COMMENT No. 15

15

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
DEC. 20 1988
223-04
SECRETARY

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-4793
(202) 783-0800

December 19, 1988

Donald S. Clark, Esq. BY HAND
Secretary
Federal Trade Commission
Room 136
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Charles F. Rule, Esq. BY HAND
Assistant Attorney General
Antitrust Division
Department of Justice
Room 3214
10th and Constitution Avenue, N.W.
Washington, DC 20530

Re: Comments on Proposed Modification of Premerger Notification Reporting and Waiting Period Requirements

Gentlemen:

Enclosed for filing are comments opposing the Federal Trade Commission's pending proposal to exempt acquisitions of up to 10% of an issuer's voting securities from premerger notification obligations. These comments were prepared by Covington & Burling, Capital Economics, and Howrey & Simon.

We would be glad to address any questions you may have regarding the enclosed materials.

Yours very truly,

John C. Peirce

COMMENT No. 15

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
DEC 20 1988
SECRETARY

Before the
FEDERAL TRADE COMMISSION
and
DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

COMMENTS OPPOSING PROPOSALS TO EXEMPT ACQUISITIONS OF TEN PERCENT OR LESS OF AN ISSUER'S VOTING SECURITIES FROM EXISTING PREMERGER NOTIFICATION OBLIGATIONS

COVINGTON & BURLING
George M. Chester, Jr.
Richard G. Slattery
Evan R. Cox
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

HOWREY & SIMON
Alan M. Wiseman
Raymond A. Jacobsen, Jr.
John C. Peirce
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

CAPITAL ECONOMICS
William Kerr, Ph.D.
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 383-7411

December 19, 1988

TABLE OF CONTENTS

		Page
I.	INTRODUCTION AND SUMMARY	1
II.	THE PROPOSAL WOULD EXEMPT TRANSACTIONS THAT MAY RAISE SUBSTANTIAL ANTITRUST CONCERNS AND THEREFORE REQUIRE PREMERGER AGENCY REVIEW	7
	A. Clayton Act Standards	9
	B. Antitrust Case Law	12
	C. Economic Authorities	21
	D. Statutory and Regulatory Presumptions	25
	1. Section 7A of the Clayton Act	25
	2. Section 13(d) of the Securities Exchange Act of 1934	31
	3. Industry-Specific Statutes	33
	a. Federal Aviation Act	33
	b. Bank Holding Company Act	34
	c. Interstate Commerce Act	36
	d. Other Statutes	36
	E. Antitrust Enforcement Experience	37
III.	THE PROPOSAL WOULD INTERFERE WITH PREMERGER REVIEW OF LARGE ACQUISITIONS AND CREATE INCENTIVES FOR ANTICOMPETITIVE BEHAVIOR	39
	A. Examples of Transactions That Would Be Exempt	40
	B. Example of Acquisitions In Which Premerger Reporting Would Be Delayed	46
IV.	IN LIEU OF THE PROPOSED EXEMPTION, THE COMMISSION SHOULD SEEK PENALTIES THAT WILL EFFECTIVELY DETER NONCOMPLIANCE	48
V.	THE ALTERNATIVE PROPOSALS ARE NOT VIABLE	50
	A. The Escrow Alternative	50
	B. The Optional Notification Alternative	52
VI.	CONCLUSION	54

COMMENTS OPPOSING PROPOSALS TO EXEMPT
ACQUISITIONS OF TEN PERCENT OR LESS
OF AN ISSUER'S VOTING SECURITIES FROM
EXISTING PREMERGER NOTIFICATION OBLIGATIONS

I. INTRODUCTION AND SUMMARY

These comments are submitted in response to the Notice of Proposed Rulemaking and Request for Comments published by the Federal Trade Commission ("Commission") on September 22, 1988, 53 Fed. Reg. 36,831.

The Commission is proposing to exempt from existing federal premerger notification requirements[1/] all acquisitions of up to 10% of a corporation's shares, including those of very large corporations, by purchasers seeking to influence or control the business decisions of the target company.[2/] The proposed exemption would apply when the 10% acquisition was the opening move in a hostile takeover, as well as when one company simply wished to obtain an influential minority ownership position in another.

Under the FTC's proposal, the Commission and the Department of Justice ("Department") would not even be notified of such transactions until potentially billions of dollars worth of stock had already changed hands. In the case of

---

1/ Section 7A of the Clayton Act, 15 U.S.C. § 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

2/ Section 7A(c)(9) of the Clayton Act, 15 U.S.C. § 18a(c)(9) and 15 C.F.R. § 802.9 (1988) already exempt acquisitions of up to 10% of an issuer's voting securities when made solely for purposes of investment.

Philip Morris' recent offer for Kraft, for example, the FTC proposal would have permitted Philip Morris to purchase $1.1 billion of Kraft stock before giving the enforcement agencies any opportunity for federal antitrust review. If the FTC's proposal had been in effect, in at least 12 recent acquisitions or attempted acquisitions, no federal agency would have been advised about the transaction before over $500 million worth of stock had been acquired:

Target Firm/ Acquiring Firm	Value of Shares That Could Be Acquired Without Reporting Under Proposed Rules
RJR Nabisco Kohlberg Kravis Roberts	$2,507,000,000
Gulf Corp. Chevron Corp.	$1,321,000,000
Kraft Inc. Philip Morris Co.	$1,310,000,000
Getty Oil Co. Texaco Inc.	$1,013,000,000
Conoco Inc. Du Pont Co.	$ 804,000,000
Standard Oil Co. British Petroleum Co.	$ 776,000,000
Marathon Oil Co. U.S. Steel Corp.	$ 662,000,000
RCA Corp. General Electric Corp.	$ 597,000,000
General Foods Corp. Philip Morris Cos.	$ 563,000,000
Beatrice Cos. Kohlberg Kravis Roberts	$ 536,000,000

Hughes Aircraft Co. General Motors Corp.	$ 503,000,000
Cities Service Co. Gulf Oil Co.	$ 500,000,000

A number of these and other acquisitions that would be affected by the Commission's proposal were closely reviewed by the Commission and the Department, and several were challenged on antitrust grounds.3/ Under current law, the antitrust agencies in most cases must be notified before the acquiring party buys $15 million of the target's stock.4/ The FTC's proposed change would effectively remove the $15 million size-of-transaction test from the premerger statutory scheme for all transactions involving 10% or less of a company's shares.

We believe the proposed change is an ill-advised, and probably unauthorized, effort by the Commission to repeal the Congressionally-enacted $15 million notification threshold. If adopted, the proposal would permit acquisitions that may raise substantial antitrust concerns to go forward without the Congressionally-required premerger review. Moreover, it would impede the antitrust enforcement activity of both the Commission and the Department even in acquisitions that would not be completely exempted, because it would delay antitrust review until the acquiring party had already obtained a substantial, and likely influential, block of the target's stock. Indeed, only a year ago, the Commission testified

3/ See Table I, attached hereto.

4/ Clayton Act § 7A(a)(3)(B), 15 U.S.C. § 18a(a)(3)(B).

before Congress that the $15 million threshold should remain at that level, rather than be raised to $25 million. The Department of Justice testified that the dollar threshold worked well and should not be abolished. Moreover, in 1978, the Commission opposed the very proposal that it now offers. See pp. 28-29, infra.

The Commission is not authorized to promulgate a rule that would both repeal a Congressionally enacted notification threshold and exempt some very large transactions that clearly may raise antitrust concerns. Early antitrust review is the guiding principle of Section 7 of the Clayton Act, the basic federal antitrust law governing mergers. Section 7 allows for enjoining potentially anticompetitive acquisitions in their "incipiency," i.e., at the earliest moment when a potential competitive problem is detected. Congress enacted the premerger notification law in 1976 to serve this goal by providing the Commission and the Department with an opportunity to review all potentially significant transactions before consummation.

Although Congress delegated authority to the Commission to write narrow exemptions for specific classes of transactions that are unlikely to raise antitrust questions, the Commission has failed to show that the acquisitions it now proposes to exempt, i.e., acquisitions of up to 10% of a company's shares by a purchaser seeking influence or control, are inherently devoid of antitrust concern. On the contrary, numerous legal and economic authorities support the view that minority stock acquisitions of this type may raise valid antitrust concerns when they confer influence or control over a competitor, customer or supplier. Court and agency decisions, as well as economic authorities, indicate that 10% shareholdings, or even lower, may give the holder substantial influence, and even control, of a large corporation's management. The fact that the Commission has chosen not to challenge acquisitions of under 10% does not establish that such minority shareholdings, if acquired for the purpose of influencing or controlling large corporations, are unlikely to raise potential antitrust issues.

The Commission's proposal would permit -- and, indeed, encourage -- companies to acquire up to 10% of a competitor's stock, either to place a director on the competitor's board, or to influence the competitor's business decisions as its largest shareholder. The proposal also would, in all likelihood, permit competitors in concentrated markets to acquire unreported interlocking minority shareholdings, which could reduce competitive vigor and increase the risks of illegal collusion.

Moreover, the proposal would create incentives for businesses, acting individually or in combination, to engage in potentially anticompetitive behavior by making acquisitions of up to 10 percent of their competitors' stock as a prelude to a threatened takeover. The proposal would exempt such strategies from prior antitrust review, and would place increased pressure on an already overburdened enforcement staff. It also would require the enforcement agencies to "unscramble" anticompetitive shareholdings of up to 10% acquired prior to a premerger filing.

