FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF
THE CHAIRMAN

7/26/83

JUL 26 1983

The Honorable George Bush
President of the Senate
United States Senate
Washington, D.C. 20510

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

SUBJECT: Sixth 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 the need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the sixth annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons with sales or assets greater than a specified amount who intend to make a stock or asset acquisition of a specified size or larger must report their intentions to the Federal Trade Commission and the Department of Justice. Thereafter, the parties must wait a prescribed period of time, usually 30 days, before consummating the transaction. The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with a meaningful opportunity to review mergers and acquisitions of substantial size before those transactions take place. If either agency believes that a proposed transaction may violate the antitrust

laws, Section 7A(f) of the Act allows the agency to seek an injunction in federal district court to prohibit consummation of the transaction. The ability of the antitrust agencies to make such a determination is enhanced by the provisions of Section 7A(e) of the Act, which authorize either of the agencies to issue a request for additional information or documentary material to either or both parties to a reported transaction. Such a request must be issued during the initial waiting period and, in most cases, has the effect of extending the period until 20 days after the requesting agency receives all the requested information or material.

Final rules governing implementation of the premerger notification program were promulgated by the Commission, with the concurrence of the Assistant Attorney General, on July 31, 1978. 1/ At the same time, a comprehensive Statement of Basis and Purpose was published which contains a section-by-section analysis of each provision of the rules and an item-by-item analysis of each item of the Premerger Notification and Report Form. The program became effective on September 5, 1978.

Statistical Profile of the Premerger Notification Program

Attached to this report are two tables which provide a statistical profile of the premerger program based on slightly more than four years of operation. Appendix A provides a statistical compilation for each of the five years in which the program has been in operation (September 5, 1978, through December 31, 1982) in five categories: number of transactions reported, number of filings received, number of requests for additional information or documentary material (hereinafter referred to as "second requests"), and number of requests for early termination received, granted, and denied. Appendix B provides a month-by-month comparison of the number of filings received and the number of transactions reported for 1980 through 1982.

The statistics set out in these appendices illustrate that the number of transactions reported continues to increase. Appendix A shows that the number of transactions reported in 1982 increased 5.6% from the number reported in 1981 (1083 in 1981 to 1144 in 1982). Despite this increase, the statistics indicate a significant decrease in the number of second requests issued in 1982; 49 second requests were issued in 1982 while 81 were issued in 1981. This decrease is part of a long-term decline in the

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1/ 43 Fed. Reg. 33450 (July 31, 1978). The rules also appear in 16 C.F.R. Parts 801 through 803. For more background information concerning the development of the rules and operating procedures under the premerger notification program, see the second and third annual reports covering the years 1978 and 1979, respectively.

umber of second requests issued as a percentage of reportable ransactions (12.6% in 1979, 9.0% in 1980, 7.5% in 1981, and 4.3% in 1982). As indicated below, this downward trend may reflect a beneficial deterrent impact of the premerger notification program. Because the program enables the enforcement agencies to detect and challenge virtually all sizeable anticompetitive acquisitions, businesses may be increasingly avoiding transactions that approach the line of illegality.

The statistics also show that the number of transactions involving requests for early termination continues to increase. In 1982, early termination was requested in 254 transactions (174 transactions in 1981). This represents, as a percentage of reportable transactions, a request rate of 22.2%, an increase from the 1981 rate of 16.1%. The agencies granted early termination in 243 transactions in 1982. This is a significant increase in the percentage of requests granted (82.2% in 1981 to 95.7% in 1982). As noted below, the increases in requests for and grants of early termination reflected in these statistics are probably attributable to the recent change in the agencies' standard for granting early termination.

