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October 21, 2002

BY FACSIMILE AND FEDERAL EXPRESS

Joseph J. Simons, Esq.
Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580

Dear Mr. Simons:

As Chair of the Committee on Antitrust & Trade Regulation of The Association of the Bar of the City of New York, I respectfully submit for the Commission's consideration the enclosed comments regarding merger remedies. The Committee submits these comments in anticipation of the upcoming Merger Best Practices Workshop to be held on October 23, 2002 at the House of the Association.

We look forward to discussing these comments and other matters at this week's Workshop. Thank you for your attention to this matter.

Very truly yours,

William H. Rooney

cc: Daniel P. Ducore, Esq.
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Barbara Anthony, Esq.
Regional Director
Federal Trade Commission
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James J. Calder, Esq.
Merger Subcommittee
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Submission of the Association of the Bar of the City of New York to the Federal Trade Commission with Respect to Merger Remedies

Federal Trade Commission Workshop On Merger Remedies October 23, 2002

The Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York[1] (the "Committee") respectfully submits these comments to the Federal Trade Commission in connection with the Commission's Workshop on Merger Remedies.

Basic Principles

1. The purpose of non-litigated merger remedies is to prevent the acquisition of assets (typically by divestiture) that may provide the acquiring company with market power or otherwise facilitate anticompetitive conduct. The Committee does not believe that the remedy process should attempt to improve the post-merger competitive structure of the relevant market as compared to the pre-merger market structure.

2. It is not necessary, or competitively desirable, that every divestiture result in a competitively successful business or that divested assets be operated in a commercially successful manner. Competition frequently involves the entry and exit of competitors. A divestiture policy that aims to ensure that 100% of divested assets will remain active in the relevant market for "x" years following the divestiture will result in over-enforcement and may fetter ordinary competitive forces. Also, insisting on certainty in durable divestitures will cause some transactions to be abandoned, thereby sacrificing efficiencies that could have been realized by the abandoned mergers.

3. In crafting merger remedies, consideration should be given to avoiding arrangements between sellers and acquirers of divested assets that effectively force them, in their new role as competitors, to collaborate so as to enhance the likelihood that the divestiture will "succeed." A merger consent decree should not impose affirmative obligations of material cooperation between or among competitors.

4. In identifying divestiture strategies and purchasers, care should be taken to ensure that smaller competitors are not discriminated against in acquiring divested assets or businesses. Although the Committee recognizes that the FTC must test the competitive bona fides of any offer to purchase divested assets, we suggest some deference to a willing buyer's ability to realize the future cash flows that are reflected in a market price that the buyer is prepared to pay for the divested assets. That proposition appears to have been supported by the conclusion in the FTC's Study of the Divestiture Process in 1999 that small firms were just as likely (if not more likely) to succeed in operating divested assets and businesses as large firms. The closer the divestiture process resembles an

[1] The Committee approved this document by an affirmative vote of 34 members and two abstentions. Adjunct members of the Committee are not invited to vote on Committee documents.

ordinary-course auction instead of a duress sale, the more likely the purchase price will predict commercial success.

5. Divestitures by consent decrees are *settlements,* with the merging parties claiming that the assets to be divested do not confer market power or are not competitively significant. In some instances, the merging parties may be correct.

6. A central theme of the FTC's Study of the Divestiture Process was that some divestitures fail because the buyers do not have access to (or do not review adequately) necessary information about the assets to be divested during the due diligence process. If information deficiencies are a significant contributing factor to failed divestitures, efforts should be made to improve the due diligence process for the sale of the business or assets to be divested.

7. Efficiency and speed are crucially important in the process of negotiating merger remedies. Transactions are fragile and particularly vulnerable to delay and regulatory impediments. The merger remedy process works most effectively when staff attorneys, who are thoroughly familiar with the competitive issues raised by the transaction, retain primary responsibility for negotiating all substantive aspects of the merger remedy. Compliance personnel appear to participate most effectively in the process by addressing the implementation and enforcement aspects of the proposed remedy.

Comments on Specific Remedies

1. **Buyer-Up-Front** – We are unaware of evidence that up-front buyers are more competitively successful or durable than post-divestiture buyers. The Divestiture Study did not directly address that point since it did not control for up-front versus post-divestiture buyers. In addition, a requirement that divesting parties identify committed buyers prior to HSR clearance may place severe time constraints on the selling process and, as a result, attract below-market divestiture purchase prices and suboptimal buyers. Although each case must be assessed on its unique facts, a presumption in favor of an up-front buyer requirement should not be necessary, as divested assets that pose true competitive concerns should have sufficient market value to be saleable, if only to smaller competitors.

   The up-front buyer requirement can lead to significant delay and provide substantial bargaining leverage to the preferred divestiture buyer. The costs of delay include harm to consumers to the extent the merger's efficiencies are delayed. Additional costs may be incurred as the value of the business to be divested deteriorates as employees and customers leave due to the uncertainty about the business's future.

2. **Crown Jewels** – This is a punitive measure. It should be used, if at all, only when there has been demonstrable misconduct of the parties. If the parties prove correct in their initial assessment that the assets to be divested cannot be sold because they have no stand-alone value (and may be competitively insignificant), the assets should be retired without penalizing the parties by forcing them to surrender other valuable assets.

3. **Single Buyer** – Requirements that divested assets be sold to a single buyer may discriminate against smaller purchasers that have the wherewithal to purchase some, but not all, of the divested assets. While the stated purpose of requiring a single buyer is to maximize the prospects that the divested assets will be operated successfully, a necessary corollary is a distrust that small competitors can profitably operate assets for which they are willing to pay market value. That distrust is unwarranted in light of the findings of the FTC's Divestiture Study. In addition, the distrust inhibits small firms, which may include industrious and capable entrepreneurs who are not part of the industry establishment, from growing into more potent competitors.

4. **Hold Separate** – This approach is appropriate when assets/personnel are separable. In this connection, would the Commission consider permitting the parties in time-sensitive deals to: a) identify, put in a trust, and operate separately those assets that create a competitive concern; and b) close while the agency completes its investigation and determines whether the assets should be divested? If the agency determines that divestiture was not needed, the merged entity would reclaim the assets from the trust. If the agency determines that divestiture was necessary, the assets would be sold out of the trust to a third party.

Dated: New York, NY
October 21, 2002

Respectfully Submitted,

Association of the Bar of the
City of New York
Antitrust and Trade Regulation Committee

Chair:
William H. Rooney

Secretary:
David K. Park