

**Supporting Statement for
Proposed Amendments to the
Hart-Scott-Rodino Rules and Notification 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” 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 to file when a proposed transaction meets the Size of Transaction test, subject to other provisions of the Rules, including exemptions. Parties must file 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 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 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.

The NPRM primarily addresses two HSR notification issues: (1) aggregation of assets across certain acquiring parties (*e.g.*, investment funds and Master Limited Partnerships) about which very limited information is currently reported, leading to an incomplete picture of an investment structure and (2) treatment of certain *de minimis* acquisitions of voting securities that are unlikely to raise competition concerns. To address the first issue, the NPRM proposes to expand the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about their associates when making an HSR filing. To address the second issue, the NPRM proposes a new exemption, § 802.15, which would exempt the acquisition of ten percent or less of an issuer’s voting securities in certain circumstances.

In addition to addressing aggregation of assets and treatment of certain *de minimis* acquisitions, the Commission’s NPRM also proposes necessary amendments to this HSR Form and accompanying Instructions to effect the proposed changes. In particular, Items 4 through 8 on the HSR Form would be revised to seek information about associates of certain acquiring persons, including the aggregation of acquisitions in the same issuer across its associates.¹ Although these proposed changes would result in an increased burden for certain acquiring persons, the Commission would also revise the HSR Instructions to limit the financial information required in Items 4(a) and 4(b). The change in Items 4(a) and 4(b) should reduce burden for certain acquired persons and clarify what types of information should be submitted.

The proposed amendments would help ensure that the Commission and the U.S. Department of Justice (DOJ) Antitrust Division (the Agencies) receive HSR filings that contain enough information to conduct a preliminary assessment of whether the proposed transaction presents competition concerns, but not receive filings related to acquisitions that are very unlikely to raise competition concerns.

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.

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 of information and the need to receive information quickly that motivated Congress to enact Section 7A.

¹ There would be no change to the information Items 6(c) and 7 require, because those items already require information from associates. Each of these items would, however, be consolidated in the HSR Instructions and Form to reflect the new definition of “person,” as explained in the NPRM.

5. Efforts to Minimize Small Organization Burden

The Act and HSR Rules are designed to have minimal impact on small entities. First, for a transaction to trigger a reporting requirement under the Act, the transaction must be valued at more than \$50 million (as adjusted).² Such a high transaction threshold will typically not catch most transactions involving small entities. In addition, the Act requires that in cases where the transaction is valued at greater than \$50 million (as adjusted) but \$200 million (as adjusted) or less, one party to the transaction must have at least \$10 million (as adjusted) in sales or assets and the other party must have at least \$100 million (as adjusted) in sales or assets in order to trigger reporting requirements.³

6. Consequences to Program if Collection Done Less Frequently

The Act requires an HSR filing when a transaction meets the Size of Transaction test, subject to other provisions of the Rules, including exemptions. Parties must file 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 and formal 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 is seeking public comment on the proposed collections of information (or proposed amendments to them). 85 Fed. Reg. 77,053 (Dec. 1, 2020).

9. Payments of Gifts to Respondents

Not applicable.

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 85 Fed. Reg. 4,984 (January 28, 2020), and became effective on February 27, 2020. Under these thresholds, a transaction must be valued in excess of \$94 million to meet the minimum size of transaction threshold.

³ Under the current adjusted thresholds, for transactions valued in excess of \$94 million but less than or equal to \$376 million, one party must have sales or assets of at least \$188 million and the other party must have sales or assets of at least \$18.8 million for the transaction to be reportable.

