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COMMENTS SUBMITTED TO FEDERAL TRADE COMMISSION ON PROPOSED AMENDMENTS TO PREMERGER NOTIFICATION RULES

March 19, 2001

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Re: Comments Regarding Proposed Amendments to Premerger Notification Rules

INTRODUCTION

Baker & McKenzie is pleased to submit these comments to the Federal Trade Commission in connection with the proposed amendments to the existing premerger notification rules (the "Proposed Rules") in 16 C.F.R. §§ 801 to 803 promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Most of the comments that Baker & McKenzie make today relate to the Proposed Rules that the Commission has published at 66 Fed. Reg. 8723–8729 (February 1, 2001), though we discuss where necessary the interim amendments, 66 Fed. Reg. 8680 (the

"Interim Rules"), that the Commission published to make the procedural elements of the existing premerger notification rules compliant with the amendments to the Hart-Scott-Rodino Act of 1976, Pub. L. No. 106-553, 114 Stat. 2762 ("HSR Act Amendments"), which became effective February 1, 2001.

The Proposed Rules published by the Commission reflect a great deal of effort, attention, and thoughtful drafting to implement the changes in the Rules required by the recent HSR Act Amendments. Baker & McKenzie would like to express its appreciation to the Commission and the staff of the Premerger Notification Office for their work, on behalf of our many clients who will benefit from reduced burden and expense as a result of the changes to the statute and the Rules.

Baker & McKenzie is a law firm with offices in 61 cities in 35 countries. Almost 70% of our Firm's attorneys are located outside the United States. As a result, a majority of the clients we serve are non-U.S. companies, or "foreign persons" within the definition of Rule 801.1(e)(2)(i)(A). Several of the Proposed Rules will significantly impact transactions that primarily involve parties and commerce outside the United States, and we make the following comments to be certain that the Commission fully considers the impact that the Proposed Rules, if adopted, will have on such primarily foreign transactions.

Transactions that reach the new $50 million reporting threshold of the HSR Act Amendments are becoming increasingly multinational. A rapidly increasing number of governments are enacting complex, diverse, and often contradictory merger control reporting laws that effect such multinational transactions. The revised Notification and Report Form drafted by the Commission recognizes the possibility of multiple merger notifications for multinational transactions and requests voluntary submission of information on other countries' merger notifications.[1] The February 2000 REPORT TO THE ATTORNEY GENERAL OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE ("ICPAC REPORT") concluded that proliferation of complex merger reporting regimes, and the potentially conflicting substantive competitive review of multi-jurisdictional transactions, has become a significant impediment to effective business planning for major transactions.[2] Citing statistics on the large number of HSR Act notifications in fiscal year 1999 that involved a foreign acquiring person or a foreign acquired person, and the very few foreign transactions that resulted in issuance of a second request, ICPAC concluded that "[t]hese statistics suggest not only that very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transactions than may be necessary come within the U.S. merger review net."[3] Our

1 Interim Rules, 66 Fed. Reg. 8679, 8705 (Feb. 1, 2001).

2 REPORT TO THE ATTORNEY GENERAL OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE at 87-162 (February 2000) ("ICPAC REPORT").

3 Of the 849 HSR Act notifications in fiscal year 1999 that involved a foreign acquiring person or a foreign acquired person, only 21 notifications, or 2.4%, resulted in issuance of a request for additional information. ICPAC REPORT at 125.

analysis of the Proposed Rules indicates that, in several circumstances that are common for primarily foreign transactions, the Proposed Rules will continue to bring "many more transactions than necessary within the U.S. merger review net."

From work performed over many years on the regulatory requirements of completing multi-jurisdictional transactions, the authors of these comments published last month a comprehensive survey of the numerous merger control reporting laws currently operational throughout the world.[4] Commission staff in the Premerger Notification Office and other sections assisted in this survey. According to our research, as of January 2001, 65 countries had various mandatory and voluntary premerger or post-closing reporting laws. The increasing globalization of transactions and the proliferation of complex merger reporting procedures have, we believe, contributed to the increase in the number of inadvertent failures to file HSR Act notifications, which prompted the Premerger Notification Office to issue guidelines on correcting overlooked merger notifications in the United States and to insert a provision for "corrective filings" in the revised Notification and Report Form.[5]

Our analysis of the Proposed Rules indicates that they do not address sufficiently the problems created for multinational transactions by multiple merger control

[4] H. ADLER & D. LAING, eds., THE GLOBAL MERGER NOTIFICATION HANDBOOK (2d ed. 2001).

