

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Honorable Warren G. Magnuson
President Pro Tempore
United States Senate
127 Russell Senate Office Building
Washington, D.C. 20510

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
2231 Rayburn House Office Building
Washington, D.C. 20515

SUBJECT: Fourth Annual Report to Congress pursuant
to Section 201 of the Hart-Scott-Rodino
Antitrust Improvements Act of 1976

Gentlemen:

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a (hereinafter referred to as "the Act"). Subsection (j) of the Act provides as follows:

Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the fourth annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons with sales or assets greater than a specified amount who intend to make a stock or assets acquisition of a specified size or larger must report their intentions to the Antitrust Division of the Department of Justice and to the Federal Trade Commission. Thereafter the parties must wait a prescribed period of time, usually 30 days, before consummating the transaction. The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement

agencies with a meaningful opportunity to review mergers and acquisitions of substantial size before those transactions take place. If either agency believes that a proposed transaction may violate the antitrust laws, Section 7A(f) of the Act allows the agency to seek an injunction in Federal district court to prohibit consummation of the transaction. The ability of the antitrust agencies to make such a determination is enhanced by the provisions of Section 7A(e) of the Act, which authorizes either, but not both, of the agencies to issue a request for additional information or documentary material to either or both parties to a reported transaction. Such a request must be issued during the initial waiting period and, in most cases, has the effect of extending the period until 20 days after the requesting agency receives all the requested information or material.

Final rules governing implementation of the premerger notification program were promulgated by the Commission, with the concurrence of the Assistant Attorney General, on July 31, 1978. ^{1/} At that same time, a comprehensive Statement of Basis and Purpose was published, which contains a section-by-section analysis of each provision of the rules and an item-by-item analysis of each item of the Premerger Notification and Report Form. The program became effective on September 5, 1978.

Statistical Profile of the Premerger Notification Program

Attached to this report are two tables which provide a statistical profile of the premerger notification program based on slightly more than two complete years of operation. Appendix A provides a statistical compilation for each of the three years in which the program has operated (the last four months of 1978, all of 1979, and through November 30 in 1980) in three categories: number of transactions reported, number of requests for additional information or documentary material (hereinafter referred to as "second requests"), and number of early termination requests.

Appendix B provides a month-by-month comparison, based on the number of filings received, of the first 11 months of 1980 with the first 11 months of 1979. While possibly relevant in revealing cyclical trends with respect to merger and acquisition activity, the data also

^{1/} 43 Fed. Reg. 33450 (July 31, 1978). The rules also appear in 16 C.F.R. Parts 801 through 803. For more background information concerning the development of the rules and operating procedures under the premerger notification program, see the second and third annual reports covering the years 1978 and 1979, respectively.

form some basis for assessing the impact of revised rule 802.20 (the minimum dollar value exemption), which was amended on November 21, 1979. ^{2/} The November 1979 amendment, which substantially broadened the exemption for certain transactions involving \$15 million or less in voting securities or assets, was designed to reduce the number of filings by approximately 20%. Although there is no accurate method of determining precisely how many transactions were actually exempted, the month-by-month statistics do show an actual drop of 20.7% (from 526 filings to 417) when the first seven months of 1980 are compared to the same time period in 1979. This trend has been reversed, however, in recent months: August through November 1980 show a net increase of 10.4% over the same four-month period in 1979, including a record high of 90 filings in the month of October 1980.

Other trends apparent from these statistics are that the two agencies have issued fewer second requests in 1980 than in 1979, both in terms of actual numbers (66 for 11 months in 1980 compared to 109 in all of 1979) and as a percent of transactions filed (down from 12.6% in 1979 to 9.0% in 1980), and that more requests for early termination have been granted in 1980 than in 1979 (77 of 93 requests granted in 1980 compared to 62 of 115 requests granted in 1979).