The Commission asserts that its proposed change is necessary because a few companies are evading, or at least have incentives to evade, the premerger reporting requirements under current law, and the Commission is having consequent difficulty enforcing the law. This compliance problem admittedly is limited to a small number of large hostile takeovers, in which the party initiating the takeover attempt may be reluctant to notify the target prior to acquiring more than $15 million of the target's shares. Rather than accommodating the lawbreakers by relaxing the reporting requirements, as proposed, we believe the Commission in appropriate cases should consider seeking stronger sanctions, such as equitable disgorgement of profits, that would remove the "incentives for noncompliance" by making violations unprofitable.

The two alternative proposals also are not viable. The escrow proposal is unlikely to increase compliance or reduce enforcement costs, and it assumes incorrectly that all risk of anticompetitive effects is eliminated if an acquirer cannot exercise its voting power. The optional notification proposal would not provide the antitrust agencies with necessary information known only to the target company, would generate duplicative filings, would place the enforcement agencies in the inappropriate position of deciding whether <u>they</u> should notify the target of an acquisition the acquirer intended to keep secret, and still would have all of the shortcomings of the principal proposal.

II. THE PROPOSAL WOULD EXEMPT TRANSACTIONS THAT MAY RAISE SUBSTANTIAL ANTITRUST CONCERNS AND THEREFORE REQUIRE PREMERGER AGENCY REVIEW

The Commission claims it is empowered to make the proposed change under Section 7A(d)(2)(B) of the Clayton Act, which delegates authority to: "exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws." The Commission avers that the transactions it seeks to exempt are not likely to violate the antitrust laws. The Commission admits that "[i]t is not possible to say that voting securities acquisitions of 10 percent or less, or 5 percent or less, cannot violate the antitrust laws."5/ Nevertheless, it asserts, acquisitions of less than 10% of a company's shares or assets are inherently less troublesome than acquisitions of 10% or more, and therefore appropriate for exemption.

The transactions to be exempted under the proposal would include large purchases of stock in sizable companies having outstanding shares valued in excess of $150 million. The greatest impact of the proposal would be on acquisitions of large companies, such as the $1.5 billion company used in the Commission's hypothetical example.6/ In such a case, as the

---

5/ 53 Fed. Reg. at 36,841 (1988).

6/ 53 Fed. Reg. at 36,840 (1988).

Commission acknowledges, the proposal would effectively raise the statutory size-of-transaction test from $15 million to $150 million or higher. In the campaign for control of RJR Nabisco, the proposed rule would have raised the notification threshold from $15 million to about $2.5 billion.

The other salient characteristic of the transactions to be exempted is their purpose. The exemption would affect only purchasers whose purpose was to influence or control the business decisions of the target company, including, but not limited to, 10% acquisitions made as an overture to a takeover. Current law already exempts acquisitions "solely for the purpose of investment" of up to 10% of an issuer's shares,7/ an exemption which the pending proposal would "subsume."8/ The Commission defines the "investment only" exemption as follows:

> Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination or

---

7/ Clayton Act § 7A(c)(9), 15 U.S.C. § 18a(c)(9); 16 C.F.R. § 802.9 (1988); see also Clayton Act § 7 (Act's prohibitions do "not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."); Cf. F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 818 (2d Cir. 1979) (even when acquisition of minority shareholding might not confer immediate control of competitor, acquisition was not for investment only because "it is difficult to believe that Schmidt invested in Schaefer without the hope of obtaining control at some point.")

8/ Statement of Basis and Purpose, 53 Fed. Reg. at 36,834 (1988).

<u>direction of the basic business decisions of the issuer.</u>[9]

By definition, then, the transactions to be exempted under the proposed rule are those in which the acquiring party intends to "participat[e] in the formulation, determination or direction of the basic business decisions of the issuer," <u>and</u> the target corporation's stock is valued in excess of $150 million. The proposed exemption can be justified only if such acquisitions, when they involve 10% or less of the target's stock, are clearly unlikely to lessen competition. The Commission, we submit, has not made, and indeed cannot make, such a showing.

A. <u>Clayton Act Standards</u>

The Commission acknowledges that Section 7 of the Clayton Act prohibits any acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly,"[10] and empowers courts to enjoin any stock acquisition that may give the acquiring person "the power to influence target management in an anticompetitive manner."[11] The Commission further acknowledges that numerous decisions hold that anticompetitive consequences may result from shareholdings falling far short of majority control. However,

---

9/ 16 C.F.R. § 801.1(i)(1) (1988) (emphasis added).

10/ 15 U.S.C. §18.

11/ Statement of Basis and Purpose § II.A., 53 Fed. Reg at 36,836, citing <u>United States v. E.I. du Pont de Nemours & Co.</u>, 353 U.S. 586 (1957).

the Commission concludes that although shareholdings of 25, 20, or even 15% may involve anticompetitive influence or control, shareholdings below 10% are unlikely to do so.12/ The authorities cited by the Commission, other decisions which it has not cited, and even the Commission's own precedents, contradict this conclusion.

The Clayton Act prohibits not only acquisitions that restrain trade, but also those whose effect "may be" substantially to lessen competition. Section 7 is intended to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."13/ Section 7 confers "jurisdiction to consider the anticompetitive effects of partial acquisitions, even where

---

12/ It appears that the Commission selected a 10% threshold, not because of any antitrust analysis or evidence that an 11% shareholding poses any greater antitrust concern than a 9% shareholding, but rather because the perceived "incentives for noncompliance" appear to decrease for acquisitions in excess of 10% due to securities law considerations. See Statement of Basis and Purpose § I.B., III, 53 Fed. Reg. at 36,835-36, 36,839 ("the Commission has identified the 10 percent level based also in part on marketplace incentives related to the securities laws. If the federal securities laws are amended, the Commission may want to focus on a different threshold level.") Because the Commission is only empowered to exempt transactions that are unlikely to raise antitrust concerns, these comments are limited to antitrust issues. Balancing antitrust law and the securities law considerations is a legislative, not an administrative, task.

13/ S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950). The Supreme Court acknowledged this Congressional purpose, and noted that the Commission itself suggested the "incipiency" standard to Congress, in Ford Motor Co. v. United States, 405 U.S. 562, 567 n.4 (1972).

control is neither attained nor contemplated."14/ As the Supreme Court stated in Denver and Rio Grande Western R.R. Co. v. United States, 387 U.S. 485, 501 (1967): "A company need not acquire control of another company in order to violate the Clayton Act."15/ Moreover, the Commission itself claims far-reaching powers under Section 5 of the FTC Act to "arrest trade restraints in their incipiency without proof that they amount to an outright violation of . . . the antitrust laws."16/

Thus, the relevant inquiry here is not merely whether acquisitions of 10% or less of the shares of a large corporation may constitute "control," although legal and economic authorities discussed herein show that, in many cases, a holder of 10% or less may well exert competitively significant influence or control. The Commission also must ask whether there are circumstances under which the acquisition of 10% or less of a large company's shares may represent incipient control, or have the potential for exerting anticompetitive influence on the target company's management, particularly when

---

14/ 5 P. Areeda & D. Turner, Antitrust Law ¶ 1203b (1980); citing American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 395 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958).

15/ See also Brown Shoe Co. v. United States, 370 U.S. 294, (1962) (Clayton Act § 7 was concerned with "probabilities, not certainties.")

16/ FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966); see also Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 466 (1941); Tysons Corner Regional Shopping Center, 85 F.T.C. 970, 1009 (1975).

the acquiring party's ultimate goal is a takeover.17/ Under antitrust case law (including the cases cited and discussed by the Commission) and widely-accepted economic learning there is no minimum percentage shareholding below which antitrust concerns are absent. Indeed, in the case of large publicly-held corporations it is not unusual for shareholders with holdings under 10% to exercise a very substantial degree of influence or control.

B. Antitrust Case Law

We are unaware of, and the Commission does not cite, any decision suggesting that there is any minimum percentage shareholding below which Clayton Act issues rarely arise. On the contrary, the cases cited by the Commission, and other decisions not cited, establish that any level of shareholding may substantially lessen competition. Such circumstances are as likely to be present in the case of a 9.9% shareholding as

---

17/ The Commission's analysis at times seems to suggest that actual control (or actual conspiracy) is the standard for determining whether an acquisition may be illegal:

> Anticompetitive acquisitions appear to be of two principal types: acquisitions conferring control of an issuer, and acquisitions that facilitate collusion by obtaining the power to elect a member of the issuer's board of directors.

Statement of Basis and Purpose § II.A, 53 Fed. Reg. at 36,837 (1988). If this means that the Clayton Act only prohibits "anticompetitive" acquisitions that confer actual control or cause actual collusion, it is of course, an incorrect and overly restrictive statement of the law.

in the case of equity interests in excess of that percentage amount.

