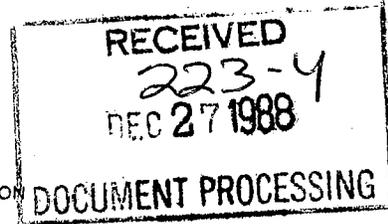


THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK  
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COMMITTEE ON ANTITRUST AND TRADE REGULATION

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December 19, 1988

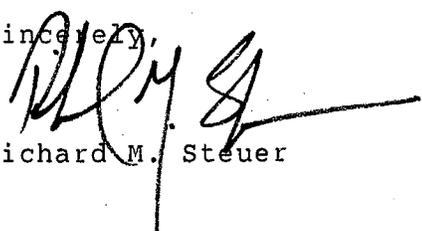
Secretary  
Federal Trade Commission  
Room 136  
Washington, D.C. 20580

Dear Sir:

On behalf of the Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York, I am sending you the Committee's comments on the proposals published in the Federal Register on September 22, 1988 (pages 36831, et. seq.) for altering the premerger notification procedures for acquisitions of ten percent or less of an issuer's voting securities.

If you have any questions, or need anything further in this connection, please let me know.

Sincerely,

  
Richard M. Steuer

RMS:th

Enclosure

cc: David Klingsberg, Esq.  
Alan Rothstein, Esq.

ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK  
COMMITTEE ON ANTITRUST  
AND TRADE REGULATION

Comments on the Proposed Revisions  
to 16 C.F.R. Part 800 set forth in  
53 Fed. Reg. 36831 (September 22, 1988)

The Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York writes to comment on the proposed revisions to the 10% investment exemption (16 C.F.R. §802.9) to the premerger notification requirement of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, in response to the Federal Trade Commission's Notice of Proposed Rulemaking published in 53 Fed. Reg. 36831 (September 22, 1988).

The Commission presents in the Notice three alternative revisions to the §802.9 exemption and poses four general questions (with subparts) regarding all three alternatives and a number of specific questions addressed to particular alternatives.

In these comments, the Committee first addresses each of the questions raised in the notice and then offers some general views on the relative merits of the three proposals. We conclude with a comment by the Committee on Corporation Law of the Association on the proposals.

General Questions (53 Fed. Reg. at 36840)

Question 1:

Is promulgation of any one of these proposals likely to change significantly existing patterns of acquiring voting

securities? Would, for example, many more persons make acquisitions of up to 10 percent of the voting securities of an issuer?

The dearth of antitrust cases involving acquisitions of 10 percent or less suggests that it is unlikely that such acquisitions will raise competitive problems. It is possible, however, that some acquisitions of more than 10 percent that were found to be anticompetitive would also have had significant anticompetitive effects if they had involved 10 percent or less. Special treatment of acquisitions of 10 percent or less could encourage some acquirors who might not otherwise have done so to limit their initial or total purchases to 10 percent. Under what circumstances might acquirors be so influenced, and in what situations would such small acquisitions be likely to violate the antitrust laws?

Comment:

Our experience leads us to believe that, as a result of enforcement actions in the past year, buyers have been more reluctant to rely on the investment exemption in §802.9 for purchases of less than 10% but over \$15 million of the outstanding voting securities of an issuer, since the parameters of that exemption are perceived to have become more restricted and uncertain. On the other hand, our experience has been that, as in the past, the premerger notification requirement generally has not been a deciding factor in business decisions, but may affect the method by which business goals are reached.

Therefore, we believe that the promulgation of either of the first two proposals, especially the principal proposal of an unrestricted exemption, would have the effect of encouraging more direct acquisitions of up to 10% of the voting securities of

an issuer rather than other acquisition approaches (such as through partnerships, newly formed corporations, etc.) to fulfill business goals set according to market conditions. There would no longer be the uncertainty of a subjective intent standard for such transactions. (Also, there probably would be less reliance on §802.64 in circumstances which have been questioned by the Commission and which have placed significant enforcement burdens on the government in situations which are unlikely to raise any substantive antitrust questions.)

