AKIN, GUMP, STRAUSS, HAUER & FELD
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1333 NEW HAMPSHIRE AVENUE, N.W.
SUITE 400
WASHINGTON, D.C. 20036
(202) 887-4000
FAX (202) 887-4288

4100 FIRST CITY CENTER
1700 PACIFIC AVENUE
DALLAS, TEXAS 75201-4618
(214) 969-2800

31 CURZON STREET
LONDON, W1Y 7AE
(01) 409-1093

2100 ONE CONGRESS PLAZA
111 CONGRESS AVENUE
AUSTIN, TEXAS 78701
(512) 499-6200

1500 INTERFIRST PLAZA
300 CONVENT STREET
SAN ANTONIO, TEXAS 78205
(512) 270-0800

3200 REPUBLICBANK CENTER
700 LOUISIANA STREET
HOUSTON, TEXAS 77002
(713) 221-0101

WRITER'S DIRECT DIAL NUMBER (202) 887-4010

December 23, 1988

RECEIVED
DEC 27 1988
223-4
DOCUMENT PROCESSING

Donald S. Clark, Esquire
Secretary
Federal Trade Commission
Room 136
Washington, D.C. 20580

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

Re: Comments Concerning the Proposed Amendments to the Hart-Scott-Rodino Premerger Notification Rules

Dear Mr. Clark and Mr. Rule:

This letter is submitted in response to the Notice of Proposed Rulemaking published by the Federal Trade Commission on September 22, 1988 in the Federal Register, 53 Fed. Reg. 36,831, requesting comments on proposed amendments to the premerger notification rules contained in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino" or the "Act"). The proposed amendments would ease reporting requirements on acquisitions of 10 percent or less of an issuer's stock.

This letter comments on the Commission's proposed Rule 802.24; alternative proposed Rule 801.34; and the alternative amendment to Rule 801.30. The principal proposal, Rule 802.24, would exempt purchases of up to 10 percent of an issuer's stock from the reporting requirements of the Act. The first alternative proposal, Rule 801.34, would allow acquirors to purchase the same amount of stock without filing, but would require that the stock be placed in escrow pending approval by the antitrust enforcement agencies. The second alternative proposal, amended Rule 801.30, would permit purchasers of up to 10 percent of an issuer's stock to file a notification form containing sufficient information about the issuer so that preacquisition notification to the issuer would not ordinarily be necessary.

I. BACKGROUND

The Federal Trade Commission and the Antitrust Division of the Department of Justice initiated a proposed rulemaking on September 24, 1985 to close the Hart-Scott-Rodino "partnership loophole."1/ Akin, Gump, Strauss, Hauer & Feld filed a comment on November 29, 1985 supporting the closing of the partnership loophole and proposing the adoption of a rule exempting de minimis acquisitions of up to 5 percent of an issuer's stock.2/ In support of our proposal, we argued in that comment that a de minimis exemption would make the operation of the Hart-Scott-Rodino filing thresholds -- specifically the $15 million threshold -- conform with the disclosure requirements of the Williams Act. Our comment also documented the absence of antitrust enforcement interest in acquisitions of less than 5 percent of an issuer's stock at the Federal Trade Commission and the Antitrust Division of the Department of Justice. The Antitrust Section of the American Bar Association filed a comment on April 6, 1987 endorsing our proposed 5 percent de minimis exemption.3/ The Federal Trade Commission amended the Hart-Scott-Rodino rules on May 29, 1987 in an effort to close the partnership loophole.4/ We understand that the Federal Trade

---

1/ By use of the "partnership loophole", purchasers were able to acquire an issuer's stock without being required to make a preacquisition filing pursuant to Hart-Scott-Rodino. A purchaser was able to avoid Hart-Scott-Rodino by purchasing shares through a partnership with few assets other than the cash necessary to make the acquisition. Because the Hart-Scott-Rodino rules deemed the partnership, rather than the individual partners, to be the "acquiring person", the partnership fell below the "size-of-person" threshold set forth in the Act.

2/ A copy of the comment is appended to this filing.

3/ Comments of the American Bar Association, Section of Antitrust Law, Comments on Proposed Hart-Scott-Rodino Rules relating to Control of Partnerships and Other Entities having No Outstanding Voting Securities (April 6, 1987) at pp. 8-9.

4/ 52 Fed. Reg. 20,058. The Commission amended the definition of control in § 801.1(b) to provide that persons owning 50 percent or more of partnerships or other entities that do not have outstanding voting securities would be deemed to "control" such entities. Those persons are thereby required to report acquisitions by these entities. 16 C.F.R. § 801.1(b) (1987).

Commission began drafting this proposed 10 percent de minimis exemption rule in July 1987, but postponed further action on it pending Congressional consideration of proposed legislation to modify the threshold levels for disclosure under the federal securities laws. The current rulemaking was initiated on September 22, 1988.

II. STATEMENT OF POSITION

The operation of the current Hart-Scott-Rodino $15 million filing threshold undermines the principle of neutrality underlying the Williams Act, which governs the public disclosure of stock acquisitions. Absent any significant antitrust enforcement interest in transactions involving less than 10 percent of an issuer's stock, the Federal Trade Commission should adopt the proposed rule in order to coordinate the preacquisition notification requirements under Hart-Scott-Rodino with the disclosure requirements in the federal securities laws.[5/] As the Commission's own findings in the Notice of Proposed Rulemaking indicate, the antitrust enforcement agencies have never challenged the acquisition of 10 percent or less of an issuer's stock as a violation of Section 7 of the Clayton Act.[6/] Absent such enforcement interest, it would be appropriate to exempt such stock purchases from Hart-Scott-Rodino reporting, pursuant to the statutory authority granted by Congress. However, if the Commission concludes that acquisitions of 10 percent of an issuer's stock might permit a purchaser to exert control over an issuer (thereby raising the possibility of some competition concern under Section 7 of the Clayton Act), notwithstanding the historical absence of any antitrust enforcement interest in such acquisitions, the Commission should alternatively adopt a lesser 5 percent de minimis exemption.

Contrary to the views that some have taken on this proposed rule change, the antitrust enforcement agencies should not use the Hart-Scott-Rodino preacquisition notification requirements to make acquisitions, hostile or otherwise, more or less difficult. The sole goal of the enforcement agencies under Hart-Scott-Rodino

---

5/ Congress has given the Commission the authority to exempt "transactions which are not likely to violate the antitrust laws" from the Hart-Scott-Rodino filing requirements. The Hart-Scott-Rodino Antitrust Improvement Act of 1976, § 7A(d)(2)(B), 15 U.S.C. 18a (1976).