Antitrust courts enforcing Section 7 of the Clayton Act have long recognized the practical potency of minority shareholdings, a recognition reflected in the very language of Section 7 itself, which expressly prohibits any anticompetitive acquisition of "the whole <u>or</u> <u>any</u> <u>part</u> of the stock or other share capital" of another person.[18/] By including partial acquisitions within the reach of Section 7, Congress acknowledged that a shareholder need not have majority ownership in order to exercise control or substantial influence over the acquired company in ways that may be inimical to competition. In fact, although most of the cases cited by the Commission that resulted in injunctions involved stockholdings over 10%, the facts of those cases indicate that the same competitive concerns would have arisen with much lower percentage holdings. Far from supporting the proposed elimination of the $15 million threshold in voting securities acquisitions, the rationale of these antitrust decisions supports the need for premerger notification and review of acquisitions of large blocks of shares in very large corporations, when the acquisition is not for investment only, and regardless of whether the acquiring person's stockholding is likely to remain below 10% or is but the first step in an outright acquisition of majority control.

18/ 15 U.S.C. § 18 (emphasis added).

Both legal precedent and common sense support the presumption that a relatively significant minority stockholder in a publicly-traded, widely-held corporation normally will, at a minimum, be in a position to influence materially the business activities of the acquired company, especially if the stockholder has one or more representatives on the issuer's board of directors. Minority control or influence does not arise inevitably, of course, and may be successfully frustrated by a hostile management bolstered by countervailing shareholder support. Nonetheless, a shareholding of 10%, 5% or even less, in a large, widely-held U.S. corporation often will be the largest single block of shares, and frequently will enable the stockholder to gain representation on the issuer's board of directors.

Even where control is neither exercised nor sought, minority ownership of one or more corporations may still produce anticompetitive effects within the reach of Section 7.

A minority shareholding, for example, may adversely affect the ability of the issuer to compete when the acquiring company obtains representation on its board and, consequently, access to its competitively sensitive information.19/ Board representation also may provide a platform from which the principal shareholder's interests may be subtly yet effectively

---

19/ Section 8 of the Clayton Act, 15 U.S.C. 19, which prohibits interlocking directorates, does not prohibit other types of intercorporate relationships among competitors, such as when an officer of one company (other than a bank) becomes a director of its competitor.

exercised. See, e.g., F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 818 (2d Cir. 1979) (per curiam) (affirming an order preliminarily enjoining Schmidt from acquiring a 29% interest in competitor because the probable resulting representation would permit Schmidt to obtain competitively sensitive information of the issuer and to be in a position to "steer" the issuer in directions favorable to Schmidt); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, 181-182 (E.D. Mich.), aff'd, 280 F.2d 747 (6th Cir. 1960) (if Crane succeeded in appointing a member of Briggs' board, Briggs would be hard-pressed to deny that Crane had not influenced its policies); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 394 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958); Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 314 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953); see also United States v. Pacific Telesis Group, Trade Reg. Rep. (CCH) ¶ 45,086 (C.D. Cal. Feb. 28, 1986) (16% acquisition led to creation of "partnership relationship" with majority holder).

A minority interest of substantial value may also lead to a significant lessening of the zeal with which the shareholder and issuer would otherwise compete against each other, since the shareholder may avoid actions that could undermine the value of its "investment," and the management of the acquired company would try to avoid unnecessarily offending a substantial shareholder. As Professors Areeda and Turner explain in their influential treatise:

> It is seldom easy to tell what constitutes control, particularly in large and widely held corporations. A holding too small in itself to vote a majority onto the board of directors might be large enough to provide a nucleus for others opposed to management. Directors aware of this may seek to avoid antagonizing the acquiring company -- at least when other considerations are equal -- even in the absence of any attempt by the acquiring company to exert influence.[20/]

Although there is no precise numerical test for establishing or presuming that a minority shareholder may exercise effective control or wield material influence over an issuer, and although the decided cases more typically deal with minority shareholdings above 10%, the reasoning of those decisions clearly indicates that the competitive problems being addressed do not disappear once the stockholding in a widely-held corporation falls below the 10% level relied on in the FTC's proposal. As the district court noted in the Briggs case, enjoining a proposed acquisition of a 21% interest in a competitor:

> the application of Section 7 turns on the probable effects upon competition by the acquisition of stock in one corporation by another, rather than on the numerical percentage of voting control acquired.[21/]

For example, in what is perhaps the principal Section 7 decision involving a partial acquisition, United

---

20/ 5 P. Areeda & D. Turner, Antitrust Law ¶ 1203c, at 320 (1980)

21/ Briggs Mfg. Co., supra, 185 F. Supp. at 184.

States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957), a decision cited by the Commission, the Supreme Court held that du Pont's 23% interest in General Motors violated that statute because it had fostered a close relationship between the two companies to the disadvantage of du Pont's competitors in the sale of automobile finishes and fabrics to GM. In so holding, the Court stressed that "Section 7 is designed to arrest in its incipiency . . . the substantial lessening of competition from the acquisition . . . of . . . any part of the stock of a competing corporation . . . ." Id. at 589. Although the Government's complaint was filed when the GM holdings of the du Pont shareholders had risen to 23%, the close relationship between GM and du Pont actually arose well before du Pont's GM stockholdings had surpassed 10%. Indeed, Pierre S. du Pont had become Chairman of GM, and three of his nominees had been elected to GM's board, when the du Pont holdings of GM stock were well below 10%.22/

The Supreme Court in du Pont further noted that the "potency of the influence" of du Pont's 23% interest had been enhanced due to the fact that the remaining GM shares were widely dispersed.23/ Sensitive to this practical aspect of corporate control, the Court rejected du Pont's suggestion, after remand, that effective relief could be obtained simply by

---

22/ United States v. E.I. du Pont de Nemours & Co., 126 F. Supp. 235, 240-41 (N.D. Ill. 1954), rev'd, 353 U.S. 586 (1957).

23/ 353 U.S. at 607 n.36.

disenfranchising du Pont's GM stock.[24] Such action was undesirable in the Court's view, because it would substantially reduce the number of voting GM shares, "thereby making it easier for the owner of a block of shares far below an absolute majority to obtain working control, perhaps creating new antitrust problems . . . ."[25]

The Court's recognition in du Pont that the likelihood of minority control increases as the size of any countervailing shareholdings decreases is particularly relevant where a shareholder's interest in an issuer far surpasses those of the remaining shareholders. In such circumstances, of course, management has no assurance, and often little reason to expect, that it would succeed in a proxy fight initiated by the principal shareholder. Whatever its possible outcome, one may reasonably assume that most corporation managements prefer to avoid triggering a proxy challenge, a predisposition which inevitably finds a policy of accommodation attractive.

The potency of a small minority shareholding has been recognized in subsequent antitrust decisions. In Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962), a case also cited by the Commission, the district court issued an injunction against a threatened violation of Section 7 even though no entity or person owned 10% or more of

---

24/ United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 333 (1961).

25/ Id. at 333.

the plaintiff's stock. However, the defendants did constitute "related interests" whose aggregate shareholdings were less than 20%. Under the Commission's principal Premerger Rule change proposal, no premerger filing would have been required in such a situation.

As the Commission suggests, the antitrust agencies might attempt to address this obvious enforcement problem by adopting some test by which nominally independent acquisitions by "related interests" are aggregated for HSR purposes. However, any such effort to redress the obvious problems with unreported acquisitions of multiple, affiliated 10% stockholdings is almost certain to give rise to the ambiguities, ensuing confusion and "considerable uncertainty and concern" that prompted the Commission and Department of Justice several years ago to delete the concept of a "group organized for any purpose" from the Premerger Rules.[26/]

In Borg-Warner Corp., 101 F.T.C. 863 (1983), rev'd sub nom, Borg-Warner Corp. v. F.T.C., 746 F.2d 108 (2d Cir. 1984), the Commission likewise found a violation of both Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act notwithstanding the fact that Bosch GmbH owned less than 10% of Borg-Warner's shares. The appellate court reversed, but as the Commission correctly notes, "only on the grounds of mootness (competition between the two firms had ceased as a

---

26/ See 48 Fed. Reg. at 34,428-29 (1983).

result of divesting the competing business line, and the firms no longer had common directors)."[27]

The Department of Justice has in the past even gone so far as to challenge the acquisition by one competitor of 3% of another competitor's stock. United States v. Newmont Mining Corp., Civil Action No. 4227 (S.D.N.Y., filed Dec. 31, 1962). The Government's Section 7 complaint alleged that Newmont's acquisition of 3% of Phelps Dodge's voting securities had made it one of Phelps Dodge's largest shareholders, a relationship which the Department claimed would substantially lessen competition in the production and sale of copper and copper products. The lawsuit was settled four years later when Newmont agreed to divest itself of the 3% stock interest and to dissolve certain indirect director interlocks. Id., 1966 Trade Cas. (CCH) ¶ 71,709 (S.D.N.Y. 1966) (consent order).

There are cases in which a court has found that even a 20-40% stock interest had not enabled the shareholder to exercise effective control or influence over the acquired company's affairs. Certain of these cases involve situations in which a hostile and entrenched management, with countervailing stock ownership support, had successfully rebuffed overtures by the minority shareholder or in which a sizable minority interest was held to have been made solely for the purpose of investment in view of the shareholder's having entered into some form of contract or consent judgment limiting

---

27/ 53 Fed. Reg. at 36,837 (1988).

its freedom to vote its stock or imposing some other restraint, e.g., United States v. International Harvester Co., 564 F.2d 769, 777-78 (7th Cir. 1977); United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1098-1100 (C.D. Cal. 1979); Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1218 (S.D.N.Y. 1975).

