COMMENT No. 17

AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC.

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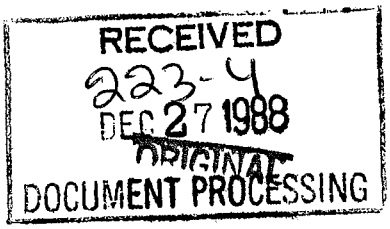
December 19, 1988

Secretary
Federal Trade Commission
Room 136
Washington, DC 20580



Assistant Attorney General
Antitrust Division
Department of Justice
Room 3214
Washington, DC 20530

Re: 16 CFR Parts 801, 802 and 803
Premerger Notification; Reporting
and Waiting Period Requirements

Dear Sirs:

The Tender Offers Committee of the American Society of Corporate Secretaries, Inc. is pleased to submit its comments on the proposals set forth in the above release (the "Release").

The Society is a professional association whose membership is composed principally of corporate secretaries, assistant secretaries and other executives involved in duties normally associated with the corporate secretarial function. The Society's 3,300 members, representing over 2,500 corporations in the United States and Canada, are regularly involved in such matters as corporate governance, the regulation and trading of securities, proxy solicitation and other shareholder activities.

We do not believe that the premerger notification, reporting and waiting period requirements should be amended so as to exempt all acquisitions of 10% or less of an issuer's voting securities.

As stated in the Release, the purpose of premerger notification and related requirements is to give the Federal Trade Commission ("FTC") and the Antitrust Division of the Justice Department notice of significant mergers and a reasonable opportunity to investigate them before they are consummated. By the insertion into Section 7A of the Clayton Act of a $15 million threshold test, Congress made clear its intention as to what it considered significant. Even adjusting upward that figure for inflation during the period since the enactment of the Hart-Scott-Rodino Act of 1976 (which of course Congress has not chosen to do), there would remain an express legislative dollar measure as to when a transaction is deemed to require scrutiny. The proposed amendments would seem to fly directly in the face of that determination by Congress.

It is true that under Section 7A of the Clayton Act, the FTC is empowered to "exempt ... classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws." To classify all acquisitions of 10% or less of the voting securities of an issuer as a class of transactions unlikely to violate the antitrust laws, however, seems misguided.

First, a holding of less than 10% may have antitrust consequences. Simply by stock ownership, a 10% holding may permit a minority shareholder to influence significantly the independent decision making of a target in areas which affect its competitiveness.

Second, a 10% threshold is insufficient in terms of allowing advance scrutiny of an impending business combination. It would have been possible to acquire a $2 billion stake in RJE Nabisco before reaching the 10% level. In the tender offer context, the battle can be over and done for all practical purposes long before the bidder actually acquires 10% of the target's securities. While the initial acquisition of less than 10% may itself not violate the antitrust laws, the completion of the hostile acquisition to which those early purchases may be a prelude, may very well cause a violation. Surely it is better and more efficient to look at a proposed megamerger before the offer by the bidder has been announced, the defenses by the target raised, a settlement negotiated, millions of dollars spent and the deal ready to close. An opposite conclusion seems contradictory to the purposes of the premerger notification requirements.

The real thrust of the suggestion is not that the $15 million threshold test serves no antitrust purpose, but rather that the FTC finds it difficult to force compliance by those who wish to make hostile tender offers. That, however, is not by itself an appropriate reason for the rules change. Violations cannot be ignored. The $15 million threshold exists because Congress believed that was the point at which transactions should begin to be examined. If the FTC now believes that a higher threshold is appropriate, it should take the matter up with Congress. If more time is needed for review, longer periods should be sought. The Commission should not attempt to sidestep the statute for purposes of administrative convenience. What is really called for perhaps, is not weaker rules, but more vigorous enforcement.

We agree that the specific purpose of a Hart-Scott-Rodino filing is not to provide disclosure in the hostile takeover area, yet the fact is that such

filings have become part of the fabric of takeover regulation because they do provide disclosure to a target. Indeed, the FTC's statement in the Release that compliance problems are largely "the result of non-antitrust related economic incentives to avoid the notification procedures" demonstrates the enormous importance of the premerger rules in the takeover context. As a practical matter, the proposed amendments threaten to materially affect the present balance between target and bidder. We believe that this reality has not been addressed and we would prefer the FTC not change the Hart-Scott-Rodino rules until the entire subject of tender offer regulation has been reviewed. Comprehensive legislation was considered in the last Congress and we would expect these issues to be again before Congress next year.

If a percentage threshold were adopted exclusively for premerger notification, a sound approach would be to coordinate that percentage with the Williams Act and set the level at 5%. On close examination the goals are not entirely separate. The 5% threshold for a 13D disclosure is an express recognition that at that point a move for combination or control has acquired sufficient substance to fall within the public interest. Significantly, substantial support exists both without and within Congress to reduce the 13D filing threshold to a lower percentage and eliminate the 10-day so-called window period for filing. It is odd that while the Williams Act filing at 5% is widely regarded as excessively high, these proposed amendments seek to elevate the level for a Hart-Scott-Rodino filing.

Finally, we would point out the importance of preserving the requirement to notify a target company of a premerger filing. Certainly the process benefits by having a target company furnish information about its product lines. Further, to deny a company the opportunity to participate by permitting a clandestine filing would unfairly turn the review into an ex parte proceeding.

Accordingly, we urge that the proposed amendments not be adopted.

Very truly yours,

John W. Hetherington
Chairman, Tender Offers Committee

JWH/v

Ken Davidson, Esq. JJT 01-03-89

DOCUMENT RECEIPT RECORD

THIS ACKNOWLEDGES SERVICE OF
Comment From John W. Hetherington, Chairman, Tender Offers Committer, American Society Of Corporate Secretaries, Inc. in the Matter of Premerger Notification, H-S-R

DATE FILED	DOCKET NUMBER	REFERENCE NUMBER
12-27-88	223-04	223-04-1

PLEASE SIGN ►

DATE RECEIVED

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FTC Form S-25 (rev. 11/88)

Bobbie Baruch, Esq. JJT 01-03-89

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