

FEDERAL TRADE COMMISSION

WASHINGTON, D. C. 20580

C OF THE CHAIRMAN

Honorable Strom Thurmond
President Pro Tempore
United States Senate
Washington, D.C. 20510

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

SUBJECT: Fifth 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, Publ. 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 fifth 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 Federal Trade Commission and the Department of Justice. 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 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 the 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 three years of operation. Appendix A provides a statistical compilation for each of the four years in which the program has been in operation (the last four months of 1978 through December 4, 1981) in three categories: number of transactions reported, number of requests for additional information or documentary material (hereinafter referred to as "second requests"), and the number of requests for early termination received and granted.

Appendix B provides a month-by-month comparison, based on the number of filings received, of the first 11 months of 1981 with the first 11 months of 1980 and 1979. The month-by-month statistics illustrate the rather substantial increase in the number of transactions reported to the agencies. In total, the number of filings received in 1981 was 132% of the number received in 1980.

^{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.

These statistics indicate that although the number of filings has increased substantially this year, the number of second requests issued by the two agencies has remained about the same as last year; 75 second requests were issued in 1981, one more than the 74 requests issued in 1980. This continues the downward trend in second requests issued as a percentage of reportable transactions (12.6% in 1979, 9.0% in 1980, and 7.6% in 1981). The number of early termination requests was 169 in 1981, a sharp increase over prior years. This represents a request rate of 17.1%, an increase from 1980's rate of 13.8%. This year, as was the case last year, the agencies were able to grant a large percentage of these requests (78.1% in 1980, and 76.3% in 1981).

Recent Developments Relating to Premerger Notification Rules and Procedures

1. Formal Interpretations

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.^{2/} In 1981, two formal interpretations were issued.^{3/} The first, issued June 2, 1981, instructs holders of debentures which were issued by the Sun Company, Inc. to treat those debentures as "voting securities" of Becton, Dickinson and Company, since the debenture currently can be voted for directors of Becton, Dickinson. The second formal interpretation, issued April 7, 1981, allows parties to incorporate by reference certain SEC documents which are required to be filed by item 4(a) of the premerger notification form. Parties may incorporate by reference only those SEC documents which were supplied with earlier premerger notification filings.

The staff of the FTC Premerger Notification Office has identified several areas which may require additional formal interpretations. The need for clarification of the rules has emerged as the result of specific situations posed by actual filings or by telephone inquiries.

^{2/} See 16 C.F.R. § 803.30. The texts of the formal interpretations are collected at 4 Trade Reg. Rep. (CCH) ¶ 42,475.

^{3/} Copies of these formal interpretations are attached as Exhibits "A" and "B".

2. Proposed Changes in the Rules

On July 29, 1981, the FTC published proposed changes in the Premerger Notification Rules.^{4/} The changes are largely technical, and are designed to lessen confusion and reduce unnecessary filings. They do not materially expand the coverage of the existing premerger notification rules. Some of the proposed changes will be briefly described below.

The present rules do not make clear how parties are to file the premerger notification form when two companies join into one of the existing companies, or where two firms join to create a new company. The new rule will make clear who in these situations is the acquiring and who is the acquired person, the determination of which affects the parties' responses to certain items on the form.

At the present time, companies that acquire control of another company through a cash tender offer need to file (if the acquisition is of sufficient size) and wait 15 days before consummating the transaction. If, however, the acquired company has sufficient minority holdings in other entities, the acquiring person must file for the acquisition of this stock as well. These acquisitions are referred to as secondary acquisitions, and the parties must observe a 30-day waiting period before consummating these acquisitions. In the past, this has resulted in the situation where the 15-day waiting period applicable to the cash tender offer expires, but the 30-day waiting period applicable to the secondary acquisitions remains in effect. The new rule would coordinate these waiting periods so that the entire transaction would be subject to a single 15-day waiting period.