Recent Developments Relating to Premerger Notification Rules and Procedures

1. Paperwork Burden

On July 2, 1982, the Commission published in the Federal Register a Notice of Request for Comments 2/ regarding how to reduce the paperwork burden imposed on companies required to comply with the Act. The Notice presented, through eleven statistical tables, a profile of Hart-Scott-Rodino premerger notification filings and enforcement interest in 1981. The Notice also set out four approaches to reducing burden about which comments were specifically requested. The first proposal considered raising the size of person or size of transaction dollar reporting thresholds. The second asked whether separate size of person or size of transaction thresholds should be established for different industries taking into account the nature of the markets affected. The third considered eliminating the requirement that parties file an additional notification when they increase their holdings of voting securities from 15% to 25%, and the last suggestion proposed allowing parties to incorporate by reference information and documents submitted with previous filings.

2/ 47 Fed. Reg. 29182 (1982), Exhibit A.

Seven comments were received in response to the July 2, 1982 Federal Register Notice. 3/ The Commission has reviewed these comments and is in the process of drafting proposed rules which would reduce paperwork burden. The rules are being drafted pursuant to the rulemaking authority set out in Section 7(A)(d)(2)(B) of the Act. That subsection permits the agencies to exempt from the notification requirements classes of persons or transactions which are not likely to violate the antitrust laws.

2. Formal Interpretations

On August 20, 1982, the Commission, with the concurrence of the Assistant Attorney General of the Antitrust Division, issued a formal interpretation under § 803.30(c) of the rules. 4/ The formal interpretation, concerning criteria for granting early termination under the rules, superseded a formal interpretation issued on April 10, 1979, which required that at least one of the parties involved in a reportable transaction demonstrate a special business reason that warranted early termination of the waiting period. 5/ After several years of experience with the former interpretation, the agencies determined that requests for early termination could be granted in the absence of a showing of special business justification without diminishing the effectiveness of the premerger program. Once the agencies have determined that an acquisition does not require immediate antitrust enforcement action, they no longer have an interest in or desire to delay the transaction. In addition, experience indicated that the agencies are not equipped to evaluate the relative merits of the special business reasons given by the parties in their requests for early termination. Accordingly, the new standard, as set forth in the August 20, 1982 formal interpretation, no longer requires parties to set forth the reason for their request. The new formal interpretation states that the agencies normally will grant a request for early termination if the parties to the transaction have submitted all the information required and the agencies have determined not to take any enforcement action during the waiting period.

3/ One of the seven comments included ten responses to a questionnaire about the premerger notification program which an attorney with a major corporation took upon himself to send to several corporations and law firms.

4/ The formal interpretation is attached as Exhibit B.

5/ Section 7A(b)(2) of the Act and § 803.11 of the premerger rules set forth a mechanism whereby the FTC with the concurrence of the Assistant Attorney General may terminate the waiting period required by the Act.

This change in policy may account for some of the gnificant increase over previous years in the number of equests for early termination received and granted during 1982. The effect of the new interpretation is evidenced in the following table comparing the number of requests for early termination of the waiting period received between September and December of 1981 with the number of requests received during the same time period in 1982:

	1981 6/	1982
September	5	32
October	16	42
November	27	49
December	35	63

All requests for early termination of the waiting period received between September 1, 1982, and December 30, 1982, have been granted. 7/

3. Litigation

In March 1982, a civil action was filed in federal district court against the Commission in a controversy involving the administration of the premerger program. The case arose out of a rather unique factual situation in which General Cinema Corporation and Heublein, Inc., were attempting to purchase each other's voting securities. General Cinema filed to acquire 49.9% of the stock of Heublein on February 4, 1982. The applicable waiting period was to expire on March 6, 1982. Heublein filed to acquire 49.9% of the stock of General Cinema on March 3, 1982. Heublein's waiting period was to expire April 2, 1982. In a letter accompanying its filing, Heublein requested that its waiting period be terminated as soon as possible but no later than the date that General Cinema's waiting period to acquire Heublein's stock expired. The Commission denied Heublein's request because Heublein offered no adequate business reason why it needed early termination.

6/ Requests granted: 5 in September; 13 in October; 21 in November; and 16 in December.

