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October 9, 2001

BY MESSENGER

Donald S. Clark, Esq.

Secretary

Federal Trade Commission

Room H-172

600 Pennsylvania Avenue, N.W.

Washington, D.C. 20580

Dear Mr. Secretary:

On behalf of the Section of Antitrust Law of the American Bar Association (the "Section"), I am pleased to submit these supplemental comments on the proposed changes to the rules and regulations implemented pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR" or "HSR Act"). These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association ("ABA") and should not be construed as representing the position of the ABA.

The Section previously submitted a report to the Commission on March 19, 2001, with respect to the HSR interim rules, form changes, and proposed rule changes announced by the Commission on January 25, 2001. These supplemental comments are submitted on the invitation of Commissioner Thomas B. Leary to address further the proposed filing thresholds implemented by the interim rules.

The Section welcomes the opportunity to continue to provide its views to the Commission on these important regulations. Staff of the Premerger Office should be commended for their outstanding work in preparing complex rules quickly to implement these very important amendments to the HSR Act. Staff conducted considerable outreach with members of the Section and HSR practitioners to develop fair and practical rules under very tight deadlines. Staff's actions have been

exemplary, and their sophistication and seriousness of purpose in considering these difficult issues is a model for the Commission to follow in future considerations of rule changes.

Now that the bar and the business community have lived with the interim rules for over seven months, further reflection and analysis of the views expressed by various constituencies indicate that consideration should be given towards modifying the interim rules with respect to the thresholds for filing the Notification and Report Form ("filing thresholds"). The Section believes that filing thresholds should be consistent with the merger enforcement responsibilities of the agencies and the intent of Congress when enacting the amendments. Modifications of the current filing thresholds can achieve these objectives while minimizing the potential burden on filing parties. The Section looks forward to continuing to work with the Commission to produce a solution that satisfies the agency's needs while minimizing any added burden the interim rules may have inadvertently placed on filing parties.

#### I. The Proposed Filing Thresholds

Prior to the recent HSR Act amendments, the HSR Rules imposed four filing thresholds for acquisitions of voting securities: (a) \$15 million, (b) 15%, (c) 25% and (d) 50%. With respect to asset acquisitions, the only threshold applicable under the original HSR Rules was the \$15 million size-of-transaction threshold. The new filing thresholds established by the interim rules, however, now include the dollar amount thresholds for the filing fees ("filing fee thresholds") contained in the HSR Act amendments. Thus, the interim rules now establish five filing thresholds: (i) \$50 million; (ii) \$100 million; (iii) \$500 million; (iv) 25% where the value of voting securities to be held is greater than \$1 billion; and (v) 50%.<sup>1/</sup> The dollar thresholds are applicable to both asset and voting securities acquisitions, while the percentage thresholds are applicable to voting securities acquisitions only.

In the Section's previous report, we noted several potential problems raised by keying filing thresholds to the dollar value of voting securities, including the uncertainty created by market fluctuations not controlled by the acquiring party, and the unintended effect of generating additional filings and filing fee obligations.<sup>2/</sup> Indeed, on the last point, Senator Orin Hatch, the primary author of the HSR Act

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<sup>1/</sup> The new filing thresholds eliminate the 15% threshold, consistent with the HSR Act amendments.

<sup>2/</sup> The ABA section of Antitrust Law continues to believe that the imposition of filing fees on premerger notifications is bad public policy, because it is an inappropriate taxation on transactions in a free market, the vast majority of which are pro-competitive. In our view, agency enforcement activities are the type of government function that should probably be funded by Treasury receipts rather than "user fees." However, recognizing that Congress has imposed such fees, we offer the suggestions in these comments to improve the system.

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amendments, recently noted in a letter to Chairman Muris and Attorney General Ashcroft that these interim rules actually may lead certain acquiring parties to pay much higher filing fees, which was not the sponsors' intent.<sup>3/</sup>

During a recent meeting between Commissioner Leary and members of the Section, several other concerns regarding these new filing thresholds were noted. First, the dollar amounts selected have no relation to potential competitive concerns raised by the transaction but simply track the filing fee thresholds implemented in the HSR Act amendments. As Senator Hatch stated, the dollar amounts chosen for the filing fees "were definitely not selected because they were closely correlated with either increased competitive concerns or increased investigative costs." By using these dollar amounts as filing thresholds, the interim rules may increase filing obligations and costs to the parties for transactions that do not raise any competitive significance.

