FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

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SUBJECT: Third 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, Pub. 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 third annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons with sales and 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 Antitrust Division of the Department of Justice and to the Federal Trade Commission. Thereafter the parties must wait a prescribed period of time, usually 30 days, before consummating the transaction.

The waiting period is designed to permit the antitrust enforcement agencies to determine whether action against a reported acquisition is warranted prior to its consummation. The Act authorizes the enforcement agencies during the waiting period

to issue requests for additional information or documentary material. Such a request in most cases extends the waiting period while the requested information or documentary material is compiled for submission to the requesting agency and for an additional time, usually 20 days, after that agency receives those materials. In the event that during this waiting period either enforcement agency seeks a preliminary injunction to prevent consummation of the reported acquisition, the Act provides for expedited consideration by a Federal district court.

The legislative history suggests several complementary purposes underlying the Act. First, Congress clearly intended to eliminate the large "midnight merger," which is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Second, Congress wanted to assure that large acquisitions were subjected to meaningful scrutiny under the antitrust laws. Third, Congress provided an opportunity for the enforcement agencies to seek a court order enjoining the completion of those transactions which the agencies deemed to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy where a challenge by one of the enforcement agencies proved successful. Thus the Act requires that the agencies receive prior notification of significant acquisitions between sizeable parties, provides certain tools to facilitate a prompt but thorough investigation, assures an opportunity to seek a preliminary injunction before the parties are legally free to complete the transaction, and eliminates the problem of unscrambling the assets when one of the agencies obtains an order enjoining consummation of the acquisition.

Operation of the premerger notification program

The Act authorizes the Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Justice Department, to promulgate implementing rules. Prior reports to the Congress have described the steps taken to implement the program, which became effective on September 5, 1978. The second annual report to Congress covered only the first few months of the program's operation (to December 1, 1978) and thus did not present any comprehensive overview of the operation or impact of the program. While a definitive overview and assessment of the program would still be premature after only fifteen months experience, it is possible at this time to provide Congress with considerably more information about the operation of the program and its impact to date.

The rules implementing the Act[1] define the terms in the statute, specify the means for determining whether a transaction is reportable under the Act, detail certain procedures for compliance with the requirements of the Act, and create certain

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1 16 C.F.R. Parts 801-803 (1979).

exemptions from those requirements. In addition, the rules state (in an appendix to Part 803) the information to be submitted on the Notification and Report Form, which must be completed by both parties to a reportable acquisition.[2]

In general, receipt of completed Notification and Report Forms from both parties begins the waiting period.[3] At this time, the staffs of both enforcement agencies review these filings and make separate initial determinations whether the reported transaction may raise significant antitrust issues which warrant further investigation. If neither agency believes that further inquiry is needed, the waiting period is allowed to expire or the agencies may entertain requests for early termination of the waiting period from either or both parties.[4]

If either or both agency staffs believe that significant antitrust issues may be raised by a reported transaction, an established liaison arrangement is used to determine which of the two agencies will investigate the matter further. Either agency may investigate a given transaction, but the Act does not permit both agencies to request additional information from the same parties with respect to the same transaction. Thus, if only one of the agencies believes an investigation is necessary, generally that agency will proceed. If both agencies desire to investigate an acquisition, unnecessary duplication of effort by the agencies and burden on reporting persons are avoided by a decision as to which agency will proceed.

Once an investigation is authorized, the agency conducting the investigation may use any tools at its disposal to probe further and to facilitate its determination whether to challenge the proposed transaction. Frequently the investigating agency issues to either or both parties requests for additional information or documentary material ("second requests") under § 7A(e) of the Act and § 803.20 of the rules. With the information from the initial notification forms, the responses to second requests and any other information available to it, the investigating agency then determines whether a challenge to the transaction is appropriate. If not, then the extended waiting period is allowed to expire, or requests for early termination may be considered.

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2 A comprehensive Statement of Basis and Purpose, which explains the operation, purpose, and need for each of the rules, was published along with the final rules. 43 Fed. Reg. 33450 (July 31, 1978).

