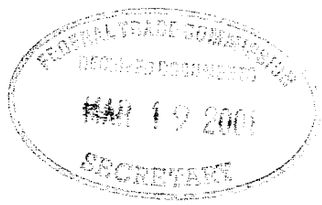


BEFORE THE UNITED STATES
FEDERAL TRADE COMMISSION

Premerger Notification Office Interim Rules with Request for Comment	)

COMMENTS OF O'MELVENY & MYERS LLP

These brief comments are submitted on behalf of O'Melveny & Myers LLP. O'Melveny and Myers LLP is an international law firm with nine offices in the U.S., including in Washington, D.C., and four offices in Asia and Europe.

The Premerger Notification Office's interim rules (50 Fed. Reg. 8680 et seq.) effectively implement Congress' recent amendments to the Hart-Scott-Rodino ("HSR") Act, and Staff should be commended for its accomplishment here, particularly in light of the short amount of time available. We have identified two discrete issues to address in these comments, concerning (i) the exemption for "transitional" filers, and (ii) the thresholds for asset transactions. Additionally, we take the opportunity to point out one inconsistency in the instructions to the HSR form that should be clarified.

Transitional filers. First, and most important, while the interim rules include a provision exempting, for one year, certain acquisitions by "transitional" filers, this provision is not broad enough. Transitional filers are acquiring persons who filed HSRs subject to the 1978 thresholds, and who crossed the threshold for which they filed within a year of the expiration of the waiting period, but whose five-year period for making additional acquisitions under Section 802.21(a) had not expired as of February 1, 2001. See 66 Fed. Reg. at 8683. Transitional filers should be able to make additional small acquisitions of the same issuer, we submit, for the full five-year period set forth in Rule 802.21(a), where a 2001 threshold is not crossed.

The new interim Rule 802.21(b) addresses acquisitions of voting securities up to the next notification threshold by transitional filers. Under new 802.21(b), transitional filers have one year from February 1, 2001 (the effective date of the new amendments), or until their original five-year period expires, whichever comes first, to acquire up to what was the next reporting threshold under the 1978 rules, without having to file a new notification.

This is a necessary provision, and it serves the goal of facilitating the transition of HSR regimes without unduly prolonging the life of the 1978 thresholds. However, it is not clear why the exemption should be limited to one year for subsequent transactions by transitional filers where their originally reported transaction took them over a 2001 threshold. Take this example: In June 2000, person "A" filed an HSR report to acquire $55 million of an issuer's voting securities, checking the 25% threshold box on the form. Had the 2001 thresholds been in place, the filer presumably would have checked the $50 million threshold box. The transaction was consummated 60 days later. Fast forward to February 2, 2002. Person "A" intends to acquire an additional $2 million of the issuer's stock, about 2% (or for that matter intends to acquire only one more share). Notwithstanding the small size of the additional investment, a new filing is necessary. This result seems clear from new example 4 to Rule 802.21.

There is little rationale for requiring person "A" to file in these circumstances. Person "A" already is above the $50 million threshold and got there with the blessing of the FTC and Department of Justice. The minor additional investment person "A" is making is not significant from a competition standpoint and is well within the five-year period. Similar examples can be imagined at higher transaction levels with higher filing fees. One can envision, in fact, a situation where the filing fee will be greater than the amount of the additional investment.

Our suggestion is this: Rule 802.21 should be amended to exempt "transitional" filers from having to file for an additional investment in the same issuer where the five-year period still applies, the value of the transaction as set forth in Item 1(f) of the pre-February 2001 form was above a 2001 threshold, and the additional investment will not result in holdings that cross another 2001 threshold. The example above involving person "A" would not require a filing under this proposal. "A's" "approved" threshold would be $55 million – the value of the transaction set forth in the June 2000 filing – and the additional acquisition would not result in a crossing of the $100 million threshold.

Asset Thresholds. New interim Rule 801.1(h) sets asset notification thresholds of $50 million, $100 million, and $500 million, and voting securities thresholds of $50 million, $100 million, $500 million, 25% and 50%. See 66 Fed. Reg. at 8682 ("the three monetary thresholds apply to acquisitions of voting securities or of assets but the percentage thresholds apply only to acquisitions of voting securities"). It is not clear, however, that multiple notification thresholds for asset-only acquisitions are necessary — $50 million may be the only one needed. Indeed, prior to the recent revisions, there was only one notification threshold for assets acquisitions ($15 million).

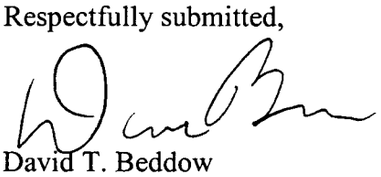
A system of multiple reporting thresholds for acquisitions of assets would not appear to assist either the Premerger Notification Office or practitioners. The need for notification thresholds for acquisitions of voting securities is clear—since prior acquisitions must be aggregated to determine the size-of-acquisition, small, competitively insignificant transactions would otherwise be reportable. Unlike acquisitions of voting securities, however, in an asset deal one does not aggregate the value of prior asset or securities purchases (except for the 180-day rule) to determine the size-of-acquisition. See Rule 801.13. Indeed, Rule 802.21 applies only to acquisitions of voting securities, underscoring the point that tiered thresholds for asset-

only deals may not be necessary.

The main advantage in having a single threshold for asset transactions would be simplicity – particularly for parties not closely familiar with the ways of HSR, such a rule would minimize confusion. The main question will simply be, is a transaction (taking account of the 180-day rule) valued at more than $50 million? Parties will plainly understand that, unlike voting securities transactions, there are no transactions between tiers that may be exempt. To be sure, parties would still have to determine the value of an asset transaction for filing fee purposes and, separately, to see if the size of parties test applies. But tiered thresholds for asset deals do not appear to be necessary.

Instructions to Form. The instructions to Item 5(b)(ii) of the revised form state that "Products deleted by reason of disposition of assets or voting securities since 1992 should also be listed here." Although this is consistent with previous written instructions, it contradicts the practice of the Premerger Notification Office and the "Item 5 Tips" on the FTC's webpage. We propose deleting the language quoted above and adding the following sentence just before the instructions for Item 5(a): "If an entity has been divested since the base year (either by loss of a controlling interest or sale of substantially all of the assets of that entity), no information should be provided for that entity in Item 5."

Respectfully submitted,



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