Recent Developments Relating to Premerger Notification Rules and Procedures

The only amendment to the premerger notification rules adopted since the period covered by the last annual report involved an updating of revenue data from parties filing premerger notification Forms. ^{3/} Most of the data which parties are required to submit is comparable to data already submitted to the Bureau of Census in connection with their annual and more detailed five-year surveys. At the time the premerger notification program went into effect, the 1972 Census survey was the most recent five-year survey available and thus parties were required to provide information concerning their dollar revenues during 1972 and during the most recent year. Because the 1977 Census survey is now largely complete, since May of this year filing parties have been required to provide the more recent 1977 data, rather than the 1972 data. This change not only has provided enforcement agencies with more recent data, but also has reduced the burden on reporting persons who no longer have to locate, and sometimes adjust, data that are now eight years old.

^{2/} 44 Fed. Reg. 66781 (November 21, 1979).

^{3/} 45 Fed. Reg. 14205 (March 5, 1980), a copy of which is attached hereto as Exhibit "A."

Also this year, Congress passed the FTC Improvements Act of 1980, 4/ which has resulted in a number of changes in various FTC procedures. For the most part, these changes have had only incidental impact on the premerger notification program. For example, second requests must now be signed by a Commissioner, rather than by certain Commission staff officials. 5/ The new FTC Act also contains detailed provisions concerning confidential treatment of documents obtained by the Commission in the course of its investigations. However, because premerger notification documents and information are already exempt from the Freedom of Information Act and protected against disclosure under subsection (h) of the Act, 6/ there was no significant change here.

Since the inception of the premerger notification program, the staff of the Commission, with the concurrence of the Assistant Attorney General, has issued a number of formal interpretations, which have been placed on the public record. 7/ Past interpretations have focused on technical aspects of the rules or contained general policy statements regarding incorporation by reference, early termination, and attorney-client privilege. In 1980, two formal interpretations have been issued: one regarding the treatment of accounts receivable under the rules and the other regarding disclosure in subsequent administrative or judicial proceedings of confidential data contained in premerger notification documents. 8/

4/ Pub. L. 96-252, 94 Stat. 374.

5/ The authority to issue second requests conferred upon the Assistant Attorney General remains unchanged, however, and may be delegated under § 803.20(b)(1) of the premerger notification rules, 16 C.F.R. § 803.20(b)(1). Within the Commission, this authority had previously been delegated to various staff officials in the Bureau of Competition. See 43 Fed. Reg. at 33515.

6/ 15 U.S.C. § 18a(h).

7/ See 16 C.F.R. § 803.30. The texts of the formal interpretations are collected at 4 Trade Reg. Rep. (CCH) ¶ 42,475.

8/ Copies of these formal interpretations are attached as Exhibits "B" and "C," respectively.

The 1979 annual report to Congress referred to pending litigation involving the premerger notification program. One important issue involved in that litigation (the validity of the agencies' policy of retaining documents submitted under the premerger notification program, even where parties to a particular transaction have abandoned a reportable transaction) has been resolved in favor of the government agencies. In Borg-Warner Corp. v. FTC, Civil No. 79-294 (D. Del. February 26, 1980), the court concluded that "the [a]gencies' policy of retaining premerger documents after a planned merger has been abandoned is consistent with the Act." ^{9/} In the same opinion, Judge Latchum ruled that the other issue raised by plaintiff (regarding the agencies' policy on disclosure of premerger notification documents in subsequent administrative or judicial proceedings) was not ripe for judicial resolution. ^{10/}

The staff of the FTC Premerger Notification Office is presently engaged in several projects which may result in amendments, additions, or clarifications to the premerger notification rules. Additionally, several technical areas have been identified which may require additional formal interpretations or, possibly, rules changes. Many of these proposed rules changes or clarifications have emerged as the result of specific situations posed by actual filings or by telephone inquiries.

