

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

January 2, 1979

Honorable James O. Eastland
President Pro Tempore
United States Senate
2241 Dirksen 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: Second 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 Improvements Act of 1976, Pub. L. 94-435, added a new § 7A to the Clayton Act, 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 second annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons of specified size or larger, who intend to make stock or asset acquisitions of specified size or larger, must report their intentions to the Antitrust Division of the Department of Justice and to the Federal Trade Commission and must thereafter wait a prescribed period of time before consummating the transaction.

The waiting period is designed to permit the agencies to determine whether action against a reported acquisition is warranted prior to its consummation. Section 7A(f) of the Act provides for expedited consideration by a Federal district court in the event that either agency seeks a preliminary injunction to prevent consummation of an acquisition.

The Act was signed by the President on September 30, 1976. On December 15, 1976, the Federal Trade Commission, with the informal concurrence of the Assistant Attorney General in charge of the Antitrust Division, issued proposed rules and a proposed Notification and Report Form for public comment; the notice of proposed rulemaking was published in the Federal Register of December 20, 1976. Approximately 130 comments were received in response to those proposed rules and form. In response to the comments, the staff prepared substantial revisions to the proposed rules. On July 25, 1977, the Commission approved revised proposed rules and a revised proposed Notification and Report Form and determined that additional public comment thereon would be desirable. The revised proposed rules and form were published in the Federal Register of August 1, 1977, 42 FR 39040. A total of 116 comments were received in response to the revised proposed rules and form.

Additional changes in the revised proposed rules and form were made after the close of the comment period, and on February 14, 1978, the Commission gave its interim approval to final versions of the rules and form. The Notification and Report Form was then transmitted to the General Accounting Office ("GAO") for review under the Federal Reports Act, 44 U.S.C. § 3502. On February 27, 1978, GAO published in the Federal Register a notice soliciting comments regarding the final version of the form, 43 FR 8038. Seven comments were received. Those comments and a letter requesting the staff's responses to the issues raised in the comments were forwarded to Commission staff on March 22, 1978. The staff responded on April 5, 1978. The staff and GAO then held additional discussions concerning the form at which several modifications were agreed to and incorporated into the final form. GAO submitted its final report to the Commission on May 12, 1978.

The Commission formally promulgated the final rules and form and issued a Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The Statement of Basis and Purpose was published in the Federal Register of July 31, 1978, 43 FR 33451 (attached) and the final form was published in the

Federal Register of August 4, 1978, 43 FR 34443. ^{1/} The rules and form went into effect on September 5, 1978.

As of December 1, 1978, the agencies had received filings covering two hundred ninety-two transactions. The staffs of the two agencies independently review all filings to determine whether an investigation should be opened and, if warranted, a request for additional information or documentary material issued pursuant to § 7A(e) of the Act and § 803.20 of the rules. Prior to opening an investigation and issuing such a request, Commission and Antitrust Division staff determine through normal liaison procedures which agency will conduct an investigation. These procedures are designed to avoid unnecessary duplication of effort by the agencies and unnecessary burdens on persons whose transactions might otherwise be investigated by both agencies.

As of December 1, 1978, the agencies had issued forty-six requests for additional information in twenty-six transactions. Because of the short period of time in which the premerger notification program has been in operation, few investigations of reported acquisitions have been completed.

In a number of cases, initial notification reports provided information that enabled the staffs of the agencies to determine whether to open an investigation. Such information had not previously been available to the staff and has provided valuable assistance in the expeditious preliminary review of acquisitions involving large persons. Information submitted in response to requests for additional information has made possible a more detailed review and analysis of transactions which the agency staffs believe may pose antitrust questions. To date, information provided by the premerger notification program has been employed in two motions for preliminary injunctions; United States v. Occidental Petroleum Corp., Civ. No. C-3-78-288 (S.D. Ohio, filed October 11, 1978), and United States v. United Technologies, Inc., Civ. No. 78-CV-580 (N.D.N.Y., filed November 13, 1978). The staffs believe that additional motions for preliminary injunctions will be filed in the near future.

Of the two hundred ninety-two transactions reported through December 1, 1978, early termination of the waiting period was requested pursuant to § 7A(b)(2) of the Act in twenty-five cases. Early termination was granted and appropriate notice in the Federal Register published in twelve of these cases. The balance were denied.

^{1/} A version of the form was published with the Statement of Basis and Purpose on July 31, 1978, but, because of extensive Federal Register omissions, had to be republished on August 4, 1978. The attached reprint embodies the August 4 corrections.

On the effective date of the rules, Commission staff instituted a compliance monitoring program to insure that acquisitions covered by the Act and rules are being reported under the premerger notification program. The staffs have also made a concerted effort to inform and educate the public concerning the operation of the program. In addition to writing a detailed Statement of Basis and Purpose, staff members have discussed the program at numerous bar association seminars, discussion groups and meetings. Most recently, Commission staff held a series of premerger notification seminars in New York City, Chicago, Dallas, and San Francisco, which were jointly sponsored by the Commission and the Federal Bar Association.

Since September 5, 1978, one formal interpretation (attached) pursuant to § 803.30(c) of the rules has been issued by Commission staff with the concurrence of the Assistant Attorney General. At the present time, a number of additional formal and informal interpretations by Commission staff are under consideration.

Because of the Commission's limited experience under the premerger notification program, it is unable fully to assess the effects of the program on the law enforcement activities of the agencies, reporting persons, and merger and acquisition activity in the economy as a whole. The Commission does not believe that revisions of the Act by Congress are necessary at the present time.

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

By direction of the Commission.

Signed and hand-delivered

Carol M. Thomas
Secretary