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MEMORANDUM

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Re: Comments on Interim and Proposed Hart-Scott-Rodino Rules

This Memorandum is in response to the recent amendments to the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976 and the call for comments relating to the issuance of interim rules, proposed rules and HSR Form changes in connection thereof. Our firm has prepared approximately 230 Premerger Notification and Report filings in the past year, reflecting transactions of all sizes and type and can therefore claim a great familiarity with the HSR process and its effects.

The raising of the $15 million jurisdictional threshold was long overdue. However, several of the other changes to the HSR Rules, necessitated by the Congressional amendments to the HSR Act, increase the cost of compliance for what appear to be primarily revenue-raising purposes not directly connected to the substantive enforcement of the antitrust laws. Although it may be the case that nothing short of additional Congressional amendments may be necessary to rectify this situation, nevertheless some relief may be available through certain changes in the interim and proposed rules.

Once the decision was made by Congress several years ago to have filing fees almost exclusively provide the funding for the antitrust agencies, it was inevitable that the issue of the adequacy of a filing fee would overwhelm most other concerns about HSR reform. All proposed changes were required to be "revenue neutral," that is, assurance that the amount of total fees collected did not decrease as required filings decreased because of long-needed adjustments to the size-of-transaction jurisdictional threshold. But even if one were to accept "revenue neutrality" as a countervailing accompaniment to raising the HSR transaction threshold, it was not inevitable that a sliding scale of fees was the only option. Arguably, the establishment of a slightly lower threshold in conjunction with the raising of the filing fee to a flat $75,000 or even $100,000 would have provided revenue neutrality and avoided the multiple problems created by the new filing fee structure that has made valuation of a transaction a central focus and has led to the need to reconcile the old rules, particularly Rule 802.21, with the new thresholds. It is not a match made in heaven.

Any shift from the old percentage thresholds to thresholds based on the filing fee levels established by Congress would have created difficulties, as would have been the keeping of percentage thresholds in the face of the new filing fee structure. However, the decision, in the new rules, to establish a combination of thresholds based on dollar amount filing fee levels and certain percentages will lead to significant additional filing fees that are costly and burdensome when parties acquire additional stock of the same acquired person. The current structure, which will require additional filings and incremental filing fees each time one of the five thresholds is crossed, can lead to costly and, one might say, even unfair results without any appreciable substantive antitrust benefit. Indeed, it is possible to imagine a scenario in the incremental acquisition of a company's voting securities, where the filing fees would exceed $1 million dollars for the acquisition of control.[1]

The agencies explain that the new filing fees are linked somehow to required levels of antitrust scrutiny. This explanation is difficult to justify. Bigness, in and of itself, has little competitive significance. A $505 million stock acquisition of a $20 billion company is virtually inconsequential from a competitive standpoint. And if it is not, then it should be scrutinized carefully the first time around. Such scrutiny is not required twice more at a cost of $280,000 a filing. Also, it is hard to imagine that a transaction valued at $490 million will generate less or more competitive significance than one valued at $505 million, if the target is the same company. The $10 million difference in size-of-the-transaction should not require that the filing fee be more than doubled. Or the increased fee should not be justified on the

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1 For example, in an open market purchase, Company A, who cannot claim the investment only exemption, purchases $55 million of voting securities of Company B, to get a toehold in B, paying a $45,000 filing fee. A then acquires another $55 million of B stock, crossing the $100 million threshold and paying a filing fee of $125,000. Six months later, A decides to acquire an additional $395 million of B's stock. A must now pay an additional $280,000. But this only represents 12% of B's stock. So A must pay an additional $280,000 to cross the "25% valued at more than a billion" threshold and another $280,000 to cross the 50% threshold, for a total of $1.1 million.

grounds that the $505 million transaction will require the use of twice the amount of enforcement resources.

It appears that the rhetoric of revenue-neutrality has been replaced with the reality of revenue-enhancement. Substantive antitrust and resource allocation considerations do not require the creation of a sliding scale fee structure with five thresholds, mixing and matching percentage thresholds with dollar amount filing fee thresholds. The initial percentages were created because Congress believed that the original $15 million, 15%, 25% and 50% thresholds provided meaningful benchmarks for evaluating the competitive impact of certain acquisitions. That rationale is no less true today.

The notification thresholds for voting securities should return to the $50 million, 15%, 25% and 50% levels. Asset transactions that exceed $50 million will have filing fees commensurate with the value of the assets being acquired, as is currently the case. Additionally, Rule 802.21 should be restored in its entirety. It is not necessary to interpret the statutory changes in filing fees as requiring any other changes. The statute can be thus interpreted: the filing fees are $45,000, $125,000 and $280,000 when there are reportable transactions. They do not apply when a transaction is exempt. Rule 802.21 provides an exemption that you may acquire up to the limit of the percentage threshold without having to refile if you do so within five years. Therefore, there is no need to file and pay a filing fee simply because you are making an acquisition that crosses a filing fee threshold. Unless you cross a percentage threshold, there is no reportable acquisition and therefore, no requirement to file and pay a filing fee. In sum, meaningful percentage thresholds should be determinative of reportable filing obligations; not the dollar size of a transaction. Under the new rules, filing fees have become the revenue tail that wags the HSR dog.