These cases, however, simply further illustrate the obvious point that sometimes a minority stock interest will pose a competitive problem and sometimes it will not. The test for antitrust purposes is not whether the shareholding exceeds 10% or some other numerical threshold but rather whether the shareholding will allow the acquiring person to influence the competitive behavior of the issuer. The objective of Congress' HSR premerger reporting scheme, of course, is to provide the antitrust agencies with an adequate opportunity to review the circumstances of these sorts of cases and to decide if an enforcement challenge, further monitoring of the situation, or no action is necessary. That statutory objective cannot be effectively met if the Commission's principal proposal (or either of the two alternative proposals) is adopted.

C. Economic Authorities

As discussed above, a Section 7 violation may occur when a company acquires control of -- or the ability to assert influence over -- a competitor. Economic research over the years has confirmed what is otherwise intuitively obvious: even low percentage shareholdings, particularly of large corporations, can and do confer on the minority shareholder influence and control over the issuer. And, generally, the larger the corporation and more widely dispersed its shares, the smaller the shareholding needed to exert influence or effective working control. In their basic economics text, Lipsey and Steiner observe that:

> The characteristic pattern of corporate ownership is that tens of thousands or hundreds of thousands of shareholders own minute fractions of the total, while dominant groups (often including other corporations) hold from 3 percent to 20 percent of the voting stock.28/

This characteristic of large corporations is particularly important here, because the Commission's proposal would, by definition, exempt only acquisitions of the shares of large companies valued in excess of $150 million.

These observations were objectively confirmed as early as 1940 by an interagency group of the federal government, the Temporary National Economic Committee (TNEC), which systematically examined sources of control in large U.S. corporations. The TNEC identified a number of firms where control was exercised by groups with small minority holdings of less than 10% of the corporation's voting securities.29/

28/ Lipsey and Steiner, Economics, 4th ed., Harper & Row, New York, at 348.

29/ The Distribution of Ownership in the 200 Largest Nonfinancial Corporations, The Temporary Economic Committee, the Securities Exchange Commission, Washington, October 1940, at 78.

More recent economic studies similarly have concluded that ownership of less than 10% of a corporation's stock can be sufficient to convey control.

Dennis Leech, for example, in the Oxford Economic Papers studied econometrically the critical level of shareholding that would convey control in a sample of U.S. corporations and found that effective control would have been enjoyed by shareholders of these corporations with holdings of between 5.89% and 17.86%.30/

In a study by Thomas R. Dye of "strategic ownership positions," defined as "a role in the corporation which permits the occupant to participate in key corporate decisions,"31/ the author summarized the consensus view that small ownership positions in U.S. corporations may be sufficient to confer corporate control. Dye concluded that:

> For purposes of analysis, our definition of corporate strategic ownership position is (1) ownership of more than 1 percent of outstanding common stock of the corporation and (2) ownership of one of the largest five blocks of common stock of the corporation.32/

In a major study published in 1981, Prof. Edward S. Herman of the University of Pennsylvania also found that

---

30/ Leech, Corporate Ownership and Control: A New look at the Evidence of Berle and Means, 39 Oxford Economic Papers 534, 546 (1987).

31/ Dye, Who Owns America: Strategic Ownership Positions in Industrial Corporations, 64 Social Science Quarterly 864 (1983).

32/ Id. at 865 (emphasis in original).

control and influence over the actions of U.S. corporations could be conveyed to shareholders with less than 10% ownership positions. For his study he defined minority owner control as existing in cases where the control group owned at least 5% of the corporation's voting stock, and noted that "in early 1975 the market value of the median-sized 5 percent holding of the 200 largest amounted to about $38 million."33/

Herman found that even when a 5% holding did not provide actual control of a major corporation, it ". . . might allow the selection of an outside director or two and the establishment of a weak power position capable of being strengthened; and it may strengthen the control by an existing control group," and allow the shareholder "a voice in corporate affairs."34/

33/ E. Herman, Corporate Control, Corporate Power: A Twentieth Century Fund Study 63 (1982). The dollar value of the 5% holdings cited by Herman would be significantly greater today, when a 5% holding in the largest 200 U.S. firms would average $145 million. Under the Commission's proposal, the acquirer of such a company would be exempt from premerger notification requirements until he had amassed nearly $300 million worth of the target's stock.

34/ Id. at 621. Other economists have studied the same question and reached similar conclusions. Most notable among this group are P. Burch, The Managerial Revolution (1972); R. Larner, Ownership and Control in the 200 Largest Nonfinancial Corporations, 1929 and 1963, 56 American Economic Review 777-87 (1966); and J. Chevalier, The Problem of Control in Large American Corporations, 14 Antitrust Bulletin (1969). For a summary of early studies on the question of corporate control, see John S. Blair, Economic Concentration: Structure, Behavior and Public Policy (New York, 1972) at 75 et seq.

The conclusions of these economists clearly refute the Commission's belief that antitrust concerns are not improbable in acquisitions involving 10% or less of a company's stock. As their recent studies have shown, "effective control,"35/ a "strategic ownership position,"36/ or "a voice in corporate affairs,"37/ may be conferred upon holders of between 1 and 10% of a large corporation's shares. Significant antitrust problems clearly become possible when one competitor attains such a position with respect to another.

D. Statutory and Regulatory Presumptions

The FTC's Notice of Proposed Rulemaking discusses a variety of federal statutory schemes incorporating presumptions as to the level of stock ownership conferring effective working control of an issuer. Those statutes, including Section 7A of the Clayton Act and Section 13(d) of the Securities Exchange Act of 1934, on which the Commission places special emphasis, do not support and are not consistent with the proposed change.

1. Section 7A of the Clayton Act

The proposed rule is completely at odds with Congressional intent as expressed in the premerger notification statute. The Commission's proposal would eliminate the dual

---

35/ Leech, *supra*.

36/ Dye, *supra*.

37/ Herman, *supra*.

dollar-percentage threshold enacted by Congress, which has been an integral part of premerger notification since the statute's enactment over a decade ago.[38] As originally proposed, the HSR Act contained a transaction threshold of 25% or $20 million of the securities or assets of the acquired corporation. This dual percent/dollar threshold manifested Congress' clear intent to require antitrust review of even relatively low percentage acquisitions of shares in very large corporations. The original version mandated premerger notification without regard to the dollar or percentage amount of the actual transaction. S. 1248, 94th Cong., 1st Sess. (1976). The "size of the transaction" threshold was first introduced in the House version of the bill, H.R. 13131, 94th Cong., 2d Sess (1976).[39] Representative Hutchinson explained the importance of the $20 million figure as proposed in the original House bill:

38/ Prior legislative proposals for premerger notification also mandated disclosure upon satisfying a minimum dollar threshold. See H.R. 1517 78th Cong., 1st Sess. (1943); S. 577, 78th Cong., 1st Sess. (1943); H.R. 4519, 79th Cong., 1st Sess. (1945); H.R. 2357, 79th Cong., 1st Sess. (1945); S. 615, 79th Cong., 1st Sess. (1945); S. 104, 80th Cong., 1st Sess. (1947); S. 72, 80th Cong., 1st Sess.(1947); H.R. 1241, 81st Cong., 1st Sess. (1949); H.R. 9424, 84th Cong., 2d Sess. (1956); H.R. 7698, 85th Cong., 1st Sess. (1957); S. 442, 86th Cong., 1st Sess. (1959); S. 1005, 86th Cong., 1st Sess. (1959); H.R. 2882, 87th Cong. 1st Sess. (1961); H.R. 2511, 90th Cong., 1st Sess. (1967). The Commission's previous premerger notification program mandated notification based upon a minimum dollar threshold. 1 Trade Reg. Rep. (CCH) ¶ 4540 (1974).

39/ See also H.R. 14,580, 94th Cong., 2d Sess. (1976).

> If the percentage test were the only test of substantiality, the cited statutes might provide inappropriate guidance. But the $20 million figure, in effect, operates to reduce the percentage required as the transaction gets larger. Thus the two-pronged committee test is both more flexible and more exact than other statutory tests.

Ultimately, Congress adopted both dollar and percentage transaction thresholds substantially lower than those originally proposed, reducing the transaction threshold from $20 million to $15 million, and the percentage threshold from 25% to 15%.[40/] The fact that these transaction thresholds ultimately were reduced demonstrates Congress' specific intent to impose both a dollar and a percentage notification threshold at or about $15 million and 15%.[41/]

In 1987, the Senate considered amending the thresholds established by the Act by, among other things, increasing the "size of the transaction" threshold from $15 to $25 million.[42/] The rationale for raising thresholds was to adjust

---

40/ See Axinn, Fogg & Stoll, Acquistions Under the Hart-Scott-Rodino Antitrust Improvements Act § 3.4.5 (1984); It was a Fight to the Finish When Congress Passed the Antitrust Bill, 8 Nat'l L.J. 1353 (1976).

