KELLEY DRYE

Premerger Antitrust Requirements

The 2010 Hart-Scott-Rodino Premerger Notification Sourcebook

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KELLEY DRYE

Introduction

Kelley Drye leads routine and contentious transactions through a challenging framework of antitrust, competition, and consumer protection laws in the U.S. and in jurisdictions around the world. Our firm is international in scope and presence, with an office in Brussels, Belgium and an affiliate office in Mumbai, India, as well as our worldwide network of antitrust contacts that has proven to be essential for expediting an often arduous merger and acquisition process.

We advise clients on the structure of transactions, timing, potential premerger issues, and file premerger notifications where required, including Hart-Scott-Rodino ("HSR") filings required at the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") for certain acquisitions of assets or securities. We also advise clients whose business may be impacted by a consolidating industry, proposed merger, acquisition or other combination.

Premerger HSR filing notifications are complex and subject to rule changes promulgated by the FTC. This reference guide, updated annually, provides the fundamentals needed to understand the HSR filing and merger review process. To help clients stay abreast of developments that may impact their business or next deal, this guide also provides a summary of important and recent examples of transactions challenged by antitrust authorities.

We would be happy to answer any questions you may have about this process. For additional information, please contact:

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RECENT HEADLINES AND IMPORTANT DEVELOPMENTS

2009 MERGER ENFORCEMENT ROUNDUP

The following is a roundup of 2009 Department of Justice ("DOJ" or "Department") and Federal Trade Commission ("FTC" or "Commission") merger enforcement efforts. Kelley Drye attorneys carefully monitor agency activity for indicators of how a potential transaction might be received by enforcement officials, and how it may be advantageous for potential or existing competitors to participate in an agency proceeding.

Parties to transactions, and entities whose business may be impacted, have opportunities to shape the competitive landscape of their industry. Certain entities are in a position to defend a proposed transaction. Others participate as third parties identifying possible anti-competitive actions, and potentially gain or protect a competitive interest by, for example, purchasing an asset, product line, supply agreement, or intellectual property right being divested as a result of federal agency action. Kelley Drye represents clients in each context.

Agrium / CF Industries; CF / Terra: In the context of competing hostile takeover efforts in the fertilizer industry, dubbed the "Fertilizer Wars," Agrium received conditional approval from the FTC to proceed with its proposed hostile takeover of CF Industries. Under the terms of the proposed consent order, Agrium agreed to divest a range of assets to obtain clearance and settle charges that the acquisition would eliminate competition in the market for anhydrous ammonia fertilizer. The FTC alleged the combination would reduce the number of competitors from three to two, in one geographic market, and two to one, in two geographic markets. The FTC coordinated with Canadian competition authorities, which required a divestiture in the production market.

AT&T Inc. / Centennial Communications Corp. (consummated transaction): DOJ required AT&T to divest assets in eight areas in Louisiana and Mississippi in order to proceed with its $944 million acquisition of Centennial Communications. According to the complaint, AT&T and Centennial were each other's closest competitor for a significant set of customers in eight Cellular Marketing Areas (CMAs), as defined by the Federal Communications Commission.

Daily Gazette Comp. / MediaNews Group Inc. (now known as Affiliated Media Inc.): The Department settled charges to resolve its nearly three year old litigation alleging that an agreement between the owners of the two daily newspapers in Charleston, West Virginia violated both Sherman Act Section 1 and Clayton Act Section 7 by consolidating ownership and control of the two papers and eliminating competition between them, leaving Charleston with a single daily newspaper, the Charleston Gazette. The settlement requires the companies to restructure their 2004 transaction to address the department's competitive concerns. Upon settling and restructuring their arrangement, the prior owner of the Daily Mail will regain independent control over the operations of the paper and economic incentives to grow it. Additionally, the settlement requires the companies to offer substantial discounts of the Charleston Daily Mail in order to rebuild its subscriber base and prohibits the Daily Gazette from discriminating against the Daily Mail in circulation, advertising sales, and other key joint activities. The settlement also requires the companies to continue publishing the Daily Mail as long as it has not failed financially.

Dean Foods Comp. / Foremost Farms USA: DOJ, along with three state attorneys general, filed a complaint against Dean Foods challenging its April 2009 acquisition of Foremost Farms USA's Consumer Products Division. The Department seeks to require Dean Foods to sell the dairy processing plants it acquired from Foremost Farms. According to DOJ, the merger eliminates substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores and other retailers in Illinois, Michigan and Wisconsin. The April 2009 transaction between Dean Foods and Foremost Farms was not required to be reported under the HSR Act because the purchase price of the transaction was less than the minimum reporting threshold.

John C. Malone / Discovery Holding Company (failure to file): Malone agreed to pay a $1.4 million civil penalty to settle FTC charges that he violated the HSR Act, in connection with acquisitions of shares in 2005 and 2008. The FTC alleged that Malone failed to file the required HSR notification in 2005 after buying Discovery voting securities, and then in 2008 purchased additional Discovery shares of stock before the expiration of a waiting period required by the HSR Act. This is the first HSR Act enforcement action in which a party claimed its failure to file was based on its reliance on advice contained in an informal interpretation by the FTC's Premerger Notification Office (PNO) staff. According to the FTC Complaint, Malone's counsel relied on a 2001 PNO informal interpretation of the HSR Act and rules in concluding that a particular 2005 acquisition did not require filing a report under the HSR Act. Counsel was apparently not aware that the particular informal interpretation relied upon had been disavowed by the PNO six months earlier in another informal interpretation also published on the FTC's website.

Memorial Health Inc. / St. Joseph's/Candler Health System (joint purchasing agreement): DOJ approved a proposal by Memorial Health Inc. and St. Joseph's/Candler Health System to enter an exclusive joint purchasing agreement to purchase certain medical and surgical supplies. Under the agreement, Memorial and St. Joseph's/Candler will jointly evaluate medical and surgical products, designate suppliers and negotiate prices and other terms with them. The Department said that the proposed joint purchasing agreement may yield volume discounts and reduced transaction costs for the hospitals and ultimately could result in lower costs and increased hospital services for consumers. The proposal met the requirements of a specific DOJ and FTC antitrust safe harbor, according to DOJ. The Department's action came under the Department's business review procedure, in which an organization may submit a proposed action to the Antitrust Division and receive a statement as to whether the Division currently intends to challenge the action under the antitrust laws.

Microsoft Corporation and Yahoo! Inc.: DOJ announced the closing of its investigation into the proposed Internet search and paid search advertising agreement between Microsoft Corporation and Yahoo! Inc. After an extensive investigation, DOJ decided that the proposed transaction is not likely to substantially lessen competition or harm the users of Internet search, paid search advertisers, Internet publishers, or distributors of search and paid search advertising technology. In fact, DOJ reported that the proposed agreement would likely enable more rapid improvements in the performance of Microsoft's search and paid search advertising technology than would occur if Microsoft and Yahoo! were to remain separate. Many U.S. market participants commented that combining the parties' technology would likely increase competition by creating a more viable competitive alternative to Google, the firm that now dominates these markets and is the continuing focus of antitrust authorities.

PepsiCo, Inc. / Pepsi Bottling Group and PepsiAmericas, Inc.: The FTC settled charges and approved PepsiCo's $7.8 billion acquisition of two of its largest bottlers and distributors. Under the settlement, PepsiCo will set up a "firewall" to ensure that its ownership of the bottling companies does not give certain PepsiCo employees access to commercially sensitive confidential Dr Pepper Snapple marketing and brand plans. Dr Pepper Snapple provides commercially sensitive information about its marketing plans to Pepsi Bottling Group and PepsiAmericas to help them bottle and distribute its beverages, the FTC's complaint states. In a related deal, PepsiCo agreed to continue bottling and distributing three Dr Pepper Snapple carbonated soft drink brands, Dr Pepper, Crush, and Schweppes, in the territories of the two bottlers.