Due to the passage of the Airline Deregulation Act, 49 U.S.C. § 1378, certain mergers among airlines are now no longer exempt from the reporting requirements of the Hart-Scott-Rodino Act. Since these mergers are subject to review by the Civil Aeronautics Board, and since the Department of Justice has the power to intervene in such cases before the CAB, the proposed rule would apply a limited exemption to regulated air carrier mergers.

^{4/} See 46 Fed. Reg. 38,711. Attached as Exhibit C is a copy of the notice published in the Federal Register.

On March 5, 1980, the Premerger Notification Rules were amended to exempt certain relatively small acquisitions from the filing requirements of the Act.^{5/} The proposed rule would change the dollar values currently applicable to acquisitions of and by foreign companies so that they coincide with the dollar value of the amended minimum dollar exemption currently applicable to U.S. companies.

At present, parties may comply with the filing requirements of the Act and with requests for additional information by supplying documents written in a foreign language. The proposed rule would require that these documents be supplied in English if such English versions of the foreign language document exist at the time the submission is made.

Currently, the form requires companies to supply all recent registration statements with their filings. The proposed rule would require that companies supply only those registration statements prepared in connection with the transaction being reported, and then only if they are available at the time of filing.

3. Premerger Notification Form

Since the filing requirements of the Act took effect in 1978, parties to an acquisition have been required to prepare a premerger notification form. The Premerger Notification Office of the FTC has now, after three and a half years of experience with the form, devised a new form which is intended to be easier for parties to prepare.^{6/} The new form does not alter the substance of the information which parties are required to furnish. The changes are primarily improvements in the format and clarification of the instructions to the form.

^{5/} See 16 C.F.R. § 802.20.

^{6/} See Exhibit D for a copy of the new Antitrust Improvements Act Notification and Report Form.

Merger Enforcement Activity During 1981 7/

The Antitrust Division did not seek any preliminary injunctions in merger cases in 1981; however, it did file two complaints in merger cases.^{8/} The U.S. v. Waste Management case is still pending, and Du Pont was settled when Du Pont consented to an order requiring it to purchase the assets of a joint venture which had been established by Conoco, Inc. and Monsanto Company.

In addition to the two filed cases, one proposed merger was cancelled following public announcement by the Department that it would oppose the transaction if carried out ^{9/}; and one proposed merger was modified to eliminate an area of competitive overlap, again following a public announcement that the Department would oppose the transaction as proposed.^{10/} The Department of Justice also has entered into consent agreements in two cases which had been filed prior to 1981.^{11/}

The Federal Trade Commission authorized the staff of the FTC to seek four preliminary injunctions in 1981. Three of these actions were brought in an attempt to block acquisitions. The Commission also sought a preliminary injunction enforcing the 20-day waiting period under the Hart-Scott-Rodino Act.^{12/}

^{7/} The fifth annual report covers the period from January 1, 1981, through December 15, 1981.

^{8/} United States v. Waste Management, Inc. et al. (S.D.N.Y., filed February 25, 1981) and United States v. E.I. Du Pont de Nemours & Co., Inc. et al (D.D.C., filed August 4, 1981).

^{9/} Proposed acquisition of Jos. Schlitz Brewing Co. of Milwaukee, Wisconsin, by the G. Heileman Brewing Co., Inc. of La Crosse, Wisconsin.

^{10/} Proposed acquisition of the Piping Systems Division of Celanese Corporation of New York by Nibco Inc., of Elkart, Indiana.

^{11/} United States v. Hospital Affiliates International (E.D. La., filed on September 25, 1980, consent reached on December 14, 1981) and United States v. Cross and Trecker Corp. (E.D. Mich., filed on September 25, 1979, consent reached on July 6, 1981).

^{12/} FTC v. Dana Corporation et al. (N.D. Texas, filed January 7, 1981).