Currently, purchasers may rely on §802.20 to acquire less than \$15 million (and 50%) of voting securities of an issuer and then are faced with the tactical decision of how to handle additional purchases in the context of the time constraints of premerger notification. These tactical decisions generally arise from business, not antitrust, concerns. The first two proposals would eliminate this tactical factor and would permit buyers to plan purchases of up to 10% of the voting securities of an issuer without the constraint of the premerger notification waiting periods.

However, we do not believe that the last proposal, of an optional notification, would have any significant effect on existing patterns of acquiring voting securities. The principal business difficulties with the current regulations are: (1) the waiting period before a threshold can be crossed; and (2) the disclosure to the issuer of the proposed acquisitions before they can be made and often before disclosure would be required under

the securities laws. The optional notification proposal does not eliminate the waiting period and would not completely eliminate the problem of premature notice to the issuer. Thus, it probably would not have a substantial effect on buyers, especially in cases of purchases from parties other than the issuers.

It would appear that the likelihood of significant substantive antitrust concerns arising where less than 10% of the voting securities of an issuer is being acquired for other than investment purposes is very small. However, where the buyer and the issuer are competitors and private companies, such a shareholder-issuer relationship may offer an opportunity for them to act anticompetitively, even if no change of corporate control is involved, since private companies generally may be subject to less scrutiny than public companies. On the other hand, any anticompetitive activity facilitated by the shareholder-issuer relationship would not be the result of market concentration per se and is better policed under Sherman Act §1.

Acquisition of less than 10% of the voting securities of an issuer may in some cases result in representation of the buyer on the issuer's board, but these will be subject to the restraints of Clayton Act §8. Also, public companies are generally subject to a significant amount of scrutiny by the public and securities regulatory agencies, and conflict of interest concerns on the part of directors may sharply restrict any potentially anticompetitive activities by the buyer and the

issuer. Therefore, the probability that such small acquisitions may have an effect violative of Clayton Act §7 appears to be very slight.

In those few cases where substantive antitrust concerns are raised, it would seem unlikely that the proposals would influence buyers to limit their initial or total purchases to 10%. Such a tactic would succeed only if the antitrust enforcement agencies never learn of the acquisitions. (And the optional notification proposal eliminates this possibility.) In the case of public issuers, if the antitrust enforcement agencies can monitor the filings of Schedule 13-D's and the business press on a continuous basis, it is unlikely that they would remain ignorant for any significant period of time of any acquisition of between 5 to 10% of the voting securities of public company. Once the enforcement agencies have focused on such an acquisition, and if they determine that §7 may have been violated, "unscrambling the eggs" in such a minority transaction would not involve the concerns and difficulties which provided the impetus for the HSR Act.

Question 2:

Under any of these proposals, will a substantial number of purchasers typically seek to acquire more than 10 percent of the voting securities of an issuer before notifying the target? If so, is it likely that any of these proposals will effectively reduce the Commission's burden of policing compliance with the premerger rules?

Comment:

The optional notification proposal would allow a buyer to acquire up to 10% of an issuer's voting securities without notifying the issuer. However, since the antitrust agencies remain authorized to seek information from the issuer (53 Fed. Reg. at 36843), issuers may still become aware of an acquisition in situations where substantive antitrust concerns arise.

In those cases, and in the cases of the principal and escrow proposals, the incentive to seek to acquire just over 10% without notifying the issuer would appear to depend on: (1) whether the buyer can as a practical matter acquire over 10% of the issuer's securities before filing a Schedule 13-D with the Securities and Exchange Commission; and (2) what the incentives are for buyers to acquire over 10% without filing a Schedule 13-D.

Based upon past experience with Schedule 13-D's, it would appear that there are relatively insignificant incentives for buyers to acquire more than 10% without notifying the target. Moreover, in the case of a publicly traded company, the acquisition of over 10% of an issuer's voting securities in a short time may in itself amount to notice to the issuer, regardless of disclosure of the identity of the buyer.

Therefore, it would seem likely that, at least with respect to the factor of notice to the issuer, all three proposals would reduce the incentive to evade the premerger notification requirement and effectively reduce the Commission's

burden of policing compliance with the premerger rules. However, as we have noted (Comment in response to Question 1), the optional notification proposal would not resolve the business difficulty with a waiting period, and thus, to that extent, the third proposal may not affect the Commission's enforcement burden.

Question 3:

If Congress amends the securities laws to eliminate the "ten day window," how should that change be reflected in these proposals?