3 Certain types of transactions, specified in § 801.30 of the rules, have waiting periods which begin when only the acquiring person files notification.

4 Requests for early termination have been received in 111 of the 814 transactions reported so far this year; 61 of the requests were granted and 50 were denied.

If, however, the reported transaction is thought to present significant antitrust problems, the investigating agency may seek a preliminary injunction in Federal district court to stay the consummation of the transaction pendente lite. If the matter is thought inappropriate for a preliminary injunction proceeding, the agency may decide to challenge the transaction without seeking an injunction. The Antitrust Division of the Justice Department challenges an acquisition by filing a complaint in Federal district court; the Commission challenges an acquisition by issuing an administrative complaint which is tried before an administrative law judge, subject to a right of appeal to the full Commission and thereafter to a United States court of appeals.

Acquisitions challenged during 1979

Throughout the first eleven months of calendar year 1979, the agencies have received filings with respect to 814 transactions.[5] Upon review of these filings, the Commission and the Antitrust Division initiated 95 investigations in which second requests were issued to one or both parties.[6] After receipt of the requested information, some of these investigations were closed without further action; others are continuing as of this date. The remainder resulted in enforcement action by the agencies as detailed below.

The Commission has sought to enjoin three acquisitions under the premerger notification program so far this year. In a challenge to the acquisition of Applebaums' Food Markets by National Tea Company, a preliminary injunction was denied by the District Court in Minnesota on June 25, 1979, and the denial was affirmed by the Court of Appeals for the Eighth Circuit on July 16, 1979.[7] Even though the courts held that an injunction should not be granted, the Commission's administrative complaint challenging the now-consummated acquisition is scheduled for trial in early 1980. In July, the proposed acquisition of Reliance Electric Co. by Exxon Corp. was challenged by the

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5 Sixty-three transactions were reported during the month of December, 1978, after the second annual report to Congress had been reported, making the total number of 1978 transactions 355.

6 A total of 179 requests were issued in 95 transactions. Thus in most, but not all, investigations in which second requests were issued, both parties received them.

7 FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979).

Commission in the District Court for the District of Columbia. The district court issued a temporary restraining order on July 28, 1979.[8] After further hearings, however, the court issued an order permitting the acquisition but requiring that Exxon hold a portion of the Reliance assets separate for the duration of the Commission's administrative proceedings.[9] Finally the Commission sought a preliminary injunction to prevent the acquisition of Harnischfeger Corp. by Mannesmann A.G.[10] Before the district court could rule on that motion, Mannesmann withdrew its offer to purchase Harnischfeger. Mannesmann publicly announced that it had canceled its proposed acquisition because of the Commission's challenge.[11]

The Antitrust Division has so far sought preliminary injunctions six times during 1979.[12] In United States v. Tracinda Investment Corp.,[13] the Division sought to enjoin an acquisition of the stock of Columbia Pictures Industries, Inc. by Tracinda, which, along with its controlling shareholder, already held 48% of the stock of Metro-Goldwyn-Mayer, Inc. The

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8 FTC v. Exxon Corp., 5 Trade Reg. Rep. (CCH) ¶ 62,763 (D.D.C., July 28, 1979).

9 FTC v. Exxon Corp., 5 Trade Reg. Rep. (CCH) ¶ 62,972 (D.D.C., October 26, 1979).

10 FTC v. Harnischfeger Corp., Civ. No. 79-2601 (D.D.C., filed September 28, 1979).

11 Wall Street Journal, November 5, 1979, at 2, col. 3.

12 The second annual report to Congress listed two cases in which the Division had sought preliminary relief during 1978. After that report was completed, Occidental Petroleum Corp. announced that it was withdrawing its cash tender offer for the shares of Mead Corp., and the court therefore did not rule on the motion for a preliminary injunction. United States v. Occidental Petroleum Corp., Civ. No. C3-78-228 (S.D. Ohio, filed October 11, 1978). The District Court for the Northern District of New York denied the Division's motion to enjoin the takeover of Carrier Corp. by United Technologies, Inc., United States v. United Technologies, Inc., 1978-2 Trade Cases (CCH) ¶62,393 (N.D.N.Y., December 6, 1978), aff'd, 1978-2 Trade Cases (CCH) ¶62,405 (2d Cir., December 18, 1978). The district court, however, imposed a hold separate order pending the outcome of further proceedings on the merits. United States v. United Technologies, Inc., 1979-1 Trade Cases (CCH) ¶62,512 (N.D.N.Y., February 9, 1979). The matter is still pending before that court.