7/ Three transactions had early termination requests pending as of December 30, 1982.

On March 15, 1982, Heublein filed suit against the Commission in the United States District Court for the District of Connecticut. The same day, the judge entered an order requiring the Commission to "cease to prevent Heublein, Inc. from immediately acquiring up to 49.9% of the common stock of General Cinema."8/ The court held that there was no rational basis for the Commission to require a "special business reason" from companies requesting early termination and that if a company presented a lawful business reason for its request, it was beyond the Commission's authority not to grant early termination if it has determined that the acquisition would not lessen competition. 9/

The Commission did not appeal the decision, and subsequently issued the revised formal interpretation on the standards for early termination discussed above.

4. Compliance

Prior reports to Congress have noted that the premerger program has "been characterized by a high degree of cooperation between the enforcement agencies and those subject to the Act." 10/ The two agencies frequently assist parties in determining whether transactions are subject to the notification requirements of the Act and advise them on how to prepare the notification form. 11/

Compliance with the Act's filing requirements is believed to be very good. This is evidenced by the fact that the agencies have not brought any actions under Section 7A(g)(1) of the Act to recover civil penalties for non-compliance. This is not to say that the agencies have not observed transactions which they believed may be in violation of the Act. When such transactions come to the agencies' attention, letters are sent to the parties to the transaction requesting an explanation of why the notification requirements have not been met.

8/ Heublein, Inc. v. Federal Trade Commission, Cv. H-82-284 (D. Conn. filed March 15, 1982), preliminary injunction dated March 15, 1982.

9/ Heublein, Inc. v. Federal Trade Commission, 539 F.Supp. 123 (D. Conn. 1982), Exhibit C.

10/ Fifth Annual Report to Congress, page 8.

11/ FTC's Premerger Notification Office which administers the program receives approximately 50 such inquiries daily.

In one such transaction this year, the Bureau of Competition ("Bureau") of the Federal Trade Commission concluded that the acquisition was reportable but decided, in the exercise of its prosecutorial discretion, not to recommend that the Commission refer the matter to the Department of Justice for a possible civil penalty action. The matter involved an acquisition by an "institutional investor," O'Connor & Associates ("Associates"), of voting securities of The Trane Company. 12/ Associates did not file because it believed the transaction was exempt from the filing requirements under Section 7A(c)(9) of the Act because the acquisition was being made "solely for purposes of investment." 13/ The Bureau concluded, however, that the transaction was not exempt because it was not made solely as a passive investment.

The Bureau decided not to recommend that a civil action for penalties be sought because Associates had made the acquisition in a good faith belief that it was not in violation of the Act. Moreover, when notified of the violation, Associates agreed to comply with the notification requirements and to cease purchasing additional voting securities of Trane until the expiration of any applicable Hart-Scott-Rodino waiting period. 14/

12/ The term "institutional investor" is used in § 802.64 of the premerger rules. Associates fell within the exemption set forth in § 802.64 and as such was entitled to make certain purchases of Trane stock without filing a premerger form so long as the purchases were made "solely for the purpose of investment" as that term is used in the Act and the premerger rules.

13/ As used in § 802.64 and as defined in § 801.1 of the premerger rules.

14/ See the letter from Thomas J. Campbell, Director, Bureau of Competition, FTC, to Michael N. Sohn, Esq., Arnold & Porter (August 19, 1982), Exhibit D. Associates' counsel agreed to permit the Commission to make this letter public. The letter was made public by The Trane Company when it attached the letter to a Schedule 13D it filed with the Securities and Exchange Commission on August 20, 1982.

Another possible compliance problem arose in an unrelated case at the end of 1982 and has not yet been resolved.

Merger Enforcement Activity During 1982 15/

The Antitrust Division sought one preliminary injunction in a merger case in 1982. The action challenged the acquisition of Means Services, Inc. by ARA Services, Inc. 16/ Before the court ruled on the motion for a preliminary injunction, the case was settled, as ARA agreed to divest the textile rental operations of Means in Akron and Columbus, Ohio, and Huntington, West Virginia.