6/ 53 Fed. Reg. 36,831, 36,838 (September 22, 1988).

should be to use preacquisition notification to complement enforcement of the substantive antitrust laws. If the antitrust enforcement agencies or any other entity believes that, as a policy matter, hostile or other acquisitions should be restricted, that goal should be achieved through legislative changes to other federal laws, not through the antitrust laws.

III. DISCUSSION

1. Congress Intended that Hart-Scott-Rodino Conform to the Principle of Neutrality Underlying the Williams Act.

Congress passed the Williams Act in 1968 to regulate the use of tender offers in corporate acquisitions. In adopting the Williams Act, Congress rejected an initial approach intended to protect target companies in favor of one that was neutral between the interests of bidders and targets.[7/] The scheme eventually adopted by Congress mandated public disclosure designed to permit shareholders an opportunity to make informed and unpressured investment decisions. Manuel Cohen, then Chairman of the SEC, confirmed this in testimony before the Senate Subcommittee on Securities:

7/ In 1965, Congress considered a less neutral approach to tender offer regulation. Indeed, "the disclosure provisions originally embodied in S. 2731 'were avowedly pro-management in the target company's efforts to defeat takeover bids." Edgar v. MITE Corp., 457 U.S. at 633, quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. at 30 (This earlier bill (S. 2731, 89th Cong., 1st Sess. (1965)), also introduced by Senator Williams, would have required disclosure by a bidder in advance of a tender offer). This careful drafting of the Williams Act reflects Congress' decision to disclaim any "intention to provide a weapon for management to discourage takeover bids." Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). Instead, Congress sought to "protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." Edgar v. MITE Corp., 457 U.S. at 634 (emphasis added). The fact that Congress previously eschewed a non-neutral approach to tender offer regulation is significant.

> The general approach . . . of this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts.[8/]

Chairman Cohen responded to the fear that the Williams Act would favor incumbent management in resisting potentially beneficial takeover bids by stating:

> [T]he principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor . . . . This is our concern and our only concern.[9/]

After examining the legislative history of the Williams Act, the Supreme Court concluded: "Congress was indeed committed to a policy of neutrality in contests for control."[10/] The sponsor of the legislation, Senator Williams, recognized this as well:

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholders and employees, and in a few severe situations, it will be necessary if the company is to survive.[11/]

8/ Hearing on S. 510 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 15 (1967) (quoted in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, at 27 (1977)).

9/ Piper v. Chris-Craft Industries, Inc., 430 U.S. at 27.

10/ Piper v. Chris-Craft Industries, Inc., 430 U.S. at 29.

11/ Cong. Rec. S. 443-444 (daily ed. Jan. 18, 1967) (remarks of Senator Williams). See also Letter from Chairman Oliver and Commissioner Calvani to the Council of the Corporation Section of the Delaware Bar Association, Commenting on a Proposal to Amend Delaware's General Corporation Law to Restrict the Ability of Acquirors to Engage in Business Combinations with Target Corporations for Three Years after Acquiring Ten Percent of the Target Firms' Shares. (December 10, 1987, at page 10) ("Corporate law should remain neutral in contests for corporate

(continued...)

Accordingly, the draftsmen took extreme care to balance the scales to protect the legitimate interests of the bidder, issuer, issuer's management, and shareholders without unduly impeding takeover bids. Senator Williams again emphasized the neutrality of the legislation with the often-cited words:

> We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid. [The Williams Act] is designed solely to require full and fair disclosure for the benefit of investors.[12/]

Eight years after the passage of the Williams Act, Congress adopted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, allowing the Federal Trade Commission and the Justice Department to investigate the antitrust implications of large acquisitions before those transactions are consummated. During the legislative debates, House Judiciary Chairman Peter Rodino emphasized that Hart-Scott-Rodino "in no way intend[ed] to repeal or reverse the congressional purpose underlying the 1968 Williams Act . . .[13/] As the House Committee report makes clear, Hart-Scott-Rodino "underscores the basic purpose of the Williams Act -- to maintain a neutral policy toward cash-tender offers . . ."[14/]

11/ (...continued)
control, providing an advantage neither to acquirors nor to target management. Neutrality of the law with respect to takeovers promotes shareholder sovereignty, economic efficiency, and consumer welfare.")

12/ 113 Cong. Rec. 24,664 (1967).

13/ 122 Cong. Rec. H30877 (daily ed. September 16, 1976)(statement of Rep. Rodino).

14/ House Committee on the Judiciary, Hart-Scott-Rodino Antitrust Improvements Act of 1976, H. Rep. No. 1373, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 2572, 2644.

2. **Operation of the Hart-Scott-Rodino $15 Million Threshold Undermines the Neutrality of the Williams Act.**

This principle of neutrality underlying the Williams Act is threatened by the operation of the $15 million Hart-Scott-Rodino filing threshold. Rule 13d-1 of the Williams Act provides that any person who obtains a 5 percent or more beneficial interest in an issuer must file, within ten days after making such an acquisition, a Schedule 13D statement with the Securities and Exchange Commission and the target issuer.[15/] Under Rule 14d-3 of the Williams Act, any person making a tender offer that would result in ownership of more than 5 percent of a class of equity securities must file a Schedule 14D-1 statement with the Securities and Exchange Commission and the target issuer, and must disclose this information to the market.[16/]

Thus, both Rule 13d-1 and Rule 14d-3 permit the purchase of up to 4.99 percent of an issuer's stock before any disclosure obligation is incurred. However, depending upon the size of the issuer, an acquiror who intends to purchase stock valued at $15 million or more may be obligated to report under Hart-Scott-Rodino before Rule 13d-1 or Rule 14d-3 applies. Although Hart-Scott-Rodino filings are confidential, the purchaser must notify the issuer in order to make available to the antitrust enforcement agencies information necessary for a complete antitrust review of the proposed stock purchase. Typically, an issuer learns about a large stock purchase as a result of a Schedule 13D filing. However, in cases where 5 percent or less of an issuer's stock is valued in excess of $15 million, the issuer receives preacquisition notification through the Hart-Scott-Rodino requirements, prior to the purchase of that stock, even though the Williams Act would not require that a Schedule 13D be filed at that time. As a result, in the context of an unsolicited acquisition of stock, an issuer can begin to take defensive actions long before the Williams Act disclosure requirements are triggered.[17/] This contradicts the general

---

15/ 17 C.F.R. § 240.13d-1 (1985).