Merger Enforcement Activity During 1980

The Antitrust Division has sought preliminary injunctions in three merger cases during 1980. One challenge was successful: INA Corporation was enjoined from acquiring American Health Services, where both firms operate psychiatric hospitals in New Orleans. ^{11/} In another case, challenging Siemens' proposed acquisition of Searle Diagnostics, a preliminary injunction was denied and this denial was affirmed by the Second Circuit. ^{12/} A third suit, involving the proposed acquisition of the assets of H.P. Hood by Agri-Mark, resulted in a consent decree. ^{13/}

^{9/} Slip opinion at 10.

^{10/} Id. at 4-7.

^{11/} Wall Street Journal, October 2, 1980, at 7. The case was filed as United States v. Hospital Affiliates International, Civ. No. 80-3672 (E.D. La.), on September 25, 1980.

^{12/} United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980).

^{13/} See 5 Trade Reg. Rep. (CCH) ¶ 50,758 (1980). The consent decree was issued on July 16, 1980, after the injunction action had been filed on June 27, 1980. 4 Trade Reg. Rep. (CCH) ¶ 45,080 (Case 2774).

The Commission has authorized preliminary injunction actions on two occasions in 1980. In March of this year, the Commission authorized a challenge to the acquisition by Transamerica Corporation of certain container rental and leasing operations from Hudson General Corporation. Because the parties cancelled their acquisition plans upon learning of the Commission's decision, no formal suit was filed. More recently, the Commission has sought to enjoin the proposed acquisition of the Menasha Wooden Ware Company by Weyerhaeuser Company. 14/

During 1980 the FTC and the Justice Department have each filed five complaints in merger cases, for a total of ten such complaints. 15/ Those cases which are not settled will be tried by a Federal district court judge or an FTC administrative law judge and most are presently in the pre-trial discovery stage.

14/ Federal Trade Commission v. Weyerhaeuser Co., Civ. No. 80-3175 (D.D.C. filed December 12, 1980). At the time of preparation of this report, no court action had been taken on this request.

15/ FTC complaints in 1980: BAT Industries, Ltd., Docket 9135 (issued May 13, 1980); Champion Spark Plug Company, Docket 9141 (July 29, 1980); Lehigh Portland Cement Company, Docket 9142 (July 30, 1980); Dairymen, Inc., Docket 9143 (July 31, 1980); Xidex Corp., Docket 9146 (September 16, 1980).

Justice Department complaints in 1980: United States v. Ibstock Johnsen Limited (E.D. Pa. filed July 21, 1980); United States v. Acorn Engineering Co. (N.D. Cal. filed August 19, 1980); United States v. Gould, Inc. (D. Minn. filed September 10, 1980); United States v. The Flintkote Co. (D.D.C. filed September 30, 1980); United States v. Beatrice Foods Co. (D. Minn. filed October 28, 1980). In addition, the Justice Department issued complaints in two cases where consent orders were filed simultaneously. United States v. Wheelabrator-Frye, Inc. (D.D.C. filed September 15, 1980); United States v. Rockwell International Corp. (W.D. Pa. filed September 30, 1980).

In addition, consent agreements involving partial divestiture of assets or voting securities have been reached in 13 cases, 16/ four involving the Department and nine involving the Commission. 17/

16/ Justice Department consent orders in 1980 involved Agrimark, Inc. (acquisition of assets of H.P. Hood, Inc.); Rockwell International Corp. (acquisition of Serck Ltd.); United Technologies, Inc. (acquisition of Carrier Corp.); Wheelabrator-Frye, Inc. (acquisition of Pullman, Inc.). The United Technologies-Carrier settlement resolved a case initiated in 1978. See 1979 annual report, at 3.

FTC consent orders made final in 1980 involved Bayer AG (acquisition of Miles Laboratories); Bendix Corp. (acquisition of Warner & Swasey); Genstar Ltd. (acquisition of the Flintkote Co.); Murata Manufacturing Co., Inc. (acquisition of Erie Technological Products, Ltd.); National Tea Co. (acquisition of Applebaum's Food Markets, Inc.); Pay Less Drug Stores Northwest, Inc. (acquisition of Pay Less Drug Stores, Inc.); Schlumberger, Ltd. (acquisition of Fairchild Camera and Instrument Corp.); SmithKline Corp. (acquisition of Allergan Pharmaceuticals, Inc.); W.R. Grace & Co. (acquisition of Daylin, Inc.).