The Division filed eight complaints in merger cases. 17/ Four cases, United States v. Archer-Daniels-Midland Companies, United States v. Newell Companies, Inc., United States v. Tribune Company, and United States v. G. Heileman Brewing Company, are still pending. United States v. Baldwin-United Corporation was settled when Baldwin agreed to divest itself of AMIC, a subsidiary whose mortgage guaranty insurance operation competed with MGIC Investment Corporation, the acquired company. United States v. American Brands, Inc. was settled when American Brands agreed to divest itself of the Ace Fastener Company Division of Swingline Company. United States v. The Stroh Brewing Company was settled when Stroh agreed to divest either the Winston-Salem or Memphis plant it acquired in the merger with Jos. Schlitz Brewing Company. Finally, in United States v. Virginia National Bankshares, Inc., after a trial on the merits, United States District Court Judge Glen Williams allowed the parties to merge.

15/ The Sixth Annual Report covers the period from January 1, 1982, through December 31, 1982.

16/ United States v. ARA Services, Cv. C-2-82-436 (S.D. Ohio filed April 26, 1982).

17/ United States v. Archer-Daniels-Midland Companies, Cv. 83-51-D (S.D. Iowa filed December 14, 1982); United States v. G. Heileman Brewing Company, Cv. No. 82-750 (D.Del. filed November 22, 1982); United States v. American Brands, Inc., Cv. 82-CIV- 5020 (S.D.N.Y. filed August 2, 1982); United States v. Newell Companies, Inc., Cv. N-82-305 (D. Conn. filed June 14, 1982); United States v. Tribune Company, Cv. No. 82-260-ORL-CIVR (M.D. Fla. filed May 26, 1982); United States v. The Stroh Brewery Company, Cv. 82-1095 (D.D.C. filed April 16, 1982; consent decree entered November 10, 1982); United States v. Baldwin-United Corporation, Cv. C-1-82-179 (S.D. Ohio filed February 22, 1982; consent decree entered on May 21, 1982); and United States v. Virginia National Bankshares, Inc., Cv. No. 82-0083 (W.D. Va. filed February 26, 1982).

In addition, on five occasions, the Antitrust Division informed parties to proposed transactions that it would file an antitrust suit challenging the transaction unless the parties restructured the proposal to avoid competitive problems. 18/ In each case, the parties either restructured the transaction to eliminate areas of competitive overlap or did not consummate, eliminating any need for legal action by the Antitrust Division.

Of the 23 investigations which involved the issuance of second requests, one transaction was abandoned by the parties after the Division issued the request for additional information.

Finally, the Division entered into consent decrees in three merger cases in which complaints had been filed prior to January 1, 1982. 19/

The Commission sought one preliminary injunction during calendar year 1982. The action was brought in an attempt to block the $5.13 billion acquisition of Cities Service Company by the Gulf Oil Corporation. 20/ After the Commission obtained a temporary restraining order from the court, the acquisition was abandoned before an administrative complaint was formally issued.

18/ Department of Justice Press Release of September 10, 1982, involving the capital stock acquisition by Early California Industry, Inc., of Pacific International Rice Mills, Inc.; Department of Justice Press Release of August 6, 1982, involving the capital stock acquisition by National Medical Enterprises, Inc., of National Health Enterprises, Inc.; Department of Justice Press Release of June 21, 1982, involving American Sugar Division of Amstar Corporation's proposed purchase of the "Jack Frost" trademark of the National Sugar Refining Company; Department of Justice Press Release of April 19, 1982, involving the capital stock acquisition by Beverly Enterprise, Inc., of Mediplex; and Department of Justice Press Release of March 15, 1982, involving the capital stock acquisition by Anacomp, Inc., of D.S.I.