Under those circumstances, should all the proposals be restricted to voting security acquisitions of 5 percent or lower? Would applying any or all of these proposals to acquisitions of 5 percent (or [3] percent), rather than 10 percent, of an issuer's voting securities be a better approach even without changes in the securities laws?

Comment:

Since a primary impetus for the proposed revisions was to harmonize the premerger notification requirement with the securities laws and to eliminate the incentive to violate the premerger rules because of the differences between the securities laws and the HSR Act and the premerger rules, it would appear desirable for the proposals to be harmonized with any such changes in the securities laws.

In that case, the principal and escrow proposals might be revised to exempt acquisitions of up to 5% of the issuer's voting securities. Then, a buyer would violate both the securities laws and the HSR Act if it acquires over 5% without

appropriate filings. Any other percentage threshold would again give rise to the current discordance between the securities laws and the HSR Act.

It should be noted that such a revision to 5% may create incentive to avoid premerger notification because of the waiting period under the HSR Act before a buyer can exceed 5%, since presumably the securities laws would still permit acquisitions immediately following the filing of a Schedule 13-D. This possible incentive, and the fact that there have been no cases where a 10% or less holding of voting securities has been found violative of §7, would suggest that the proposals should not be revised to 5%. Retaining a 10% threshold in the revision would permit buyers to purchase stock in situations where few substantive antitrust issues are likely to arise, subject only to changing market conditions following disclosure under the securities laws. The enforcement agencies would still have the opportunity to review transactions at the 10% level.

In any event, the optional notification proposal should not be revised, since any lowering of the threshold to 5% would recreate the situation giving rise to the current Notice -- a buyer would not be able under the HSR Act to buy over \$15 million of securities immediately, without either the delay of a premerger notification or notice to the issuer, while he would be able to do so under the securities laws.

The proposals should not be revised to 5% or 3% rather than 10% if the securities laws are not changed, because they

would then not resolve the concerns giving rise to the Notice. At 5% or 3%, buyers would still be precluded from acquiring -- without delay and notice -- the number of shares which they can acquire freely under the securities laws. Therefore, the incentive to avoid premerger notification in these cases where substantive antitrust concerns are unlikely would not be eliminated and the intent of the proposals would be defeated.

Question 4:

Should the Commission revise the other voting securities thresholds of §801.1(h) if it exempts acquisitions of 5 percent or 10 percent of the voting securities of an issuer?

For example, if a 10 percent exemption were adopted, would it make sense to retain the 15 and 25 percent reporting thresholds? Would the program be diminished or enhanced by replacing those with 10 and 20 percent thresholds?

Comment:

If no revisions are made to the current thresholds in §801.1(h) and one of the proposals is adopted, the effect would be to add another threshold to the premerger notification scheme, 10%, so that there would be five thresholds, \$15 million, 10%, 15%, 25% and 50%. We believe that the practical effect of such a structure would be notifications only for the current thresholds, because a buyer would probably, when approaching 10%, file premerger notification for at least 15%, stating that (a) it has a good faith intention to acquire 10%, (b) it may, depending on market conditions, acquire more of the voting securities and (c)

it thus designates the 15% (if not 50%) threshold. (See 16 C.F.R. §803.5 Example 3.) Moreover, such a five tier structure may increase the compliance burden on the parties (if filings are made at both the 10% and 15% levels) without significantly improving the antitrust agencies' ability to enforce §7. It would seem unlikely that the substantive antitrust analysis would differ significantly between 10% and 15%.

Therefore, it may be more effective from an enforcement perspective to revise the thresholds in §801.1(h). There have been relatively few notifications at the 25% threshold, most having been, for voting securities, at the \$15 million and 50% thresholds. (See, e.g., Ninth Annual Report to Congress pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Table V.) As a practical matter, thresholds of \$15 million, 10% and 50% may be as effective as the current thresholds. However, since there may be a significant time lapse between the crossings of the 10% and 50% thresholds, and market and other conditions may have changed significantly in the interim, it may remain desirable from an enforcement perspective to have an intermediate threshold, so that the antitrust agencies may have sufficient opportunity to re-visit the situation and study developments.

