

**Supplemental Supporting Statement for
Final Amendments to
Hart-Scott-Rodino (Premerger Notification) Rules and Report Form
16 C.F.R. Parts 801-803
(OMB Control No. 3084-0005)**

The Federal Trade Commission (“FTC” or “Commission”) seeks OMB clearance for revised information collection requirements under its Hart-Scott-Rodino Antitrust Improvements Act Rules (“HSR Rules”) and corresponding Premerger Notification and Report Form for Certain Mergers and Acquisitions (“Notification and Report Form” or “Form”).

1. and 2. Necessity for and Use of the Information Collection

Section 7A of the Clayton Act (“Act”), 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, requires parties of a certain size contemplating large acquisitions to file notification with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“Assistant Attorney General”) and wait a specified time period before consummating the transaction. Section 7A(d) of the Act states that the Commission, with the concurrence of the Assistant Attorney General:

shall require that the notification required under subsection (a) [of the Act] be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisitions may, if consummated, violate the antitrust laws; and . . . prescribe such other rules as may be necessary and appropriate to carry out the purposes of . . . [the Act].

Pursuant to its rulemaking authority, the Commission promulgated § 803.1(a) of the HSR Rules, among other rules, designating the Antitrust Improvements Act Notification and Report Form together with all documentary attachments, as the notification required by the Act. The information and documentary material required by the Notification and Report Form provide the Commission and the Antitrust Division with the opportunity to review mergers and acquisitions and take appropriate enforcement action before consummation.

The premerger notification program has been in effect since September 5, 1978, when the implementing rules became final. The HSR Rules are divided into three parts, which appear at 16 C.F.R. Parts 801, 802, and 803. Part 801 defines a number of the terms used in the Act and the HSR Rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the Act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to Part 803 of the HSR Rules. Changes of a substantive nature have been made in the premerger notification rules or the Notification and Report Form on several occasions.

3. Use of Information Technology

Consistent with the Government Paperwork Elimination Act, Pub. L. No. 105-277, Title XVII, 112 Stat. 2681-749, the Notification and Report Form is available electronically and payment may be made by electronic funds transfer. Furthermore, electronic submission of the Notification and Report Form was introduced in 2006.¹

4. Efforts to Identify Duplication

Most of the information required by the Notification and Report Form is not available from other government agencies or public sources. Prior to passage of the Act, efforts were made to obtain information that is necessary for a preliminary antitrust analysis from other sources but these sources proved to be inadequate for law enforcement purposes. The information that was available was not the type of information needed nor was it available on a timely basis. It was the lack of alternative sources or information and the need to receive information quickly that motivated Congress to enact Section 7A.

5. Efforts to Minimize Small Organization Burden

The premerger notification program does not affect small businesses or other small entities. The requirements of the Act do not apply to acquisitions valued at \$66.0 million² or less. In addition, a firm must have sales or assets of at least \$13.2 million to be subject to the requirements of the Act. A firm with assets of less than \$13.2 million would also be subject to the requirements of the Act, but only if it intends to acquire assets valued at more than \$263.8 million or if it is an acquisition target that has been valued at more than \$263.8 million.

6. Consequences to Program if Collection Done Less Frequently

The Act requires parties of a certain size who are contemplating proposed acquisitions of a specified minimum amount to file a notification report with the Commission and the Antitrust Division before consummating the transaction. Collection of information on a less frequent basis would be contrary to the Act since the enforcement agencies must review proposed acquisitions before they are consummated. Moreover, individual firms, not the enforcement agencies, control the frequency of filing.

7. Circumstances Requiring Collection Inconsistent with Guidelines

The collection of information in the HSR Rules and the Notification and Report Form is

¹ 71 Fed. Reg. 35,995 (June 23, 2006).

² The 2000 amendments to Section 7A require the Commission to revise the Act's jurisdictional and filing fee thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5) for each fiscal year beginning after September 30, 2004. See 15 U.S.C. 18a(a). The current adjusted thresholds appear at 76 Fed. Reg. 4349 (January 25, 2011). These thresholds became effective on February 24, 2011.

consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

8. Public Comments/Consultation outside the Agency

The HSR Rules and the Notification and Report Form are a product of informal consultations with the affected public to develop a fuller understanding of the issues and methods of addressing them. In the instant context, in accordance with 5 C.F.R. 1320.8(d), the FTC sought public comment in order to extend the existing the PRA clearance for the HSR Rules and the Notification and Report Form. See 75 Fed. Reg. 8991 (Feb. 26, 2010). No comments were received.

9. Payments of Gifts to Respondents

Not applicable

10. and 11. Assurances of Confidentiality/Matters of a Sensitive Nature

The enforcement agencies are prohibited by Section 7A(h) of the Act from disclosing to the public information and documentary materials filed under the premerger notification program “except as may be relevant to an administrative or judicial action or proceeding.” The Commission has implemented procedures to assure the confidentiality of the submitted information.

The Notification and Report Form does not request any information of a sensitive, personal nature that is commonly considered private.

12. Estimated Annual Hours Burden: 53,756 hours

The following burden estimates are primarily based on FTC data concerning the number of HSR filings and staff’s informal consultations with leading HSR counsel.

Premerger Notification Office staff canvassed eight practitioners from the private bar to estimate the projected change in burden due to the initially proposed (now final) amendments to the Form. All are considered HSR experts and have extensive experience with preparing HSR filings for the types of transactions that are most likely to be affected by the amendments.