Polypore International Inc. / Microporous L.P. (consummated acquisition): An FTC administrative court found that Polypore International Inc.'s consummated acquisition – through its Daramic Acquisition Corp. subsidiary – of rival battery separator manufacturer Microporous L.P. constituted an illegal combination in four battery separator markets in North America, and ordered Polypore to divest Microporous to an FTC-approved buyer within six months. The administrative law judge also ruled that a joint marketing agreement between Polypore and a rival manufacturer illegally divided up markets, but dismissed a separate monopolization allegation. The Judge's Initial Decision is subject to review by the full Commission on its own motion, or at the request of any party.

Reliance Network Joint Venture: DOJ approved a proposal by seven regional less-than-truckload (LTL) freight transportation companies to bid jointly and engage in other collaborative activity as part of their nationwide LTL truck transportation services joint venture. The Department said that the proposed conduct is not likely to reduce competition in regional LTL truck transportation markets and could enhance competition in the long haul LTL market. The carriers represented that each serves a distinct geographic region in North America with insignificant overlap among their respective operations, in competitive markets, and that, collectively, the carriers would account for less than 20 percent of the LTL freight transportation business in these regional markets, and far less than 20 percent of a nationwide LTL freight transportation market. The Reliance Network carriers requested and received a business review letter from the Antitrust Division expressing its enforcement intentions with respect to a proposal to engage in collaborative activity, including collective rate-making for multi-regional shipments and territorial restrictions.

Smithfield Foods Inc. / Premium Standard Farms LLC: DOJ and Smithfield Foods and Premium Standard Farms settled charges that require the companies to pay a total of $900,000 in civil penalties for violating premerger waiting period requirements. According to the complaint, Premium Standard sought Smithfield's consent for all of the hog procurement contracts that arose during the waiting period, providing Smithfield with the contract terms, including price, quantity and duration. Requiring a buyer's approval of the seller's ordinary course contracts can prematurely transfer operational control, violating premerger notification requirements, the Department said. Such conduct, commonly known as "gun jumping" violates the HSR Act.

Ticketmaster / Live Nation: DOJ, along with 17 state attorneys general, settled charges allowing the merger of Ticketmaster Entertainment, Inc. and Live Nation, Inc. to proceed. After almost a one-year investigation, the merger between a dominant firm and its nearest competitive threat was allowed to proceed. DOJ negotiated a solution, applying a combination of licensing, divestiture and conduct restrictions in an effort to position two competitors to replace Live Nation's competitive

presence. DOJ addressed vertical foreclosure concerns with a set of conduct restrictions designed to preserve competition by "equally efficient rivals" – restrictions to prevent the firm from retaliating against competitors, as well as restrictions from taking advantage of information acquired in the course of running the integrated businesses. Many look to this merger as an early indicator of the new administration's antitrust enforcement policies.

2008 FTC *Horizontal Merger Investigation Data Report*: Specific factors can be identified in a deal to gauge whether the agencies are likely to look for either a horizontal or vertical issue to investigate. In addition to reported cases, there are a number of investigations that occur outside of the public domain. The updated FTC *Horizontal Merger Investigation Data Report, Fiscal Years 1996-2007* (Dec.1, 2008) is a good source of information, describing the FTC's enforcement record with respect to transactions occurring in fiscal years 1996-2007, including those that are not publicly reported. Although the Department of Justice does not release similar information, the two antitrust agencies have similar perspectives on when a transaction raises antitrust concerns. Highlights from the FTC's 2008 report include:

- *Market Concentration*: The more concentrated the market pre-merger and the greater the change in concentration, the more likely there was to be a challenge by the agencies.

- *Number of Post-Merger Competitors*: The number of significant competitors remaining post-merger is also a meaningful predictor of enforcement activity. In markets where *five or more* competitors remained, there was good chance that the deal would survive without a challenge. But where the number of competitors was *four or fewer*, there is a much higher chance of being challenged. Nearly all transactions where only one competitor remained and the vast majority of transactions where two competitors remained were challenged.

- *"Hot Documents"*: Where "hot documents" – documents written by one or more of the merging companies predicting anticompetitive effects – were identified, the transaction was almost always challenged; the absence of hot documents was less predictive. The antitrust agencies often find "hot documents" during HSR pre-merger notification, and such documents continue to be relevant should an antitrust agency proceed with an inquiry.

- *Customer Complaints*: Strong customer complaints lead almost inevitably to enforcement inquiries, regardless of the concentration level in the relevant markets.

- *Barriers to Entry*: High market entry barriers have been held to increase competitive concerns in highly and even moderately concentrated markets. In contrast, where entry is easy, the agencies will not likely bring a case regardless of the market share because the threat of entry should prevent market participant from raising prices for fear of losing customers to a new, low price entrant.

A PRACTICAL GUIDE
TO MERGER AND ACQUISITION ANTITRUST CLEARANCE

Overview

The Antitrust laws stand as a potential roadblock, if you will, to the successful completion of a strategic merger or acquisition. The focus of this chapter is how best to prepare for and receive U.S. Antitrust Agency clearance for acquisitions that are reportable under the Hart-Scott-Rodino Act.

Strategic acquisitions – those involving horizontal competitors, or upstream and downstream suppliers and customers – have drawn the interest and curiosity of antitrust enforcement agencies since the enactment of the first Anti-Monopoly Act, the Sherman Act, in 1890. In 1914, the Clayton Act was enacted, focusing particularly on antitrust issues raised by mergers and acquisitions.

The Sherman Act and the Clayton Act remain largely unchanged since their inception. The legal thinking and economics underlying modern antitrust analysis has evolved through interpretation by the courts; political administration changes affecting the focus and resources allocated to antitrust enforcement; the development and application of economic principles to industry consolidations; and the significance given to foreign competition and economic measurable efficiencies.

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act, which imposes premerger governmental filing obligations with filing fees and waiting periods for transactions that meet certain threshold requirements. Reportable filings go through a process of Agency review that includes an initial 30–day waiting period in most instances, followed perhaps by a request for additional information ("Second Request") and further investigation prior to the acquisition or merger deal getting approval from the agency to close. In addition, today over 50 countries have some form of merger filing requirement, many including waiting periods and filing fees, as does the HSR Act.

In 1982, the U.S. Department of Justice Merger Guidelines ("the Guidelines") were released. The Guidelines effectively have become the Antitrust Bible for merger analysis by the antitrust enforcement Agencies and are a tool for guiding the antitrust bar and business community through the assessment of antitrust risks. In 1997, the Guidelines were jointly revised by the FTC and the DOJ with regard to the treatment of efficiencies. In March of 2006, the Agencies jointly issued a Commentary on the Guidelines, concluding that the existing Guidelines' analytic framework does not need revision. Although the Guidelines have proven both robust and sufficiently flexible to permit the Agencies to assess the facts of each particular horizontal merger under investigation, the horizontal Guidelines are now being reconsidered and may be soon updated.

The Value of Prospective Planning

In the context of the premerger HSR filing requirements in the U.S., and now foreign jurisdiction filing requirements as well, the value of prospective antitrust planning cannot be over-emphasized. The deal may or may not trigger a filing, but without pre-planning you won't be prepared if a filing is required, and the Agency review process, whatever that ultimately may be, will be frustrating, and more time-consuming and costly than you dreamed. Moreover, failure of forethought can negatively affect the outcome of the Agency review process, as well as the expected timing of the proposed merger.