16/ 17 C.F.R. § 240.14d-1 (1985).

17/ See B. Mendelsohn & A. Berg, Debating Federal Takeover Legislation, Wall St. J., Nov. 19, 1987 (Letter to the Editor); Sandler, New Takeover Rules Governing Disclosure May Mean More Worries for Big Companies, Wall St. J., July 14, 1987; Donovan,
(continued...)

policy favoring coordination between the two regulatory schemes, and more specifically, contravenes the principle of neutrality, one of the cornerstones of the Williams Act.[18] In this instance, the mandatory notification of a Hart-Scott-Rodino filing to the issuer functions as a surrogate, but clearly premature, Schedule 13D disclosure. Here, an antitrust provision -- which is concerned with the competitive impact of stock purchases -- essentially preempts the operation of the Williams Act -- which is concerned with the disclosure of information to the marketplace.

Public disclosure of stock acquisitions is solely within the province of the Williams Act. As the Commission recognizes in its Notice of Proposed Rulemaking, "[Hart-Scott-Rodino] was never intended to generate public disclosure of stock acquisitions".[19] Yet Hart-Scott-Rodino reporting assuredly has this effect. In light of a clear Congressional intent that Hart-Scott-Rodino not usurp the Williams Act disclosure requirements, the Commission should adopt the proposed 10 percent <u>de minimis</u> exemption, unless a significant antitrust enforcement interest exists.

If Congress concludes either that target companies should receive earlier notification of significant stock acquisitions or that "hostile" tender offers should be discouraged, Congress should deal with these issues directly through other statutory schemes, not the antitrust laws. Concerns focusing on the adequacy of existing disclosure rules or addressing the role that the federal government should play in the market for corporate control are concerns that should properly be considered as part of an evaluation of existing federal securities laws. The goal of the principal proposal is not to encourage hostile tender

---

17/ (...continued)
<u>Change in Antitrust Laws Forces Takeover Players to Show Cards</u>, Investor's Daily, July 29, 1987.

18/ <u>See</u>, <u>e.g.</u>, Statement of John S.R. Shad, Chairman, Securities and Exchange Commission Before the House Subcommittee on Telecommunications, Consumer Protection, and Finance (March 28, 1984) at 10. <u>See also</u> Statement of Congressman Rodino, 122 Cong. Rec. H30877 (daily ed. Sept. 16, 1976)("[H-S-R] in no way intends to repeal or reverse the Congressional purpose underlying the 1968 Williams Act . . .").

19/ 53 Fed. Reg. at 36,834.

offers; rather, it seeks to conform the antitrust laws with the principle of neutrality underlying the Williams Act. As an antitrust law, Hart-Scott-Rodino should not be used to accomplish "backdoor" changes in the federal securities laws, changes that Congress explicitly considered and rejected when it adopted the Williams Act.

3. There Is No Antitrust Enforcement Interest in Stock Acquisitions at the $15 Million Filing Threshold.

Enforcement statistics appearing in the Federal Trade Commission's Notice of Proposed Rulemaking demonstrate a negligible enforcement interest in acquisitions involving 10 percent or less of an issuer's stock.[20/] These statistics show that for the most recent years in which complete statistics are available (1981-1984) only 74 transactions involving 10 percent or less of an issuer's stock were reported under Hart-Scott-Rodino.[21/] Although the Commission is still compiling statistics for 1985 and 1986, incomplete data shows that a slightly higher number of such transactions (at the 10 percent level) were reported in those two calendar years, presumably reflecting the increased number of transactions reported overall for those years.[22/] However, significantly, none of these transactions were challenged by either the Federal Trade Commission or the Justice Department as violations of the Clayton Act. In addition, the Commission's statistics show that enforcement clearance[23/] was obtained for only 7 of the 74 transactions (9.5 percent of all such stock transactions), and that only 1 second

---

20/ 53 Fed. Reg. at 36,837-838.

21/ 53 Fed. Reg. at 36,838.

22/ 53 Fed. Reg. at 36,838.

23/ "Clearance" demonstrates the most minimal level of antitrust enforcement concern. Under clearance procedures, the Federal Trade Commission and the Department of Justice decide which agency will conduct a preliminary review of the proposed acquisition. It is a prelude to a determination whether the acquisition merits any investigation by one of the two enforcement agencies. See American Bar Association, Antitrust Section, Antitrust Law Developments (2d ed.) p. 344, & note 7; Antitrust Division, U.S. Department of Justice, Antitrust Division Manual VII: 2 (1979).

request was issued (1.4 percent of all such transactions).24/ According to the Commission, these statistics "demonstrate a much lower than average level of enforcement interest in acquisitions of 10 percent or less."25/ Given the absence of significant enforcement interest in transactions involving 10 percent or less of an issuer's stock, the Commission should act to conform the Hart-Scott-Rodino filing requirements to the Williams Act's principle of neutrality by adopting the 10 percent *de minimis* exemption.

4. The 10 Percent *de minimis* Exemption Would Protect the Integrity of the Hart-Scott-Rodino Notification Program.

Adoption of the proposed rule would also protect the integrity of the Hart-Scott-Rodino filing requirements. In the past, some purchasers have avoided preacquisition notification under Hart-Scott-Rodino in order to prevent premature disclosure to the issuer before the acquisition thresholds under the Williams Act disclosure rules were reached. Intentionally or otherwise, purchasers accomplished this goal by using partnerships to acquire stock. On May 29, 1987, the Commission attempted to close the partnership loophole by amending the definition of "control" in Rule 801.1(b) to provide that persons owning 50 percent or more of partnerships or other entities that do not have outstanding voting securities would be deemed to control such entities.26/ Therefore, under this definition, a partner meeting the statutory "size of person" threshold who owns 50 percent or more of the acquiring partnership would be required

---

24/ 53 Fed. Reg. at 36,838.

25/ 53 Fed. Reg. at 36,837. This lack of enforcement interest is consistent with sound antitrust theory. Although Professors Areeda and Turner believe that partial stock acquisitions should be treated in the same manner as controlling or full acquisitions under Section 7 of the Clayton Act, they conclude that "a presumptive rule-of-thumb ignoring, say, 5 percent holdings seems reasonable." 5 P. Areeda & D. Turner, *Antitrust Law* § 1203d at 322 (1980).