13 464 F. Supp. 660 (C.D. Cal. 1979).

injunction was denied and the matter went to trial. After a two-week trial the court dismissed the suit,[14] and the Justice Department has filed an appeal.

On March 22, 1979, the Antitrust Division filed an application for a temporary restraining order to prevent the acquisition by Emerson Electric Co. of Skil Corp. The district court denied the application for a temporary restraining order,[15] but on March 23, 1979, the court issued an order which required Emerson Electric Co. to hold separate the operations of Skil Corp. pending the resolution of the government's case.

Efforts to enjoin the acquisition of American Investment Company by Household Finance Corporation were initially unsuccessful. On a record in which all issues except the relevant product market had been stipulated by the parties, the District Court for the Northern District of Illinois declined to issue an injunction. On appeal, however, the Seventh Circuit reversed,[16] and divestiture was ordered. Defendants have petitioned the United States Supreme Court for the issuance of a writ of certiorari.

In three other cases, the Antitrust Division sought preliminary injunctions to prevent consummation of acquisitions which had been reported under the premerger notification program. In each case the defendants entered into consent agreements with the Division before the courts ruled on the preliminary injunction motions. United States v. Martin Marietta Corp. (acquisition of the assets of Wedron Silica Company, a subsidiary of Twentieth Century-Fox Corp.), Civ. No. 79-C-3626 (N.D. Ill., filed August 31, 1979) (divestiture of certain assets was required); United States v. Beneficial Corp. (acquisition of Southwestern Investment Company, a subsidiary of Beatrice Foods Co.), Civ. No. 79-C-3550 (N.D. Ill., filed September 24, 1979) (divestiture of 23 Southwestern offices was required); United States v. Beneficial Corp. (acquisition of Capital Finance Services, Inc., a subsidiary of the Continental Corp.), Civ. No. 79-C-3551 (N.D. Ill., filed August 29, 1979) (divestiture of 112 Capital offices was required).

There have been two other challenges to reportable acquisitions this year; although a preliminary injunction was not sought in either, both matters are now in litigation. The

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14 5 Trade Reg. Rep. (CCH) ¶62,889 (C.D. Cal., September 14, 1979).

15 United States v. Emerson Electric Co., Civ. No. 79-C-1144 (N.D. Ill., March 22, 1979).

16 United States v. Household Finance Corp., 602 F.2d 1255 (7th Cir. 1979).

Antitrust Division filed a complaint challenging the merger of Cross Company with Kearney and Trecker Corp.[17] The Commission filed a complaint challenging the acquisition by BASF A.G. of the Pigments Division of Chemetron Corp., a subsidiary of Allegheny Ludlum Industries.[18]

A number of additional acquisitions investigated by the Commission under the premerger notification program resulted in agreements under which complaints challenging the transactions were issued simultaneously with divestiture orders, under the Commission's consent docket. This procedure was followed with respect to the acquisition by Crane Co. of Medusa Corp. (Docket No. C-2959, issued April 5, 1979); the acquisition of Gardner Denver Co. by Cooper Industries, Inc. (Docket No. C-2970, issued June 18, 1979); Schering Plough Corp.'s acquisition of Scholl, Inc. (Docket No. C-2986, issued August 10, 1979); the acquisition by Liquid Air Corp. of the industrial gases assets of Chemetron Corp., a subsidiary of Allegheny Ludlum Industries (Docket No. C-2990, issued September 5, 1979); and the acquisition of Daylin, Inc., by W.R. Grace & Co. (File No. 791-0073, consent agreement placed on the public record for comments on October 30, 1979).