[5] *Procedures for Submitting Post-Consummation Filings*, at www.ftc.gov/bc/hsr/postconsumfilings; Interim Rules, 66 Fed. Reg. 8679, 8699 (Feb. 1, 2001).

notification regimes. A more complete solution requires a coordination between governments that is far beyond the scope of the Commission's authority in this rulemaking proceeding, but the Commission can, through the Proposed Rules, more effectively reduce the burden and expense created by the HSR Act for transactions that have relatively little connection with U.S. commerce and little anticompetitive potential in the United States. In these comments, we explain further the specific problems we anticipate that the Proposed Rules will cause for multinational transactions, and we provide suggested solutions and modifications to the Proposed Rules to correct these problems.

PROPOSED RULE AMENDMENTS AFFECTING PRIMARILY FOREIGN TRANSACTIONS

Global Value of Transaction for Purposes of Determining Filing Fees

One of the more important concerns that multinational companies will have with the HSR Act Amendments and the Proposed Rules relates to the substantially increased filing fees, which are tiered according to the transaction's value. According to the HSR Act Amendments, Rule 801.10, Interim Rule 803.9, and the worksheet for "Valuations of Transactions Reportable under the Hart-Scott Rodino Act," the valuation of a multinational transaction for purposes of determining the appropriate filing fee will be made on a global basis, not just the U.S portion of the transaction. For many primarily foreign transactions, filing parties will have to pay either the $125,000 and $280,000 fee for transactions with a relatively minimal nexus to the United States.

For example, consider the following hypothetical, which is based on an actual transaction on which we are now advising.

> Example: A British financial investment company, with a British ultimate parent entity, proposes to acquire a German manufacturing company, which has a German ultimate parent entity. The German company that is being acquired has a U.S. sales subsidiary. The U.S. subsidiary being acquired had $65 million in sales last year. The transaction will be structured as a purchase of voting securities, and the global value of the transaction will be approximately DM 1.5 billion, which is approximately $700 million at current exchange rates. The parties have not allocated any specific value to the U.S subsidiary being acquired.

Though the parties have not allocated any separate value to the U.S. subsidiary being acquired, we have concluded that the transaction will require reporting under the HSR Act because of the sales of the U.S. subsidiary being acquired.[6] To place in perspective the relative size of the U.S. subsidiary to the other companies being acquired, the sales of the U.S. subsidiary are approximately 9% of the sales of all the subsidiaries being acquired. Though the sales of the U.S. subsidiary just exceeds the new $50 million filing threshold, and the U.S. portion of the transactions represents less than 10% of the revenues of the acquired company, the large global value of the transaction will, under

[6] We discuss below the substantial issues created by the valuation requirements of the exemptions afforded by Proposed Rules 802.50 and 802.51.

the HSR Act Amendments, the Proposed Rules, and the Interim Rules, require the acquiring person to pay the highest possible filing fee of $280,000.

Even with the previous $45,000 maximum filing fee, the United States had by far the highest fee associated with premerger notification requirements of any jurisdiction in the world. Based on our experience, other countries with relatively high filing fees, such as Germany or the United Kingdom, still have a usual or maximum filing fee of less than $20,000, which is charged only if the notification results in a full investigation of the transaction. In such jurisdictions, the fee is often based upon the actual amount of investigation required and the government resources expended, calculated after the investigation has ended.[7]

The Congressional mandate to increase the filing fees so substantially, over which the Commission has no control, will exacerbate this difference between the United States' and other countries' merger control filing fees. The Commission's rule making authority under Section 18A(d) of the HSR Act, however, permits the Commission to correct such high filing fees being required for transactions with a relatively small connection to the United States. To lessen the expense on primarily foreign transactions caused by the new graduated fee structure, we suggest that the Commission revise