Antitrust preparation for a strategic acquisition ideally should begin upon contemplation of the potential transaction. It is not unusual for veterans of strategic mergers to prepare preliminary antitrust analyses a year or more in advance as they "scan the horizon" for complementary acquisitions. Not only is it important to assess potential transactions to determine whether they make business sense; deals must also be reviewed to see what issues may be raised in the antitrust arena. Early assessment of antitrust risks is critical to minimizing those risks and helping the transaction pass governmental antitrust scrutiny.

Common problems that upfront planning can help avoid or minimize are:

1. Failure to make a required premerger filing, with the possible attendant government prosecution and civil penalties;

2. Creation of documents that haunt you in the agency review process;

3. Delay in the closing of the transaction; and

4. Pre-closing information sharing that raises "gun-jumping" or other antitrust concerns.

What follows below is a brief detailing of the kinds of antitrust pre-planning that can help avoid or minimize these problems.

Premerger Filing Requirements

Engaging antitrust counsel, even at the stage of scanning the horizon, can be beneficial. Antitrust advice may be significant in selecting an acquisition target – will a particular deal raise antitrust flags? Will HSR filings be required? Are there specific competitive issues that the Agencies will be interested in that perhaps could be avoided? Will filings in foreign jurisdictions be required?

Once the decision is made to go forward with a particular merger, antitrust counsel can be helpful in identifying and analyzing any antitrust risks of the transaction, including the structure of the transaction. What might seem reasonable from a business perspective, for example, a series of follow-on acquisitions, may be problematic under the HSR Act. No company wants to find itself in the unhappy situation of not making a required HSR filing. The civil penalties for failure to file are up to $16,000 for each day that has passed since the filing should have been made. Obviously, this adds up

quickly. It is not uncommon for an HSR filing violation to result in penalties of $1 million or more. And, it is likely that a failure to file will eventually be brought to the Agencies' attention. While HSR filings bring to the Agencies most of their merger investigations, Agency staff keep apprised of industry happenings through reading the trade press, etc., and receive complaints from the public, including your competitors and customers.

The FTC and the DOJ have concurrent jurisdiction to enforce the antitrust laws. However, there are some historical dividing lines between the two Agencies, based on industries. While these lines are blurring, it may be possible to predict which Agency will conduct an antitrust investigation of a particular transaction, and this prediction may be important to anticipating outcome and timing.

The Timing of the Transaction

Once a potential acquisition or merger has been identified, the typical goal is to accomplish it quickly and efficiently. There may be business reasons for delay, but you certainly don't want to have an unexpected delay as a result of the antitrust Agency review process.

Antitrust counsel can assist in developing a reasonable expectation as to the timing of the completion of the Agency review and the closing of the transaction. Reportable transactions face the statutory 15 or 30 day initial waiting period, which can be terminated early if the Agency has no antitrust concerns. Counsel can help predict the likelihood of early termination of the waiting period or of an in-depth Agency review involving a Second Request, and can analyze possible Agency interest in divestitures of assets or other measures designed to solve any antitrust concerns the Agency may have. Counsel can help predict the length of time it will take to respond to Agency requests, and, if Agency opposition is expected, to engage in negotiations to resolve competitive issues outside of the courtroom.

In the initial waiting period it is fairly common for Agency staff to request submission, on a voluntary basis, of certain customer and competitor information and planning documents. Quick cooperative response to these requests may assist in avoiding a Second Request, or at least may help narrow the scope of any Second Request that issues. Again, antitrust counsel can help anticipate what the Agency will request, and can advise as to how best to respond.

Issuance of a Second Request extends the waiting period prior to closing until such time as the parties to the transaction "substantially comply" with the document and information requests contained in it. Once substantial compliance is made, the Agency has an additional 20 days within which to decide to permit the transaction to close, or to challenge it. Substantial compliance with a Second Request is time-consuming and costly. With proper antitrust planning, counsel can help structure an efficient document search and streamline substantial compliance with a Second Request. Knowledge of Agency staff and process as well as knowledge of Agency interest in particular industries and issues is helpful in this regard.

Depending on the severity of the antitrust issues that arise in analysis of the proposed transaction, and the mindset of the company regarding possible divestiture or other remedies, the timing of the closing can be positively affected by an early proposal to the Agency to "fix" the competitive problem. If an early fix is not palatable, later agreed to consent decree remedies can avoid a lawsuit. It is wise to

think through these possibilities early with antitrust counsel, and be prepared, so that your transaction may close within a reasonable timeframe.

Document Creation

From the time that a transaction is contemplated, it is likely that business executives, consultants, and others are writing documents analyzing the goals, advantages, disadvantages, costs, etc. of the deal. While these documents may be necessary for the decision making process, proper planning can help minimize, if not avoid, some of the potential antitrust harm from the creation of these documents.

It is particularly important in a strategic acquisition that will undergo Agency review that documents not be created that will give the Agency ammunition for opposing the deal, or at a minimum cause you and your company angst during the investigation process. The Agencies like documents. They are tangible evidence of the corporate mindset and often set the framework for the Agency's understanding of the transaction. And documents are among the first information the Agency obtains about the transaction. The HSR filing itself requires the attachment of what are called 4(c) documents – documents required by Item 4(c) of the filing form. The definition of 4(c) documents is: *studies, surveys, analyses, and reports prepared by or for officers or directors for the purpose of evaluating and analyzing the acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth or expansion into product or geographic markets.*

Obviously, 4(c) documents will of necessity be created by business executives, investment bankers, and other consultants in contemplation of a proposed transaction. Antitrust counsel can give the appropriate cautions as to types of statements, or words to avoid, if possible, as the documents are created. And, to the extent these cautions cannot be adhered to, or aren't, for whatever reason, antitrust pre-planning will help counsel's understanding of the reasons for the possibly harmful statements in such documents, and will help counsel understand the "story" that ultimately may have to be presented to the Agency. Additionally, since Item 4(c) requires only the final or latest draft of a document presented to officers or directors, antitrust counsel can review draft documents prior to their presentation to officers or directors and point out any antitrust problems, some of which may be solved by the next or final draft.

Document creation problems are not limited to 4(c) documents. During due diligence, as well as long before the transaction is contemplated, corporate documents are created that can haunt you during the Agency review process. A good antitrust compliance program, with a focus on the need to be watchful in document creation, is wise.

The Agency review process initially focuses on the filing itself, with its attached 4(c) documents. But, once an investigation is opened, the Agency may issue a formal request for additional information, referred to as a "Second Request." The Second Request is a broad-based subpoena type demand, which covers the waterfront of corporate documents. Substantial compliance with the Second Request is required in order for the Agency to complete its investigation and hopefully clear the transaction so that it may close. Documents created within the past several years prior to the issuance of the request are called for; thus, the need for caution in document creation as a general corporate practice.

It is important to note that documents in our high–tech world include emails, which can create nightmares for everyone involved in the Agency review process. The "think-before-you-ink" admonition applies equally to ink-less written communications!

Problematic Information Sharing

Information sharing between the parties to an unconsummated transaction, from the time of first discussions through due diligence and onward, can raise antitrust concerns at the Agency. Antitrust counseling on the kinds of information sharing that causes concern inside or outside the context of a proposed acquisition is, again, a good corporate practice as part of a compliance program. Sharing competitively sensitive information raises red flags at the Agencies.

Information sharing during the process of completing a transaction, but prior to closing, may result in an accusation by the Agency of "gun-jumping" – engaging in behavior that indicates that the acquiring company is taking operational control of the yet-to-be-acquired company. Again, penalties are severe, with the parties subject to a maximum civil penalty of $16,000 per day for each day they are in violation of the HSR Act's prohibitions in this regard.

