

**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 proposed 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”).

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 FTC 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].

The Commission proposes amending sections 801.1 and 801.2 of the HSR Rules to reflect the longstanding staff position that a transaction involving the transfer of exclusive rights to a patent in the pharmaceutical industry, which typically takes the form of an exclusive license, is potentially reportable under the Act. The proposed HSR Rules would define and apply the concepts of “all commercially significant rights,” “limited manufacturing rights,” and “co-rights” in determining whether the rights transferred with regard to a patent in the pharmaceutical industry constitute a potentially reportable asset acquisition.

3. Use of Information Technology

Consistent with the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note, 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 Due to technical reasons, however, electronic submission has been suspended.

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

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 \$68.2 million² or less. In addition, a firm must have sales or assets of at least \$13.6 million to be subject to the requirements of the Act. A firm with assets of less than \$13.6 million would also be subject to the requirements of the Act, but only if it intends to acquire assets valued at more than \$272.8 million or if it is an acquisition target that has been valued at more than \$272.8 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 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. The proposed amendments and the associated PRA burden analysis have been published for public comment, pursuant to 5 C.F.R. §§ 1320.8(d)(3) and

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 77 Fed. Reg. 4323 (January 27, 2012). These thresholds became effective on February 27, 2012.

1320.11.

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. Additionally, 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: 56,420 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 (“PNO”) staff reviewed letters from outside counsel discussing non-reportable transactions that would be reportable under this proposal. The average annual number of letters over the past five years was 21. Consultations with several outside practitioners who are heavily involved in analyzing HSR reportability for patent licensing in the pharmaceutical industry indicate that there are an estimated 9 additional transactions per year that fall into this category and are not confirmed by letter with staff.

Consequently, PNO staff estimates that there will be an increase of 30 transactions per year requiring non-index HSR filings due to the proposed rule change.³ The outside practitioners who were contacted by staff agreed that this is a reasonable estimate. This would yield, cumulatively, 1,458 non-index filings per year (an increase of 30 such filings relative to the FTC’s currently cleared estimate of 1,428 non-index filings per year). Rounding conservatively

³ “Index” filings pertain to banking transactions, and thus would not be affected by the proposed amendments. Index filings are incorporated, however, into the FTC’s currently cleared burden estimates (the FTC has jurisdiction over the administration of index filings). They are mentioned here to distinguish them from and to further explain what a “non-index” filing is. 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 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 (which require “non-index” filings), as illustrated by the calculations in footnote 5 below.

upward, and thus based instead on a projected 1,500 total non-index filings per year,⁴ estimated total burden hours under the proposed amended HSR Rules would increase from 53,756 hours to 56,420 hours.⁵

Estimated labor costs: \$25,953,000

Applying total burden hours, as revised (56,420), for the proposed amended HSR Rules, to an assumed hourly wage of \$460 for executive and attorney compensation, yields \$25,953,000 (rounded to the nearest thousand) in labor costs.

13. Estimated Capital/Other Non-Labor Costs Burden

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.

14. Estimated Cost to Federal Government

The total cost to the Commission for the premerger notification program for fiscal year 2011 was approximately \$4.9 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 2011, the Antitrust Division of the U.S. Department of Justice expended \$441,832 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 \$5,341,832.

⁴ The projection focuses on FY2012 to FY2014, a period closely coinciding with the Rule's existing clearance duration.

⁵ The currently cleared estimate of 53,756 hours was calculated as follows: [(1,428 non-index filings x 37 hours) + (22 transactions requiring more precise valuation x 40 hours) + (20 index filings x 2 hours) = 53,756 hours]. 76 Fed. Reg. 42,471, 42,479 (July 19, 2011). An increase from 1,428 to 1,500 non-index filings would yield incremental burden of 2,664 hours ((1,500 - 1,428) x 37 hours per non-index filing). Thus, cumulative burden under the proposed amended HSR Rules would be 56,420 hours.

15. Program Changes or Adjustments

An estimated increase from 1,428 to 1,500 non-index filings would yield incremental burden of 2,664 hours.⁶

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.

⁶ See *supra* note 5 and accompanying text.