[7] *See* H. ADLER & D. LAING, eds., THE GLOBAL MERGER NOTIFICATION HANDBOOK 110-14, 278-81(2d ed. 2001). Germany has a statutory maximum filing fee of DM 100,000 (approximately US$44,000), but in practice we find that the Bundeskartellamt, the German merger control authority, typically charges about half of the statutory maximum after conducting a full investigation. *Id.* at 110-11

Proposed Rule 803.9 to require payment of a filing fee above $45,000 for a proposed transaction involving a foreign acquired or acquiring person only if more than 50% of the transaction's value is attributable to either assets located in the U.S. or to sales in or into the United States. This could be accomplished through the addition of a new section 803.9(f), which should read as follows:

> 803.9(f) A filing fee above the minimum filing fee provided for by the act shall be required for transactions involving a foreign acquired person or a foreign acquiring person only if the value of all assets to be acquired and located in the U.S., or the revenues of all acquired entities derived from sales in or into the U.S., are at least 50% of the total assets or sales of the acquired entities.

This suggested revision does not provide any exemption from notification requirements for transactions that are primarily foreign, so the U.S. antitrust agencies would still have the opportunity to review all transactions that meet the statutory thresholds and are not otherwise exempt. This suggested revision would also require payment of the higher filing fees for all transactions that primarily affect the U.S. economy. This suggested revision would, however, lessen a substantial "tax" upon transactions that are primarily outside the United States. Such a revision should be made to ensure that the HSR Act does not become primarily a revenue-generating device, which is not the purpose of U.S. merger control program or the function of the Commission.

Acquisitions of Foreign Assets and Voting Securities—Sections 802.50 & 802.51

After concluding that "very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transaction than may be necessary come within the U.S. merger review net," ICPAC recommended that the Commission review the scope and level of the HSR Act exemptions for transactions involving foreign persons and that the U.S. antitrust agencies give serious consideration to the exemptions based on certain threshold levels of U.S. commerce to ensure that transactions that are not likely to violate U.S. antitrust laws are exempt from premerger reporting.[8] The Commission has proposed wholesale revision of the primary exemptions for transactions involving foreign ultimate parent entities, which are contained in Rules 802.50 and 802.51. However, Proposed Rules 802.50 and 802.51 will not alleviate the over-inclusion of primarily foreign transactions in the U.S. merger review process, and in some respects Proposed Rules 802.50 and 802.51 will likely require that even more primarily foreign transactions file notification under the HSR Act.

Aggregation of U.S. Sales Figures

In a very significant departure from existing treatment of U.S. sales for purposes of the foreign party exemptions in Rules 802.50 and 802.51, the Commission would

[8] ICPAC REPORT at 126.

require under Proposed Rules 802.50 and 802.51 that the calculation of sales in or into the United States reflects the *aggregation* of such revenues during the most recent fiscal year *and* the amount of such sales since the end of the most recent fiscal year. The Commission's stated reason for this aggregation of U.S. sales is to ensure that transactions involving voting securities or assets of companies' whose U.S. sales have been "trending steeply upward prior to the acquisition" are notified.[9]

This language in Proposed Rules 802.50 and 802.51 will, however, in many transactions remove all benefit of the increased $50 million threshold for U.S. sales, which is the primary purpose of the revisions in Proposed Rules 802.50 and 51. An aggregation requirement would also require notification for transactions where U.S. sales have been stagnating or perhaps even declining. Most importantly, the aggregation requirement will produce widely disparate results based solely on when the transaction closes. Transactions that propose to close later in the year will have less chance of claiming the exemption in Proposed Rules 802.50 and 802.51 than transactions that close early in the year. This will disconnect the filing requirement from a transaction's effect on U.S. commerce and the transaction's potential for anticompetitive effects in the United States.

The following hypothetical transactions illustrate these results of the aggregation of U.S. sales in Proposed Rules 802.50 and 802.51.

[9] 66 Fed. Reg. 8725 (February 1, 2001).

Example 1: In December 2001, foreign person "A" enters into an agreement with foreign person "B" whereby "A" will acquire $500 million dollars of foreign assets from "B." In year 2000, $26 million in sales into the U.S. were attributable to the foreign assets to be acquired. Through November 2001, $26 million in sales into the U.S. are attributable to the foreign assets of to be acquired. In January 2002, $10 million of sales into the U.S. were attributable to the foreign assets to be acquired.