Furthermore, these dollar filing thresholds may reduce the acquiring parties' flexibility in structuring deals because they may limit the ability of a company to engage in additional incremental acquisitions if the trading value of the stock increases. In addition, the dollar value of stock holdings are more difficult to monitor in rapidly changing financial markets, increasing a company's compliance monitoring and perhaps producing more frequent unintended violations of the Act.<sup>4/</sup> Finally, the dollar levels chosen for these filing thresholds are inconsistent with foreign filing thresholds and increase the complexity that acquiring parties face in determining the myriad of filing obligations around the world.

It should be noted, however, that these possible adverse effects are limited to incremental acquisitions of minority holdings. Acquisitions of assets or acquisitions of 50% or more of an issuer's voting securities are unaffected by the various filing thresholds established by the interim rules. Nonetheless, even if these new thresholds affect only a small percentage of HSR filings, the Commission should still strive to adopt rules that impose a minimal burden on all filing parties, especially in situations where there is little likelihood of competitive concern raised by the transaction.

Consequently, the Section believes that the Commission should reconsider the filing thresholds proposed in the interim rules and establish thresholds that are more consistent with the purposes of the HSR Act and its amendments.

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<sup>3/</sup> See letter of Senator Orrin Hatch to Attorney General John Ashcroft and Chairman Timothy Muris, July 17, 2001.

<sup>4/</sup> Such situations may have occurred less frequently since the interim rules were issued due to the recent downturn in the stock market, as opposed to the period in the mid-1990's when stock values experienced significant growth rates.

II. Section's Proposal of Separate Filing  
Thresholds and Filing Fee Thresholds

During Commissioner Leary's meeting with members of the Section on July 18, 2001, the Commissioner sought ideas on alternative filing thresholds and filing fee payment schemes that the Commission may consider in lieu of that proposed in the interim rules. During that meeting, several alternatives were suggested. Based on those discussions, the Section has attempted to identify a way to address potential competitive concerns, while also creating a system under which the Commission will collect the appropriate filing fee with little administrative burden.

A. Three filing thresholds: \$50 million, 20% and 50%

When Congress amended the HSR Act to raise the size-of-transaction threshold from \$15 million to \$50 million, it recognized that the smaller number of filings which likely would occur would reduce the total amount of revenues the antitrust agencies would receive. Congress therefore increased the filing fee for transactions with significant values by imposing a three-tiered fee structure to offset the expected decrease in filing fees.<sup>5</sup>

However, the interim rules changed the filing thresholds and tied these thresholds to the tiered filing fee structure adopted by Congress. The Section believes that tying the filing thresholds to filing fees ignores the purpose of thresholds. Filing thresholds were originally designed to exempt transactions that would not raise significant antitrust concerns, not to raise revenue, as Senator Hatch has confirmed. The Section proposes the Commission adopt final rules consistent with its statutory requirements, including its power to exempt from the requirements of the Act classes of persons, acquisitions or transfers not likely to violate the antitrust laws. Such a scheme would focus on the substantive Section 7 issues raised by the proposed transaction.

Congress has set the minimum and maximum thresholds at \$50 million and 50% of voting securities, and these filing thresholds should be maintained in the final rules. Given the large market capitalizations of some concerns, it is reasonable that the Commission also adopt an additional intermediate threshold between the \$50 million and 50% thresholds. The Staff has proposed a 25% threshold where the value of the voting securities is over \$1 billion. The Section also believes that a single intermediate filing threshold should be set at a percentage level keyed to the degree of ownership the agencies believe would, in the majority of cases, raise concern under

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<sup>5</sup>/ For transactions between \$50 million and \$100 million, the filing fee is \$45,000. For transactions between \$100 million and \$500 million, the fee is \$125,000. For transactions exceeding \$500 million, the fee is \$280,000.

Section 7 of the Clayton Act.<sup>6</sup> While the appropriate percentage may be debated, the threshold should not be set below 20%.

An intermediate filing threshold would allow the agencies a second look at a transaction that passes the \$50 million minimum threshold but involves such a small percentage of the total outstanding voting securities of the issuer that scarce enforcement resources should not be devoted to a detailed review of the transaction. Therefore, the Section recommends adoption of a single intermediate filing threshold, in addition to the 50% and \$50 million thresholds established by Congress.

#### B. Fee Payments Pursuant to Different Filing Fee Thresholds

If the Commission adopts this three-tiered filing threshold structure, then one must consider how to determine what filing fee is appropriate under the multi-tier fee structure adopted by Congress. Adopting filing thresholds that do not align to the fee thresholds has the potential to introduce inconsistencies in the payment of fees between two acquirers or two transactions that result in the same percentage of voting securities held. Incremental acquisitions of voting securities are difficult to administer in a consistent manner under any multi-tier fee structure. Of course, inconsistencies could also have been produced in the pre-amendment system, but now the filing fees are much more significant and thus the potential inequities are more pronounced.