17/ It should be noted that not all of the cases mentioned involve transactions which were reportable under the premerger notification program. In fact, one-third of the cases (or nine out of 27) involve transactions which were non-reportable or arose prior to the establishment of the program. Because of the Act's provisions regarding the confidentiality of information obtained pursuant to the program, it would be inappropriate to identify which of these cases were initiated under the premerger notification program.

In addition to the formal challenges and consent orders discussed in the text, four transactions were abandoned in 1980 following the issuance of a second request. Although the likelihood of an antitrust challenge may not have been the sole basis for every decision to cancel, one cannot totally discount the possibility that antitrust considerations had some role in the decision to cancel. Similarly, it is possible that some firms may have been deterred from entering into merger agreements which might involve the antitrust laws simply because of the existence of the premerger reporting system and the statutory waiting period requirements, although there is no way of measuring the extent to which Hart-Scott-Rodino may act as a self-policing device.

Assessment of the Effects of the Premerger Notification Program

The impact of the premerger notification program on the antitrust enforcement agencies and the industries which they monitor can, in part, be measured in terms of statistics, such as numbers of reportable transactions, second requests, or litigated cases. However, to assess or evaluate the meaning of the statistics fully, some additional observations are appropriate.

First, as indicated in last year's annual report, the creation of a program of premerger notification itself has fulfilled a major goal of the Act. By requiring firms to observe a waiting period before completion of a proposed transaction, the phenomenon of the "midnight merger" has been largely eliminated. Therefore, the Act's provisions have assured that virtually every significant acquisition occurring in the United States will be subject to a meaningful review by the antitrust enforcement agencies.

Second, it is important to recognize that information furnished pursuant to the premerger notification program has streamlined certain antitrust enforcement efforts by allowing the agencies to proceed in a more focused and well-informed manner. The procedural tools available to the agencies under the Act (such as the second request and the initial Notification and Report Form) provide sufficient information, in most cases, for the agency to evaluate the proposed acquisition and determine which, if any, transactions to challenge. This review procedure might also work to the advantage of private parties in that the information provided may convince the antitrust agency that further investigation is unnecessary.

Another point to be emphasized in reviewing the first two full years' experience with the program is the high degree of cooperation which the agencies have received from persons subject to the Act. The beneficial effects of this cooperation are apparent at several stages of the process: first, compliance with the Act has been good, and thus far there have been no actions under subsection (g)(1) to recover civil penalties for violations of the Act; second, difficult and technical questions have often been resolved prior to the filing of the initial notification by a phone inquiry to the FTC's Premerger Notification Office (a practice which both agencies encourage); 18/

18/ FTC's Premerger Notification Office estimates that it presently receives between 20 and 25 such inquiries daily.

and, in those transactions raising antitrust concerns, the parties have often supplied information voluntarily and negotiated with staff to limit or narrow requests for information. In addition, the fact that there have been as many negotiated consent orders as contested challenges in 1980 indicates that both government and private parties have diligently sought means to avoid the costs of protracted litigation.

The ability of the antitrust enforcement agencies to obtain effective relief through negotiated consent agreements has been aided by the tools made available under the Act. In particular, the Act's waiting period requirements, coupled with the agencies' ability to seek or threaten to seek a preliminary injunction, often provide the parties to the transaction under scrutiny with a powerful incentive to negotiate. Although the agencies have sought and will continue to seek preliminary injunctions, the successes achieved in 1980 indicate that the positive impact of Hart-Scott-Rodino on the ability to obtain effective consent relief should not be overlooked. 19/

