October 18, 2010

Via Electronic Filing

Mr. Robert L. Jones
Deputy Assistant Director
Federal Trade Commission
Office of the Secretary, Room H-135 (Annex Q), 600
Pennsylvania Avenue, NW
Washington, DC 20580

Re: Notice of Proposed Rulemaking on Premerger Notification; Reporting and Waiting Period Requirements

Dear Mr. Jones:

The below associations representing a wide cross-section of the business community appreciate the opportunity to comment on the Federal Trade Commission's (FTC) recently proposed changes to the Hart-Scott-Rodino (HSR) premerger notification rules.

We applaud the proposed changes that would reduce the initial filing burdens by eliminating those requirements that do not typically yield anything useful to competition analysis. As discussed below, we would recommend that the FTC consider going a step further and amending 16 C.F.R. § 802.70 to exempt acquisitions already under the supervision of court-appointed trustees who regularly report to the agencies. Where a court-appointed trustee is already providing the agencies significant information about such planned transactions, an HSR filing is redundant.

Other proposed changes, however, if implemented, would greatly and unnecessarily increase the burden of all HSR filings. The vast majority of transactions notified under HSR do not raise any antitrust concerns. In fiscal year 2008, for example, only 21 of 1,726 transactions notified (slightly more than one percent) were subject to a "second request" in-depth investigation. Several of the FTC's proposed HSR rule modifications would impose significant additional burdens on notifying parties in *all* reportable transactions, not just the very few that raise antitrust concerns. These proposed changes would add additional layers of uncertainty, complexity and expense to the process of completing the HSR Form, creating burdens disproportionate to any improvement in enforcement effectiveness. Accordingly, we urge the FTC to modify its proposed changes.

<u>Increased Burden of Proposed Item 4(d)</u>

The most onerous new burden would be a dramatic increase in the volume of documents that filers would have to locate, collect and review to comply with the new proposed Item 4(d). This would be in addition to the document filing obligations under current Item 4(c) of the HSR Form, which requires the inclusion of certain documents analyzing the competitive aspects of the transaction, but only if *created in connection with the transaction*. Item 4(c) documents often can be obtained by surveying a relatively small number of persons involved in the transaction being notified. Item 4(c) generally has proven sufficient to allow the FTC and the Department of Justice to identify the small number of transactions that raise substantive antitrust questions.

The FTC's proposed Item 4(d)(ii) expands the document submission requirements to documents that may not have been prepared specifically for the purpose of analyzing the acquisition, *i.e.*, "all studies, surveys, analyses and reports . . . for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, *and that also reference the acquired entity(s) or assets*." As a consequence, proposed Item 4(d)(ii) would require the submission of numerous ordinary course documents, creating a substantial added burden on the filing parties.

The FTC asserts that the limitation of Item 4(d)(ii) to documents prepared by bankers, consultants and other outside advisors within two years of the filing date would increase the yield of useful information while mitigating the burden of increased document production. However, the realities of modern document creation and retention indicate that this is a very optimistic assessment of both the benefit and the burden of the new rule. Many firms have outside advisors who create numerous documents of this character in the ordinary course of business. For example, consumer goods companies procure vast quantities of "market research," while financial investors regularly receive – often unsolicited – financial and market analyses and solicitations from investment bankers and consultants. Thus, compliance with Item 4(d)(ii) may involve searching the files of numerous persons (and perhaps outside consultants), who were not involved in the transaction under review. Additionally, some of these custodians may not even be aware of the proposed transaction. In many cases the transaction is not publicly known at the time when the HSR filing is being prepared. Thus, the search for 4(d)(ii) documents could significantly increase the risk of confidentiality breaches as uninvolved persons are asked to search their files for responsive documents.

Proposed Item 4(d)(i) raises similar issues. Item 4(d)(i) purportedly is limited to "offering memoranda," but in fact could be interpreted to involve a broad range of documents. While it is fairly clear to business people what "offering memoranda" are, the rule also calls for the production of vaguely-defined "documents that serve [the] function" of offering memoranda. A generous view of this term might include a variety of documents, none of which were prepared in connection with the transaction being notified. The Statement of Basis and Purpose for the proposed new rules compounds this problem. In explaining Item 4(d)(i), it says that "Any such *study, survey, analysis or report* will only be responsive to Item 4(d)(i) if it also contains some reference to the acquired entity(s) or assets." This language does not appear in the proposed rule, but could serve to greatly expand the scope of Item 4(d)(i). The Statement also says that pre-existing "presentations" given to prospective buyers are the equivalent of an offering memorandum. So, the "documents that serve the function" requirement potentially extends Item 4(d)(i) well beyond documents commonly understood to constitute "offering memoranda" to a host of additional documents.