41/ Indeed, a statement of the Additional Views of Representative Seiberling indicates that at least one Congressman thought that even a $15 million threshold would be too high, and that: "10 percent and $10 million limits are more consistent with this stated purpose" of detecting and investigating large mergers of questionable legality before they are consummated. H.R. Rep. No. 1373, 94th Cong., 2d Sess. 23 (1976).

42/ S. 432, 100th Cong., 1st Sess. (1987).

them to reflect ten years of inflation and, thereby, remove certain small transactions from the requirements of premerger notification that were never intended to be covered by the Act.43/ In opposing that proposed change,44/ the Commission's continued support for a relatively low dollar transaction threshold was expressed as follows:

> We oppose the provision that would raise the . . . size of transaction threshold from $15 to $25 million. Had those thresholds been higher in the past, filings would not have been made for many transactions that have resulted in enforcement action.
>
> Over ten percent of the mergers the Commission has challenged in the last 10 years have involved transactions valued at between $15 and $25 million. Moreover, had the thresholds been at the higher level proposed in S. 432, it only would have eliminated 4 percent of merger filings.45/

43/ See S. Rep. 115, 100th Cong., 1st Sess. (1987).

44/ Assistant Attorney General Rule supported the change, stating that "the cost/benefit balance drawn in 1976 when Congress set the dollar threshold in section 7A has worked well and should be maintained by a periodic raising of the relevant dollar thresholds." Statement submitted for the Hearing Record to the Subcommittee on Antitrust Committee on the Judiciary, U.S. Senate, Concerning S. 431 and S. 432, February 26, 1987, at 13. Mr. Rule thus proposed that the dual dollar-percentage be preserved and adjusted, not abolished, as would happen under the Commission's present proposal.

45/ Legislation to Amend The Hart-Scott-Rodino Act Before the Committee on the Judiciary, Subcommittee on Antitrust Monopolies and Business Rights, 100th Cong., 1st Sess., at 9 (1987).

The Senate demonstrated its agreement with the Commission's desire to preserve alternative percentage and dollar value tests by failing to adopt the proposed change.

The Commission has repeatedly recognized a clear Congressional intent to set up a dual dollar and percentage threshold. The Commission in fact has formally rejected a proposal, similar to the present one, to eliminate the $15 million transaction threshold by creating a blanket 10% or less exemption for premerger notification:

> A number of comments . . . endorsed the suggestion that investment intent should be disregarded and that all acquisitions below the 10 percent levels should be exempt . . . such an exemption would, when large corporations are involved, eliminate the $15 million reporting threshold of section 7A(3)(B)(15% or 15 million), contrary to congressional intent.46/

The Commission thus long ago has acknowledged its congressional mandate to conduct premerger review of both acquisitions of a percentage of the shares or assets of small companies and acquisitions of a relatively low percentage of the shares or assets of large companies, because: "[I]f Congress had intended [a contrary] result, the Act could easily have been worded so as to achieve it."47/

Congress and the Commission also have consistently distinguished between minority acquisitions for investment

---

46/ 43 Fed. Reg. 33,490 (1978) (emphasis added).

47/ 43 Fed. Reg. at 33,490 (1978); 44 Fed. Reg. at 66,782 (1979).

purposes and minority acquisitions for non-investment purposes. Section 7A(c)(9) incorporates this distinction by exempting acquisitions of 10% or less, made "solely for the purpose of investment," from the premerger notification requirements. Rule 801.1(i)(1) defines "solely for the purpose of investment" in terms of the acquiring party's intention to participate in the acquired party's business decisions.48/ This definition indicates that antitrust concerns involving minority shareholdings depend, in large part, on the intent of the acquirer to exert influence or control through its investment.49/ Both Congress and the Commission thus clearly recognize that acquisitions of less than 10% of a company's shares do raise antitrust concerns when made with the "intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."50/ Indeed, the original Statement of Basis and Purpose to Rule 801.1(i)(1) suggests that the mere fact that shareholder and issuer are competitors may be inconsistent with

---

48/ Section 7 of the Clayton Act also exempts pure investment acquisitions.

49/ Indeed, in rejecting suggestions to abandon the "solely for purposes of investment" exemption, the Commission stated: "The language of Section 7A(c)(9) makes the acquiring person's intentions a relevant consideration." 43 Fed. Reg., at 33,490.

50/ See 16 C.F.R. § 801.1(i)(1); FTC, Formal Interpretation Under 16 C.F.R. § 803.30 Concerning the Investment Exemption Under Section 7A(c)(9) and § 802.9 (letter to L.T. Sorking, Jan. 17, 1979); Letter from Thomas J. Campbell, Director, Bureau of Competition, FTC, to Michael N. Sohn, Esq., Arnold & Porter (Aug. 19, 1983).

the requisite "investment" intent, an observation that presumably arose from the recognition that the existence alone of a major dollar investment may have an anticompetitive effect regardless of the shareholder's intent.51/

2. Section 13(d) of the Securities Exchange Act of 1934

In 1970, Congress amended Section 13(d) of the Securities Exchange Act of 1934 to reduce by half -- from 10% to 5% -- the percentage share of an issuer's voting securities that an acquiror can amass before triggering Section 13(d)'s disclosure requirements. The legislative history of this 1970 amendment demonstrates that key sponsors and supporters of the amendment believed that shareholdings of less than 10% could, without more, confer the ability materially to influence and even control the issuer's management.

Senator Williams, the amendment's sponsor, observed during the amendment hearings that "ten percent of the stock of large corporations, indeed even five percent, can involve large amounts of money and can have a significant impact on corporate control."52/ And, in similar vein, Representative Moss, who chaired key hearings on the legislation in the House, noted during other hearings on the eventual amendment that a

---

51/ See 43 Fed. Reg., at 33,465.

52/ Hearings on S.336 and S.3431 Before The Subcommittee on Securities of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 1 (1970).

"5-percent acquisition of A.T.&T. might place a person in a position where he could exercise some rather significant control."[53/] Representative Springer remarked during the floor debates that "[t]he 10-percent figure is lowered to 5 percent because experience indicates that in many instances a 5-percent holding can mean effective control of a company;" and Representative Monahan, the sponsor of the House version of the amendment, explained that "[c]learly, lowering the trigger mechanism to 5 percent is a proper recognition of the impact that acquisition of 5 percent of a company's stock can have upon the control and marketing of the securities involved . . . ."[54/]

The legislative history of the 1970 Section 13(d) amendments also reveals that Congress considered the acquisition of a 5-10% block of stock so likely to portend a subsequent tender offer for the remaining shares or "important changes in the management or business of the company . . . [that] shareholders should be fully informed."[55/] The Commission's proposed 10% reporting threshold therefore appears to ignore congressional recognition in another but closely related context that shareholdings well below 10% may confer on

---

53/ Hearings on H.R.4285, S.3431 and S.336 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 91st Cong. 2nd Sess. 61 (1970).

54/ 116 Cong. Rec. H11,241 (daily ed. Dec. 7, 1970).

55/ S. Rep. No. 1082, 91st Cong., 2d Sess. 3 (1970), H.R. Rep. No. 1655, 91st Cong., 2d Sess. 3 (1970).

the shareholder considerable power to influence the target company's management.

3. Industry-Specific Statutes

In its Notice of Proposed Rulemaking, the Commission discusses other federal statutes, regulating specific industries or industrial sectors, which define a specified percentage of voting stock that must be owned to establish the possibility of "control."56/ The Commission notes that several of these statutes presume that a person holding 5% or more of an issuer's voting stock may have "control," or use 5% as the threshold level for reporting acquisitions. However, the Commission unaccountably emphasizes that "other federal statutes imply that holders of 10 percent or less of an issuer's voting securities are unlikely to control the issuer . . . ."57/

a. Federal Aviation Act

Section 408(f) of the Federal Aviation Act of 1953, 49 U.S.C. § 1378(f), contains a statutory presumption that a person owning 10% or less of an air carrier's voting securities does not have "control."58/ However, as the Department of

---

56/ 53 Fed. Reg. at 36,838 (1988).

57/ Id. at 36,839.

58/ This statutory presumption will cease to exist at the end of this month as a result of the transfer of authority over airline acquisitions from the Department of Transportation to the antitrust enforcement agencies. See 49 U.S.C. § 1551(a)(7).

Justice argued in 1986 in comments filed in the Texas Air-Eastern Air Lines merger proceeding "there are circumstances in which an acquisition that does not constitute 'control' for purposes of section 408 nevertheless can have substantial anticompetitive effects." Answer of the Department of Justice to Applicant's Voting Trust Application, Application of Texas Air Corp., DOT Docket 43825 (filed May 10, 1986), at 6-7. Accordingly, the Department urged that prior notification be required for all acquisitions in excess of $15 million or 10% of an air carrier's voting securities. Id. at 5 & n.3, 10. The Department further noted in its Answer that the Civil Aeronautics Board, the Department of Transportation's predecessor in administering the Federal Aviation Act, "has recognized that a carrier may also be in a position to exert control over another carrier below the ten percent threshold." Id. at 4 n.2.

b. Bank Holding Company Act

The Bank Holding Company Act of 1956[59/] originally contained a presumption (in actuality, an irrebuttable presumption) that ownership of 25% of a bank's voting securities constitutes control. In 1970, Congress amended the statute to allow a finding of control whenever a company owned 5% or more of the voting stock of a bank.[60/] This amendment,

---

59/ 12 U.S.C. § 1841 et seq.