26/ 52 Fed. Reg. 20,058.

to file preacquisition notification. However, the partnership loophole has not been completely eliminated.[27/]

The proposed 10 percent _de minimis_ exemption directly addresses the underlying cause of this noncompliance problem. The 10 percent _de minimis_ exemption would eliminate this incentive to avoid premature market disclosure under Hart-Scott-Rodino by conforming the Hart-Scott-Rodino filing thresholds with the Williams Act filing requirements without hampering the antitrust enforcement mission of the Federal Trade Commission and the Department of Justice.

Although the proposed 10 percent _de minimis_ exemption properly reflects the lack of antitrust enforcement interest at the 10 percent level, it should be noted that a _de minimis_ rule exempting acquisitions of either 5 or 10 percent of an issuer's stock would conform the Hart-Scott-Rodino filing thresholds with the Williams Act disclosure rules. While we strongly support the Commission's proposed 10 percent _de minimis_ rule because of the absence of enforcement interest at that level, an alternative 5 percent _de minimis_ exemption would be consistent with the arguments advanced above. Should the Commission conclude that sufficient enforcement interest exists for acquisitions of stock at the 5 to 10 percent level, we urge the Commission alternatively to adopt the lesser 5 percent _de minimis_ exemption.

The two alternatives contained in the Notice of Proposed Rulemaking are inadequate. Both alternative proposals would require the purchaser to continue to bear burdensome reporting costs even though the antitrust enforcement agencies have demonstrated little or no enforcement interest in transactions involving less than 10 percent of an issuer's stock. In addition, because the second alternative (alternative amendment to Rule 801.30) would require the enforcement agencies to inform the issuer to facilitate an adequate antitrust review, the integrity of the Williams Act disclosure principles would

---

27/ For example, if three persons form a partnership to acquire an issuer's stock and each of these partners is entitled to receive one-third of the profits of the partnership or one-third of the assets if the partnership is dissolved, this partnership would continue to be exempt from the Hart-Scott-Rodino filing requirements. (Hearing on S.431 and S.432 before the Senate Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary, 100 Cong., 1st Sess. 25-26 (1987) (Statement by Commissioner Calvani in response to a question from Senator Metzenbaum)).

continue to be subject to abuse. In short, the disadvantages of the alternative proposals outweigh any enforcement benefits that might be realized from their enactment.

IV. SUMMARY AND CONCLUSION

Preacquisition disclosure of the intended purchase of a significant portion of an issuer's stock may be warranted when an overriding interest is involved, such as the protection of competition. But where no such concern is present, as the empirical data establishes is the case in purchases of up to 10 percent of an issuer's voting securities, the harm that premature public disclosure produces cannot be ignored. Because the current $15 million Hart-Scott-Rodino filing threshold is often lower than the Williams Act's Rule 13d-1 5 percent filing threshold, the issuer whose stock will be acquired receives notice of the intended acquisition before disclosure is mandated by the federal securities laws. This inconsistency undermines the principle of neutrality upon which the Williams Act is based.

For these reasons, we urge the Federal Trade Commission to adopt a 10 percent de minimis filing exemption for purchases of voting securities under Hart-Scott-Rodino.

Very truly yours,

AKIN, GUMP, STRAUSS, HAUER & FELD

By: Edward S. Knight
Edward S. Knight
Andrew G. Berg
J. David Carlin

Attachment A

AKIN, GUMP, STRAUSS, HAUER & FELD

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.
SUITE 400
WASHINGTON, D.C. 20036
(202) 887-4000
TELEX NUMBERS:
89-665
440-509

DALLAS OFFICE
4100 FIRST CITY CENTER
1700 PACIFIC AVENUE
DALLAS, TEXAS 75201-4618
(214) 969-2800

LONDON OFFICE
31 CURZON STREET
LONDON, W. 1
(01) 409-1093

AUSTIN OFFICE
900 MBANK TOWER
AUSTIN, TEXAS 78701
(512) 499-6200

SAN ANTONIO OFFICE
1100 ONE RIVERWALK PLACE
700 NORTH ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(512) 224-1801

WRITER'S DIRECT DIAL NUMBER 887- 4040

November 29, 1985

Ms. Emily H. Rock
Secretary, Federal Trade Commission
Room 172
Washington, D.C. 20580

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

Re: Comments Concerning the Proposed Amendments to the Hart-Scott-Rodino Premerger Notification Rules

Dear Ms. Rock and Mr. Ginsburg:

This letter is submitted in response to the Notice of Proposed Rulemaking published by the Federal Trade Commission on September 24, 1985 in the Federal Register, 50 Fed. Reg. 38,741, requesting comments on proposed amendments to reduce the cost to the public of complying with the Hart-Scott-Rodino rules and to improve the effectiveness of the premerger notification program. As a former director of the Bureau of Competition and as an antitrust lawyer with a merger and acquisition practice, I am particularly interested in the efficient operation of the premerger notification program.

This letter comments on the Commission's proposed Rule 801.5, which requires persons intending to make acquisitions through certain entities to file notifications as if they were making those acquisitions directly. I suggest an additional proposal for reducing the burden of compliance with the Hart-Scott-Rodino rules. More specifically, I propose that the Commission adopt a _de minimis_ exemption for purchases of up to 5%

of the voting securities of an issuer. While a 5% de minimis exemption seems clearly appropriate in the "acquisition vehicle" context addressed by the proposed rule, public policy considerations suggest that such an exemption should apply across the board to stock acquisitions generally.

I. Summary of Position

Proposed Rule 801.5 would extend the Hart-Scott-Rodino rules to cover virtually all "acquisition vehicles" now commonly used in initiating tender offers. While I strongly support pre-transaction antitrust review for competitively-significant stock purchases, the current $15 million minimum notification threshold is simply too low and serves no legitimate antitrust purpose. I am concerned that unless this minimum threshold is increased, proposed Rule 801.5 will discourage the initiation of tender offers.

My concern is that proposed Rule 801.5, in conjunction with the limited availability of the "solely for the purpose of investment" exemption,[1/] will drastically limit the amount of stock that may be profitably purchased in anticipation of a subsequent tender offer. Absent a demonstrable investment intent, all purchases of voting securities valued in excess of $15 million would be barred, pending Hart-Scott-Rodino clearance, including purchases by newly-formed partnerships of only tiny portions of the issuer's voting securities.[2/] The problem is that the Hart-Scott-Rodino filing must be reported to the target issuer as

---

1/ See Correspondence from Thomas J. Campbell to Michael N. Sohn Concerning O'Connor & Associates' Acquisition of Voting Securities Solely for the Purpose of Investment (August 19, 1982), reprinted in The Hart-Scott-Rodino Antitrust Improvements Act of 1976: Premerger Notification Source Book 213 (1985); United States v. Coastal Corp., 1985-1 (CCH) Trade Cas. ¶ 66,425 (D.D.C. 1984).

