34

V890079

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

COMMISSION AUTHORIZED

July 7, 1989

The Honorable John T. Doolittle
State Senate
Room 5087
State Capital
Sacramento, California 95814

Dear Senator Doolittle:

Thank you for your invitation to comment on Assembly Bill 671, which, if enacted, would require certain persons who file premerger notification reports with federal authorities under the Hart-Scott-Rodino Antitrust Improvements Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, simultaneously to submit the reports to the Attorney General of California. The bill would permit the California Attorney General to disclose the reports to the attorneys general of other states, and it would authorize California courts to order divestiture of assets acquired in a merger.[1]

The state of California may have reasons for enacting a merger statute and a premerger notification requirement to facilitate enforcement of that statute, and we express no opinion in that regard. State law enforcement can play a valuable role in restraining anticompetitive conduct, particularly when competitive effects are limited to markets in the state. Although we express no opinion on California's decision whether to adopt premerger notification, we believe that it may have some negative effects on federal law enforcement, on business and ultimately on consumers.

---

[1] We offer no comments on Section 1 of A.B. 671, which would prohibit monopolization and is similar to Section 2 of the Sherman Act, 15 U.S.C. § 2, or on Section 2 of A.B. 671, which is similar to Section 7 of the Clayton Act, 15 U.S.C. § 18.

Section 3 of A.B. 671, which would require certain entities[2] that file premerger notification reports with the Commission and the Department of Justice simultaneously to submit the reports to the California Attorney General, may adversely affect compliance with the Hart-Scott-Rodino Act and federal merger law enforcement. Premerger reports (as defined in A.B. 671) contain highly sensitive information, often including trade secrets, confidential marketing and other corporate plans. Congress has mandated that the federal enforcement agencies keep these reports in strict confidence, 15 U.S.C. § 18a(h), and the high degree of voluntary compliance with Hart-Scott-Rodino may be attributable in part to the confidence of businesses that their reports will be kept confidential. By requiring submission of HSR reports to the California Attorney General, who then could disseminate it to many different, independent law enforcement agencies, A.B. 671 could increase concern that sensitive data might be disclosed to competitors. Reporting firms may believe that increasing the number of recipient agencies will increase the risk of disclosure. Insofar as firms perceive that they face an increased risk of disclosure, whether or not they in fact do, compliance with the Hart-Scott-Rodino Act could be diminished. This, in turn, could impose higher costs on the federal agencies, both to enforce compliance with the Act and to review mergers on the merits.

Reports prepared under the Hart-Scott-Rodino Act may not provide information that would assist the California Attorney General to assess the competitive effects of proposed acquisitions within the state. The federal reports typically would include information not relevant to markets within a specific state, and they generally do not identify areas of local concern. Such reports also would not facilitate state review of mergers that fall below the size-of-person and size-of-transaction thresholds of the Hart-Scott-Rodino Act. A premerger notification program tailored to businesses and markets within the state may be more useful to implement state merger law enforcement than HSR reports.

---

[2] Filing persons would be required to submit reports to the California Attorney General if either party to the proposed transaction is incorporated in the state, has its principal place of business in the state, is registered to do business in the state or has "any tangible assets, employees, or agents" in the state. Because of the broad reach of the last two criteria, a substantial proportion of federal HSR filings are likely to be covered by A.B. 671, even though the proposed transaction might involve assets or businesses having no contact with or effect on California.

Businesses confronting the prospect of simultaneous investigations by federal and state authorities may be deterred from initiating mergers and acquisitions. Multiple enforcement efforts would involve direct costs to businesses and to the federal and state government agencies, as well as the possibility of inconsistent results. Particularly in crafting appropriate relief, difficult judgments are required, about which different agencies or judges may differ. To the extent that a proposed transaction may be competitively neutral or even procompetitive, this deterrence may impose costs that ultimately are borne by consumers.

For these reasons, we believe that A.B. 671 may fail to achieve the purposes of the state of California to implement a program of premerger notification to facilitate state law enforcement. In addition, A.B. 671 may harm federal merger law enforcement and impose costs on both businesses and consumers. We urge you to consider whether the benefits of the proposed legislation warrant the imposition of such considerable costs.

By direction of the Commission*,

Daniel Oliver
Chairman

---

* Commissioner Strenio does not join in this letter.