Post-Consummation Filing

When persons discover that they have consummated a reportable acquisition without filing and waiting, they should immediately notify counsel, engage the FTC Premerger Notification Office, and subsequently file their HSR notification as soon as possible. In addition to submitting a completed form, the FTC will require the parties to provide detailed information, signed by a company official, explaining all of the facts relating to why the HSR Act procedures were not followed.

Parties that fail to follow appropriate HSR Act procedures may be liable for a civil penalty of up to $16,000 for each day of each violation and may be subject to other equitable relief. In determining whether and how much civil penalties are warranted, the FTC and DOJ will consider all of the facts, including among other factors, the parties' explanations.

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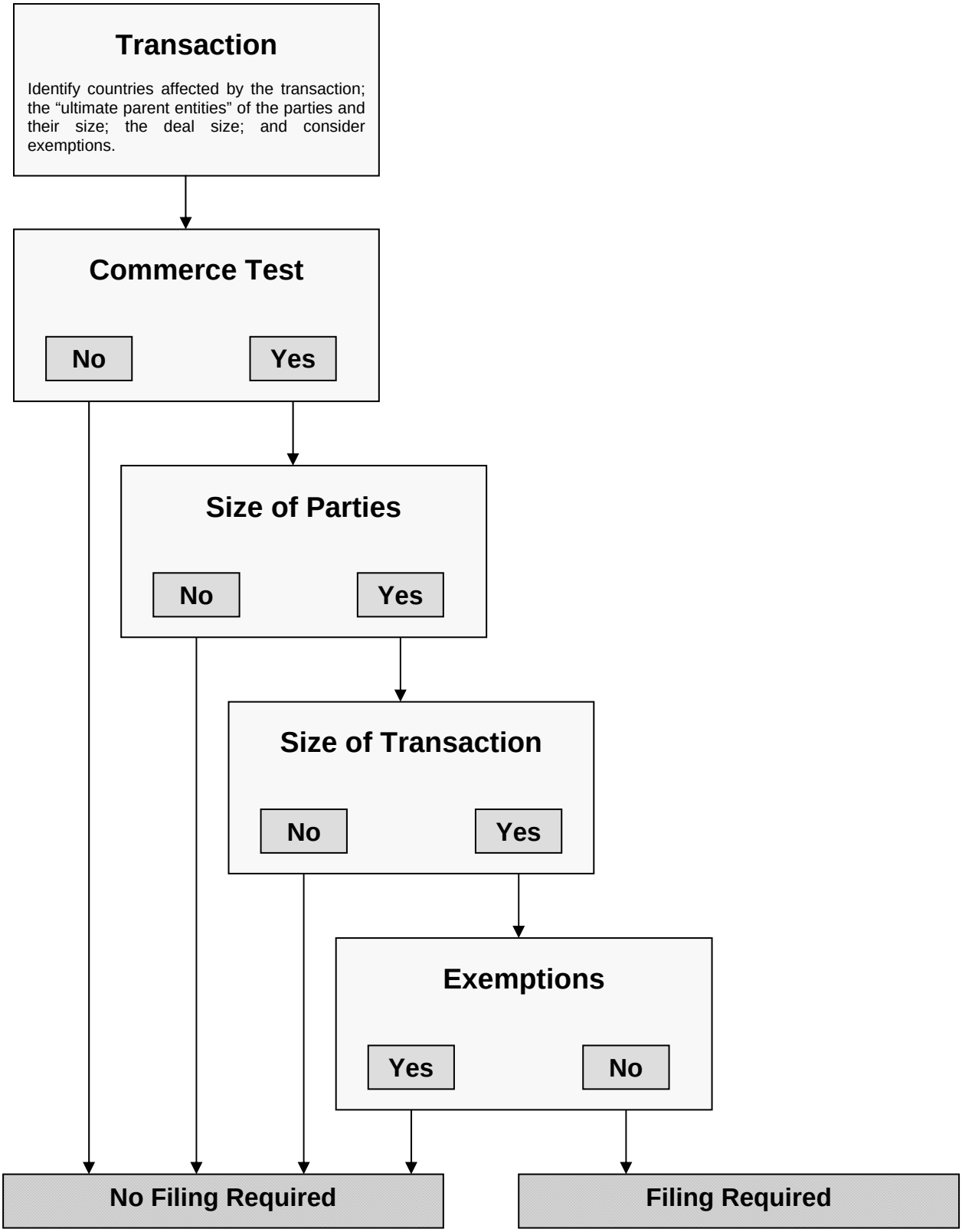
As the above discussion highlights, proper antitrust planning may be essential to completing a strategic acquisition in a timely and cost-effective manner.

HSR TRANSACTION ANALYSIS FLOWCHART



Hart-Scott-Rodino
Premerger Notification Program

Introductory Guide I

What is the Premerger Notification Program?
An Overview

Revised March 2009

AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr.

Other Guides in this series provide more detailed information. Guide II explains in greater detail certain terms used in the Act and the Rules, and analyzes a hypothetical transaction to determine whether it is reportable and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you not only consult the Act, the Rules, and the other Guides in this series, but also the additional material referenced in Section XII of this Guide. If you have specific questions not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the "enforcement agencies") before consummating the proposed acquisition. The parties must wait a specific period of time while the enforcement agencies review the proposed transaction. The Program became effective September 5, 1978, after final promulgation of the Rules.[1]

The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission ("FTC" or the "Commission") and the Department of Justice ("DOJ") to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.

In general, the Act requires that certain proposed acquisitions of voting securities, non-corporate interests ("NCI") or assets be reported to the FTC and the DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a "second request"). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a bankruptcy sale), after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

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[1] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

The Program has been a success. Compliance with the Act's notification requirements has been excellent, and has minimized the number of post-merger challenges the enforcement agencies have had to pursue. In addition, although the agencies retain the power to challenge mergers post-consummation, and will do so under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the Program as a helpful tool in advising their clients about particular acquisition proposals.

The Rules, which govern compliance with the Program, are necessarily technical and complex. We have prepared Guide I to introduce some of the Program's specially defined terms and concepts. This should assist you in determining if proposed business transactions are subject to the requirements of the Program.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal and informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $200 million (as adjusted)[2], regardless of the sales or assets of the acquiring and acquired persons[3]; or

2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less; and

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[2] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year.

[3] *See* § 7A(a)(2) of the Act.

3. One person has sales or assets of at least $100 million (as adjusted); and

4. The other person has sales or assets of at least $10 million (as adjusted).

A. Size of Transaction Test

The first step is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be "held as a result of the acquisition." Calculating what will be held as a result of the acquisition (referred to as the "size of the transaction") is complicated and requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.[4]

If the value of the voting securities, NCI, assets or combination thereof exceeds $200 million (as adjusted) and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the parties must look to the size of person test.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the "acquiring person" and "acquired person." "Person" is defined in Rules 801.1(a)(1) and is the "ultimate parent entity" or "UPE" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[5] The "acquired entity" is the specific entity whose assets, NCI or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the

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[4] The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

[5] *See* "control" under 801.1(b).

issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Oftentimes the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.[6] For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.[7]

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act's minimum size criteria. This "size of person" test generally measures a company based on the person's last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.[8] The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired, but also the UPE and any other entities the UPE controls.[9]

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than $50 million (as adjusted) worth of the voting securities of another issuer crosses the first of five staggered "notification thresholds."[9] The rules identify four additional thresholds: voting securities valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted); voting securities valued at $500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than $1 billion (as adjusted);

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[6] *See* Rule 801.1; Rule 801.30.

[7] *See* Rule 803.5.

[8] *See* Rule 801.11.