Proposed Item 4(d)(i) also requires the parties to "look back" two years to identify and produce any documents falling into these categories. This confirms that the search obligation would include individuals who may not be involved in the present transaction and documents not seen by those who are involved. As with Item 4(d)(ii), this would greatly expand the document search and review burden of HSR for all notifying parties, without significantly contributing to regulatory efficiency.

These issues were considered when the HSR rules were originally formulated. The 1978 Statement of Basis of Purpose[1] justified Item 4(c) on the grounds that the required documents generally form the basis of a party's decision to proceed with an acquisition. Thus, Item 4(c) has historically been limited to documents that analyze the proposed transaction, meaning that the search and review could be limited to persons actually involved in the proposed transaction. The FTC accepted the possibility that under Item 4(c), HSR filings might not give the agencies immediate access to all relevant documents, because requiring the "submission of a broader range of documents would entail searches of historical files by reporting persons for documents prepared at other times for other purposes, and could produce too large a number of documents for purposes of effective preliminary antitrust review." The FTC concluded, "The criterion in [Item 4(c)] is easily administrable and should yield a reasonable number of genuinely important documents."

Simply put, in 1978, the FTC correctly concluded that an HSR filing was a preliminary step that permitted the FTC to review the actual documents relied upon by the merging parties in analyzing and evaluating the proposed transaction. The FTC did not view the HSR filing as an appropriate vehicle to sweep in at the initial filing stage *any* documents – however useful they might potentially be – that had not been relied upon by the merging parties to structure the deal presented for review. Moreover, the agencies have always been free to obtain additional relevant documents following receipt of the HSR filing through an access letter or by second request should a significant substantive antitrust issue emerge.

The overall impact of the proposed Items 4(d)(i) and 4(d)(ii) would be to increase substantially the burden on filing parties. Given that this burden is imposed on all filing parties (not just parties to the small number of transactions that raise antitrust issues), it seems highly unlikely to be justified by specific, identifiable regulatory benefits. For these reasons, we request the FTC to reconsider proposed Items 4(d)(i) and 4(d)(ii).

<u>Increased Burden of Proposed Foreign Revenue Reporting</u>

The FTC also proposes to broaden the reporting of revenues to include detailed breakdowns from the foreign manufacturing operations of the filer and any entity it controls. Currently the HSR Form requires revenues by North American Industry Classification System (NAICS) code only for US operations. The proposed rule expands the requirement as follows:

> "Provide 6-digit NAICS industry data concerning the aggregate operations of the person filing notification for the most recent year in NAICS Sectors other than 31-33 (non-manufacturing industries) in which the person engaged and 10-digit NAICS product code data for each product code within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged, including revenues for each product manufactured outside the

---

[1] 43 Fed. Reg. 33525 (July 31, 1978).

U.S. but sold in or into the U.S. Sales made directly into the U.S. should be reported in a manufacturing code. Sales made into the U.S. through a wholesale or retail operation within the same person should be reported in both manufacturing (transfer price) and wholesale or retail (sales price) codes. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry codes and 10-digit NAICS product codes may be provided if a statement describing the method of estimation is furnished."

This means that, in addition to the information currently gathered for the HSR Form, the filer will need to gather its sales in or into the US from its foreign manufacturing operations and classify those revenues by 10-digit NAICS codes.

Unlike US operations, foreign operations do not submit NAICS code revenues to the Bureau of Labor Statistics. Allocation of revenues by NAICS codes is typically not a familiar procedure for foreign operations and foreign personnel. Thus, determining the correct 10-digit code applicable to sales from foreign operations and allocating the revenues appropriately would be very time consuming and burdensome. Again, this burden would be borne by all HSR filers, not just by the parties to the small number of transactions that raise antitrust concerns.

<u>Increased Burden of Proposed "Associates" Reporting</u>

The FTC proposes to expand the groups of entities to be canvassed by a filer. Currently, an HSR Form requires information about the "ultimate parent entity" of an acquiring entity and all entities it controls. The "ultimate parent entity" is the highest entity in the same chain of control as the entity involved in the acquisition that is not "controlled" by any other entity. For corporations control is defined as either (i) holding 50 percent or more of the voting securities of the corporation, or (ii) having the contractual power presently to designate 50 percent or more of the directors of the corporation. For partnerships and LLCs control is defined as either (i) having the right to 50 percent or more of the profits of the entity, or (ii) having the right to 50 percent or more of the assets upon dissolution. These rules have provided well-understood and easily-applied guidance as to the scope of HSR filings.

The FTC has proposed expanding the required information to include information about "associates" of the acquiring entity. The proposed rule provides:

> "an associate of an acquiring person shall be an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a "managing entity"); or (B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen by the acquiring person; or (C) directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity."