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: 7,347 (derived from 10,575-1,443-1,785)

Amending § 801.1(a)(1) – Acquiring Persons

The Commission proposes to amend the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about their associates when making an HSR filing. Thus, Items 4 through 8 on the Notification and Report Form (HSR Form) would be revised to seek information about associates of certain acquiring persons, including the aggregation of acquisitions in the same issuer across its associates. The Commission acknowledges that this proposed change would result in an increased burden for certain acquiring persons. Non-corporate entity UPEs within families of funds and MLPs would be required to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons as a result of the treatment of associates under the current Rules. Given that these entities already conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should result in limited additional burden for filers. Based on filing data from the past five fiscal years, the Commission estimates that 17.28% of entities would be required to provide additional information on behalf of associates. From this, we anticipate 846 filings would be affected per fiscal year (17.28% x 4894 filings per year, as estimated in the FTC’s most recent PRA clearance for the HSR Rules). The Commission also estimates that each affected filer will need about 10-15 additional hours per filing to comply. Thus, the aggregation is expected to lead to 10,575 additional annual hours of burden (846 filings x 12.5 hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

The proposed change to § 801.1(a)(1) would also result in a reduced burden for certain acquiring persons by eliminating the potential need for families of funds and MLPs to make multiple filings with multiple filing fees. Based on filing data from the past five fiscal years, the Commission estimates that 39 filings would be affected per fiscal year. Since the FTC’s current clearance with OMB estimates an average reporting burden per responding filer of 37 hours per filing, the proposed change to § 801.1(a)(1) would be a reduction of 1,443 hours of annual burden (39 filings x 37 hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

Acquired Persons

Additionally, the Commission's proposal to revise the HSR Instructions to limit the financial information required in Items 4(a) and 4(b) should reduce burden for certain acquired persons. The HSR Form already limits what acquired persons must report in Items 5 through 7 to information on those assets, voting securities and non-corporate interests being acquired in the transaction at issue. The Commission's proposal to amend the HSR Instructions would create a similar limit for acquired persons with respect to Items 4(a) and 4(b) and should result in a reduction in the burden for families of funds and MLPs filing as acquired persons who will now face a more limited reporting burden after the amendments. Based on filing data from the past five fiscal years, the Commission estimates that 357 filings would be affected per fiscal year. The Commission also estimates that the burden on each affected filer will be reduced by 5 hours per filing. Thus, the proposed limit for acquired party reporting is expected to lead to a reduction in burden of 1,785 annual hours (357 filings x 5 hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

Amending § 802.15 – Acquisition of 10% or less

Additionally the Commission proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer's voting securities in certain circumstances. Proposed § 802.15 exempts the acquisition of 10% or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer, such as operating competing lines of business or having an existing vertical relationship, or where the investor (or its agent) is an officer or director of the issuer or a competitor. This proposed exemption would allow the acquisition of small amounts of voting securities without an examination of intent as required by § 802.9. As a result, the Commission anticipates that this exemption will reduce somewhat the number of transactions subject to review under the Rule and the number of entities that must engage in reporting under the Rule. Over the period from FY 2001 to FY 2017, the Commission received an average of 106 filings per fiscal year for acquisitions of 10% or less.⁴ Some of these filings could fall within the exemption in proposed § 802.15, leading to a reduction in burden for entities that would no longer need to report under the Rule. However, the Commission does not currently possess information as to how many entities would qualify for the proposed § 802.15 exemption. The Commission therefore requests comment on the percentage of entities that would qualify for the proposed exemption.

Associated labor costs: \$3,379,620

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 proposed changes to the HSR Rules and the Notification and Report Form is approximately \$3,379,620 (7,347 hours x \$460/hour).

⁴ The Agencies received a total of 1,804 HSR filings from FY 2001 to FY 2017 for acquisitions of 10% or less of outstanding stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less.

13. Estimated Capital/Other Non-Labor Costs Burden

The proposed amendments should impose minimal or no additional capital or other non-labor costs, since businesses subject to the HSR Rules generally have standard operating procedures based on prior experience with respect to the HSR filing requirements (which have been in force for more than 40 years).

15. Estimated Cost to Federal Government

The proposed amendments are not expected to add costs to the federal government.

14. Program Changes or Adjustments

The proposed changes to the HSR Rules and Notification and Report Form are expected to increase the burden on the affected members of the public by 7,347 annual hours from the currently cleared amount of 181,091 annual hours. The total annual labor costs (currently estimated at \$83,301,860), would increase by approximately \$3,379,620.

15. 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.

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

Not applicable.

17. Exceptions to Certification

Not applicable.