19/ United States v. Acorn Engineering Company, Cv. 80-3388 TEH (N.D. Cal. filed August 19, 1980; consent decree entered March 30, 1982); United States v. Hospital Affiliates International, Inc., Cv. 80-3672 (E.D. La. filed September 25, 1980; consent decreed entered April 1, 1982); and United States v. Beatrice Foods Co., Cv. 3-80-596 (D. Minn. filed October 28, 1980; consent decree entered April 19, 1982).

20/ FTC v. Gulf Oil Corporation, Civil Action No. 82-2131 (D.D.C. filed July 29, 1982).

The Commission issued two administrative complaints during 1982. The first complaint was issued against B. F. Goodrich 21/ challenging its acquisition of Diamond Shamrock Plastics Corporation; the second complaint challenged the 1981 acquisition by Hospital Corporation of America of Hospital Affiliates International Inc. and Health Care Corporation, two hospital chains located in Tennessee. 22/ Both cases are still pending before Administrative Law Judges.

In addition, consent agreements 23/ and final orders 24/ were issued by the Commission in five other cases.

In 1 of the 26 cases involving the issuance of second requests, the parties abandoned the transaction after the Commission issued requests for additional information.

Assessment of the Effects of the Premerger Notification Program

The impact of the premerger notification program on the enforcement agencies and on the business community can be assessed, in part, by the statistics of the number of transactions, second requests, consents and litigated cases. It should be noted that the utility of the Act cannot be judged solely on the number of injunctions obtained by the agencies under its provisions. In order to evaluate fully the statistics and the Act's impact on the antitrust enforcement process, some additional observations are appropriate.

21/ B. F. Goodrich, Docket 9159 (issued January 5, 1982).

22/ Hospital Corporation of America, Docket 9161 (issued August 2, 1982).

23/ FTC consent agreements accepted in 1982 include: Batus, Inc. (accepted July 16, 1982); ConAgra, Inc. (accepted July 19, 1982); and Canada Cement Lafarge Ltd. (accepted August 23, 1982).

24/ FTC final orders issued in 1982 include: Gifford-Hill-American, Inc., Docket C-3085 (issued February 23, 1982); and General Electric Co., Docket C-3088 (issued May 5, 1982). It should be noted that the cases mentioned in this report, although a matter of public record, were not necessarily reportable under the premerger notification program. Because of the Act's provisions regarding the confidentiality of the information obtained pursuant to the program, it would be inappropriate to identify which cases were initiated under the premerger notification program.

First, as indicated in previous reports, one of the Act's imary objectives, eliminating the so-called "midnight merger," has been achieved. The requirements imposed on persons to file notification and observe a waiting period prior to consummation largely eliminated this phenomenon. The Commission is confident that the Act's notification requirements assure that virtually all significant mergers or acquisitions occurring in the United States will be reviewed by the antitrust agencies prior to the consummation of the transaction. This provides the agencies with the opportunity to challenge unlawful transactions prior to consummation, thus avoiding the problem of constructing effective post-acquisition relief.

Second, the information provided by the Notification and Report Form and by the parties' responses to any second requests, usually is sufficient for the enforcement agencies to make a prompt determination of the existence of any antitrust problems raised by a transaction. In addition, this year, as in previous years, parties often have supplied information voluntarily to the Commission and the Antitrust Division. This has resulted in second requests which are focused and limited only to that information necessary to the inquiry.

Third, the existence of the premerger notification program also has made private industry more aware of the antitrust considerations raised by proposed transactions. The Commission believes that the certainty of detection of antitrust violations by the enforcement agencies resulting from the premerger notification program has deterred some firms from entering into merger agreements which might violate the antitrust laws. Some support for this belief can be found in the second requests statistics previously discussed. The continuing long-term decline in the number of second requests issued by the agencies (as a percentage of reportable transactions) may indicate that, due to the virtual certainty of detection, businesses are avoiding transactions of questionable legality. In addition, the premerger program, in conjunction with the Merger Guidelines and the Statement of Federal Trade Commission Concerning Horizontal Mergers, has facilitated business planning since it provides business decision-makers with some certainty as to the type of transaction which is unlikely to be challenged by the enforcement agencies.