Example 2: In December 2001, foreign person "A" contracts to acquire 100% of the voting securities of European subsidiary "C" from foreign person "B" for $500 million. "C" made sales into the U.S. in the amount of $41 million in year 2000. Through November 2001, "C" has made $11 million in U.S. sales. In January 2002, "C" made $1 million in sales into the U.S.

Example 3: In December 2002, foreign person "A" contracts to acquire one hundred percent of the voting securities of foreign person "B" for $500 million. In year 2001, "B" made $30 million of sales in the U.S. through "C", its U.S. subsidiary. Through March 2002, "C" had made $15 million of sales in the U.S. Through December 2002, "C" had made $20 million of sales in the U.S. In January 2003, "C" received a new, large contract that resulted in $20 million in sales in one month, with similar monthly sales expected for the foreseeable future.

Assuming that no other exemptions apply, the transactions described in Examples 1, 2, and 3 would be reportable if the transaction would close in December of the year in which the acquisition agreement was signed. This would be the result under the Proposed Rules, despite the fact that sales in or into the U.S. were not "trending steeply upward" at the time the acquisition closed. In Example 1, the amount of U.S. sales attributable to the assets to be acquired in fiscal year 2000 remained approximately same as in fiscal year 2001. In Example 2, the amount of U.S. sales attributable to the

European subsidiary are declining steeply. In these circumstances, the requirement to aggregate two years of U.S. sales completely removes any benefit expected from the increase in the U.S sales thresholds of Proposed Rules 802.50 and 802.51 to $50 million.

In Example 3, the reportability of the transaction would entirely depend upon the month in which the transaction is consummated. If "A" acquired "B" in March 2002, the transaction would be exempt. If "A" acquired "B" December 2002, the transaction would be reportable, there was no upward trend in the acquired U.S. subsidiary's sales. If, however, the transaction were consummated in January 2003, instead of December 2002, the transaction would not be reportable, despite a very steep increase in the sales of the U.S. subsidiary in the month of closing.

Indeed, for each of these transactions, if the parties consummated the transactions on December 31 of the year in which the parties reached agreement, the transactions would be reportable. However, if the parties closed the transactions on January 1 of the next year, none of the transactions would be reportable. This will be a common result of requiring the aggregation of the prior year's sales with the current year-to-date sales of the acquired entity. Transactions closing later in the year will have a greater chance of required notification than transactions that close earlier in the year. The Proposed Rules create an incentive to consummate acquisitions in the beginning of a year, which is an undesirable result for merger notification and control regimes. We believe that for many transactions such incentives would be strong, especially given the substantial increase in filing fees.

If the U.S. antitrust agencies believe that they require the opportunity to review the competitive effects of proposed acquisitions of companies that have recently begun to generate increased U.S. sales, a proposition for which we neither support nor oppose the underlying economic theory, the U.S. antitrust agencies' goal could be accomplished without requiring *aggregation* of U.S. sales over two years. The agencies' goal could be accomplished by requiring the *comparison* of U.S. sales over a two-year period, and determining the applicability of an exemption based on the greater of U.S. sales for a single year in that period. To effect this goal, we propose replacing the aggregation language of "during the acquired person's most recent fiscal, combined with such sales to date since the end of that fiscal year" in Proposed Rule 802.50(a), and inserting the following language:

> ". . . during the acquired person's most recent fiscal year, **or** such sales todate since the end of that fiscal year, **whichever is greater**."

Similar conforming changes would have to be made to Proposed Rules 802.50(b)(2), 802.51(a)(2), 802.51(b)(2), and 802.51(c)(2).

This suggested language would eliminate the premerger reporting requirements for transactions that would seemingly be captured unintentionally under the aggregation requirement of the Proposed Rules, and it would not create incentives to close transactions early in the acquired person's fiscal year to avoid U.S. merger filing requirements.

Applicability of the $110 Million Aggregate U.S. Sales or Assets Exception

Rule 802.51(d) currently exempts proposed acquisitions by foreign persons from U.S. premerger reporting requirements under the following circumstances:

> The acquired person is also a foreign person, the aggregate annual sales of the acquiring and acquired persons in or into the United States are less than $110 million, and the aggregate total assets of the acquiring and acquired persons located in the United States . . . are less than $110 million.