2/ For example, for a hypothetical large corporation with total issued stock valued at $3 billion, the $15 million notification threshold would be reached after the purchase of a mere .5% of stock.

well.3/ The target issuer typically makes immediate public disclosure as a defensive tactic or initiates other defensive moves intended to produce competing bids.

These defensive moves following disclosure create an "auction market" and almost invariably raise the market price of the issuer's stock, thus increasing the required initial bid price in a subsequent tender offer. Premature initiation of this "auction market," before the disclosure required under the Williams Act, denies adequate compensation to a first bidder for the discovery and search costs incurred in identifying an appropriate target issuer, thereby discouraging bidders from initiating tender offers. As the costs and risks associated with initiating tender offers increase, fewer tender offers will be initiated, denying our nation's economy the economic efficiency and other important economic benefits that have been found to result from tender offers. This loss to our economy comes with no offsetting benefit, because stock purchases of such small magnitude generally pose little or no threat to competition. Although a $15 million notification threshold may serve a legitimate antitrust purpose for asset acquisitions, it serves no such purpose for pure stock purchases and handicaps the economy in the process.

I believe that a 5% *de minimis* exemption will preserve a first bidder's incentives to engage in takeover activity by permitting recovery of search costs associated with identifying an appropriate target issuer. Perhaps even more important, a 5% *de minimis* exemption will have the added benefit of coordinating Hart-Scott-Rodino reporting obligations with disclosure requirements under the Williams Act, which permits an acquirer to purchase up to 5% of an issuer's securities without notifying either the issuer or the Securities and Exchange Commission. In the alternative, I urge the Federal Trade Commission to modify its interpretation of the "solely for the purpose of investment" exemption under Rule 802.9 so as to make that exemption expressly available to stock purchases of less than 10% of an issuer's

---

3/ *See* 16 C.F.R. § 803.5 (1985).

securities made prior to, but clearly in preparation for, a subsequent tender offer.4/

II. Discussion

1. Takeover Activity Benefits Corporate Shareholders and the Nation's Economy.

There is now widespread consensus that takeover activity in general benefits both corporate shareholders and the nation's economy. This view has been adopted by a number of very eminent authorities, including the U.S. Council of Economic Advisers,5/ the Office of Management and Budget,6/ the staff of the Federal Trade Commission,7/ the Securities and Exchange Commission,8/ the

---

4/ Under either alternative, the antitrust enforcement agencies would receive premerger notification -- with the attendant waiting periods and compulsory process safeguards -- prior to consummation of any tender offer or other stock purchase conferring control or otherwise raising legitimate antitrust concern.

5/ U.S. Council of Economic Advisers, Economic Report of the President (1985) at 196-97 [hereinafter "Economic Report of the President"].

6/ Correspondence from Frederick S. Upton (Deputy Assistant Director for Legislative Affairs) to Honorable Timothy E. Wirth (October 22, 1984).

7/ Comments of the Bureau of Economics, Competition, and Consumer Protection of the Federal Trade Commission to the Securities and Exchange Commission on Proposed Amendments to Tender Offer Rules and Tender Offers by Issuers (September 9, 1985) at 4 [hereinafter "FTC Staff Comments"].

8/ Statement of John S.R. Shad, Chairman, Securities and Exchange Commission Before the House Subcommittee on Telecommunications, Consumer Protection, and Finance (March 8, 1984) at 10-11. See generally Memorandum of the Securities and Exchange Commission in Opposition to H.R. 5972 and H.R. 5693 As Amended (July 25, 1984).

Department of Justice,[9] the Department of the Treasury,[10] and a long list of very knowledgeable antitrust and securities commentators.[11] As former FTC Chairman James C. Miller III recently stated in his testimony to the Senate Committee on the Judiciary,

> it is clear that takeover activity generates net benefits for our economy . . . [M]ergers -- both friendly and unfriendly -- have an important economic role to play. They serve to shift assets to higher-valued uses, allow firms to take advantage of economies of scale and distribution, and provide incentives for

---

9/ Department of Justice Comments submitted to the Securities and Exchange Commission on Securities Exchange Act Release No. 21079, Two-Tier Offer Pricing and Non-Tender Offer Purchase Programs (September 14, 1984).

10/ Correspondence from Secretary Donald T. Regan to Honorable Timothy E. Wirth (September 25, 1984).

11/ See, e.g., Easterbrook & Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer," 94 Harv. L. Rev. 1161 (1981); Bebchuk, "The Case for Facilitating Competing Tender Offers," 95 Harv. L. Rev. 1028 (1982); Fischel, "Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers," 57 Tex. L. Rev. 1 (1978); Jarrell & Bradley, "The Economic Effects of Federal and State Regulations of Cash Tender Offers," 23 J.L. & Econ. 371 (1980). See generally Bebchuk, "Toward Undistorted Choice and Equal Treatment in Corporate Takeovers," 98 Harv. L. Rev. 1693 (1985).

Several of these authorities disagree on whether management of target firms should be permitted to solicit competing bids. Compare Easterbrook & Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer," 94 Harv. L. Rev. 1161, 1164 (1981)(proposing rule of managerial passivity) with Bebchuk, "The Case For Facilitating Competing Tender Offers," 95 Harv. L. Rev. 1028, 1030 (1982) (concluding that competing bids should be facilitated). By taking the position set forth in this comment, I do not mean to suggest that management of a target firm must remain passive in the face of a hostile tender offer.

> managerial efficiency. Thus, a freely operating market in corporate assets and corporate control promotes economic efficiency and a higher standard of living for the nation as a whole.12/

The source of these economic benefits is very clear. Takeovers perform a desirable disciplinary function by replacing inefficient management, deterring fiduciary abuse, and enforcing greater management sensitivity to the market's judgment.13/

2. First Bidders Should Be Compensated for the Substantial Search Costs Incurred in Identifying Potential Takeover Targets.

Corporate mismanagement and inefficiency is difficult to detect and even more difficult to correct. Most shareholders are passive investors, having very little interest in monitoring the performance of the company's managers. The bulk of shareholders generally free ride on the monitoring efforts of a small number of shareholders. But the monitoring shareholders' reward for

---

12/ Statement of Chairman James C. Miller III Before the Senate Committee on the Judiciary (May 1, 1985) at 1 & 2 (emphasis added). See also Address by Chairman James C. Miller III to the William G. Karnes Symposium on Mergers and Acquisitions (May 10, 1985) at 2 & 7; Statement of Chairman James C. Miller III Before the House Subcommittee on Monopolies and Commercial Law (September 14, 1983) at 8.