[9] *See* Rule 801.1(a)(1).

and 50 percent of the voting securities of an issuer if valued at greater than $50 million (as adjusted).

The thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing.[10] If within that year the person reaches the stated threshold (or any lower threshold), it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.[11] For example, if you file to acquire $100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B's voting securities did not exceed either $500 million (as adjusted) or 50 percent, *i.e.*, additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.[12]

These notification thresholds apply only to acquisitions of voting securities. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.[13] For example, certain acquisitions of assets in the ordinary course of a person's business are exempted, including new goods and current supplies (*e.g.*, an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor).[14] The acquisition of certain types of real property also would not require notification. These include certain new and used facilities, not being acquired with a business, unproductive real property (*e.g.*, raw land), office and residential buildings, hotels (excluding hotel casinos), certain recreational land, agricultural land and retail rental space and warehouses.[15] In addition, the acquisition of foreign assets would be exempt where the sales in or

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[10] *See* Rule 803.7.

[11] *See* Rule 802.21.

[12] *See* § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

[13] *See* § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

[14] *See* Rules 802.1(b) and 802.1(c).

[15] *See* Rules 802.2(c) - (h).

into the U.S. attributable to those assets were $50 million (as adjusted) or less.[16] Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, *see* IV below).

III. THE FORM

The Notification and Report Form ("the Form") solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO, (202) 326-3100, as well as the FTC website at http://www.ftc.gov/bc/hsr.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as copies of certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product North American Industry Classification System ("NAICS") codes,[17] and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also describe certain previous acquisitions in the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.[18] In addition, the acquired person does not need to respond to Item 6 in a pure asset transaction.

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[16] *See* Rules 802.50 and 802.51.

[17] For information concerning NAICS codes *see* the *North American Industry Classification System, 2002*, published by the Executive Office of the President, Office of Management and Budget and available from the National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161 (Order Number PB 2002-101430) or online at http://www.ntis.gov/search/product.aspx?ABBR=PB2002101430; and The *2002 Economic Census Numerical List of Manufactured and Mineral Products* published by Bureau of the Census, available from the Government Printing Office or online at http://www.census.gov/prod/ec02/02numlist/m31r-nl.pdf. Information regarding NAICS also is available at the Bureau of the Census website at http://www.census.gov/epcd/www/naics.html.

[18] *See* 803.2(b).

B. Contact Person

The parties are required to identify an individual (listed in Item 1(g) of the Form) who is a representative of the reporting person and is familiar with the content of the Form. This contact person is, in most cases, either counsel for the party or an officer of the company. This person must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.[19] In all other transactions, each of the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. These required statements govern when the parties may make a premerger notification filing. The affidavit is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review.[20]

Rule 803.6 provides that the Form must be certified and the rule specifies who must make the certification.[21] One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an individual to ensure that information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.[22]

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[19] See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

[20] *See* Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

[21] The certification may be signed by a general partner of a partnership; an officer or director of a corporation; or, in the case of a natural person, the natural person or his/her legal representative.

[22] 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury *under the laws of the United States of America* that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

D. Voluntary Information

The rules provide that reporting persons also may submit information that is not required by the Form.[23] If persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, the enforcement agencies' review of a proposed transaction may be more rapid. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.[24] However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.[25] The fact that a transaction is under investigation also may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The parties should complete and return the original and one copy of the Form, along with one set of documentary attachments, to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. Three copies of the Form, along with one set of documentary attachments, should be sent to the Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530 (for non-USPS deliveries, use zip code 20004).

IV. THE FILING FEE

In connection with the filing of a Form, Congress also mandated the collection of a fee from each acquiring person. The filing fee is based on a three-tiered system that ties the amount paid to the total value of the voting securities, NCI or assets held as a result of the acquisition:[26]

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[23] *See* Rule 803.1(b).

[24] *See* Section 7A(h) of the Act.

[25] A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

[26] The filing fee thresholds are adjusted annually for changes in the GNP during the previous year. The fees themselves are not adjusted.

VALUE OF VOTING SECURITIES, NCI OR ASSETS TO BE HELD	FEE AMOUNT
greater than $50 million (as adjusted) but less than $100 million (as adjusted)	**$45,000**
$100 million (as adjusted) or greater but less than $500 million (as adjusted)	**$125,000**
$500 million (as adjusted) or greater	**$280,000**

For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).[27] In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.[28]

The filing fee must be paid at the time of filing to "The Federal Trade Commission" by electronic wire transfer, bank cashier's check or certified check. Rule 803.9 contains specific instructions for payment of the filing fee. In addition, information is available at http://www.ftc.gov/bc/hsr/filing2.htm.

V. THE WAITING PERIOD

After filing, the filing parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for reportable acquisitions by means of a cash tender offer, as well as acquisitions subject to certain federal bankruptcy provisions, and 30 days for all other types of reportable transactions.[29] The waiting period may be extended by issuance of a request for additional information and documentary material.[30] Any waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys

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[27] For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 responses would be identical.

[28] *See* Rule 803.9(a) - (c).

[29] *See* Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

[30] *See* Section VIII(C), *infra*.

voting securities from persons other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.[31] It is important to note that failure to pay the filing fee or the submission of an incorrect or incomplete filing will delay the start of the waiting period.[32]

B. Early Termination

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for "early termination" will be granted only if (1) at least one of the persons specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.[33]

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC's website at http://www.ftc.gov/bc/earlyterm/index.html.

When it's requested, early termination is granted for most transactions. On the average, requests for early termination are granted within two weeks from the beginning of the waiting period. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its potential competitive impact, and the number of filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether the Form complies with the Act and the Rules.

The Form is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to correct the errors as soon as possible because the waiting period does not begin to run until the Form is filled out accurately, all required

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[31] The joint venture entity does not file. *See* Rule 802.41.

[32] *See* Rules 803.3 and 803.10(a).

[33] *See* Formal Interpretation 13 issued August 20, 1982.

information and documentary material are supplied and payment of the filing fee is received.[34]

When the PNO determines that the Forms comply with all filing requirements, letters are sent to the parties identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction.[35] This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual persons at different times about the same matter. The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may inform the PNO of that fact; the PNO will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation, or provide written information or documents.

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[34] For transactions in which a person buys voting securities from someone other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

[35] Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a "second request."[36] As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is contained in *Guide III*. Because every transaction is unique, however, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies also have adopted a formal internal appeals process that centralizes in one decision maker in each agency the review of issues relating to the scope of and compliance with second requests.[37]

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency's staff may suggest use of the informal "quick look" procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address the critical issues (*e.g.,* product market definition or ease of entry). If the submitted information resolves the staff's concerns in these areas, the waiting period will be terminated on a *sua sponte* basis and the parties will not have to expend the time and cost of responding to the full second request. Of course, if the submitted information does not resolve the staff's concerns on determinative issues, then the parties will need to respond to the full

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[36] *See* Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

[37] *See* 66 Fed. Reg. 8721-8722, February 1, 2001.

second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or certain bankruptcy filings,[38] 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).[39] During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to any person to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time.[40] All of the agencies' other investigative tools are available to them in such investigations.[41]

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no reason to believe competition will be reduced substantially in any market, it will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the

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[38] See 11 U.S.C. § 363(b), as amended (1994).

[39] *See* § 7A(e) of the Act.

[40] *See* § 7(A)(i)(1) of the Act.

[41] *See* § 7(A)(i)(2) of the Act.

acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.[42] The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The staff of the FTC is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. A proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to $16,000 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the person to divest assets or voting securities acquired in violation of the Act.[43]

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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[42] FTC Act Section 13(b).

[43] *See* § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996).