We suggest that the intermediate threshold be 30%. This is because, with a 20% threshold, there may still be a substantial time lapse before the 50% threshold is approached. Substantive antitrust concerns, if any, would probably increase

more rapidly as the 50% threshold nears. A 30% threshold will allow for review at a time and level closer to the critical 50% threshold. In this event, the antitrust agencies will have the opportunity to analyze the situation at an intermediate stage which may more closely approximate the circumstances when consolidation would occur. This should facilitate §7 enforcement more than a 20% threshold.

We would suggest that, if any revisions are made in the thresholds in §801.1(h), harmonizing revisions be made in the institutional investor exemption in §802.64. Currently, §802.64 exempts certain acquisitions by institutional investors of up to 15% of an issuer's voting securities from the premerger notification requirement. If the 15% and 25% thresholds are eliminated from §801.1(h) in favor of a 10% threshold and an intermediate threshold such as 20% or 30%, we urge that the exemption threshold in §802.64(b) be adjusted to that intermediate level.

Otherwise, institutional investors will face a threshold other buyers will not, and at a level (15%) which is unlikely to result in substantive antitrust analysis significantly different from that at the 10% level that would be exempt under the principal and escrow proposals regardless of purpose of acquisition. Such a burden seems superfluous, especially since §802.64 by its terms exempts transactions that by their nature may be less likely than others of similar magnitude to raise substantive antitrust issues. It would lessen

the enforcement burden and should not significantly increase antitrust concerns if the exemption in §802.64(b) is adjusted to exempt investments made by an institutional investor in the ordinary course of business in less than the intermediate threshold of an issuer's voting securities. With such an intermediate threshold, there would still be substantial opportunity for the antitrust agencies to review such investments before consolidation occurs.

### Specific Questions

#### UNRESTRICTED 10 PERCENT EXEMPTION

1. When would the antitrust agencies likely learn of an acquisition of 10 percent or less of the voting securities of an issuer if the acquisition were anticompetitive?

Even before adoption of the Hart-Scott-Rodino Act, information pertaining to partial acquisitions was available from Schedule 13-D filings, press reports and industry scuttlebutt. Monitoring 13-D filings would be cumbersome, of course, but given computerization and improved communications capabilities, it might be possible to coordinate such monitoring with the Securities and Exchange Commission and thereby have some degree of information available without imposing a further reporting requirement. Press reports can be expected to bring some acquisitions of 10 percent or less to the attention of the Commission, but clearly an acquiring person is unlikely to issue a press release on an acquisition it is trying to keep under wraps. Industry rumor as a medium of communication varies widely

from industry to industry, but sooner or later it can be expected that acquisitions posing genuine competitive problems, even those of 10 percent or less, will become known and will be brought to the Commission's attention. This could take months, or even longer, but since the investment will be no more than ten percent, the risk of serious harm to competition seems acceptable.

**2. Should the Commission consider some limitation on the 10 percent exemption?**

Limitations, including the present "solely for purposes of investment" limitation, add complications to a rule that can benefit from simplification. The desire to simplify and harmonize the rules is what led to this proposal in the first place, and the injection of new limitations will serve to defeat this purpose. For example, the sample proposal included in the notice of proposed rulemaking -- for transactions that enable the acquiror to select a director -- seems unnecessary. It may not become clear until months after the acquisition whether the acquiror is able to elect a director. Moreover, to the extent that interlocking directors create an antitrust problem, this is better addressed by other provisions of the antitrust laws.

**3. Should the Commission reconsider using the group concept from the securities laws if it exempts acquisitions of 5 percent or 10 percent of the voting securities of an issuer?**

The group concept proved very difficult to apply in the past, and reconsideration of the 10 percent exemption is not sufficient reason for revisiting the abandonment of that concept. The notice of proposed rulemaking itself points out that, even if

the group concept were revived, it could be circumvented easily by the formation of a new entity not controlled by any other entity. Given the prospect of this limited application, revival of the group concept, with all of its attendant complications, appears to be unwarranted.

4. Would a 5 percent exemption unduly complicate the rules by creating for acquisitions of voting securities a 5 percent unrestricted exemption under proposed §802.24, on top of a 10 percent "investment only" exemption under §802.9, and the 15, 25 and 50 percent reporting thresholds of §801.1(h)?