13/ Corporate shareholders benefit directly from takeover activity through enhanced performance of incumbent management of potential takeover targets and financial premiums realized from selling their stock in the course of a takeover. Several studies have established that target company shareholders on average earn about 30% from tender offers and 20% from mergers. See Jensen, "Takeovers: Folklore and Science," 62 Harv. Bus. Rev. 109, 112 (1984); Jensen & Ruback, "The Market for Corporate Control: The Scientific Evidence," 11 J. Fin'l Econ. 5 (1983). See also FTC Staff Comments at 5; Economic Report of the President at 197.

their efforts is commensurate only with the extent of their investment, not their monitoring costs.[14]

Tender offers are an effective method of monitoring the performance of management,[15] but this monitoring often involves considerable time and expense. Prospective bidders monitor management's performance by comparing a corporation's current value, as reflected by share prices, with its potential value. This requires substantial research to identify underpriced corporations and to determine how their management can be improved. This entails investigating in detail the operation of many corporations before finding one whose management can be improved.[16] When the difference between the market price of a corporation's stock and the value that the stock might have under different management becomes substantial, an outsider can profit by buying the firm and improving its management.[17] This takeover threat

---

14/ Easterbrook & Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer," 94 Harv. L. Rev. 1161, 1171 (1981) [hereinafter "Easterbrook & Fischel"]. See also Fischel, "Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers," 57 Tex. L. Rev. 1, 11 [hereinafter "Fischel"].

15/ See Economic Report of the President at 189, 191, 197. See also Easterbrook & Fischel at 1173.

16/ First bidders incur other costs, in addition to search and monitoring costs. Bidders invest their own time in searching for targets, representing opportunity costs of managers' time for other projects foregone. Bidders must also assemble and keep capital available for the acquisition. Easterbrook & Fischel, "Auctions and Sunk Costs in Tender Offers," 35 Stan L. Rev. 1, 6 (1982).

17/ See Easterbrook & Fischel at 1173. See also Jarrell & Bradley, "The Economic Effects of Federal and State Regulations of Cash Tender Offers," 23 J.L. & Econ. 371, 381 (1980) [hereinafter "Jarrell & Bradley"]; Fischel at 7.

should induce present management to be more profit maximizing.[18/] But as takeovers become more difficult to mount, this threat becomes less real and the monitoring benefits on management performance decline.[19/] The prospect of profit is the incentive underlying monitoring efforts.

Disclosure of purchases made prior to or in preparation for a takeover bid, such as through a Schedule 13D statement or Hart-Scott-Rodino notification, makes a subsequent tender offer more costly.[20/] This is because notification under Hart-Scott-Rodino to an issuer that a reportable amount of its shares has been purchased leads to premature initiation of an "auction market," which, in turn, raises the market price of the issuer's shares.

18/ *See* Jarrell & Bradley at 381. Easterbrook and Fischel believe that it is this threat of takeover -- not necessarily whether the takeover is consummated -- that benefits our economy.

> More significantly for our purposes, shareholders benefit even if their corporation never is the subject of a tender offer. *The process of monitoring by outsiders poses a continuous threat of takeover if performance lags*. Managers will attempt to [improve performance] in order to reduce the chance of takeover, and the process of [improving performance] leads to higher prices for shares.

Easterbrook & Fischel at 1174 (emphasis added). *See also* Economic Report of the President at 189.

19/ *See* Jarrell & Bradley at 381; Economic Report of the President at 191.

20/ *See* Jarrell & Bradley at 384-86. *See also* Economic Report of the President at 210 ("The announcement that a large blockholder has acquired a position causes a significant increase in the price of the target company's shares."); Fischel at 6. The Securities and Exchange Commission strongly opposes pre-acquisition filing of Schedule 13D statements -- functionally equivalent to a Hart-Scott-Rodino filing at the 5% level -- for this very reason. *See* Memorandum of the Securities and Exchange Commission in Opposition to H.R. 5972 and H.R. 5693 As Amended (July 25, 1984) at 5-7.

This, of course, substantially destroys the incentive to be a first bidder, as noted by Judge Easterbrook and Professor Fischel:

> Once the offeror announces its bid, however, other potential acquirers learn the target's identity. The bid itself, and the accompanying disclosures under federal and state law, may reveal much of what the offeror has learned. If the offeror does not supply other bidders with valuable information, the target's management may do so as part of a strategy to set up an auction. But any other bidder need not bear costs as high as those already incurred by the first bidder. The subsequent bidders take a free ride, ... <u>As a result, no firm wants to be the first bidder unless it has some advantage, such as speed, over subsequent bidders to compensate for the fact that only it had to incur monitoring costs</u>. And, of course, if there is no first bidder there will be no later bidders and no tender premium.21/

21/ Easterbrook & Fischel at 1178-79 (emphasis added). Many of the costs associated with identifying an appropriate target are sunk at the time the bid is made. See generally Easterbrook & Fischel, "Auctions and Sunk Costs in Tender Offers," 35 Stan L. Rev. 1, 3-7 (1982). Once the identity of the target is disclosed, non-searching purchasers can free ride. Jarrell & Bradley at 385. Easterbrook and Fischel conclude:

> Indeed, the existence of an offer by itself tells other prospective bidders where to look, even if it conveys no other information. These other bidders can confine their study to the target firm, although the first offeror undoubtedly incurred costs in examining the records and prospects of many firms.

Easterbook & Fischel at 1178 n.45. See also Fischel at 13. The target issuer, once it receives notification of the purchase through Schedule 13D or Hart-Scott-Rodino filing, has an incentive to initiate an auction market, such as by disseminating this

FOOTNOTE CONTINUED

A bidder facing the prospect of paying a higher premium is less likely to monitor other firms, which leads to a decrease in the number of bids made.[22/] Former FTC Chairman James C. Miller III, in his testimony before the Senate Committee on the Judiciary, maintained that reducing the incentives to develop the information necessary to be the first bidder "reduces the amount of resources devoted to searching out promising targets and ultimately reduces the number of [tender] offers."[23/] As monitoring by potential bidders declines, management performance deteriorates, with a loss in the value of stock price.[24/]

Conversely, by permitting profitable pre-tender offer stock purchases the first bidder retains important financial incentives to engage in searching and monitoring activities.[25/] As Professor Bebchuk notes:

21/ FOOTNOTE CONTINUED

information to the market, so as to increase the share price in an effort to defeat the subsequent tender offer. See Jarrell & Bradley at 386.