Washington DC 20580.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.[44] For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of the assets being acquired is actually above the threshold.[45]

XI. OTHER GUIDES IN THIS SERIES

Guide I is the first in a series of guides prepared by the PNO. Others include:

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

Guide III: *A Model Request for Additional Information and Documentary Material (Second Request)*, which contains materials designed for the attorneys of the antitrust enforcement agencies in preparing requests for additional information. It is included in this series to provide an example of what you might expect if either enforcement agency issues a second request.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult:

1. Section 7A of the Clayton 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, and amended by Pub. L. No. 106-553, 114 Stat. 2762.

2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2008).

3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978); 48 Fed. Reg. 34428 (July 29, 1983); 52 Fed. Reg. 7066

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[44] *See* Rule 801.90.

[45] *See, e.g., United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

(March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 61 Fed. Reg. 13666 (March 28, 1996); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4987 (January 31, 2005); 70 Fed. Reg. 11502 (March 8, 2005); 70 Fed. Reg. 73369 (December 12, 2005); 71 Fed. Reg. 35995 (June 23, 2006).

4. The formal interpretations issued pursuant to the Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

It is advisable to check the Federal Register for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see http://www.ftc.gov/bc/hsr/basispurp.shtm. For other HSR-related rulemakings, see http://www.ftc.gov/bc/hsr/rulemaking.shtm. Amendments and formal interpretations, as well as the other material referenced above, are available on the Premerger Notification Office website at http://www.ftc.gov/bc/hsr.

There are also non-governmental publications that, while not officially endorsed by the FTC, contain useful compilations of materials relevant to the Program:

1. Commerce Clearing House's *Trade Regulation Reporter* reprints the Act, the Rules, the Form, and the Formal Interpretations.

2. The American Bar Association's Section of Antitrust Law publishes a *Premerger Notification Practice Manual (2007 Edition)* that provides a collection of informal interpretations of the PNO.

3. A loose-leaf treatise by Axinn, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act* (published by Law Journal SeminarsPress), explains requirements of the Form, the Rules, and the Act, and includes a discussion of the legislative history of the Act.

Finally, if you have questions about the program or a particular transaction not answered by the Commission's HSR website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction and completion of the Form. For general questions, contact the PNO at (202) 326-3100.

Hart-Scott-Rodino
Premerger Notification Program

Introductory Guide II

To File or Not to File
When You Must File a Premerger Notification Report Form

Revised September 2008

FTC.GOV/BC/HSR **FTC Premerger Notification Office** (202) 326-3100

AN OVERVIEW

Guide II is the second in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It describes the criteria used to determine whether a transaction is subject to the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"), and uses a hypothetical transaction to illustrate the application of the Premerger Notification Rules (the "Rules").

Other Guides in this series provide additional information. Guide I is an overview of the program and the way it operates and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you consult the Act, the Rules, and the other Guides in this series, as well as the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr. If you have a specific question on a proposed transaction and your question is not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 established the Federal Premerger Notification Program (the "Program"). The Program is designed to provide the Federal Trade Commission (the "FTC" or "Commission") and the Department of Justice (the "DOJ") with information about large mergers and acquisitions before they occur. The parties to certain proposed transactions must submit a Notification and Report Form for Certain Mergers and Acquisitions (the "Form")[1] with information about their businesses to the enforcement agencies and wait a specified period of time before consummating the transactions. During that "waiting period," the antitrust enforcement agencies analyze the likely competitive effects of the proposed transaction. If either agency believes that further information is needed in order to complete the competitive analysis, then it may request additional information and documentary material from the parties. Issuance of this "second request" extends the waiting period for a specified period, usually 30 days, after the parties have complied with the request. The additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the acquisition.

The Rules are divided into three parts:[2]

1) Coverage: The first part, 16 C.F.R. Part 801, encompasses the coverage rules. These include definitions of important terms, methods for determining dollar values and percentages, and specific instructions for the treatment of particular types of transactions.

2) Exemptions: The second part, 16 C.F.R. Part 802, contains certain exemptions for types of transactions that otherwise would be reportable. Before filing, you should consult these exemption rules, as well as the exemptions set out in the statute itself, to determine whether any of them apply.

3) Transmittal: The third part, 16 C.F.R. Part 803, sets out premerger notification filing, waiting period and second request procedures.

This Guide focuses primarily on the coverage rules, 16 C.F.R. Part 801.

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[1] FTC Form C4 (rev. 06/06/06).

[2] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

II. JURISDICTIONAL REQUIREMENTS

For the Act to apply to a particular transaction, it must satisfy three tests: the commerce test of Section 7A(a)(1) as well as the size of transaction test and the size of person test of Section 7A(a)(2).

An acquisition will satisfy the commerce test if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce. The size of transaction test is met if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests ("NCI") and assets of the acquired person valued at more than $50 million (as adjusted).[3] The size of person test is met if one of the parties has sales or assets of at least $100 million (as adjusted) and the other party has sales or assets of at least $10 million (as adjusted). [4]

III. HYPOTHETICAL TRANSACTION

Throughout this Guide, we will refer to the following hypothetical transaction (italicized in the document). The hypothetical places you in the position of legal counsel to a corporation that is about to be acquired. However, the principles it illustrates should be of use to readers in other circumstances.

The President of Beta Products, Inc., walks into your law office and informs you that the Zed Corporation is acquiring her company. She remarks that Zed Corporation mentioned something about the Hart-Scott-Rodino Act and filing a notification and report form within the next few weeks. Although you have handled certain business transactions for Beta Products in the past, this is the first time that the possibility of a premerger notification filing has been involved. You want to determine, therefore, whether the transaction must be reported, and if so, how.

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[3] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (m) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year. The values contained therein are effective as of the date published in the Federal Register notice and remain effective until superceded in the next calendar year.

[4] The size of person test is not applicable if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $200 million (as adjusted). *See* § 7A (a)(2) of the Act.

IV. PRELIMINARY QUESTIONS

In determining whether a particular transaction must be reported, you should begin by answering several preliminary questions:

1) What is being acquired?

2) What are the amount and the nature of the consideration?

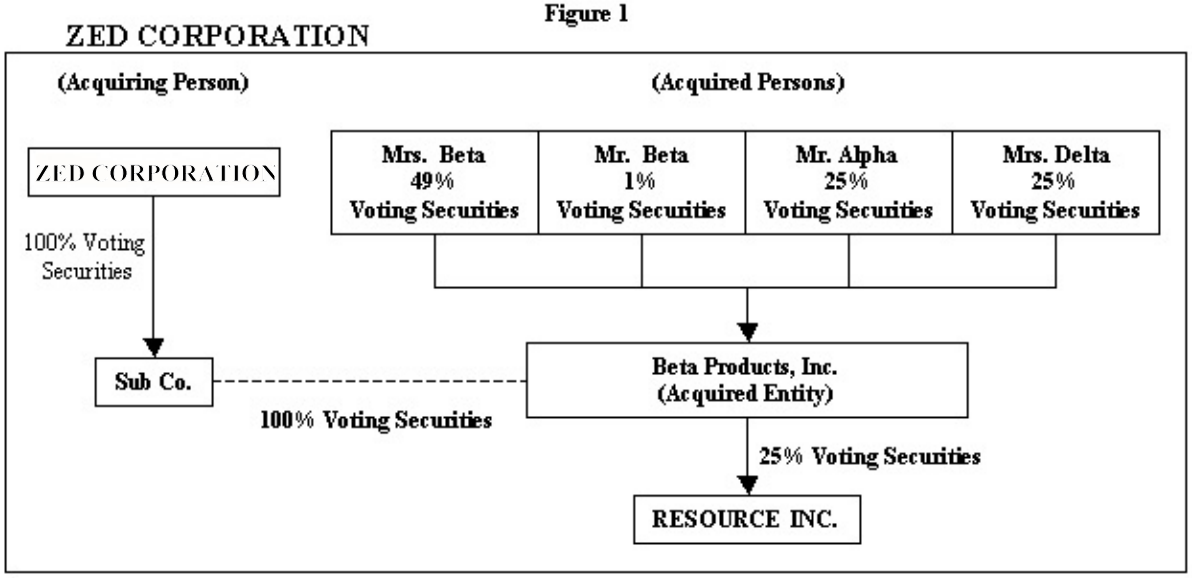
3) Who are the parties involved in the transaction?

