Notice. If, on the other hand, Congress were to close the ten-day window under the securities laws, a five percent threshold would be less objectionable.

We recognize, as the Commission observes, that there is one respect in which the securities law disclosure requirements are more stringent than the premerger reporting requirements, and that is in their treatment of purchases by a group that is acting jointly. We agree that it would be appropriate for the Commission to review its rules with respect to groups in light of the SEC's rules, if the Commission adopts a flat ten percent exemption. Importing the group concept from the securities laws to the premerger reporting context, however, would raise a number of difficult issues which should receive careful examination before proceeding.

B. <u>The Escrow Alternative</u>

Since acquisitions of less than ten percent of the voting stock of an issuer are unlikely ever to raise anticompetitive concerns, we believe the alternative escrow arrangement would simply impose a burdensome and administratively awkward regulatory requirement for no purpose. We, therefore, see no reason to require an escrow arrangement, although we agree that even with such a requirement, the proposed exemption would still be better than the current situation.

We do not believe the Commission should have any concern that even with an escrow requirement, an acquisition might somehow lessen competition because the shares will have been separated from their prior holders. In takeover situations, it is common for shares to change hands prior to their ultimate purchase by the acquiring person. So long as the shares are publicly traded, there will be a ready market for them, if the buyer is subsequently required to divest them.1/

C. The Optional Report Form

We believe the optional report form would be a bad idea. Although notice to the target would not be required if the optional form were used, we believe that most acquiring persons would be sufficiently concerned that notification to the Commission would result in further disclosure -- most likely as a result of legitimate inquiries by the Commission's staff in the course of its review of the transaction -- that this alternative would not significantly reduce the incentive to avoid reporting. This means that transactions would continue to be structured so that reporting is not required and that counsellors and the

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1/ If the Commission is concerned about the change in ownership in the case of non-publicly traded issuers, it might consider limiting the ten percent exemption to acquisitions of publicly trade securities.

Commission would continue to have to examine questions of subjective intent.

In addition, we question the practicability of this alternative. As currently drafted, the optional report form requires detailed information about the target that is not likely to be available to most acquiring persons in nonconsensual transactions. For these reasons, we are opposed to this alternative.

Respectfully submitted,

WILMER, CUTLER & PICKERING

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