Finally, the statistics show that, in the past year, the agencies have granted requests for early termination more readily and with greater frequency than in the early days of the premerger notification program. The impact of the new formal interpretation concerning early termination of the waiting period appears to be positive. It has worked well for the agencies and has been received favorably by the business community.

The Assistant Attorney General of the Antitrust Division has indicated his concurrence with this annual report.

By direction of the Commission.

James C. Miller III
Chairman

cc: The Honorable Strom Thurmond
President Pro Tempore
United States Senate
Washington, D.C. 20510

List of Appendices

Appendix A -- Summary of Transactions, 1978 - 1982.

Appendix B -- Number of Filings Received and Transactions Reported by Month for the Years 1980 - 1982.

List of Attachments

Exhibit A -- Copy of the Request for Comment Regarding Paperwork Burden published July 2, 1982, in the Federal Register.

Exhibit B -- Formal Interpretation issued August 20, 1982, concerning early termination standards.

Exhibit C -- Heublein, Inc. v. Federal Trade Commission, 539 F. Supp. 123 (D. Conn. 1982).

Exhibit D -- Letter from Thomas J. Campbell, Director, Bureau of Competition, to Michael Sohn, August 19, 1982.

Appendix A

Summary of Transactions, 1978-1982

	1978 (Sept.-Dec.)	1979 (Jan.-Dec.)	1980 (Jan.-Dec.)	1981 (Jan.-Dec.)	1982 (Jan.-Dec.)	Total
ctions Reported	355	868	824	1083	1144	4274
s Received 1/	627	1818	1462	1900	1954	7761
ctions where tional rmation was ested	36	109	74	81	49	349
TC	23	58	36	48 2/	26 3/	191
OJ	13	51	38	33 2/	23 4/	158
of Transactions lving a Request Early Termination	31	115	104	174	254	678
ranted	16	62	89	143	243 5/	553
ied	15	53	15	31	8	122

1/ More than one filing may be received for a single transaction where there are multiple parties or where the transaction is completed through several steps.

2/ Each agency withdrew requests for additional information in one transaction.

3/ One transaction was withdrawn after the issuance of second requests; one transaction was withdrawn after the Commission obtained a temporary restraining order from the court.

4/ One transaction was withdrawn after the issuance of second requests.

5/ Three transactions had early termination requests pending as of 12/30/82.

Appendix B

Number of Filings Received 1/ and Transactions Reported by Month for the Years 1980 - 1982.

	1980		1981		1982	
	Filings	Transactions	Filings	Transactions	Filings	Transactions
ary	105	56	134	73	144	92
uary	113	64	108	60	104	67
h	103	58	145	75	181	105
l	108	60	111	64	152	95
	94	55	163	92	169	105
	110	64	161	87	213	131
	104	60	183	107	178	102
st	143	82	162	92	144	91
mber	129	68	184	89	122	71
ber	159	91	249	116	199	89
mber	142	78	200	117	181	100
mber	152	88	200	111	167	96
al	1462	824	2000	1083	1954	1144

1/ More than one filing may be received for a single transaction where there are multiple parties or where the transaction is completed through several steps.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK
CONCERNING SIXTH ANNUAL REPORT TO CONGRESS REGARDING
PREMERGER NOTIFICATION PROGRAM

JUNE 14, 1983

I cannot agree with the Commission's rosy view that the marked decline in second requests as a percentage of reported transactions means businesses are "increasingly avoiding transactions that approach the line of legality." (see p. 3) Given that the Commission's enforcement levels are at the lowest in years and that premerger filings are at an all time high (see App. A), it seems more likely that businesses are increasingly willingly to risk transactions that would have been viewed as likely to result in antitrust challenge a few years ago.