

**Supporting Statement
for Proposed
Amendments to the
Hart-Scott-Rodino Rules and Notification 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” or “Form”). The proposed amendments are primarily changes to the information reported by entities for a proposed merger on the Notification and Report Form and do not affect the reportability of a proposed transaction. The proposed amendments would ensure that the FTC and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Agencies”) receive sufficient information with the Form to conduct a preliminary assessment within the initial waiting period (typically 30 days) to determine if the proposed transaction is likely to violate the antitrust laws.

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

Section 7A of the Clayton Act (“HSR 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 a Notification and Report Form when a proposed transaction is not subject to an exemption and meets the Size of Transaction test, subject to other provisions of the Rules, including a Size of Person test for some transactions. The HSR Act was intended to improve federal merger enforcement by requiring parties to notify the Agencies of their proposed acquisition and to wait a short period of time to permit the Agencies to seek a federal court injunction to stop an illegal merger prior to consummation.

Parties submit such Forms to the Agencies and must wait a specified time period before consummating the transaction. Section 7A(d) of the HSR 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 HSR 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 HSR Act. The information and documentary material required by the Notification and Report Form provide the Agencies 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 HSR 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 HSR Act. The Notification and Report Form, which is completed by persons required to file notification, and Instructions are appendices 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 and Instructions on several occasions.

In this notice of proposed rulemaking (“NPRM”), the Commission proposes amendments to the Rules, the Form, and the Instructions (Part 801 and Part 803 and its appendices), to reorganize the information currently required with an HSR Filing and to require additional information critical to the Agencies’ initial antitrust review. The proposed amendments would ensure that the Agencies receive sufficient information with the Form to conduct a preliminary assessment within the initial waiting period (typically 30 days) to determine if the proposed transaction is likely to violate the antitrust laws. These changes would improve the efficiency and effectiveness of that initial review by providing the information the Agencies need to properly narrow the scope of any additional investigation or eliminate the need to conduct a more in-depth investigation of the proposed transaction. These amendments also incorporate changes required to implement the collection of information mandated by the Merger Filing Fee Modernization Act of 2022 contained within the Consolidated Appropriations Act, 2023 (Pub. L. 117-328, 136 Stat. 4459) to the HSR Act.

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

The information required by the proposed amendments is not available from other government agencies or public sources. Prior to passage of the HSR Act, efforts were made to obtain information needed to conduct 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. Since the HSR premerger notification program was instituted approximately 45 years ago, the Commission has periodically updated the information collected on the Form to reflect changes in technology, the economy, and structures of transactions. Based upon the experience of the Agencies, there are categories of information known to filers that are not currently collected on the Form but are important to the Agencies' initial assessment of transactions.

5. Efforts to Minimize Small Organization Burden

The HSR Act, HSR Rules, and proposed amendments 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).¹ Such a high transaction threshold will typically not catch most transactions involving small entities. In addition, the HSR 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 \$100 million (as adjusted) in sales or assets and the other party must have at least \$10 million (as adjusted) in assets (or in some instances, sales) in order to trigger reporting requirements.²

6. Consequences to Program if Collection Done Less Frequently

The HSR Act requires an HSR Filing when a transaction meets the Size of Transaction test, subject to other provisions of the Rules, if not exempted. Parties must file with the Commission and the Antitrust Division before consummating the transaction. Collection of the proposed information on a less frequent basis would be contrary to the HSR Act since the enforcement agencies must review proposed acquisitions before they are consummated. Moreover, individual firms and their acquisition plans, 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).

¹ The 2000 amendments to Section 7A require the Commission to revise the HSR 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)(note). The current adjusted thresholds appear at 88 Fed. Reg. 5,004 (January 26, 2023), and became effective on February 27, 2023. Under these thresholds, a transaction must be valued in excess of \$111.4 million to meet the minimum size of transaction threshold.

² Under the current adjusted thresholds, for transactions valued in excess of \$111.4 million but less than or equal to \$445.5 million, one party must have sales or assets of at least \$222.7 million and the other party must have assets (or in some instances, sales) of at least \$22.3 million for the transaction to be reportable.

8. Public Comments/Consultation outside the Agency

The HSR Rules and the Notification and Report Form have evolved over the last 45 years through 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). 88 Fed. Reg. 42,178 (June 29, 2023). In addition, the Commission previously invited public comment in connection with its latest PRA clearance request for this Rule. See 88 Fed. Reg. 3,413 (Jan. 19, 2023). The Commission received no germane comments.

9. Payments of Gifts to Respondents

Not applicable.

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

The Agencies are prohibited by Section 7A(h) of the HSR 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. . . . [or] to either body of Congress or to any duly authorized committee or subcommittee of the Congress.” The Agencies have implemented procedures to assure the confidentiality of the submitted information. Additionally, the Notification and Report Form does not specifically require any information of a personal and sensitive nature.

12. Annual Hours Burden

Estimated Annual Hours Burden: 759,272.

The proposed amendments would change the information reported on the Notification and Report Form and do not affect the reportability of a transaction. Thus, the same number of filings projected for fiscal year 2023 in the most recent Supporting Statement submitted to OMB and also appearing in the associated Federal Register notice³ will be used for these burden hour calculations.