A filer would need to identify information about the holdings and operations of each of its "associates", and determine whether the associate has revenues in the same 6-digit NAICS codes as the target. The proposal would require (i) information about minority investments by associates in entities that derive revenues from the same business as the target; and (ii) information about any controlled associate company that derives revenues from the same business as the target. This would significantly increase the burden on many filers that have limited partnerships within their structures. Many general partners and investment fund managers are "associated" with multiple investment vehicles, and the investments held can change frequently. In addition, the proposed change would require filers to determine whether an investment held by a fund unrelated to the transaction would report revenues in any of the same 6-digit NAICS codes as the target. This is not limited to subsidiaries of an "associate" but also includes minority holdings of associates.

The proposal also includes within the definitions of "associate" an entity that "directly or indirectly, manages, directs or *oversees,* is managed by, directed by or *overseen* by, or is under common management with a managing entity." No guidance is provided regarding the definition of "oversees/overseen", and there is a danger that the term could be construed very broadly, creating uncertainty and exacerbating the burden.

Requiring filers to determine which entity may be an "associate" and whether that associate has either a subsidiary or a minority holding in an entity that derives revenues from the same NAICS code as the target would increase the complexity, burden and expense of HSR filings. For these reasons, we believe that the FTC should reconsider requiring information on "associates."

<u>Trustee-Managed Assets</u>

Acquisitions of divestitures required by the federal antitrust agencies themselves are exempt from HSR requirements under Section 802.70. A close cousin to these exempt deals is the acquisition of divested assets being monitored by a court-appointed trustee who reports regularly to the antitrust agencies. Yet because the literal language of Section 802.70 does not cover them, they are subject to the full requirements of the HSR Act, leading to additional burdens that do not generate meaningful new information for the agencies.

This situation arises when another agency investigates a transaction in conjunction with the federal antitrust agencies. Such an agency may require the divestiture of additional assets. When those assets are under the control of a court-appointed trustee who is required to provide regular reports to the relevant federal antitrust agency, the antitrust agency will already have copious information about the operation of those additional assets in the market. Requiring a redundant HSR filing relating to the divestiture of those additional assets is unlikely to provide the antitrust agencies with useful additional information. The regular reports are likely to provide all the information the agencies need if they wish to examine the competitive impact of the additional divestitures, and they can request any additional information they may need from the trustee directly. In such a case, it is unlikely that an additional HSR filing will provide the agencies with any useful additional information about the transaction.

To effectuate this change, a new subsection could be added to Section 802.70, providing that "[a]n acquisition shall be exempt from the requirements of the act if the voting securities or assets are to be acquired from an entity … whose assets are being or will be managed by a court-appointed trustee who, until the close of the transaction, is required to provide regular reports about the assets to the Department of Justice or Federal Trade Commission."

Conclusion

The FTC does propose some unrelated changes that, standing alone, would slightly reduce the burden on filing parties. Those changes are welcome. However, the overall impact of the proposals would be to increase substantially the burden on filing parties. Indeed as the FTC noted in the 1978 Statement of Basis and Purpose regarding Item 4(c), Representative Rodino stated that "in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government." The FTC proposals outlined above would require the submission with HSR filings of documents and data that the merging parties have *not* already assembled and analyzed.

Moreover, the FTC proposal is at odds with emerging international norms concerning initial premerger notification filings. The International Competition Network's Guiding Principles for Merger Notification and Review provide:

> "The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions."[2]
>
> The ICN goes on to recommend that:
>
> "A. Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.
>
> B. Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns."[3]

Similarly, the Organisation for Economic Co-operation and Development's (OECD) Recommendation of the Council on Merger Review provides:

> "Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws *avoid imposing unnecessary costs and burdens on merging parties and third parties*. In this respect, Member countries

---

[2] Int'l Competition Network, *Guiding Principles for Merger Notification and Review*, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf

[3] Int'l Competition Network, *Recommended Practices for Merger Notification Procedures* at 11, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf

> should in particular: . . .Set reasonable information requirements consistent with effective merger review." [4]

To require 99 percent of the filers to submit additional information that would only be useful in one percent of the transactions would be contrary to international norms and unsupported by agencies' own experience in administering the HSR Act. For all of the foregoing reasons the below associations urge the FTC to modify its proposed changes.

Sincerely,

BUSINESSEUROPE
Grocery Manufacturers Association
National Association of Manufacturers
The Pharmaceutical Research and Manufacturers of America (PhRMA)
U.S. Chamber of Commerce

---

[4] Org. for Economic Co-operation & Dev. [OECD], *Recommendation of the Council on Merger Review*, § I(A)(1)(2), No. C(2005)34 (Mar. 23, 2005), *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False