22/ Id. at 398-403 (empirical evidence confirming hypothesis that "the regulation-induced [disclosure] is expected to reduce the amount of resources (skill and knowledge) committed to all successful takeovers."). See also Easterbrook & Fischel at 1179.

23/ Statement of James C. Miller III Before the Senate Committee on the Judiciary (May 1, 1985) at 3.

24/ Easterbrook & Fischel at 1179.

25/ Several important authorities and commentators have relied heavily on the "first bidder" theory -- that first bidders should be permitted to recover search and discovery costs -- in arguing for deregulation of the takeover process. See, e.g., Economic Report of the President at 191, 192, 202-04; Statement of Chairman James C. Miller III Before the Senate Committee on the Judiciary (May 1, 1985) at 3-5; Jarrell & Bradley at 381-87, 404; Easterbrook & Fischel at 1178-79; Bebchuk, "The Case for Facilitating Competing Tender Offers," 95 Harv. L. Rev. 1028, 1050-56 (1982). See generally K.M. Davidson, Megamergers 353 (1985).

> A searcher that has identified a target may, and often does, start purchasing the target's shares in the market prior to making a tender offer. The searcher may purchase five percent of the target's stock without being required by the Williams Act to disclose the purchases. Whether the searcher wins or loses a subsequent bidding contest over the target, it will earn a gain on its pre-offer purchases of the target's stock.26/

Unfortunately, by drastically limiting pre-tender offer stock purchases, the present $15 million minimum filing threshold under Hart-Scott-Rodino -- even on an acquisition substantially less than the 5% permitted by the Williams Act -- takes away these economic incentives. Thus, to prevent the Hart-Scott-Rodino program from needlessly discouraging first bidders and thus promoting economic inefficiency, a new *de minimis* exemption for stock purchases should be adopted. While I believe that a good case could be made for a 10% or even 15% exemption, the 5% *de minimis* level proposed by this comment is a very conservative solution to the problem.

26/ Bebchuk, "The Case for Facilitating Competing Tender Offers," 95 *Harv. L. Rev.* 1028, 1035 (1982). Bebchuk further explains:

> If the searcher holds X shares of the target and the target is acquired through a tender offer for all shares at a premium of $Y per share, the searcher will gain $XY on its pre-offer purchase, regardless of the acquirer's identity. If the acquirer is a competing bidder, the searcher will earn $XY by tendering the stock it holds to the winner. If the searcher itself acquires the target, it will have to pay $XY less than it would have paid if it were a second bidder and had not made a pre-offer purchase of the target's stock.

Id. at 1035 n.41. *See also* Bebchuk, "Toward Undistorted Choice and Equal Treatment in Corporate Takeovers," 98 *Harv. L. Rev.* 1693, 1777 & n.171 (1985).

3. A 5% De Minimis Exemption Is Consistent with Disclosure Obligations Under the Williams Act.

A 5% de minimis exemption for stock purchases would coordinate Hart-Scott-Rodino reporting requirements with disclosure obligations under the Williams Act. Under Rule 14D-1, any person making a tender offer that will result in owning more than 5% of a class of equity securities must file a Schedule 14D-1 statement with the Securities and Exchange Commission and the target issuer, and must disclose this information to the market.27/ Regulation 13D of the Williams Act provides that any person who obtains a 5% or more beneficial interest in a company must also file, within ten days after making such acquisition, a Schedule 13D statement with the Securities and Exchange Commission and the target issuer.28/

Thus, both Rule 14D-1 and Regulation 13D permit the purchase of up to 4.99% of the stock of a target issuer before incurring any disclosure obligation. However, depending upon the size of the issuer, a purchaser of stock valued at $15 million may be obligated to report under Hart-Scott-Rodino before Regulation 13D or Rule 14D-1. This is contrary to the general policy favoring coordination between the two regulatory schemes.29/ What results

---

27/ 17 C.F.R. § 240.14d-1 (1985).

28/ 17 C.F.R. § 240.13d-1 (1985).

29/ See, e.g., Statement of John S.R. Shad, Chairman, Securities and Exchange Commission Before the House Subcommittee on Telecommunications, Consumer Protection, and Finance (March 28, 1984) at 10. See also Statement of Congressman Rodino, 122 Cong. Rec. H10,293 (daily ed. Sept. 16, 1976). A 5% de minimis exemption under Hart-Scott-Rodino would parallel Williams Act disclosure obligations even more closely under current proposals to either eliminate the 10 day period during which 5% beneficial holders may make open market purchases before actually filing the required Schedule 13D statement, see 17 C.F.R. § 13d-1(a) (1985); Advisory Committee on Tender Offers, Report of Recommendations, Securities and Exchange Commission (July 8, 1983) at 21-22, or require immediate announcement of the purchase once the 5% level is reached, see Memorandum of the Securities and Exchange Commission in Opposition to H.R. 5972 and H.R. 5693 As Amended (July 25, 1984) at 8.

in this instance is that the mandatory notification of a Hart-Scott-Rodino filing to the issuer functions as a surrogate, but clearly premature, Schedule 13D disclosure. Here, an antitrust provision -- which is concerned with the competitive impact of a stock purchase -- essentially preempts the operation of the Williams Act -- which is concerned with the disclosure of information to the marketplace. A 5% _de minimis_ filing exemption under Hart-Scott-Rodino would permit a purchaser to acquire 4.99% of voting securities without any disclosure to the issuer, as permitted by the Williams Act.