The interim rules attempted to address these inconsistencies and administrative burdens by tying the fee thresholds directly to the filing thresholds. However, as noted above, the Section believes that the Commission should adopt filing thresholds linked primarily to its mission to enforce Section 7 of the Clayton Act and Section 5 of the FTC Act, not to any fee structure. Senator Hatch has made clear that Congress did not have that important enforcement mission in mind when adopting the multi-tiered fee structure. Administrative burden on the agency of any payment scheme should, of course, also be a factor to be balanced against the enforcement mission of the agencies. But, the Section believes that any imbalance between administrative ease and the agencies' enforcement mission should be resolved in favor of the latter.

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<sup>6</sup> E.g., *Crane Co. v. The Anaconda Co.*, 411 F. Supp. 1210 (S.D.N.Y. 1975); *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093 (C.D.Cal. 1979); *United States v. AT&T Corp and Tele-Communications, Inc.*, No. 1:98CV0317 (D.D.C. December 30, 1998); *United States v. AT&T Corp. and MediaOne, Inc.*, No. 1:00CV01176 (D.D.C. May 25, 2000); *Medtronic, Inc.* Docket No. C-3842, 1998 FTC LEXIS 137 (December 21, 1998); Jon D. Dubrow, *Challenging the Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests*, 69 *Antitrust L.J.* 113 (2001); Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 *Antitrust L.J.* (2000).

There are at least two possible ways to balance these objectives in the present situation if the Commission adopts the three-tiered filing threshold structure discussed above.

1. Notice Upon Crossing a Higher Filing Fee Threshold and Payment of Balance of the Additional Fee Owed (Providing a Credit For Any Fees Previously Paid)

The first proposal is to require the payment of an additional fee when the value of the holdings acquired exceeds the next fee threshold. That is, there would be only three filing thresholds: \$50 million, 20% and 50%. However, if as a result of an acquisition of additional shares after the initial HSR waiting period has terminated the total value of the holdings exceeded another fee level, then the acquiring person would provide the FTC's Premerger Office with a short notice within some set period of time and pay the balance of the fee for the higher threshold.

Under the interim rules, an acquirer might theoretically be required to pay fees of \$45,000, \$125,000, and \$280,000 (or a total of \$450,000) as it crossed the various fee thresholds. Credits for previous filing fees paid should be given when the acquirer presents proof that it has paid a previous filing fee in connection with a prior filing for acquiring securities from the same issuer. The notice and fee payment would not trigger any waiting period, so the buyer could buy the stock whenever it wanted, and the information submitted would be very limited so the notification burden to the buyer would be minimal.

This proposal would address situations where an entity will file an HSR form for an acquisition at one fee level, will acquire additional shares in that same company at a later time (pushing the total value of the stock it holds above the next fee level) but will not be required to submit a new HSR filing. For example, assume that a buyer wanted to acquire 12% of the voting stock of a company for \$90 million and had filed its HSR form, paid its \$45,000 filing fee, and bought the stock after the waiting period expired. Then, under Rule 802.21 of the existing HSR regulations, for the next five years, it could acquire additional stock in that company, up to the 20% threshold, without making an additional HSR filing. If, for example, 6 months later it acquired another \$20 million of stock (after which it would hold a total of about 15% of the company's stock), the total value of the buyer's holdings would now be \$110 million (in excess of the \$100 million filing fee threshold). If the company had bought \$110 million of stock all at once, then it would have had to pay an HSR filing fee of \$125,000; under the interim rules, the buyer would be obligated both to file and to pay a filing fee of \$125,000. Under the Section's proposal, the company would only file notice that it crossed the \$100 million threshold and pay a filing fee of \$125,000 less the \$45,000 previously paid. However, no HSR filing or waiting period would be required until the buyer acquired 20% of the company's stock.

The advantage of this proposal is that it would address the concerns highlighted by the Staff about the appropriate fee to charge for acquisitions of minority interests and possible underpayments of fees. At the same time it reduces the burden of paying potentially duplicative fees by allowing parties to obtain a "credit" for the fee previously paid. It would also eliminate the need for an HSR filing (and the consequent waiting period) simply when a higher fee threshold is crossed. Indeed, even if the Commission determines that the filing thresholds established in the interim rules should be maintained, the Section recommends that a credit system should still be enacted to remove this potential inequity from the interim rules.

2. Notice Upon Crossing a Higher Filing Fee Threshold and Payment of the Fee Owed (Without a Credit for Any Fees Previously Paid)

A second alternative is similar to the first with the exception that the additional fee paid would not take into account all fees previously paid. Still, under this second proposal, the notice and fee payment would not require a filing or trigger any new waiting period.