In the case of FTC v. Great Lakes Chemical Corporation,^{13/} the court held against the Commission, denying the preliminary injunction. The Commission also sought a preliminary injunction to prohibit LTV Corporation from acquiring Grumman.^{14/} LTV cancelled its takeover attempt before the case was heard. The Commission has also filed for a preliminary injunction which would block Mobil's attempt to acquire Marathon.^{15/} This case is still pending.

The Federal Trade Commission issued four complaints in merger cases in 1981.^{16/} These cases are still pending before Administrative Law Judges. In addition, the Commission issued consent orders in settlement of six other cases.^{17/}

In addition to the formal challenges and consent orders discussed above, it is likely that the very existence of the premerger reporting system and the statutory waiting period requirements has deterred some firms from entering into merger agreements which might have violated the antitrust laws. Although this deterrent effect is a desirable and important aspect of the program, there is no way of measuring the extent to which Hart-Scott-Rodino may act in this way as a self-policing device.

^{13/} Filed June 3, 1981, in the Northern District of Illinois.

^{14/} Filed October 28, 1981, in the Eastern District of New York.

^{15/} Filed December 11, 1981, in the Northern District of Ohio.

^{16/} FTC complaints in 1981: Weyerhaeuser Co., Docket 9150 (issued February 9, 1981); Gulf & Western Industries, Inc., Docket 9153 (issued March 27, 1981); The Echlin Manufacturing Company, Docket 9157 (issued July 23, 1981); American Medical International, Inc., Docket 9158 (issued July 30, 1981).

^{17/} FTC consent orders issued in 1981: Owens-Corning Fiberglas Corp., Docket C-3061 (March 30, 1981); Albertsons, Inc. Docket C-3064 (April 21, 1981); Godfrey Company, Docket C-3066 (May 14, 1981); American Hospital Supply Corporation, Docket C-3067 (June 2, 1981); The British Petroleum Company Limited, Docket C-3074 (September 3, 1981); Kennecott Corporation, Docket C-3075 (September 28, 1981). It should be noted that the cases mentioned in this report were not necessarily reportable under the premerger notification 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.

Assessment of the Effects of the Premerger Notification Program

The impact of the premerger notification program on the antitrust enforcement agencies and on the business community 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 evaluate the meaning of the statistics fully, some additional observations are appropriate.

First, as indicated in past annual reports, the creation of a program of premerger notification itself has fulfilled a major goal of the Act. The requirement that firms observe a waiting period before completion of a proposed transaction has largely eliminated the phenomenon of the "midnight merger". 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 initial filing and the second requests) provide sufficient information, in most cases, for the agencies to evaluate the proposed acquisition and determine whether to seek a preliminary injunction to prevent the transaction. The review procedure also gives companies subject to the Act an opportunity to provide the enforcement agencies with information which indicates that further investigation is unnecessary.

Furthermore, it should be emphasized that the first three years of the premerger program have been characterized by a high degree of cooperation between the enforcement agencies and those subject to the Act. Compliance with the filing requirements is thought to be very good, as evidenced by the fact that thus far there have been no actions under subsection (g)(1) to recover civil penalties for non-compliance with the Act. Also, the two agencies encourage telephone inquiries regarding technical questions which arise under the Act,^{18/} in an effort to provide parties with assistance in determining whether a filing obligation exists in a given situation, and in preparing the notification form when required.

In November 1980, the Bureau of Competition contracted with Professor Samuel Thompson of the University of Virginia School of Law to conduct a study of the premerger notification program in

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

order to assess the impact of the program on filing persons.^{19/} Professor Thompson interviewed thirteen individuals, all of whom were thoroughly familiar with the premerger program and had filed several premerger forms on behalf of their clients.

As a result of his study, Professor Thompson concluded:

It is possible to say with a great deal of confidence that the Act and the rules have not distorted the acquisition process. . . . Clearly the business considerations still control the acquisition decision. Further, the costs of compliance with HSR are clearly not prohibitive or overly burdensome.^{20/}

The report went on to point out that the Act had brought about the desirable effect of heightening an awareness of antitrust considerations present whenever parties contemplate a merger or acquisition.