4) When and under what conditions will the transaction take place?

In exploring these preliminary questions about the hypothetical transaction, you have learned that Zed Corporation has entered into agreements with the shareholders of Beta Products to buy all of Beta Products' outstanding voting stock for $90 million. Further investigation reveals, however, that Zed Corporation does not plan to purchase the voting stock directly; rather, Zed Corporation's wholly-owned subsidiary, Sub Co., will buy the shares from Beta Products' shareholders. You already know who those shareholders are: Mrs. Beta holds 49 percent of the outstanding voting securities and her husband owns one percent, while Mrs. Delta, her sister-in-law, and Mr. Alpha, an unrelated private investor, each own 25 percent. You also know from your previous work that Beta Products holds 4500 shares of common stock, which constitute 25 percent of the voting securities of Resource Inc. Beta Products is the largest holder of Resource Inc. voting securities.

To clarify the relationships among the parties and the structure of the transaction, it is often helpful to draw a diagram of the transaction such as the one in Figure 1 below. *As you will see*

Figure 1



later, the Rules treat this transaction as two separate acquisitions, either or both of which may be reportable. In both acquisitions, the acquiring person is Zed Corporation. Mrs. and Mr. Beta, together, are the acquired person in the acquisition of Beta Products, Inc. In addition, because the acquisition of Beta Products will result in Zed Corporation holding voting securities of Resource Inc., the Rules treat this aspect of the transaction as a different acquisition in which Resource Inc. also is an acquired person.

V. STEPS TO DETERMINE REPORTABILITY

Once you have outlined the basic transaction, you are ready to analyze it to determine whether it must be reported. The important steps in this process include:

1) Determining the size of the transaction and the relevant reporting threshold;

2) Identifying the acquiring and acquired persons (the "ultimate parent entity") of each party; and

3) Determining the size of each person involved in the transaction.

A. The Size of Transaction Test

The size of transaction test, as its name suggests, is concerned with the value of what is being acquired. Because the objective of the Program is to analyze the effects of combining once separate businesses, the Rules generally require that assets, voting securities or NCI of the acquired person that have already been acquired must be aggregated with those that will be acquired in the proposed transaction. When what has previously been purchased plus what will be bought in the present acquisition meets the size of transaction criteria, the transaction becomes reportable unless an exemption applies.

1. Value of voting securities, NCI and assets to be held

In order to determine whether a transaction meets the size of transaction test, you must compute the value of the voting securities, NCI and assets, which you will hold as a result of the acquisition. The phrase "held as a result of the acquisition" has a technical meaning under the Rules. It includes not only those securities, NCI and assets that are currently being acquired, but also voting securities, NCI, and, in some circumstances, assets previously acquired from the same person. Rule 801.13[5] determines what is held as a result of the acquisition, and Rules 801.13 and 801.14[6] specify how such voting securities, NCI and assets should be aggregated and valued.

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[5] *See* 16 C.F.R. § 801.13.

[6] *See* 16 C.F.R. §§ 801.13, 801.14.

a. "Held as a result of the acquisition"

All voting securities, NCI and assets currently being acquired are held as a result of the acquisition. In addition, Rule 801.13[7] explains when you must aggregate previously-acquired voting securities, NCI or assets with those that you plan to acquire in order to determine what is held as a result of the acquisition. Different principles apply to asset, voting securities and NCI acquisitions.

(1) Aggregating previously-acquired voting securities or NCI

Rule 801.13(a)(1)[8] requires that you add any voting securities that you currently hold of the same issuer to any voting securities that you propose to acquire to determine what voting securities of that issuer will be held as a result of the planned acquisition. There are some special circumstances, however, described in Rule 801.15,[9] in which the prior, simultaneous, or subsequent acquisition is exempt from notification and need not be included in the calculation.

Rule 801.14,[10] requires that you aggregate the value of all of the voting securities of all of the issuers included within the acquired person that you will hold as a result of the acquisition. Thus, if you hold less than 50% of the voting securities of one subsidiary company and plan to acquire voting securities of the parent or a different subsidiary of the same parent, you would aggregate these holdings to determine the value of the securities held.

Rule 801.13(c)(1)[11] requires that you add any NCI that you currently hold of the same non-corporate entity to any NCI that you propose to acquire to determine what NCI will be held as a result of the planned acquisition. Rule 801.14,[12] requires that you aggregate the value of all NCI included within the acquired person that you will hold as a result of the acquisition as determined by Rule 801.13(c). Under Rule 801.13(c)(2),[13] an acquisition of NCI which does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

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[7] *See* 16 C.F.R. § 801.13.

[8] *See* 16 C.F.R. § 801.13(a)(1).

[9] *See* 16 C.F.R. § 801.15.

[10] *See* 16 C.F.R. § 801.14.

[11] *See* 16 C.F.R. § 801.13(c)(1).

[12] *See* 16 C.F.R. § 801.14.

[13] *See* 16 C.F.R. § 801.13(c)(2).

(2) Aggregating assets and voting securities

In some circumstances, the size of transaction test requires acquiring persons to add the value of an issuer's voting securities that it holds and will hold with the value of assets that have been acquired or will be acquired from that issuer or the person controlling that issuer. Whether the acquisitions of assets and voting securities are both to be considered "held as a result of the transaction" depends on the order of the transactions. If a noncontrolling percentage of voting securities were purchased in a nonreportable transaction and will be held at the time assets are to be acquired, then both the voting securities and assets are held as a result of the transaction. Their combined value is included to determine if the size of transaction test is satisfied. If, however, the asset transaction precedes the voting securities transaction, then the assets are not held as a result of the later acquisition of voting securities and the value of the assets is not included. The Commission explained the exclusion of assets in the second instance when it promulgated Rule 801.13:[14] "once assets are sold, they confer no continuing ability to participate in the affairs of the acquired person, and so prior acquisitions of assets need not be considered for purposes of subsequent acquisitions of voting securities."[15]

(3) Aggregating previously-acquired assets

Generally, the acquisition by an acquiring person of assets from the same acquired person is not aggregated unless: the second acquisition is made pursuant to a signed letter of intent or agreement, and within the previous 180 days the acquiring person has signed a letter of intent or agreement in principle to acquire assets from the same acquired person, which is still in effect but has not been consummated; or the acquiring person has acquired assets from the same acquired person which it still holds; and the previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act.[16] If the previous asset acquisition (or aggregated asset acquisitions) was reported properly to the enforcement agencies, aggregation is not required. In addition, if a single agreement calls for multiple closings on purchases of assets from the same person, the purchases must be aggregated to the extent that those closings are within one year.

b. Valuation

Once you have determined what is held as a result of the acquisition, you must value those securities, NCI and assets. Again, different methods are used for valuation, depending on whether voting securities, NCI or assets will be held as a result of an acquisition.

Voting securities fall into one of two groups for valuation purposes: publicly traded and untraded, *i.e.*, those not traded on a national securities exchange or quoted in NASDAQ. Under

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[14] *See* 16 C.F.R. § 801.13.