Many of the amendments would significantly reduce burden for all filers. Others would increase burden, particularly for acquiring persons that are private equity funds and master limited partnerships. The consensus of those canvassed was that, on average, burden for collecting and reporting would decrease approximately five percent. Thus, 37 hours (rounded to the nearest hour) will be allocated to non-index filings.³ [(Current estimate, 39 hours⁴) x (1-.05)

³ *Id.* Clayton Act sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the

= 37.05 hours.]

Net Effect

The Form changes only affect non-index filings which, for FY 2011, the FTC projects will total 1,428. The amendments to the HSR Rules and Notification and Report Form should reduce the time required to prepare responses for non-index filings, with an estimated net reduction of 2 hours per filing (39 hours to 37 hours). Cumulatively, however, owing to a projected increase from 841 such filings to 1,428 (independent of the amendments' effects), total burden will increase from the currently cleared estimate of 33,298 hours⁵ to 53,756 hours.⁶

Applying the revised estimated hours, 53,756, to the previous assumed hourly wage of \$460 for executive and attorney compensation,⁷ yields \$24,728,000 (rounded to the nearest thousand) in labor costs.⁸ The proposed amendments presumably will impose minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Notification and Report Form.

This estimate is conservative. In estimating PRA burden, staff considered “the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or

information submitted to these other agencies are also submitted to the FTC and the Assistant Attorney General. Thus, parties must submit copies of these “index” filings, but completing the task requires significantly less time than non-exempt transactions that require “non-index” filings.

⁴ *Id.*

⁵ The preceding estimate, detailed further at 75 FR 27558, 27559 -27560 (May 17, 2010), was calculated as follows: [(841 non-index filings x 39 hours) + (22 transactions requiring more precise valuation x 40 hours) + (20 index filings x 2 hours)] - [841 non-index filings x ½ of these filings incorporating Item 4(a) and Item 4(b) documents by reference to an Internet link x 1 hour savings] = 33,298 hours. The reduction within this prior calculation for time saved when incorporating Item 4(a) and Item 4(b) documents by reference to an Internet link would be mooted by the final amendments. The amendments would further reduce time to complete the Form, and are factored into the estimated five percent reduction stated above.

⁶ This is determined as follows: [(1428 non-index filings x 37 hours) + (22 transactions requiring more precise valuation x 40 hours) + (20 index filings x 2 hours)].

⁷ See 75 FR at 27560.

⁸ Though the filing time and associated labor per respondent is reduced as a result of these amendments, the cumulative dollar total is higher than previously stated (\$15,317,000) at the time of the proposed rulemaking. This is solely attributable to a projected increase in the number of related filings for fiscal year 2011, as compared to the prior figures for fiscal year 2010.

provide information to or for a Federal agency.” 5 CFR 1320.3(b)(1). This includes “developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information.” 5 CFR 1320.3(b)(1)(iv). Although not expressly stated in the OMB definitions regulation implementing the PRA, the definition of burden arguably includes upgrading and maintaining computer and other systems used to comply with a rule's requirements. Conversely, to the extent that these systems are customarily used in the ordinary course of business independent of the Rule, their associated upkeep would fall outside the realm of PRA “burden.” See 5 CFR 1320.3(b)(2).

Industry has been subject to the basic provisions of the HSR Rules since 1978. Thus, businesses have had several years (and some have had decades) to integrate compliance systems into their business procedures. Accordingly, most companies now maintain records and provide updated order information of the kind required by the HSR Rules in their ordinary course of business. Nevertheless, staff conservatively assumes that the time devoted to compliance with the Rule by existing and new companies remains unchanged from its preceding estimate.

Estimated labor costs: \$24,728,000

Using the burden hours estimated above and applying an estimated average of \$460/hour for executive and attorney wages, staff estimates that the total labor cost associated with the HSR Rules and the Notification and Report Form is approximately \$24,728,000 (53,756 hours x \$460/hour).

13. Estimated Capital/Other Non-Labor Costs Burden

The applicable requirements impose minimal start-up costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Notification and Report Form.

14. Estimated Cost to Federal Government

The total cost to the Commission for the premerger notification program for fiscal year 2010 was approximately \$4.8 million. This includes the cost of administering the overall program, a responsibility with which the Commission is charged under the Act. The costs cover professional and clerical salaries and expenses for the performance of an initial antitrust review of the filings submitted to the Commission.

In fiscal year 2010, the Antitrust Division of the U.S. Department of Justice expended \$415,715 in salary and overhead costs in support of the initial processing of premerger notifications by its Premerger Office. The Department of Justice does not allocate costs of initial substantive review to the program.

Thus, the total cost to the federal government is approximately \$5,215,715.

15. Program Changes or Adjustments

As noted above, the amendments to the HSR Rules and Notification and Report Form should reduce the time required to prepare responses for non-index filings, with an estimated net reduction of 2 hours per filing (39 hours to 37 hours). Cumulatively, however, owing to a projected increase from 841 such filings to 1,428 (independent of the amendments' effects), total burden will increase from the currently cleared estimate of 33,298 hours⁹ to 53,756 hours.¹⁰

16. Statistical Use of Information

Collection of information under the Act is for law enforcement purposes. There are no plans to publish information collected as a result of the premerger notification program.

17. Requesting Permission Not to Display Expiration Date for OMB Approval

Not applicable; the OMB control number and expiration date appears in the upper right-hand corner of page 1 of the Notification and Report Form.

18. Exceptions to Certification

Not applicable.

⁹ See *supra* note 5.

¹⁰ See *supra* note 6.