This interpretation will eliminate all or most of the current problems caused by trying to mix the apples of percentage thresholds with the oranges of dollar amount filing fee levels. By restoring the percentage thresholds, the more meaningful competitive benchmarks are restored and HSR filings are not driven by the dollar value of a transaction, which is, in and of itself, a meaningless measure of competitive significance.

If the restoration of the percentage thresholds and the restoration of Rule 802.21 is thought to be impossible because of the statutory language of the amendments (although somehow we had a Rule 802.20 despite the statutory language of the original HSR Act), then the agencies should consider dropping the "25% if more than a billion" threshold. If percentage thresholds are competitively significant, retain them. If dollar amount filing fee levels are equivalent, use them. But do not mix and match. Further, some sort of credit should be permitted to mitigate against the exponential increases in cumulative filing fees. If the HSR Form can have a section devoted to wire transfer information (an addition that is marginal) and a valuation sheet that resembles an IRS worksheet, then there is certainly a place for a section that identifies current filing fee minus amount of fee paid in previous filings for the same acquired person. Such a credit system would go a long way in alleviating the suspicion that the recent HSR reforms had more to do with revenue raising than with making the HSR Act more effective from a regulatory standpoint and less burdensome to business.

Further, if the current five thresholds are retained, then perhaps all that should be required is the payment of the filing fee without necessitating the requirement of an actual refiling or a procedure for filing an amended filing by the acquiring person that incorporates by reference the earlier filing, if nothing has basically changed, and requires only the payment of the difference between the initial filing fee and the later one. These would seem to be fair compromises that still enable the agencies to make their substantive reviews without an acquiror piling up additional burdensome filings or filing fees.

The elimination of the Size-of-Person test in transactions over $200 million is also of concern. The elimination of the Size-of-Person test in larger transactions is clearly part of the statutory change enacted by Congress and, arguably, less amenable to change, absent additional Congressional action. However, its effects can be mitigated by the creation of certain rules.

First of all, assume that one of the main purposes behind the statutory change was to capture large "dot-com" or other "high tech" deals where the acquired company had little or no tangible assets, but was being acquired for significant amounts of money. Under the original HSR Act and Rules, such a transaction would not have been reportable since the acquired person was not a $10 million person. It is likely that the size of some of these transactions raised concerns that the HSR Act was not available to scrutinize and review the transaction. But recent history has demonstrated that these transactions were somewhat aberrational as well and are simply no longer happening.

Nevertheless, we are now saddled with an HSR amendment, created in response to an economic situation that no longer exists, creating unintended negative consequences for transactions that do exist and have no competitive significance. By eliminating the Size-of-Person test on transactions over $200 million, the so-called "pass-through" rule (i.e., 16 CFR §801.11(e)) is no longer available for those transactions. Therefore, an entire category of transactions, which have been determined as having little to no competitive significance, have now become reportable. What is the anticompetitive difference between an LBO acquisition transaction by a new investment fund that is its own ultimate parent valued at $190 million to one valued at $210 million? Inherently, there is no difference.

The pass-through rule should be re-established. Again we point to the minimum dollar value exemption as a precedent. The FTC, in its rule-making authority, believed it had the ability to modify the statute when it created Rule 802.20. We believe it has the authority to likewise limit the full reach of the statutory elimination of the size-of-transaction test so that unintended consequences of the statutory amendment do not create an additional burden of filing for inherently nonthreatening transactions.[2]

The FTC also has proposed to rewrite the exemption for the acquisitions of foreign assets and voting securities. Although the earlier rules 802.50 and 802.51 were not models of clarity, they have become familiar and workable to most HSR practitioners. Quite frankly, the proposed rules are not models of clarity either. We also think that the proposed rules are more complicated and add a level of arbitrariness to the determination.

A better option would be simply to rewrite the old Rules 802.50 and 802.51 to include the new thresholds of $50 million to replace the earlier $15 million and $25 million assets and sales thresholds. A second option would keep the proposed rules, but eliminate the requirement to count any additional time other than the most recent fiscal year. It absurd to condition a filing requirement on the basis that "if you do the deal in March, you will not have to file, but if you do the deal in November, you will have to file because we must include an additional seven months of revenues" when we are talking about the same company.

Our comments on the Form itself are modest. First of all, too much time and energy is being placed on the valuation issue. Simply rely on the good faith determination of the acquiring person without turning the process into the equivalent of an IRS schedule. Also, Item 4(a) should be simplified, particularly in this day and age of easy access to SEC filings on EDGAR. 10-Ks, 10-Qs, 8-Ks and Proxy Statements should be provided for the parent and possibly an SEC-filing entity within the parent that is related to the transaction for which the filing is being made, but it should not be necessary to include all entities that may also have to file with the SEC. It is a costly compilation of irrelevant materials.

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2 Similarly, the formation of an acquisition vehicle should not be separately reportable under Rule 801.40 if the only contribution to the Newco is cash to make a subsequent acquisition and the subsequent acquisition is reportable.

In conclusion, the FTC and DOJ did a commendable job in creating rules that reflected the Congressional changes. It is primarily the Congressional changes that have created additional costs and burdens to the business community; the FTC and DOJ can provide rules that promote the original goals of the HSR Act yet avoid imposing on the business community a tax unrelated to the furthering of those goals.