60/ 12 U.S.C. § 1841(a)(4).

and a related amendment that required prior Federal Reserve Board approval of transactions that would lead to control of 5% or more of a bank's stock,61/ "demonstrate[s] that Congress contemplated that a bank holding company acquisition resulting in direct or indirect control of more than 5 percent of the shares of a bank might have anticompetitive aspects . . . ." North Platte Corp., 66 Fed. Res. Bull. 782, 783-85 (1980) (denying application by competitor with 4.6% of bank's stock to increase shareholdings to 13.2%, because "[a] company need not acquire control of another company in order to substantially lessen competition," and, "[w]ith a 13.2 percent interest in Wybanco and at least one seat on Wybanco's board of directors, Applicant would have access to and be in a position . . . to influence and participate in the formulation of the policies and strategies of Wybanco . . .").62/ Similarly, in First City Bancorporation of Texas, Inc., 59 Fed. Res. Bull. 105 (1973), the Board found that a shareholder had "more than a little influence" over two banks in which it held, respectively, 0.5% and 8.9% of the voting stock.)63/

61/ 12 U.S.C. § 1842(c)(1).

62/ A significant factor in the Board's finding of control was that the applicant "would be the largest shareholder of Wybanco with nearly three times the shares held by any other person." 66 Fed. Res. Bull. at 784.

63/ In an advisory letter sent to all Federal Reserve Banks and published in the Federal Register in 1971, 36 Fed. Reg. 18,945 (Sept. 24, 1971), the Board identified certain "indicia of control that may require investigation." Among them were "situations where a

c. Interstate Commerce Act

Acquisitions of control of water, rail and motor carriers are governed by the Interstate Commerce Act and are under the jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Commission has "consistently adhered to the position that the percentage of stock ownership, standing alone, does not necessarily establish control," and recognized that "a relatively small percentage of the total stock outstanding would be sufficient to create the power to control particularly when the owner of such stock holds the largest single block of shares and the remaining shares are widely diffused."64/

d. Other Statutes

Other statutes the Commission cites in its notice of proposed rulemaking -- such as the Public Utility Holding

---

(Footnote Continued)

company controls . . . 5 percent of each of three or more banks."

64/ Seaboard Air Line Railroad Co. -- Merger -- Atlantic Coast Line Railroad Co., 320 I.C.C. 122, 195 (1963) (citations omitted), aff'd sub nom, Florida East Coast Railroad v. United States, 259 F. Supp. 993 (M.D. Fla. 1966) (three-judge court), aff'd per curiam, 386 U.S. 544 (1967). In Alleghany Corporation v. Breswick & Co., 353 U.S. 151, 162-63 (1957), the court reinstated the ICC's finding that Alleghany Corporation controlled the New York Central Railroad through voting rights to "almost 10 percent" of its shares, coupled with an additional 6% shareholding by Alleghany's president and vice president.

Company Act of 1935[65] and the Investment Company Act of 1940[66] -- contain presumptions that ownership of 10% or 25% of an issuer's stock is a prerequisite to a finding of "control." However, a number of the statutes also contain definitions of "affiliated persons" that have lower thresholds of stock ownership. Both the Public Utility Holding Company Act and the Investment Company Act, define affiliated persons as those who (i) have the power to vote 5% or more of another company's securities; or (ii) 5% or more of whose own voting securities are owned by another person or entity.[67] In both statutes, controlled/controlling persons and affiliated persons must ordinarily obtain agency approvals before consummating certain transactions with each other. In the case of public utilities, acquisitions of voting stock that will result in a person becoming an "affiliate" (owning 5% or more of the voting stock) of two or more utilities are subject to notification and approval.

E. Antitrust Enforcement Experience

The Commission asserts that its own "enforcement experience" indicates that acquisitions of 10% or less of a company's shares are almost never challenged. It also contends that such transactions are "cleared" -- examined closely by one

---

65/ 15 U.S.C. § 79b(a)(7) and (8).

66/ 15 U.S.C. § 80a-2(a)(9).

67/ *See* 15 U.S.C. § 79b(a)(11) and 15 U.S.C. § 80a-2(a)(3) of the agencies because it appears on an initial review that a transaction may raise competitive issues -- or are subjected to second requests at a rate somewhat below the average for all transactions.

The data offered in support of this conclusion do not support it. The data show that from 1981 to 1986 14.5% (and from 1981 to 1984 9.5%) of transactions that would be exempt under the proposals were "cleared" to either the Commission or the Department, as compared to only 17.4% for all transactions from 1981 to 1984. In 1984, in fact, the proportion of transactions of less than 10% of an issuer's shares that were "cleared" for antitrust review was greater than that for other transactions, and in 1986 fully 26.7% of transactions in the category that would now be exempt were closely reviewed.

The fact that the enforcement agencies scrutinize acquisitions of under 10% at more than two-thirds the rate at which they scrutinize all acquisitions indicates substantial enforcement interest in those lower percentage holdings.[68] Transactions attracting such interest by the enforcement agencies cannot now be characterized as being "unlikely" to

---

68/ A more revealing comparison, not attempted by the Commission, would be between the frequency of "clearance" or second requests for stock acquisitions of between 0-10%, on the one hand, and acquisitions of 10-20% (or even 10-49%) on the other. It seems reasonable to believe that the rates would be even more similar than in the Commission's comparison, and would tend to show that minority acquisitions in the 0-10% range raise antitrust concerns at about the same rate as other minority acquisitions.

pose competitive problems. Only a small minority of all mergers and acquisitions pose significant antitrust problems; but Congress has mandated premerger review of most large acquisitions for non-investment purposes in order to screen out those prohibited few.

Moreover, the Commission's analysis of its "enforcement experience" neglects the possibility that it may confront fewer potentially-troublesome acquisitions below 10% precisely because some questionable transactions are deterred by the present premerger notification requirements. It is likely that the Commission's proposal, if adopted, would create an incentive for corporations to engage in more acquisitions of 10% or less of other large corporations, especially including their competitors, for purposes of influence or control. Such transactions may pose an above-average antitrust risk and would be more likely to inspire enforcement activity if detected.

III. THE PROPOSAL WOULD INTERFERE WITH PREMERGER REVIEW OF LARGE ACQUISITIONS AND CREATE INCENTIVES FOR ANTICOMPETITIVE BEHAVIOR

The case law and economic analysis discussed above suggest a number of classes of potentially troublesome acquisitions that would be exempt, or in which premerger reporting would be seriously delayed, if the Commission's proposal were adopted.

A. Examples of Transactions That Would Be Exempt

The following examples illustrate potentially troublesome transactions that would be exempt from all premerger review if the Commission's proposal were adopted.

> EXAMPLE 1: A and B are the two largest manufacturers of a specialized electronic component. A merger of A and B would increase the HHI from 2500 to 3750. A acquires 8% of B's stock at a price of $100 million, and elects an officer of A as a director of B.

Example 1 is typical of a number of the reported cases. Minority shareholders often can elect one or more directors. Once a director is in place, he may provide company A with "confidential trade information of one of its leading competitors, including its marketing, pricing, and new product plans, and could possibly steer [B] in a direction that would favor [A's] interests at the expense of [B]." F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 818 (2d Cir. 1979). Under these circumstances, the antitrust agencies traditionally have assumed that competition between A and B will not remain as vigorous as before the acquisition had taken place. Even if the shareholding were a matter of public record and, hence, might eventually come to the attention of the enforcement agencies, competitive injury could occur well before enforcement action was taken.

> EXAMPLE 2: A and B are large manufacturers of directly competitive, branded consumer products supported by massive national

> advertising and marketed through independent distributors. The merger of A and B would raise HHI from 1900 to 2500. A acquires 8.9% of B's shares for $200 million, does not elect a director, but announces the shareholding both to B and to the distributor community. A does not state whether or not it may eventually seek to acquire additional B stock, or attempt a takeover.

Example 2 typifies cases in which some antitrust courts have found minority shareholdings to have "caused unrest and uncertainty among . . . customers, distributors and suppliers," and may irreparably damage company B's goodwill and business relationships. Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686, 694 (D. Del. 1962).69/ Moreover, such a shareholding, even without a director on the board of B, appears likely to "affect the situation and competitive decisions of either company. The acquired firm might be prejudiced or the competitive zeal of each firm might be reduced."70/ The implied threat of a takeover may discipline B's competitive strategies and may persuade distributors to favor A's products over B's. A's competitive behavior also may be inhibited as it seeks to protect its investment in B.

> EXAMPLE 3: A, a supermarket chain with strong coverage in the Northwest and

---

69/ See also Crane Co. v. Briggs Mfg. Co., 280 F.2d 747, 748-49 (6th Cir. 1960).

70/ 5 P. Areeda & D. Turner, Antitrust Law ¶ 1203c, at 318 (1980).

> Mid-Atlantic states, acquires 4.9% of B, a supermarket chain with strong coverage in the Southeast and Midwest. The price paid for B's shares is $39 million, and A is now B's largest shareholder. B's management is considering a major geographic market expansion into the Baltimore/Washington area, where A presently is the dominant supermarket chain.