A consent order was also entered in a case challenging the acquisition of certain assets of Keystone Portland Cement Co. by Lone Star Industries, Inc. (Docket No. 9122). On January 25, 1979, the Commission issued a complaint and authorized its staff to seek a preliminary injunction in Federal district court, but the acquisition was abandoned when Lone Star learned of the Commission's action. The order prevents the contemplated acquisition from being accomplished without prior notice to the Commission.

The success of the premerger notification program cannot be judged on formal challenges and consent orders alone, although these are the most obvious and visible measures of merger law enforcement efforts by both agencies. Other indicators of the program's effectiveness are described below.

In the first eleven months of 1979, a number of transactions reportable under the program were abandoned after second requests were issued.[19] Frequently there is no announcement of the

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17 U.S. v. Cross and Trecker Corp., Civ. No. 973-737 (E.D. Mich., filed September 25, 1979).

18 In re BASF Wyandotte Corp., Docket No. 9125 (filed April 4, 1979).

19 Fourteen transactions were abandoned during Commission investigations. The Antitrust Division does not keep specific data on this aspect of the program.

reasons for abandoning a reportable merger. Obviously, one cannot conclude that the likelihood of an antitrust challenge was the basis for every decision to cancel; on the other hand, one cannot totally discount this phenomenon and the implications it raises concerning the program's effect on merger law enforcement.

It is also possible that the inception of the premerger notification program itself has deterred companies from entering into merger agreements which might violate the antitrust laws because of the parties' awareness that their transactions will be subjected to more careful scrutiny than in the past. There is, of course, no way of measuring this impact, but Congress, by passing the Act, has clearly made it more difficult for large companies to make an acquisition which violates established precedent and guidelines without the agencies knowing about it. It is therefore likely that the Act has resulted in the alteration of acquisition strategies of some large companies.

Rules changes

During the past year, the Commission staff undertook a review of the filings received during the first six months that the premerger notification program had been in operation. The staff compared the size of each reported transaction with the level of enforcement interest by either agency and discovered that a significant number of the smaller reportable transactions did not result in any investigation or challenge. As a result, the Commission proposed a revision of the so-called "minimum dollar value exemption," § 802.20 of the rules. This revision increased the dollar value reporting thresholds for certain transactions, thus providing exemption from the requirements of the Act for many of these smaller transactions.

The Commission's Notice of Proposed Rulemaking was published for comment in the Federal Register of August 10, 1979 (volume 44 at page 47099). Nine comments were received in response to this proposal, and a revision of § 802.20 was formally promulgated on November 13, with the concurrence of the Assistant Attorney General, and published in the Federal Register of November 21, 1979 (volume 44 at page 66781). The new rule became effective on November 21, 1979.

Based on the experience of both enforcement agencies, the Commission estimated that approximately 20% of the transactions reportable prior to the change would be exempt under the revised rule. The revision was designed both to reduce the burden of filing requirements for relatively small firms and to make additional agency resources available for review of other transactions. It represented a judgment by the enforcement agencies that this change could be implemented without impairing the effectiveness of the premerger notification program, while substantially reducing paperwork burdens for smaller companies.

Further information concerning this rule revision is attached to this annual report, including the Federal Register notices announcing the proposed change and the final rule, copies of the nine comments received in response to the proposal, and a copy of the press release issued by the Commission after the revision had been issued (Exhibits "A" through "L").

Litigation

The Commission and the Antitrust Division were named as defendants in a suit related to the premerger notification program and filed in the Federal District Court in Delaware by Borg-Warner Corporation on June 21, 1979. Borg-Warner had submitted a Notification and Report Form and later responded to a second request issued by Commission staff in connection with a proposed merger with the Firestone Tire & Rubber Company. The merger was subsequently abandoned, and Borg-Warner requested the return of all documents it had submitted. The Commission declined to return any documents on grounds that the Act does not require it, and that the documents may be necessary for subsequent use in an administrative or judicial action or proceeding. Borg-Warner sought a temporary restraining order, which was denied on June 22, 1979. The parties submitted briefs on cross motions for summary judgment, and oral argument was heard on November 29, 1979. No decision has been issued by the court to date.