In those areas where Professor Thompson pointed to problems with the program, the staffs of the Federal Trade Commission and the Department of Justice have either taken steps, or are currently taking steps, to correct the problems. Generally the report is positive, and tends to confirm what the staffs had concluded based on their informal contact with the public.

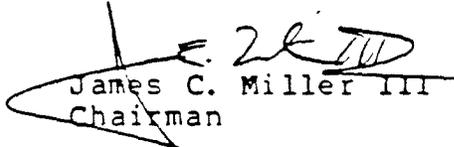
Finally, it should be noted that neither this report to the Congress, nor Professor Thompson's Report, addresses the issue of whether the waiting periods defined by Section 7A(b)(1) of the Act, and the extensions thereof permitted by Section 7A(e)(2) of the Act, provide adequate time for Commission and Justice Department consideration of planned mergers or acquisitions. Also, neither report discusses whether an extended waiting period under Section 7A(e)(2) of the Act, triggered by the issuance of a second request under Section 7A(e)(1) of the Act, may in some cases accord an unintended and perhaps unfair advantage to one suitor over another. The Commission and the Department of Justice are presently considering these issues, but have not yet reached even tentative conclusions. Should the Commission or the Department of Justice determine that Congressional action on these issues may be warranted, recommendations will be forthcoming to the Congress in a future report.

^{19/} This report was completed in May 1981, and has now been published by the Commission. A copy of the report is attached, see Exhibit E. The report is the product of an outside consultant and does not necessarily reflect the views of the Commission, individual Commissioners, or the Bureau of Competition.

^{20/} Study at 81.

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

By direction of the Commission.


James C. Miller III
Chairman

SUMMARY OF TRANSACTIONS, 1978 - 1981

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>Total</u>
	(Sept.-Dec.)	(Jan.-Dec.)	(Jan.-Dec.)	(Jan.-Nov. <u>1/</u>)	
Transactions Reported	355	868	824	989	3036
Transactions where Additional Information was Requested	36	109	74	75	294
FTC	23	58	36	44 <u>2/</u>	161
DOJ	13	51	38	31 <u>2/</u>	133
Transactions where Early Termination was Requested	31	118 <u>3/</u>	114 <u>4/</u>	169 <u>5/</u>	432
Early Termination Granted	16	62	39	129	296
Early Termination Denied	15	53	15	16	99

1/ Week ending December 4, 1981

2/ Each agency withdrew one request for additional information.

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

4/ Three transactions were found to be exempt/non-reportable, three transactions were withdrawn and the request for early termination was withdrawn in four transactions.

5/ Includes six transactions found to be exempt/non-reportable, four transactions in which the request for early termination was withdrawn and fourteen transactions with requests outstanding.

Number of Transactions Reported on a Month-By-Month Basis:

January - November, 1981 Compared to January - November,
1978 and 1979

	<u>1979</u>	<u>1980</u>	<u>1981</u>
January	71	56	73
February	75	64	60
March	75	58	75
April	57	60	64
May	84	55	92
June	76	64	87
July	88	60	107
August	75	82	92
September	50	68	89
October	78	91	116
November	<u>85</u>	<u>78</u>	<u>117</u>
Total	814	735	972

List of Attachments

- Exhibit A -- Formal Interpretation issued June 2, 1981 concerning treatment of debenture issued by Sun Company, Inc.
- Exhibit B -- Formal Interpretation issued April 7, 1981 allowing incorporation by reference for certain SEC documents required by Item 4(a) of the form.
- Exhibit C -- Copy of Proposed changes in the Premerger Notification Rules published on July 29, 1981.
- Exhibit D -- New Premerger Notification Form.
- Exhibit E -- Evaluation of Premerger Notification Program, by Samuel C. Thompson, Jr., Professor of Law, University of Virginia