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By Facsimile

Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Director of Operations and Merger
Enforcement
Antitrust Division
Department of Justice
Room 10103
601 D Street, N.W.
Washington, DC 20530

Proposed HSR Rules

Dear Sir or Madam:

On January 24, 2001, the Federal Trade Commission (the "Commission") proposed certain amendments to the premerger notification rules implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Included in the proposed rules are changes to the exemptions found in Sections 802.50 and 802.51 requiring that, in determining aggregate sales in or into the U.S., the sales of the most recent fiscal year be combined with "such sales to date" since the end of that fiscal year. Such rules, if adopted, would result in disparate treatment, based solely on the time of year a transaction is consummated, of similarly situated parties to similarly sized transactions. In addition, these proposed rules would reduce merging parties' certainty regarding the applicability of these exemptions by imposing on them the burden of recalculating revenues periodically before the closing of a transaction. Consequently, the proposed rules should be modified to provide for more even-handed treatment and greater certainty.

Proposed Sections 802.50 and 802.51 of the HSR Rules exempt certain acquisitions, respectively, of foreign assets and voting securities of a foreign issuer. One of the

purposes of the proposed rules is to exempt transactions having only a limited impact on United States commerce, as measured by a $50 million U.S. sales threshold.

Under the proposed rules, sales in or into the United States would be determined by the amount of such sales in the most recent fiscal year plus the amount of such sales since the end of the most recent fiscal year, calculated within sixty days of filing of notification or, if notification is not required, within sixty days prior to the consummation of the acquisition. We understand that the purpose of this proposed change is to require notification of acquisitions of assets and voting securities that have only recently begun to generate substantial U.S. sales. While this objective is appropriate, the proposed method of calculation does not adequately address this objective and can often lead to unfair and uneven results. Specifically, under this method of calculation, reporting obligations for foreign transactions can depend solely on the timing of the deal. For example, a transaction which would be exempt from HSR reportability if consummated in March may require notification when consummated in November, not by virtue of the acquired person's newly increased impact on U.S. commerce, but rather because more months are included in the calculation. Thus, the acquisition of assets that consistently generate $35 million of annual net sales in the U.S. would be exempt from reporting in March, but reportable in October.

The proposed rules also would reduce the certainty of HSR analysis significantly, particularly if there is delay between the time of the HSR analysis and the closing of the transaction. Under the current rules, the availability of an exemption under Section 802.50 or 802.51 of the HSR Rules depends on the U.S. sales and assets in the most recent concluded year, which is straightforward and provides certainty throughout the year in which the HSR analysis was performed. Under the proposed rules, however, the U.S. sales calculation for an exempt transaction must be made as of 60 days prior to the closing of the transaction. If there are delays in the closing after the initial HSR analysis, the parties would be required to recalculate repeatedly the U.S. sales of the acquired issuer to ascertain the continuing availability of the exemption. In transactions where the parties are close to meeting the requirements of the HSR exemption, the proposed rule changes would render HSR analyses uncertain, and the issue of reportability would often be determined solely by the timing of the transaction.

We believe that the Commission's objective can be achieved through means that provide more consistent and even-handed results. While there are undoubtedly numerous alternatives, we propose three for the Commission's consideration.

1. *Keep the calculation method the same as under the previous rules.* As noted above, the existing approach, relying on the most recently concluded year, allows for equal treatment of similarly sized transactions and also provides parties with an easily ascertainable standard and thus certainty regarding HSR analysis. The principle underlying the proposed rule change is to subject to reporting requirements those acquisitions of acquired persons that have recently begun to have an appreciable impact on U.S. commerce. Adding sales since the close of the most recent fiscal year to the calculation, however, does not always achieve this principle. While in some circumstances the proposed method of calculation may capture acquisitions of

acquired persons that have only recently begun to have a significant impact on U.S. commerce, it may just as easily include acquisitions of acquired persons that have recently had the same or reduced impact on U.S. commerce. For example, a transaction consummated in December may involve assets that generated $40 million of U.S. sales in the most recent fiscal year but only $15 million in U.S. sales since the end of the year. Although the assets have had a reduced impact on U.S. commerce, under the proposed method of calculation such a transaction would be reportable. On the other hand, a similar transaction involving assets that generated $5 million in U.S. sales in the most recent fiscal year but $40 million in the current year prior to consummation of the transaction, even where the transaction is consummated in the early part of the year, would not be reportable. The proposed method of calculation is thus both under and over inclusive and does not represent a meaningful improvement over the status quo, but deprives merging parties of the even-handed treatment and certainty inherent in the existing approach.

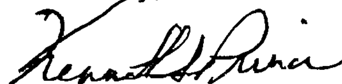
2. *Twelve-month average of sales over time period.* A twelve-month average could be determined by adding the sales in or into the U.S. in the most recent fiscal year to the sales since the end of the most recent fiscal year, calculated within sixty days of the consummation of the transaction, dividing the total figure by the number of months included, and multiplying that figure by twelve. For the transaction to be HSR reportable, the twelve-month average sales would have to surpass the $50 million threshold. This method of calculation ensures that recent sales activity, and thus its impact on U.S. commerce, is taken into account. The use of a twelve-month average is an improvement over the proposed rules in that it largely (but not totally) eliminates the timing of the acquisition as the sole determinant of reportability. This approach does sacrifice certainty, however.

3. *Most recent twelve months.* Including only the most recent twelve months, calculated within sixty days of consummation of the transaction, would assure that any recent impact on U.S. commerce is considered, and would also go a long way toward making the reportability of the transaction not contingent upon its timing. Again, however, certainty for the parties would be less than is currently provided by the existing rules.

While none of these three alternatives is perfect, we respectfully suggest that each, by reducing the impact of a transaction's timing on the issue of HSR reportability, would be an improvement over the proposed rule change.

If you should have any questions regarding these comments, feel free to contact me at your earliest convenience.

Sincerely,



Kenneth S. Prince

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