Other effects of the premerger notification program

The impact of the premerger notification program on the antitrust enforcement agencies can be seen in part from the cases they have brought. Some additional observations may be useful, however, with respect to the way in which the agencies conduct their merger enforcement activities.

First, it is clear that one of the goals of the Act has been met, merely by the creation of the premerger notification program. Implementation of the Act largely ended the phenomenon of the "midnight merger," because only under the most unusual circumstances can a significant acquisition occur in the United States without prior notification to the enforcement agencies and compliance with a waiting period.

Second, the procedural tools which the Act provides to the enforcement agencies have had a significant impact on the ability of the agencies to investigate reportable mergers and acquisitions efficiently and effectively. The information provided by the parties on completed Notification and Report Forms is sufficiently comprehensive to permit a determination, in

a substantial majority of cases, that no significant antitrust issues are raised by the transaction. That information also provides a useful focus and starting point with respect to those transactions which may raise such issues. In short, the Form has worked quite well during the first full year of the program's operation, and major revisions in the substance of those requirements seem unnecessary.[20]

The other key procedural tool which has strengthened the agencies' ability to investigate acquisitions which may violate the antitrust laws is the second request. Even though only one second request can be issued to each party the importance of this device is that the parties receiving such requests generally have a strong incentive to provide full responses as quickly as possible. Coupled with the Act's provision for extending the waiting period while responses to second requests are being prepared by recipients and for a short time thereafter, the second request permits the agencies to gather from the parties most or all of the information needed by the agencies to make their final determination whether to challenge certain transactions. The delays frequently encountered at the discovery stage of other types of litigation cannot benefit the parties to a reportable acquisition, who must defer consummation of the transaction until responses to second requests have been submitted and the waiting period has expired. At the same time, the government's ability to delay a transaction for a long period is limited by the fact that the waiting period can be extended only once.

The agencies have generally received a high degree of cooperation from the recipients of second requests, and areas of disagreement have been frequently narrowed and to date always resolved through negotiation. The second request and extended waiting period mechanism appear to have strengthened the investigative powers of the enforcement agencies, while permitting them to complete their investigations of significant acquisitions more efficiently and more quickly.

Another important aspect of the Act is that it gives the agencies an opportunity to seek a preliminary injunction to prevent consummation of a transaction which the agencies believe may violate the antitrust laws. It is too early for the agencies to make definitive judgments concerning the effectiveness of the Act in this respect. There simply have not been enough cases to support confident generalizations concerning the impact of the Act on the ability of the agencies to obtain preliminary injunctions in merger cases. It appears, however, that the

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20 It is anticipated that the Notification and Report Form will be updated shortly to provide for the submission of 1977 Economic Census data instead of the 1972 data currently required.

opportunity to seek an injunction has already been useful.

It would be misleading, however, to imply that all, or even most, future challenges to mergers and acquisitions by the agencies will necessarily be by preliminary injunction. While the Act significantly strengthens the agencies' investigative powers, it does not mean that injunctions will be sought in all situations in which the agencies believe that a transaction would violate the antitrust laws, and it certainly does not guarantee that the agencies will be more successful in obtaining injunctions when they are sought.[21]

Implicit in the Act is an assumption that at least some government antitrust challenges to mergers and acquisitions can be thoroughly investigated in a short time, that the government's case can be assembled quickly, and that a Federal district judge can feasibly and responsibly hear and decide such challenges in a preliminary injunction proceeding. The complexity of the legal and factual issues, the necessity of obtaining information from third parties who cannot be served with second requests under the Act and competing public interest considerations make some cases inappropriate for resolution in an injunction context. It would be incorrect, therefore, to assume that the Act will prevent the consummation of all large mergers or acquisitions which may violate the antitrust laws. The Act provides significant benefits to competition by improving the ability of the agencies to discover, investigate and challenge anticompetitive transactions, but it is not a panacea. Its utility should not be judged solely by reference to the number of injunctions successfully obtained by the enforcement agencies under its provisions. Instead, its full impact on the antitrust law enforcement process should be assessed. After the first full year of operation, that impact appears to be positive.