Yes. It is possible to keep all of these various exemptions in mind when focusing on this particular rule, but for practitioners who do not deal with the premerger regulations on a day-to-day basis, such a fragmented rule would become unduly complicated. Although the cutoff under the Williams Act has been reduced from 10 percent to 5 percent, the ten-day window under that Act allows for even greater accumulations before making disclosures. For this reason, adding a 5 percent blanket exemption to the 10 percent "investment only" exemption will not completely harmonize what is permitted under the premerger rules with what is permitted under the Williams Act. However, it would be better to adopt a 5 percent unrestricted exemption than to leave the rules unchanged, because this at least would make the treatment of 5 percent acquisitions consistent under the two Acts.

## ESCROW PROPOSAL

1. Is there a significant possibility of competitive harm during the time the stock would be placed in escrow, given that acquirors will not be able to acquire more than 10 percent of an issuers' voting securities?

There seems little possibility of competitive harm, since filing and a waiting period will be required before the shares could be taken out of escrow or additional shares could be acquired beyond 10 percent. The escrow arrangement is potentially very cumbersome, and, in our judgment, unnecessary. Clearly, it would lower the possibility of competitive harm, but if it is accepted that acquisitions of 10 percent or less of an issuer's securities rarely pose such a threat, except in the largest and most visible cases, the adoption of a cumbersome escrow arrangement would seem unwarranted.

2. Would the acquisition of a small percentage of shares held in escrow prevent an effective antitrust remedy?

There is no reason to believe that acquisition and escrow of 10 percent or less of an issuer's shares would prevent an effective remedy. As the Commission points out, the remedy for an unlawful acquisition would involve sale of the securities, and it would not normally be important whether the shares were sold back to the original owners or to other purchasers -- particularly where the block of stock is no more than 10 percent. Moreover, while some owners may be more desirable than others in terms of competition, §7 is designed to prevent certain persons from acquiring stock, not to prevent owners from selling their stock.

## OPTIONAL NOTIFICATION PROPOSAL

1. Is it likely that the optional notification system can significantly reduce the incentive to avoid notification, given the delay inherent in prior review?

The optional notification system is not likely to be any less burdensome than the existing notification system, and in some cases it could be more burdensome. It is our opinion that acquirors would have no less incentive to avoid notification if they were given the option of filing the proposed alternative report form than they do presently.

2. Can the antitrust agencies conduct their premerger review without contacting the acquired person and other firms in the industry in most transactions?

In transactions that on their face raise no antitrust issues the agencies would be able to do without information from the issuer or third parties. But where competitive issues arise, it seems unlikely, based on past enforcement experience, that the antitrust agencies can conduct an effective premerger review without contacting customers or other firms in the industry, including, in many cases, the acquired person. Although the experience in Canada and the U.K. suggests that many reviews can be conducted in secret, the enforcement agencies in this country have expressed the view that some of the best information they receive comes from other companies in the same industry. It seems unwise to put the enforcement authorities in the position of having to try to evaluate an acquisition with only "half a deck." There either should be an exemption or no exemption, but to ask the enforcement agencies to review

information submitted only by the acquiror, and then to be limited in the additional information they may seek, would put them in an untenable position.

3. Would the adoption of the optional notification system require the antitrust agencies to impose even more stringent rules protecting the confidentiality of the information or monitor the stock transactions of persons who have access to information included on an optional form?

Clearly, the optional notification system would require a greater research effort on behalf of the acquiring entity than the present system does, and this would increase the likelihood of inside information on the identity of the target being disseminated than otherwise would be the case. How the agencies could impose even more stringent rules protecting the confidentiality of the information is not at all clear, and more rules are likely to create even more complications for the reporting entity. Furthermore, monitoring the stock transactions of persons known to have access to the information included in the optional form is not likely to result in detection of significant insider trading, given the obviousness of such conduct.

#### General Comments

In light of the purpose of the proposed revisions, and our responses to the questions presented in the Notice, we feel that the principal proposal should be adopted.

These proposals arise out of the Commission's investigation of transactions in which purchases of voting

securities were made without proper notification or before the expiration of the waiting period, purely to avoid notifying the issuer and to acquire the stock at the lowest possible price, not to avoid antitrust scrutiny, since few of those transactions raised any competitive issues. These avoidance tactics reflect an unintended disruptive effect of the premerger notification requirement on transactions that raise few competitive concerns and that the Commission, with the concurrence of the Assistant Attorney General in charge of Antitrust, can exempt from the notification requirement. (53 Fed. Reg. at 36833.)