Some of the proposed changes are intended to reduce the burden of filing. The Commission anticipates that the proposals to report NAICS codes in ranges rather than by specific dollar amount would reduce the burden on almost all filers. Additionally, the proposed change to eliminate the requirement for filers that derive revenue from manufacturing operations to report NAPCS code revenues is also anticipated to reduce the burden for those filers. Finally, the Commission also proposes to limit the reporting of minority investors of the acquired entity.

Some of the proposed changes offer clarifications to the current rules and are unlikely to change the burden on filers. These include the proposed changes to eliminate references to paper and DVD filings (§§ 803.2, 803.5, and 803.10) and to specifically discuss the commencement of

³ 88 FR 3413, 3414 (Jan. 19, 2023).

the waiting period (§ 803.10).

Certain proposed changes would require the acquiring person to collect and report information that the Commission believes is held in its ordinary course of business records. These include proposed requirements for the acquiring person to describe its own business(es); report minority investors in additional entities related to the transaction; disclose relationships with individuals or entities that provide credit, hold non-voting securities, have the right to appoint board observers, or have management agreements with entities related to the transaction; and to identify members of boards of directors or other individuals who have board observer rights. Once collected, the Commission anticipates that the burden associated with some of these proposals will lessen for subsequent filings by the same acquiring person, as the information would only need to be updated.

Many of the proposed changes would increase the burden on all filers. These include new document collection requirements to produce transaction-related documents from supervisory deal team members; business documents that relate to competition topics but were not produced specifically for the transaction; drafts of responsive documents; other agreements between the acquiring and acquired persons, and to log the request to which documents are responsive. Additionally, the proposed requirements to provide narratives regarding transaction rationale, diagrams of the transaction, and organizational charts for custodians of documents would be applicable to all filers.

Some of the proposed changes would significantly increase the burden on only certain filers. These include those filers whose businesses have existing horizontal, non-horizontal, or labor market overlaps or relationships, with the largest burden falling on filers whose transaction involves many such relationships; transactions that involve a large number of foreign language documents; filing persons or transactions that have a complex structure; transactions that are filed on letters of intent or agreements in principle; and filing persons that receive subsidies from foreign entities of concern. These filings are the ones most likely to raise potentially significant competitive issues that require close scrutiny to determine whether the proposed transaction is likely to violate the antitrust laws.

The Commission canvassed current Agency staff who had previously prepared HSR Filings while in private practice to estimate the projected change in burden due to the proposed amendments to the Instructions. All have considerable experience with the HSR Rules and with preparing HSR Filings for the types of transactions that are most likely to be affected by the proposed changes.

These experts were asked to estimate the incremental increase in time to prepare HSR Filings, for both the company and its outside counsel, taking into account that transactions range in complexity—from relatively simple transactions with no overlaps and few documents (such as ones only involving executive compensation or other stock purchases by an individual), to moderately complex transactions (such as a fund buying or selling a portfolio company with limited overlaps) to very complex (for example, a strategic acquisition by a large company that sells many overlapping products in competition with the seller). The ranges from canvassed officials estimated that the proposed changes would result in approximately 12 to 222 additional

hours per filing, depending on the complexity of the filing at issue. In the past five years, approximately 45% of filings had reported overlaps. To estimate an average number of additional hours, the Commission conservatively assumes that 45% of the filings may require an additional 222 hours to prepare and 55% may require an additional 12 hours to prepare. Thus, the Commission estimates an average of 107 additional hours (rounded to the nearest hour) will be allocated to non-index filings.⁴ Added to the current estimate of 37 hours per filing,⁵ the total estimated hours would be 144 per filing.

Net Effect

The proposed Rule and Notification and Report Form changes only affect non-index filings⁶ which, for FY 2023, the FTC projects will total 7,096. As described above, the Commission estimates that the amendments to the HSR Rules and Notification and Report Form would increase the time required to prepare responses for non-index filings, with an estimated net increase of 107 hours per filing. Thus, the total estimated additional hours burden is 759,272 (7,096 non-indexed filing x 107 hours/each).

Estimated Annual Labor Costs: \$350,000,000.

Applying the revised estimated hours, 759,272, to the previous assumed hourly wage of \$460 for executive and attorney compensation, yields approximately \$350,000,000 in annual labor costs. The amendments are expected to impose either 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 Instructions.

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 45 years).

⁴ Clayton Act section 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 that require “non-index” filings. The proposed changes would not require any additional information from indexed filings.

⁵ 88 FR 3413, 3414 (Jan. 19, 2023).

⁶ *Id.*

14. Estimated Cost to Federal Government

The proposed amendments are not expected to add costs to the federal government. While costs could go up for data storage and increased review time, this could be offset by decreased costs associated with access to more relevant reporting information. The proposed amendments would allow the Agencies to better focus investigations, allocate fewer staff resources to collect and confirm basic business information, and reduce the need for prolonged investigations due to lack of information. The Commission plans to update this section in our supplemental supporting statement at the final rule stage.

15. 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 759,272 annual hours from the currently cleared amount of 262,579 annual hours. The total annual labor costs (currently estimated at \$120,786,340) would increase by approximately \$350,000,000.

16. Statistical Use of Information

Collection of information under the Act is for law enforcement purposes. The Agencies report to Congress on the program annually⁷ but there are no other 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.

18. Exceptions to Certification

Not applicable.

⁷ See Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, <https://www.ftc.gov/policy/reports/annual-competition-reports>.