It is possible also to offer some observations at this juncture concerning the impact of the program on persons whose transactions are reportable under it. First, compliance with the program has exceeded even the most optimistic expectations of the agencies. Both agencies have informally monitored announcements of consummated acquisitions to ensure that the parties to transactions covered by the Act are in compliance. When the program was first implemented, the agencies assumed that it might be necessary to bring some actions under §7A(g)(1) of the Act, which provides for penalties of up to $10,000 per day for

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21 That is why the provisions of § 7A(i) are so important. Congress there provided, first, that neither action nor inaction by either agency under the Act can bar any other proceeding or action with respect to the same transaction under any other provision of law; and, second, that the Act does not limit the agencies' authority to obtain information from any person under any other provision of law.

violations of the premerger notification requirements. No such actions have been filed to date.

One possible explanation for the absence of § 7A(g)(1) actions is the efforts of both agencies to disseminate information about the program. Personnel from both agencies have given a number of speeches about the program this year,[22] and the Commission prepared a "Compliance Guide," that was distributed in substantial numbers early this year. The Commission staff receives hundreds of telephone inquiries a month, and a significant portion of staff time is spent explaining the operation of the program and assisting persons with questions and problems that arise under the Act and the rules. Four formal interpretations of the Act and rules have been issued by Commission staff with the concurrence of the Antitrust Division, under § 803.30(c) of the rules, and distributed both to the public and to the media which cover antitrust and corporate matters (Exhibits "N" through "Q").[23]

Based on experience to date, it also does not appear that compliance with the initial notification requirement is inordinately difficult or unreasonably expensive. Filing persons have not had significant problems providing the information and documentary materials required by the Notification and Report Form.

The agencies have received complaints from certain recipients of second requests who objected to the breadth of those requests or to specific items contained in the requests. To a large extent, the breadth of second requests stems from the dual role of the request under the Act. First, the agencies have to include in a second request whatever they believe they have to learn from the recipient in order to make a determination whether to challenge the transaction. Second, if a decision is made to challenge the transaction, the second request is one of the

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22 For example, on August 14, 1979, Malcolm R. Pfunder, Assistant Director for Evaluation in the Commission's Bureau of Competition, delivered a speech on the subject of premerger notification to the annual meeting of the Antitrust Section of the American Bar Association in Dallas, Texas. The speech was entitled "Premerger Notification After One Year -- A Staff Perspective from the Federal Trade Commisson." Mr. Pfunder has been responsible for the administration of the premerger notification program at the Commission since April, 1977, and the speech represented his personal views. A copy of the speech is attached as Exhibit "M."

23 One formal interpretation was issued in late December of last year after the second annual report to Congress had been prepared, and is attached as Exhibit "R."

primary means by which evidence is gathered to support the agency's case in Federal district court. Moreover, because the agencies must prepare their second requests within a very short time -- relying solely on information contained in the initial notifications, information which is publicly available, and information previously in their possession -- second requests are sometimes inadvertently broader than would be necessary if more information had been available at the time they were prepared.

The agencies have attempted to mitigate these problems by adopting an approach toward second request recipients that is both practical and flexible. The staffs of both agencies have been highly receptive to negotiations with recipients, both as to the content of the request and as to the manner of compliance. It seems particularly significant that neither agency has sought a court order under § 7A(g)(2) of the Act, which authorizes each agency to seek from a Federal district court an order requiring compliance, a further extension of the waiting period, or other equitable relief. The fact that § 7A(g)(2) actions have not proved necessary suggests that the agencies have so far successfully found a reasonable balance between the use of the Act's investigative tools and reasonable and responsible accommodation of the interests of the parties to those transactions.