This proposal has many of the advantages of the first proposal but, most importantly, does not address the monetary inequity posed by the interim rules of parties potentially paying duplicative fees.<sup>7</sup>

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<sup>7</sup> / If the Commission does *not* adopt a scheme requiring subsequent notice filing when a higher fee threshold is crossed, as recommended above, then the issue to be resolved is what is the appropriate fee to be assessed in minority voting security acquisitions. Depending on the type of the transaction that is contemplated, the method of valuation may differ. For acquisitions made pursuant to an agreement, including the exercise of options and the receipt of shares by shareholders pursuant to a merger agreement, the value of the transaction for purposes of determining the proper filing fee amount is based on the value the voting securities that will be held as a result of the acquisition in accordance with 801.10(a) and 801.13(a) of the HSR Rules. Thus, the value of the transaction would include the value of the shares already held plus the value of the shares to be acquired at the agreed upon purchase price. Similarly, the value in open market purchases is generally based on the value the voting securities that will be held as a result of the acquisition in accordance with 801.10(a) and 801.13(a) of the HSR Rules. However, because the purchaser may not be able to specify the number of shares that it will acquire other than to state that it intends to cross a specific threshold, it is difficult to determine the value of the shares that will be held as result of the acquisition. There are several options the agencies could adopt: (1) the value could be based on the value of the shares that a person will hold as a result of meeting the notification threshold for which the filing is made; (2) the value could be based on the value of the shares that a person could acquire as a result of meeting or exceeding the notification threshold for which the filing is made; or (3) the value could be based on the person's present good faith intent at the time of the acquisition.

### III. Summary

The Section recognizes the difficult task that the Staff faced in implementing rules changes consistent with the HSR amendments in a timely and thorough fashion. Most of the rules changes it proposed were well reasoned and should be implemented, notwithstanding continuing consideration of the filing threshold issue.<sup>8</sup> However, the Section believes that filing thresholds should reflect the intent of the HSR amendments, be grounded in competitive concerns, and not increase the cost and burden on filing parties.

Accordingly, the Section recommends that the interim rules be modified to provide for:

- (1) three filing thresholds of \$50 million, 50% and 20%; and
- (2) separate filing fee thresholds at \$50 million, \$100 million and \$500 million with a credit for any previous fees it demonstrates it has paid with respect to the acquisition of voting securities from the same issuer and the requirement that the acquirer file a notice with both agencies when it crosses a higher fee threshold.

Therefore, under this scheme, a full notification and report form would be required whenever a person crossed a filing threshold of \$50 million, 20% or 50%. The fee, if any, payable at that time would be the amount specified in the statute for the corresponding fee bracket (subject to credit for fees previously paid). In addition, the buyer would be obligated to give notice and make payment with credit for fees previously paid as it crossed the filing fee thresholds. So, for example, if a person first acquires less than 25% of the stock valued at \$60 million (makes a filing and pays \$45,000), and then acquires more stock valued at less than \$40 million so that the total amount held is 25%, a second filing would be required but no filing fee would be required until the acquiring person acquires stock valued at least \$100 million, which triggers the next filing fee of \$125,000. When this next higher fee threshold is reached, the acquiring person would file a notice with the agencies and pay \$125,000 less the \$45,000 previously paid.

Such a modification would address the concerns raised regarding the filing thresholds established by the interim rules, while at the same time providing the

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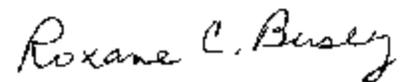
<sup>8/</sup> Several changes proposed should be allowed to go to final rules to avoid continuing confusion among filing parties as to their obligations under the rules. For example, the Commission proposed amending Rules 802.51 and 802.50 with respect to foreign transactions. The PNO has informally indicated that it has reconsidered some of the proposed changes and it is important that these rules, as well as other proposed changes, be finalized and not delayed further by the filing threshold issue.

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Commission with a mechanism to implement the multiple fee-structure adopted by Congress with minimal burden on filing parties.

We urge the Commission to reconsider these filing thresholds and implement these modifications that are consistent with the purposes of the HSR Act and the Congressional intent with respect to the amendments. We are available to discuss this and other options with the Commission and to assist as appropriate.

Sincerely,



Roxane C. Busey  
Chair, Section of Antitrust Law  
2001-02

cc: Timothy J. Muris, Chairman  
Sheila F. Anthony, Commissioner  
Thomas B. Leary, Commissioner  
Orson Swindle, Commissioner  
Mozelle W. Thompson, Commissioner  
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