Due to the Commission's restructuring of the foreign transaction exemptions, Proposed Rules 802.50 and 802.51 will now both include a similar exemption. However, the Commission's Proposed Rules 802.50 and 802.51 would limit the applicability of the existing exemption in Rule 802.51(d) to only those transactions that are still subject to the size-of-person test of Section 7A(a)(2) under the new legislation; *i.e.*, those transactions with a global value of less than $200 million. The Commission justifies the proposed change by citing the initial explanation for the exemption articulated in the 1978 S.B.P., which "explains that the $110 million threshold was adopted to approximate the size-of-person criteria of Section 7A(a)(2)."[10] Thus, the Commission now states that it "believes it is appropriate and consistent with congressional intent to require filings from foreign

[10] 66 Fed. Reg. 8723, 8725 (February 1, 2001).

persons, regardless of the size of their U.S. presence, where the transaction is valued at over $200 million and the $50 million threshold of these exemption rules is satisfied."[11]

The $110 million aggregate U.S. sales or assets threshold of course mirrors the combined statutory size-of-person thresholds in Section 7A(a) of the HSR Act required for all transactions before the HSR Act Amendments. In the 1978 S.B.P., the Commission proposed creating the exemption to "exempt[] certain acquisitions by foreign persons because of their minimal relationship to United States commerce."[12] Further, the Commission stated in the 1978 S.B.P. that "considerations of comity are more significant whenever a foreign person is an acquiring person," and also stated that "an anti-competitive impact upon United States commerce is less likely to occur when a foreign person is acquiring foreign assets or voting securities . . .."[13]

There is no discussion in the 1978 S.B.P. of the import now apparently attributed by the Commission to the overall value of a transaction in discerning whether a proposed transaction may have an anticompetitive impact on U.S. commerce. We suggest that the 1978 S.B.P. contained no such discussion, because the value of the overall transaction was not a consideration when the exemption was created. Indeed, the Proposed Rules will remove the exemption previously available for foreign parties not reaching the $110

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11 *Id.*

12 43 Fed. Reg. 33499 (July 31, 1978).

13 *Id.* at 33500.

million aggregated U.S. sales or assets level, where the global value of the transaction exceeds $200 million. The following hypothetical example illustrates this result:

Example: Foreign person "A" contracts to acquire 100% of the voting securities of foreign person "B" for EUR 1 billion, which is currently approximately US$1 billion. In years 2000 and 2001, the total sales in or into the United States for "A" and "B" were $20 million and $60 million, respectively. Thus, the aggregate total sales of "A" and "B" in or into the United States in year 2000 and year 2001 were $80 million. The aggregate total assets of "A" and "B" located in the United States is currently $30 million.

Under the existing Rules, this transaction would be exempt, because the aggregate sales during the prior year and the aggregate assets of "A" and "B" are each less than $110 million. Under Proposed Rule 802.51(c), this transaction would not be exempt from filing obligations for two reasons. First, combining two years' of revenues of both "A" and "B", as required by Proposed Rule 802.51(c)(2) would take the aggregated revenues of "A" and "B" over $110 million. We discuss above why the aggregation of two years' of revenues should be eliminated throughout Proposed Rules 801.50 and 801.51, and this example further illustrates how this revenue aggregation requirement will remove exemptions for transactions that previously did not require notification. Additionally, this transaction will not be exempt simply because the global value of the transaction is above $200 million. Again, this transaction would be exempt under the existing Rules; the Proposed Rules would remove the exemption.

This result is not consistent with the original rationale for creating this exemption. The value of a transaction outside the United States does not indicate in any way the transaction's potential anticompetitive effects in the United States. This Proposed Rule will be inconsistent with congressional intent to recognize the effects of inflation since the HSR Act was passed in 1976 and to raise thresholds for reportability. For these reasons, we believe that the global value of a proposed transaction should not be relevant to the application of this exemption. Accordingly, we submit that the Proposed Rules 802.50(b)(4) and 802.51(c)(4) be deleted.