Even without board representation, A's acquisition of the largest block of B's shares could be viewed as strategic behavior aimed at keeping B from entering A's market.71/ The acquisition also would be likely to affect both companies' strategies, including plans to open new stores, discounting, advertising, etc., in markets where they already compete. Significantly, the transaction stops short of the 5% Williams Act threshold, so that there apparently would be no requirement for public disclosure. If B was privately held -- as is true of many large retailing concerns formed through leveraged buyouts -- B could increase its shareholding further, to 9.9%, without any disclosure.

> EXAMPLE 4: A, B, C and D are the four largest producers of a mineral. Between them, they control 80% of the worldwide reserves. A acquires 9.9% each of the stock of B, C and D for a total $100 million; B acquires 6% each of the stock of A, C and D for a total $70 million; and C acquires 4% each of the stock of A, B and D for a total $50 million.

71/ See, e.g., 5 P. Areeda & D. Turner, Antitrust Law ¶ 1203c (1980).

Example 4 typifies the kind of interlocking ownership deterred by current reporting requirements. A number of reported decisions that predate the current reporting requirement demonstrate the tendency of some companies to acquire minority positions in their competitors.72/ For example, in Crane Co., 61 F.T.C. 1462 (1962) the Commission's complaint alleged that Crane, over a two year period, had acquired "all or part of the stock or assets" of five of its competitors in the manufacture and sale of various types of plumbing equipment.73/ Such interlocking ownership interests may create incentives for interdependent behavior and, possibly, collusion that should remain subject to effective enforcement review. It also is significant that, in the example, disclosure of C's shareholdings in A, B and D may not be required under the securities laws.74/ If the companies are

---

72/ See also Crane Co. v. Briggs Mfg. Co., 280 F.2d 747, 748-49 (6th Cir. 1960) (addressing one of the five acquisitions challenged by the Commission, a minority shareholding by Crane of Briggs' stock). Cf. Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962) (control group of several related parties, none of whose holdings of target's shares exceeded 10%, jointly controlled 19.7% block); First City Bancorporation of Texas, Inc., 59 Fed. Res. Bull. 105 (1973) (0.5% and 8.9% holdings of competitors' stock raised concern).

73/ See, e.g., Adams and Brock, The "New Learning" and the Euthanasia of Antitrust, 74 Cal. L. Rev. 1515, 1532-1537 (1986) (showing extensive interlocking shareholdings among major automobile manufacturers).

74/ One of the benefits of requiring those who acquire 10% or less of an issuer's stock to make a Hart-Scott-Rodino filing is the information such filings provide the antitrust agencies about patterns of minority stockholdings in competing firms, which might be privately owned, none of the shareholdings may be reported.[75/]

> EXAMPLE 5: A is one of the two largest producers of halostats, a component used in the manufacture of widgets. B, the leading widget manufacturer, is A's largest customer, and is considering opening its own halostat plant. A acquires 9.9% of the shares of B for $150 million.

Example 5 raises both horizontal and vertical antitrust concerns. The acquisition may eliminate potential competition between A and B. A also may be in a position to foreclose its competitors in the halostat business from selling to B.

> EXAMPLE 6. A is a dominant firm with 70% market share in the communications industry and $10 billion in annual revenues. B is a $500 million firm, and A's main competitor. A believes that B is about to launch an innovative product and perceives it to be a serious threat. A acquires $50 million of B's stock. A then contacts a takeover specialist to put B "in play," offering to vote its 10% in favor of the raider. News of the threatened takeover causes B's stock

---

(Footnote Continued)

insignificant when taken individually, but may have competitive significance when viewed collectively. Information revealing such patterns that is currently available to the antitrust agencies through the premerger reporting program could no longer be readily obtained, assuming it could be obtained at all, if the Commission's principal rule amendment were adopted.

75/ A number of Fortune 500 companies are privately held, and disclose little or no business information through SEC filings or otherwise. See, e.g., "How Herbert Kohler Won His Bid for Privacy," Fortune, Feb. 12, 1979, at 84.

to increase substantially in value, and defensive tactics by B's management, which believes the raider's offer inadequate, disrupt the company's operations. B increases its debt to raise money to buy back stock. Key employees uncertain of the future begin to look for new jobs. Customers concerned about future supply place a hold on new orders from B. B's new product introduction is delayed indefinitely.

In this example A has accomplished a clearly anticompetitive purpose with an acquisition that would be subject to prior review by antitrust authorities under current law, but not under the proposed amendment. A's main competitor B would end up in weaker financial position with more debt than previously. Key employees may have left B and sales may be down. The entire company may be in the hands of a raider with plans to dismember it. A may have earned a substantial premium on the resale of B's stock and has at least bought time to defend its market against B's innovation. All this would have been accomplished with no pre-acquisition review by the antitrust authorities.

Each of the foregoing illustrative examples would be reportable under current law, and would be exempted under the proposal. The reported case law demonstrates that such acquisitions do, in fact, occur. When they occur, they clearly are transactions that Congress intended to be reported to, and reviewed by, the Commission and the Department in accordance with Section 7A. If such transactions are relatively rare, it is, in part, due to the deterrent effect of current premerger notification law. The Commission's proposal could very well create a far worse problem than that sought to be cured by eliminating the statutory $15 million test, as competitors would no longer face a significant disincentive to engaging in the kinds of acquisitions suggested by these hypothetical examples.

B. Example of Acquisitions In Which Premerger Reporting Would Be Delayed

The Commission has incorrectly stated that the only effect of the proposal would be to exempt low percentage share acquisitions from HSR reporting and review. While a broad-brush exemption of such acquisitions raises obvious antitrust concerns, an equally (if not more) important consequence of the proposal would be to delay reporting of large takeovers. Such a delay is contrary to the whole concept of premerger notification and review, and appears likely to create additional incentives for corporate raiders to accumulate secret shareholdings of 9.9 percent of the target's stock, as well as encourage parties to friendly mergers to proceed much farther toward a *fait accompli* before submitting to premerger review.

The following example illustrates problems likely to arise in connection with takeover attempts under the proposals:

> EXAMPLE 7: A and B are direct competitors in the manufacture of large industrial equipment. A, with 40% of the market, seeks to acquire B, with 20% of the market and to that end acquires 10% of B's stock, at a

price of $150 million, before filing premerger notification and announcing its intention to acquire B. Premerger HHI is 2800 and would increase by 1600. The Department reviews the transaction and notifies the parties it intends to seek a preliminary injunction. The parties abandon the merger, but A retains its 10% stake in B, and (absent affirmative enforcement action by the Department) at the next meeting of B's board will elect a non-director/officer of A as a director of B.

Example 7 highlights the most basic problem with the proposed change: it would defeat the most fundamental purpose of Section 7A, which is to avoid the problems involved with "unscrambling" anticompetitive acquisitions by requiring review before they are consummated. Under current law, there is neither incentive nor opportunity for A to acquire any significant, influential or controlling stake in B before submitting to premerger review; and there would be nothing to "unscramble" if the parties abandoned the transaction prior to any action by the Department. But the Commission's proposal, in this or any of the situations described in Examples 1-6, supra, would require the Commission or the Department to consider seeking affirmative relief to "unscramble" a 10% shareholding acquired before it was reported.[76]

76/ Moreover, the proposed rule change would postpone both notification and waiting periods in many transactions that ultimately would be cleared. By requiring a filing later in the transaction, the Commission would prolong uncertainty, among the parties and in securities markets, about the outcome of premerger review.

In summary, the proposal could create serious problems in connection with the review of potentially anticompetitive takeovers and could encourage anticompetitive strategic behavior. Section 7A was carefully designed to avoid these problems by requiring review of all potentially anticompetitive transactions in advance. There is no justification whatever for abandoning this clear Congressional directive.

IV. IN LIEU OF THE PROPOSED EXEMPTION, THE COMMISSION SHOULD SEEK PENALTIES THAT WILL EFFECTIVELY DETER NONCOMPLIANCE

If the Commission faces an actual compliance problem, the source of trouble is not the premerger notification thresholds established by Congress, but rather the fact that some tender offerors have knowingly broken the law in order to maximize their profits. The Commission has emphasized in its reports to Congress that, overall, compliance with premerger notification requirements is very high.77/ The number of acquirors currently violating the law by ignoring the $15 million threshold is apparently very small. The Commission's proposal to reduce "incentives for noncompliance" by a small number of tender offerors by, in effect, legalizing their misconduct implies that the law, rather than lawbreakers, should give way.

77/ *See*, *e.g.*, Ninth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, at 8 (FTC November 12, 1986).

Given the enormous profits available in today's takeover market, some tender offerors obviously may be tempted to view existing $10,000 per day civil penalties as a mere transaction cost, and a relatively minor one at that. One effective way to deter such cost-benefit calculations would be for the Commission to seek penalties that take away the profit to be made by such violations. The Commission might, for example, seek a court-ordered disgorgement of profits made by a tender offeror that proceeds in obvious and intentional disregard of the $15 million reporting threshold. Such violations, in contrast to alleged "sham" transactions subject to Premerger Rule § 801.90, are generally clear on their face.78/

Existing law appears already to allow such a remedy. In addition to Section 7A(g)(1) of the Clayton Act, which provides for $10,000 per day civil penalties, the antitrust agencies have available Section 7A(g)(2)(C), under which the Department of Justice can ask a district court to grant "such other equitable relief as the court in its discretion determines necessary or appropriate." 15 U.S.C. § 18a(g)(2)(C). There is no apparent reason why disgorgement of ill-gained profits, a traditional equitable remedy, could

---

78/ Compare Profit Disgorgement Divides Commissioners, 287 FTC: Watch, Nov. 7, 1988, at 1, 2 (reporting 2-2 Commission split in considering possible profit disgorgement in a § 801.90 case).

not be obtained pursuant to such statutory authority in appropriate cases.