4. The $15 Million Notification Threshold Does Not Serve a Legitimate Antitrust Purpose for Stock Purchases.

Although the $15 million notification threshold may serve a legitimate antitrust purpose for asset acquisitions, it serves no such purpose for stock purchases. Enforcement statistics appearing in the FTC's Hart-Scott-Rodino Annual Report to Congress demonstrate a very low level of enforcement interest in transactions at the $15 million filing threshold,30/ the lowest filing threshold, which covers purchases of stock valued in excess of $15 million but comprising less than 15% of the issuer. Statistics contained in the most recent Annual Report (covering transactions during 1983) show that $15 million filings comprised only 41 of 903 total transactions (4.5%); that enforcement clearance was obtained for only three transactions (7.3% of all such transactions); and that only one second request was issued (2.4%

30/ These statistics show only the number of filings per notification threshold, number of clearances granted, and number of second requests issued. _See_ 50 Fed. Reg. 38,759 (September 24, 1985) (explaining enforcement significance of "clearance" and "second request"). These demonstrate only _prima facie_ enforcement interest; a more meaningful analysis would show the number of enforcement actions initiated and the number of successful enforcement actions (i.e., preliminary injunctions obtained), if any. _See id._ (increasing the § 802.20(b) threshold on the ground that "no enforcement actions have been instituted based on reported transactions valued at $15 million or less").

of all such transactions).31/ These statistics demonstrate no more enforcement interest than in the case of filings under § 802.20(b), where, on the basis of 1981, 1982, and 1983 enforcement statistics, the Commission has now concluded that there is a sufficiently reduced enforcement interest to warrant raising the "controlled issuer" level to $200 million from $25 million.32/ This same logic strongly suggests that the current $15 million notification threshold is too low, and that it should be

---

31/ See Eighth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (September 19, 1985), Table V. Enforcement statistics for transactions occurring in 1981 show a similar low level of enforcement interest: $15 million filings comprised only 20 of 762 total transactions (2.6%), enforcement clearance was obtained for only one transaction (5.0% of all such transactions), and no second requests were issued. See Sixth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (July 26, 1983), Table V.

32/ See 50 Fed. Reg. 38,759 (September 24, 1985). For instance, the 1981 enforcement statistics show that § 802.20(b) "controlled issuer" filings (identified as "less than $15 million transactions") comprised 87 of 762 total transactions (11.4%), enforcement clearance was obtained for 10 transactions (11.5% of all such transactions), and three second requests were issued (3.5% of all such transactions). Id. See also Sixth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (July 26, 1983), Table I. Fewer clearances and second requests (in terms of both absolute numbers and percentages) were required for $15 million threshold filings than for § 802.20(b) filings. Enforcement statistics for 1982 do show a higher level of enforcement interest for the $15 million threshold filings (of which there were only 16 in total). However, because these statistics do not break down filings below the 15% level on a percentage basis, they do not indicate how much, if any, of the enforcement activity (four clearances and two second requests) involved transactions that would be exempted under a 5% *de minimis* provision. See Seventh Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (May 31, 1984), Table V.

substantially raised in dollar amount[33/] or, more appropriately, supplanted with a 5% exemption.[34/]

In fact, the 1983 enforcement statistics easily justify a *de minimis* exemption *above* 5%, perhaps even as high as up to 14.99%. Enforcement statistics for the $15 million threshold actually overstate enforcement interest, if any can be said to exist, for purchases of 5% of voting securities, because statistics for the $15 million threshold -- specifically, the number of clearances granted and second requests issued -- cover stock purchases valued in excess of $15 million but comprising less than 15% of the issuer. The enforcement statistics do not identify the number of filings that would be covered under a 5% *de minimis* exemption. However, if there is no enforcement interest in purchases of up to

---

33/ Although the $15 million threshold is specifically prescribed by statute, *see* 15 U.S.C. § 18a(a)(3)(B), "acquisitions, transfers, or transactions which are not likely to violate the antitrust laws" may also be exempted, *see* 15 U.S.C. § 18a(c)(12). One authoritative commentator has suggested that a decision to raise the $15 million threshold would be within the Commission's delegated authority:

> Although Congress' withdrawal of the FTC's authority to *lower* the size of transactions subject to the Act's requirements evidenced a concern in Congress that transactions *below* statutory thresholds not be covered, it is clear that the legislators had no objections to the FTC *raising* the size thresholds of covered transactions in appropriate circumstances.

S. Axinn, B. Fogg & N. Stoll, *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act* 66 (1984) (emphasis in original). In fact, the Commission has utilized this provision in the past to propose additional filing exemptions. *See, e.g.*, Sixth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (July 26, 1983) at 4.

34/ Under this proposal, the quantitative threshold (in dollars) for a stock purchase could remain at $15 million, provided that the purchase also constitutes 5% or more of the issuer's voting securities.

14.99% of an issuer's stock,[35/] as the Commission's enforcement statistics clearly suggest, certainly there can be no competitive concern with a 5% *de minimis* exemption.

This lack of enforcement interest in purchases of up to 5% of an issuer is consistent with sound antitrust theory. Although Professors Areeda and Turner believe that partial stock acquisitions should be treated in the same manner as controlling or full acquisitions under Section 7 of the Clayton Act, they conclude that "a presumptive rule-of-thumb ignoring, say, 5 percent holdings seems reasonable."[36/] Thus, since premerger notification is intended to facilitate enforcement of Section 7, a 5% *de minimis* exemption is clearly warranted.

III. Summary and Conclusion

Disclosure of the purchase of a significant portion of an issuer may be warranted when an overriding interest is involved, such as the protection of competition in the marketplace. But where no such concern is present, as is the case in the purchase of up to 5% of an issuer's voting securities, the harm that disclosure produces cannot be ignored. Disclosure of the purchase of up to 5% of an issuer's voting securities, which may be compelled only by Hart-Scott-Rodino and not the Williams Act, will reduce incentives to initiate tender offers without any offsetting benefits to competition. By increasing the cost of making a tender offer, this compelled disclosure of the purchase of a competitively-insignificant portion of an issuer's voting securities reduces the effectiveness of tender offers and thereby undermines an important check against inefficient management to the detriment of both shareholders and the economy.

35/ The reasoning underlying the Commission's rejection of an earlier proposed increase in the $15 million threshold to $25 million, *see* 50 Fed. Reg. 38,743, does not apply to consideration of a 5% *de minimis* exemption. *See generally* 47 Fed. Reg. 29,198 (July 2, 1982). A $25 million holding in some cases may be in excess of 5% but less than 15% of the voting securities of an issuer.

36/ 5 P. Areeda & D. Turner, *Antitrust Law* § 1203e at 324 (1980).

The costs of regulation must constantly be reassessed. Here, the central issue is whether the costs to shareholders and the economy of compelled disclosure of purchases amounting to less than 5% of an issuer's voting securities outweigh the benefits -- preventing competitive harm to the marketplace. I believe that they do, because a 5% purchase of stock is competitively insignificant.

For these reasons, I urge the Federal Trade Commission to adopt a 5% _de minimis_ filing exemption for purchases of voting securities under Hart-Scott-Rodino.

Very truly yours,

Owen M. Johnson, Jr., P.C.