Book Value of Assets

Proposed Rules 802.50(b), 802.50(b)(3), 802.51(a)(1), and 802.51(b)(1) have asset valuation tests for determining the applicability of the exemptions. In a very significant change to current asset valuations required by Rules 802.50 and 802.51, the Commission states that for Proposed Rules 802.50 and 802.51"[f]air market value would replace book value of assets in order to harmonize these sections with the rest of the rules."[14] The Commission's proposal to change assets valuations under Proposed Rules 802.50 and 802.51 is, however, actually inconsistent with the rest of the Rules, and the implementation of a fair market value test for purposes of these Proposed Rules will

[14] 66 Fed. Reg. 8723, 8725 (February 1, 2001).

impose a new, substantial burden upon parties in voting securities transactions to determine whether they are eligible to claim the exemptions.

Contrary to the Commission's assertion that a market valuation test is consistent with "the rest of the rules," in determining whether a party satisfies the "size-of-person" test in Section 7A(a) of the HSR Act, the book value of its assets are conclusive. Rule 801.11(c)(2) states that "the total assets of a person shall be as stated on the last regularly prepared balance sheet of that person." Thus, the most fundamental asset valuation in the HSR Act and the Rules is based on an existing balance sheet, not on a market valuation. It is only when assets are being *acquired* that the rules require that a fair market value be attributed to the assets,[15] and in the vast majority of transactions, the negotiated purchase price is the best estimate of current market value. No separate appraisal of the assets is required or performed. However, the Commission's proposed market valuation requirement, which is stated only in the S.B.P. and not made part of Proposed Rules 802.50 or 802.51, would require such a valuation merely to determine eligibility for the exemption.

This will impose a substantial burden on companies involved in voting securities transactions. They will have to perform a market value appraisal of U.S. located assets of the issuers to be acquired. Such as appraisal is similar to the due diligence performed by an acquiring person is an asset deal, which is a great amount of work. Companies enter into voting securities transactions primarily based on the future earning prospects of the acquired company as a whole, not on the basis of the purchase price compared to the book value of the acquired company's assets. In a stock deal, the "market value" of assets are not easily determinable, and any excess over the book value of the assets of the acquired company is reflected as "goodwill" on the balance sheet of the acquiring company, precisely in recognition of the difficulties of a market value appraisal.

Presumably, in order to comply with the Commission's proposed market valuation requirement for voting securities transaction, any parties intending to claim the exemption would have to undertake a fair-market valuation of the acquired issuer's U.S. assets consistent with Rule 801.10(c)(3). To illustrate the substantial burden this will create, consider the following example.

> Example: Foreign person "A" contracts to acquire one hundred percent of the voting securities of foreign person "B" for $100 million. "B's" sales into the U.S., calculated according to Proposed Rule 802.51(b)(2), are $35 million. B holds assets located in the United States having an aggregate total book value of $40 million.

In order to determine whether "A" and "B" meet the statutory "size-of-person" test, "A" and "B" can rely upon their regularly maintained and readily available balance sheets and the book value of their assets,[16] which include a book value of "B's" assets located in the United States. However, in order to determine whether the transaction is eligible for the

[15] *See* Rules 801.10 (b), (c)(3).

[16] Rule 801.11(c)(2).

exemption in Proposed Rule 802.51(a)(1), (b)(1), and (b)(3), "A" must incur the significant additional expense and burden of either: a) convening a meeting of its board of directors and educating each of its members in order for them to assign a fair-market value in good-faith to "B's" U.S. assets; or b) having its board hire an investment firm to undertake the appraisal of "B's" U.S. assets.[17] In either case, we emphasize the practical difficulty that the acquiring company will have in performing such an appraisal. These are appraisals that, in normal voting securities transaction, are never performed. Additionally, the acquiring company must exercise considerable care in this unusual appraisal to avoid possible claims that the appraisal is a device to avoid reporting the transaction, in violation of Rule 801.90.

The competitive significance of "A's" proposed acquisition of "B" will likely not turn upon whether the value of "B's" U.S. assets has increased since its last book value calculation. Similarly, the impact of "A's" proposed acquisition of "B" on U.S. commerce will not be materially increased based upon whether the market value of "B's" U.S. assets has increased to above $50 million. As a result, we propose that the Commission state in its S.B.P that parties can continue to rely upon the book value of assets when determining whether a transaction qualifies for the exemptions in Proposed Rule 802.51.