The Commission seeks in these proposals "to: (1) substantially reduce the non-antitrust related incentive to evade the obligations of the program; (2) eliminate any unnecessary burden on the parties; and (3) avoid any unneeded interference with the securities laws' disclosure requirements and the market for corporate control." (53 Fed. Reg. at 36833.)

The Committee agrees that the history of these avoidance tactics and the lack of substantive antitrust implications from the overwhelming majority of such transactions indicate that some revision to the premerger notification requirement is warranted. We feel that at least one of the proposals should be adopted, since each of them does ameliorate the current situation. However, we conclude that the principal proposal is the most effective.

The optional notification proposal would not fulfill all of the Commission's objectives. It would not eliminate the

current delay to await the termination of the waiting period before the voting securities can be acquired. It therefore does not address buyers' desire to acquire the stock under the most favorable market conditions, and before any securities law disclosures to the issuer are required. Moreover, given the low probability of any substantive antitrust concerns connected with such transactions, an optional notification and attendant waiting period after the \$15 million threshold is crossed and before the 10 percent threshold is crossed is an unnecessary burden on the buyer.

The escrow proposal does not differ substantively for most enforcement purposes from the principal proposal, but imposes the added burden of the establishment and maintenance of an escrow. If the buyer later chooses to acquire over 10% and files a premerger notification for that threshold, then the result from a substantive antitrust perspective would be the same as under the principal proposal. The buyer's inability under the escrow proposal to vote any of its shares until the waiting period is over is unlikely to have any competitive effects different from those under the principal proposal, given the current securities laws' disclosure requirements. In either case, the antitrust enforcement agencies would be aware of the situation without much delay. If violations of §7 are then found, the remedies under both proposals are unlikely to differ substantively. Thus, the escrow proposal would appear to

accomplish the same results as the principal proposal but at the cost of the added burden of the escrow.

The principal proposal achieves all three of the stated objectives. It would eliminate all non-antitrust related incentives to evade premerger notification for transactions involving less than 10% of an issuer's voting securities. It would be in greater harmony with the securities laws and decrease significantly any interference with the market for corporate control, by permitting buyers to acquire stock rapidly under favorable market conditions, without delay and notifying the issuer. The proposal would eliminate entirely the current premerger notification burden on the parties for such acquisitions.

Therefore, the Committee urges that the principal proposal be promulgated.

We have been authorized to advise you that the Committee on Corporation Law of The Association of the Bar of the City of New York also endorses the principal proposal. That Committee concurs in the views expressed in the Commission's public notice that (i) the principal proposal will "reduce compliance problems and reduce filing burdens" without compromising antitrust enforcement (53 Fed. Reg. at 36834), (ii) acquisitions of 10 percent or less of an issuer's voting securities, regardless of value, "are unlikely to violate the antitrust laws" (id. at 36834, 36841) and (iii) the principal proposal will result in the "freeing up of Commission resources

currently expended on compliance investigations regarding transactions that lack antitrust significance" (id. at 36834). In the view of the Corporation Law Committee, the alternative proposals do not significantly reduce either the filing burdens of those subject to the Act or the administrative burdens of the Commission and do not reflect the Commission's conclusion that acquisitions of 10% or less are unlikely to violate the antitrust laws. The Committee on Corporation Law believes that the principal proposal is the one best designed to achieve the underlying purposes of the HSR Act with a minimum of burden to investors and the Commission.

Committee on Antitrust and Trade Regulation

David Klingsberg, Chair

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\*Subcommittee which prepared this report.

November 6, 1988

Ken Davidson, Esq.

JJT 01-03-89

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THIS ACKNOWLEDGES SERVICE OF  
Comment From David Klingsberg, Chairman,  
Committee On Antitrust and Trade Regulation  
of The Association Of The Bar Of The City  
Of NY in the Matter of Premerger Notification  
H-S-R

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Bobbie Baruch, Esq.

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City Of NY in the Matter of Premerger ~~XXXXXXXXXX~~  
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