V. THE ALTERNATIVE PROPOSALS ARE NOT VIABLE

The Commission has proposed two alternative procedures for consideration in lieu of its principal proposal. The primary arguments against adoption of the principal proposal apply equally to these alternative proposals. Moreover, each alternative also would create additional problems of its own.

A. The Escrow Alternative

The escrow proposal would allow an acquiror to purchase up to 10% of an issuer's voting securities without filing a notification, provided that the shares are placed in escrow. Notification then would only be required when the shares were proposed to be released from escrow.

The Commission has noted that its authority to adopt this proposal is unclear given its possible inconsistency with Congress' mandate for review of transactions prior to their consummation. The proposal does not include any form of notice that an escrow had been established or the terms of such arrangements. Even if the antitrust agencies were informed of acquisitions through escrowees, this alternative procedure presumably would impose a continuing responsibility on the Commission and the Department to review proposed escrow arrangements to assure against escrow acquisitions that permit the real party in interest to exercise too much influence or control of the target issuer.79/

The escrow proposal also is flawed because it assumes that a stock acquisition's possible anticompetitive effects depend on the acquirer's ability to vote its shares. As the foregoing sections of this Comment demonstrate, the anticompetitive effects that may arise when, for example, one competitor acquires a minority holding in another, do not depend solely on the acquirer's voting rights. On the contrary, the acquisition of 9.9% of a competitor, even through an escrowee, may constitute anticompetitive strategic behavior by the acquirer, sending a powerful threat to the target; or may dampen the acquiring company's desire to compete vigorously against its investment.80/

The Department of Justice expressed similar concerns about the use of voting trusts in the Texas Air-Eastern Air Lines proceeding before the Department of Transportation, arguing that Texas Air's voting trust for Eastern Air Lines stock "may not prevent a lessening of competition" because

---

79/ See, e.g., 43 Fed. Reg. 33,458 (1978) (Statement of Basis and Purpose to Premerger Rule § 801.1(c)'s definition of "hold").

80/ The premerger rules' exemption for the acquisition of convertible securities, 16 C.F.R. § 802.31 (1988), does not present the same concerns. In the case of conversions, it is the issuer, not the shareholder, which decides when and if to convert the securities into voting securities. Under the Commission's escrow proposal, the shareholder takes the initiative in deciding when to take the securities out of escrow and vote them for whatever purpose the shareholder may have in mind.

"[t]he more Eastern stock that Texas Air is permitted to acquire in this friendly merger, the less incentive each airline has to compete vigorously against the other . . ." Answer of the Department of Justice, Application of Texas Air Corp., supra, at 7. It therefore urged the Department of Transportation to adopt procedures that would preclude acquirors from using voting trusts -- which it described as "inappropriate vehicles for preserving competition" -- to acquire stockholdings valued in excess of $15 million. Id. at 6. Noting that Texas Air's shareholdings in Eastern already exceeded this threshold, the Department of Justice suggested that a "possible remedy" was to require Texas Air to sell off enough Eastern stock to reduce its holdings to the $15 million level. Id. at 10.

B. The Optional Notification Alternative

The optional notification proposal would allow an acquirer to purchase up to 10% of an issuer's voting securities without notice to the issuer after submitting information on both itself and the issuer to the Commission. Such a unilateral filing could not possibly give the antitrust authorities adequate and reliable information on which to base enforcement decisions.

Present law requires both parties to provide revenue, market overlap, and vendor-vendee data in response to items 5-8 of the Notification and Report Forms. If the optional notification alternative were adopted, the Commission would be forced to rely on the acquirer, with limited access to information about the target, to identify the target's product and geographic market coverage and the magnitude of any overlaps or any customer-supplier relationships.81/ While the acquiring party may have access to annual reports and other public filings of the target, it almost certainly will not have information about the target's precise product lines at the 7-digit SIC code level. Nor is it likely to know the precise geographic markets in which the target competes. Where the acquiror's aim is to buy a stake in a private company from one faction without alerting the remaining owners in advance, even such rudimentary information will not be available.

If one purpose of a hostile takeover offer is to deter or weaken potential competition, it is highly unlikely that the acquiring party will report that fact. In the hostile tender offer situations which prompted the Commission's principal proposal, target issuers provide the best possible source of information about any possible antitrust problems with the acquisition.

The poor quality of information available under the "optional notification" proposal will create another, more serious problem. The Commission proposes to reserve its right

---

81/ Obvious practical difficulties would face acquiring companies in attempting to provide the Commission with sales data in useful form, down to the 7-digit SIC product code level for manufactured products. The Commission and Department in such cases will be faced with the alternatives of relying on the acquirer to define the scope of the "diligent search" called for in the proposed Optional Notification and Report Form or expending significant staff resources in conducting an independent search of the relevant informational sources to verify the acquirer's compliance.

to request additional information from the target. Under this proposal, therefore, the Commission and its staff will from time to time face the very difficult decision whether to notify the target issuer (and, indirectly, the securities markets) of the acquirer's activity. This dilemma will introduce pressures into merger enforcement decisions that are not properly antitrust concerns, and which may deter the agencies from seeking relevant information that otherwise would have been made available. Also, because the "optional notification" approach leaves open the possibility that the target issuer will be notified by the Commission in any event, it is not at all clear that adoption of this proposal would effectively remove the "incentives for noncompliance" perceived by the Commission.

VI. CONCLUSION

The proposed rule change should be withdrawn.

George M Chester

George M. Chester, Jr.
Richard G. Slattery
Evan R. Cox
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Alan Wiseman

Alan M. Wiseman
Raymond A. Jacobsen, Jr.
John C. Peirce
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

William Kerr

William Kerr, Ph.D.
CAPITAL ECONOMICS
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 383-7411

Dated December 19, 1988

TABLE I

REPORTING LEVELS FOR MERGERS UNDER PROPOSED RULES

Target Firm/ Acquiring Firm	Antitrust Enforcement Activity	Reporting Level Under Proposed Rules (Millions)	Year
RJR Nabisco Kohlberg Kravis Roberts		$2,507	1988
Gulf Corp. Chevron Corp.	FTC Consent Order Entered	$1,321	1984
Kraft Inc. Philip Morris Co.		$1,310	1988
Getty Oil Co. Texaco Inc.	FTC Consent Order Entered	$1,013	1984
Conoco Inc. du Pont Co.	DOJ Consent Order Entered	$804	1981
Standard Oil Co. British Petroleum Co.		$776	1987
Marathon Oil Co. U.S. Steel Corp.		$662	1981
RCA Corp. General Electric Corp.	DOJ Consent Order Entered	$597	1985
General Foods Corp. Philip Morris Cos.		$563	1985
Beatrice Cos. Kohlberg Kravis Roberts		$536	1985
Hughes Aircraft Co. General Motors Corp.		$503	1985
Cities Service Co. Gulf Oil Co.	FTC Won P.I. and Merger Dropped	$500	1982
Nabisco Brands Inc. R.J. Reynolds Ind.		$491	1985
Signal Cos. Inc. Allied Corp.	DOJ Consent Order Entered	$448	1985
Sperry Corp. Burroughs Corp.		$439	1986
Safeway Stores Inc. SSI Holdings Corp.		$420	1986

Target Firm/ Acquiring Firm	Antitrust Enforcement Activity	Reporting Level Under Proposed Rules (Millions)	Year
Dome Petroleum Ltd. Amoco Corp.		$418	1987
Cities Service Co. Occidental Petroleum		$412	1982
Texas Oil & Gas U.S. Steel Corp.		$409	1985
Owens-Illinois Inc. Kohlberg Kravis Roberts		$363	1986
American Broadcasting Capital Cities Comm.		$353	1985
Celanese Corp. American Hoechst Corp.	FTC Consent Order Entered 1987; FTC Complaint, Dkt. No. 9216, 11/17/88	$287	1986
St. Regis Corp. Champion International	FTC Consent Order Entered	$181	1984
J.P. Stevens West Point Pepperell	FTC Consent Order Entered	$120	1988
United Energy Resources MidCon Corp.	FTC Consent Order Entered	$114	1985
Republic Steel Corp. LTV Corp.	DOJ Consent Order Entered	$77	1984
Brockway Inc. Owens Illinois Inc.	FTC Sought P.I.; FTC Complaint, Dkt. No. 9212, 1/11/88	$74	1987
Jos. Schlitz Brewing Pabst Brewing Co.	DOJ Won P.I. and Merger Dropped	$59	1981
National Steel Corp. U.S. Steel Corp.	DOJ Objection and Merger Dropped	$58	1984
Safeway Stores Von's Grocery	FTC Consent Order Entered	$31	1988