[17] This is according to the valuation methods required by Rule 801.10(c)(3).

PROPOSED RULE AMENDMENTS WITH GENERAL APPLICATION TO DOMESTIC AND FOREIGN TRANSACTIONS

Rule 801.10

The Commission's proposed amendments do not include any reference to Rule 801.10, other than the inclusion in the Interim Rules of a new "Example" to Rule 801.10. However, given that the premerger notification regulations are in the process of being substantially revised to reflect the HSR Act Amendments, it seems to be an appropriate time to eliminate what we perceive to be an anomaly in Rule 801.10(c)(1)(ii). The current regulation reads as follows:

> For acquisitions not subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price within the 45 or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire."

By its terms, it does not allow the parties to such an acquisition to use the date of submission of the required premerger notification and report form as the pertinent point of reference for valuing their transaction.

For most transactions, the lack of such an option is of no consequence. However, for parties to proposed transactions that are either subjected to an investigation or whose closing is unexpectedly and substantially delayed such an option is essential to ensure full compliance with the HSR Act, especially in light of the new graduated filing fee structure. As an illustration, consider the following hypothetical.

> Example: Corporation A and Corporation B are both publicly traded companies. Corporation A contracts to acquire one hundred percent of Corporation B pursuant to a share exchange. Immediately following the announcement of the proposed acquisition, Corporation B's share price hits a fifty-two week high. The parties calculate the value of its proposed acquisition in compliance with Rule 801.10(c)(1)(ii) to be $485 million, submit their premerger notification forms, and Corporation A pays the $125,000 filing fee. Prior to the expiration of the applicable waiting-period, the FTC issues a request for additional information and documentary material. In the meantime, the share price for Corporation B continues to increase in value. In fact, two months into the FTC's investigation the value of the proposed transaction (calculated pursuant to Rule 801.10(c)(1)(ii)) has increased to $580 million.

Under such a factual scenario, two months into the Commission's investigation, the proposed transaction would actually be subject to the higher $280,000 filing fee. As a result, Corporation A has unintentionally failed to comply with the HSR Act. There does not seem to be any provisions in either the existing or the Proposed Rules that contemplate this circumstance and, thus, there is no mechanism for an appropriate resolution.

Other common circumstances can easily lead to the same problematic result. It is difficult to conceive of a justification for not allowing parties to calculate the value of their proposed non-801.30 transactions based upon the date of the submission of their premerger notification forms. None of the numerous Statements of Basis and Purpose issued by the Commission have included any rationale for not providing the parties with this option. On the other hand, Rule 801.10(c)(1)(i) provides parties to an acquisition subject to Rule 801.30 with an alternative point of reference for calculating the value of proposed transactions,[18] and Rule 801.10(c)(3) allows parties to utilize the "date of filing of the notification" as a point of reference when making a fair market value determination. Additionally, Rule 801.11(b)(2) explicitly allows parties to utilize "the date of filing of the notification" as a point of reference in calculating whether the size-of-person test has been satisfied.

In order to remedy this apparent anomaly, we propose taking some language from Section 801.10(c)(3) and inserting it into Section 801.10(c)(1)(ii) so that it reads as follows:

> For acquisitions not subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, **within the 45 or fewer calendar days which are prior to the date of filing of the notification required by the act, or if such notification has not been filed,** within the 45 or fewer calendar days prior to the consummation of the acquisition the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire."

We believe that by inserting this proposed language, complications similar to the one we hypothetically describe above will be avoided.

[18] "For acquisitions subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, with the 45 calendar days prior *to receiving the notice required by § 803.5(a) or* prior to the consummation of the acquisition" (emphasis added).

CONCLUSION

We hope that these comments provide some useful information and considerations to the Commission as it continues the difficult task of revising the Rules to comply with the HSR Act Amendments. We have tried to indicate what we believe will be the most important effects of the Proposed Rules on transactions that are primarily foreign, and we request that the Commission adopt our suggested changes to limit the number of primarily foreign transactions that will create U.S. merger control reporting obligations. We would welcome the opportunity to discuss any of these issues with the Commission staff or to provide additional information.

Sincerely yours,

BAKER & McKENZIE