Another impact on the parties to a reportable transaction results from the extension of the waiting period when second requests are issued.[24] Extension of the waiting period may or may not create inconvenience or hardship to the parties, depending upon whether consummation of the transaction is delayed, and if so, the consequences resulting from that delay. The purpose of the delay is to permit the enforcement agencies to conduct a more thorough investigation and to decide whether to challenge the transaction prior to consummation. Thus some delay is necessary to carry out the purposes of the Act.

This delay, however, may be mitigated. The parties can

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24 When a second request is issued to the acquiring person in a cash tender offer, the 15-day waiting period is extended until 10 days after the response to the second request has been received. When a second request is issued to the acquiring person in a non-cash tender offer, the 30-day waiting period is extended until 20 days following receipt of the response. A second request issued to the acquired person in either type of tender offer has no effect on the waiting period, regardless of how long it takes for the recipient to compile its response, although the rules require that the response be provided within a reasonable time. A second request issued to either or both parties in a non-tender offer transaction extends the 30-day waiting period until 20 days after all recipients have responded.

request early termination, which would normally be granted if a good business reason is provided to support the request and if, after receiving the second request responses, the investigating agency determines not to challenge the transaction. In many cases the parties, by filing their initial notifications earlier or by scheduling the consummation of the transaction for a date later than immediately following the originally anticipated expiration of the waiting period, can minimize the possibility that delay may adversely affect them.

There have been a number of situations during the past year in which recipients of second requests, for whatever reason, have simply not responded promptly. In a few cases, the parties have provided no response for a number of months. On the other hand, a review of all cases in which second requests have been issued reveals that the time necessary for receipt of all responses which affected the length of the waiting period was less than 20 days about as often as it was longer than 20 days. Thus experience to date does not appear to suggest that second requests are inappropriately lengthy or complex, or that waiting period extensions have been unduly long or damaging to the parties to transactions under investigation.

While conclusions based on only one year's experience must of necessity be somewhat tentative, the agencies have attempted to exercise the powers conferred on them by the Act in a responsible manner, while at the same time seeking to carry out the Congressional mandate to subject all significant acquisitions to careful antitrust scrutiny. Interference with mergers and acquisitions that do not raise significant antitrust issues appears to have been minimized, while transactions questionable under the antitrust laws have been investigated and prosecuted more effectively under the Act.

Recommendation for a possible revision of the Act

The agencies do not believe that any major revisions of the Act are needed at this time. There is one area, however, in which a relatively minor change might be appropriate. Section 7A(h) provides that any information filed with the agencies under the Act is confidential and may not be made public "except as may be relevant to any administrative or judicial action or proceeding." The agencies have taken the position, in response both to informal requests and to requests under the Freedom of Information Act, that the fact of filing is itself part of the information protected from disclosure under § 7A(h). The agencies do not disclose the fact that parties to a transaction have filed notification under the Act because this may reveal information filed with the agencies under the Act, such as the sizes of the parties, the size of the transaction, the likely consummation date, and other information the Act intended to keep confidential. However, section 7A(b)(2), which authorizes the agencies to grant early termination of the waiting period, requires that notice be published in the Federal Register when

early termination is granted. Section 7A(b)(2), therefore, appears to be in conflict with § 7A(h).

This problem was pointed out in the comments received when the implementing rules were under consideration. See 43 Fed. Reg. 33514 (July 31, 1978). The Commission at that time interpreted the mandatory publication requirement in § 7A(b)(2) to be "a necessary exception to section 7A(h)" even though it had the effect of revealing the fact of filing.

The agencies believe, however, that parties to a reportable transaction should not have to choose between keeping confidential the fact that their transaction has been reported under the premerger notification program and requesting early termination of the waiting period. In no other respect is confidential information received under the program required to be made available to the public. The Commission and the Assistant Attorney General thus recommend that § 7A(b)(2) be amended by deleting that portion of the subsection which follows the word "section," as indicated below:

> The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section~~, and shall cause to be published in the Federal Register notice that neither intends to take any action within such period with respect to such acquisition.~~

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

By direction of the Commission.

Carol M. Thomas
Secretary