Statistics show that, in the past year, the agencies have granted requests for early termination more readily and with greater frequency than in the early days of the premerger notification program. In part this flexibility reflects a reluctance on the part of the antitrust agencies to pass judgment on the sufficiency of the business justifications advanced by parties who seek to close a transaction without observing a full waiting period. Initially, because it was feared that excessive use of the early termination device might adversely impair the ability of the agencies to exercise their responsibilities under the program, the agencies were cautious; hence, business reasons were carefully scrutinized and only about half the requests for early termination were

19/ For an additional perspective on the interplay between government antitrust enforcement efforts and the premerger notification program, see "The Premerger Notification Program and Government Enforcement of Section 7 of the Clayton Act: Some Current Reflections," Remarks by Malcolm R. Pfunder, Assistant Director for Evaluation in the FTC's Bureau of Competition, before the ALI-ABA Course of Study, Washington, D.C. (November 21, 1980). A copy of the speech is attached as Exhibit "D"; the remarks contained therein represent the personal views of the author and do not necessarily reflect the views of the Commission or the Justice Department.

sometimes with oral or written presentations designed to persuade us that the overlap is insignificant and should not be challenged. Sometimes, too, these discussions result in consent arrangements which permit the transaction to proceed, subject to a divestiture obligation which eliminates the anticompetitive impact of the deal.

Antitrust problems other than horizontal ones are also more visible as a result of premerger notification, and these too sometimes result in voluntary or negotiated adjustments which mitigate the anticompetitive effects, although these are somewhat less common. In short, I believe that the HSR program may have increased both the need for, and the effectiveness of, antitrust counseling.

The impact of the program on some of the more mechanical aspects relating to execution of mergers and acquisitions is, I think, relatively insignificant. There just is not much opportunity for using the statute to erect what would otherwise be artificial barriers, for example in a hostile takeover attempt. Of course, it is not infrequent that a hostile target presents us with arguments as to why we should be concerned with the antitrust consequences of the proposed tender offer, but that was equally true before the advent of the program.

What we really don't see as much as I had originally feared is the use of the program to create additional filing obligations and waiting periods, for example by the purchase of significant minority positions in third parties, in order to create a secondary acquisition filing obligation for the offeror.

The Assistant Attorney General has indicated his concurrence with this annual report.

By direction of the Commission.

Carol M. Thomas
Secretary

Summary of Transactions 1978 - 1980

	<u>1978</u> (Sept. - Dec.)	<u>1979</u> (Jan. - Dec.)	<u>1980</u> (Jan. - Nov.)	<u>Total</u>
Transactions Reported	355	868	735	1958
Transactions where Additional Information was Requested	36	109	66	211
FTC	23	58	34	115
DOJ	13	51	32	96
Transactions where Early Termination was Requested	31	118 <u>1/</u>	96 <u>2/</u>	245
Early Termination Granted	16	62	77	155
Early Termination Denied	15	53	16	84

1/ Includes two transactions found to be non-reportable and one transaction in which the filings were withdrawn.

2/ Includes three outstanding early termination requests.

NUMBER OF TRANSACTIONS REPORTED ON
A MONTH-BY-MONTH BASIS:
JANUARY-NOVEMBER, 1980 COMPARED TO
JANUARY-NOVEMBER, 1979

	1979	1980
January	71	56
February	75	64
March	75	58
April	57	60
May	84	55
June	76	64
July	88	60
August	75	82
September	50	68
October	78	90
November	85	78
	<u>814</u>	<u>735</u>

List of Attachments

Exhibit A -- Amendment to Premerger Notification and Report Form which requires reporting persons to utilize 1977, rather than 1972, data.

Exhibit B -- Formal Interpretation concerning treatment of accounts receivable under the Premerger Notification Rules.

Exhibit C -- Formal Interpretation concerning release of premerger notification documents in subsequent administrative or judicial proceedings.

Exhibit D -- Text of Remarks by Malcolm R. Pfunder entitled "The Premerger Notification Program and Government Enforcement of Section 7 of the Clayton Act: Some Current Reflections," before the ALI-ABA Course of Study, Washington, D.C. (November 21, 1990).