[15] *See* 43 Fed. Reg. 33478-9 (1978).

[16] *See* 16 C.F.R. § 801.13 (b)(1) and (b)(2).

the Rules, the value of publicly traded voting securities that are to be acquired is the higher of "market price" or "acquisition price." Thus, if the voting securities are trading at $50 a share, and you have a contract to buy a block for $60 a share, the $60 value is used. If the acquisition price of publicly-traded shares has not been determined, the value is the market price. For non-publicly traded voting securities, the securities are valued at their "acquisition price" or, if the "acquisition price" has not been determined, at "fair market value." Previously acquired securities are valued in similar ways pursuant to Rules 801.10 and 801.13.[17] NCI are valued in the same manner as non-publicly traded voting securities. In an acquisition of assets, Rule 801.10(b)[18] provides that the assets must be valued at their "fair market value" or, "if determined and greater than the fair market value," at their "acquisition price."

The terms "market price," "acquisition price," and "fair market value" are defined for premerger notification purposes in Rule 801.10(c).[19] For useful information concerning the "valuation rule", please visit http://www.ftc.gov/bc/hsr/hsrvaluation.shtm and http://www.ftc.gov/bc/hsr/801.10summary.shtm.

(1) Determining market price

In transactions subject to § 801.30, *e.g.*, open market stock purchases, the "market price" is the lowest closing quotation or bid price within 45 days prior to receipt by the issuer of the notice required by Rule 803.5(a) from the acquiring person, which must be delivered to start the waiting period. In transactions to which Rule § 801.30 does not apply, *e.g.*, purchases from a "controlling" stockholder or directly from the issuer, the "market price" is the lowest closing quotation or bid price within the 45 calendar days preceding the closing of the acquisition, but not extending back prior to the day before execution of the agreement or letter of intent to merge or acquire. The "45-day rule" will enable you to determine whether a particular transaction will meet the size of transaction test even though the price of the voting securities may be fluctuating significantly on the open market.

(2) Determining acquisition price

Rule 801.10(c)(2)[20] states that the "acquisition price" includes the value of all consideration for the voting securities, NCI and assets being acquired. This consideration includes any cash, voting securities, tangible assets, and intangible assets that the acquiring person is exchanging with the seller. In an asset transaction, it also includes the value of any liabilities that the acquiring person will assume. Thus, if you will pay $85 million in cash for a factory and, in

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[17] *See* 16 C.F.R. §§ 801.10 and 801.13.

[18] *See* 16 C.F.R. 801.10(b).

[19] *See* 16 C.F.R. S 801.10(c).

[20] *See* 16 C.F.R. § 801.10(c)(2).

addition, will assume $10 million in liabilities, the acquisition price is $95 million.

(3) Determining fair market value

"Fair market value" must be determined in good faith by the board of directors of the ultimate parent entity of the acquiring person (or the board's designee).[21] Such a determination must be made within 60 days of filing or, if no filing is required, within 60 days of consummation of the acquisition. Thus, if the parties neither file nor consummate within 60 days of the determination, they cannot rely on it. If a filing is made within the 60 days, however, a new fair market value determination is not required regardless of the consummation date.

(4) Voting securities and assets previously acquired

Voting securities that were acquired in an earlier transaction are valued on the basis of their current worth, not their historical purchase price.[22] If the securities are publicly traded, you should use their current market price, as determined by the 45-day rule under Rule 801.10(c)(1).[23] Otherwise, they are valued at their current fair market value, as determined by Rule 801.10(c)(3).[24] NCI are valued in the same manner as non-publicly traded voting securities. Previously acquired assets should be valued according to Rule 801.10(b)[25] at the greater of their current fair market value or the acquisition price at the time they were acquired.

Since Beta Products, Inc., is a closely-held company and the stock is not publicly traded, the applicable Rule is 16 C.F.R. § 801.10(a)(2). This Rule provides that the value of the voting securities will be the acquisition price, if determined, or, if the acquisition price has not been determined, the fair market value of the voting securities as set by the board of directors of the acquiring person. Sub Co. and Beta Products' shareholders have agreed on a total purchase price of $90 million for 100 percent of the voting securities of Beta Products, Inc. Therefore, you will not have to get the board of directors of Zed Corporation to determine the fair market value of Beta Products' stock. Rather, you can rely on the acquisition price of $90 million to conclude that the acquisition meets the size of transaction test.

To determine whether Zed Corporation and Resource Inc. must report, you will have to calculate the value of the voting securities of Resource Inc. that will be held by Zed as a result of acquiring Beta Products. Because the acquisition price of the Resource securities is not

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[21] *See* 16 C.F.R. § 801.10(c)(3).

[22] *See* Rule 801.13(a), 16 C.F.R. § 801.13(a).

[23] *See* 16 C.F.R. § 801.10(c)(1).

[24] *See* 16 C.F.R. § 801.10(c)(3).

[25] *See* 16 C.F.R. § 801.10(b).

separately identified, the Rules require that the value be determined by the market price.[26] *In this transaction, the market price can be determined because the voting securities are publicly traded. Resource shares sell, at the time of your research, for $100 a share; thus, the value of the 4500 Resource shares that Zed will obtain is likely to be about $4.5 million.*[27] *If Zed already owned other Resource voting securities, you would add the current market price of those shares to determine if the total value of the voting securities held as a result of the acquisition meets the size of transaction test. After reviewing Zed's holdings, you determine that it does not hold any other Resource securities. Accordingly, the secondary acquisition does not meet the size of transaction test and is not reportable.*

c. Calculating percentage of voting securities to be acquired

Rule 801.12 sets out a formula to be used whenever the Act or Rules require calculation of the percentage of voting securities of an issuer to be held or acquired, *e.g.*, in determining control.[28] The Rule is designed to recognize weighted voting rights and different classes of voting securities. As illustrated below, the percentage is derived from the ratio of two numbers: the number of votes for directors of the issuer that the holder of a class of voting securities is presently entitled to cast, or, as a result of the acquisition, will become entitled to cast, divided by the total number of votes for directors which presently may be cast by that class, multiplied by the number of directors elected by that class, divided by the total number of directors.

$$\frac{\textit{\# of Votes of Class A Held}}{\textit{Total Votes of Class A}} \times \frac{\textit{Directors Elected by Class A Stock}}{\textit{Total \# of Directors}} = \%$$

The resulting percentage should be calculated separately for each class, and then totaled to determine an acquiring person's voting power. You should omit authorized but unissued voting securities or treasury securities, as well as convertible voting securities that have not yet been converted and do not have a present right to vote, unless you are filing notification for their acquisition or conversion.

2. The Notification Thresholds

Rule 801.1(h), 16 C.F.R. § 801.1(h), establishes five notification thresholds for acquisitions of

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[26] *See* Rule 801.10(a)(1)(ii), 16 C.F.R. § 801.10(a)(1)(ii).

[27] *See* Rule 801.10(c)(1), 16 C.F.R. § 801.10 (c)(1).

[28] *See* 16 C.F.R. § 801.12(b).

voting securities[29]:

a) $50 million (as adjusted);

b) $100 million (as adjusted);

c) $500 million (as adjusted);

d) 25%, if valued at greater than $1 billion (as adjusted); and

e) 50%, if valued at greater than $50 million (as adjusted).

Because the Rules provide that all voting securities held by the acquiring person after an acquisition are "held as a result of the acquisition," the thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold it indicated in the filing.[30] If within that year the person reaches the stated threshold or any lower threshold, it may continue acquiring shares up to the next threshold for five years measured from the end of the waiting period. The acquiring person must file again, however, before it can cross that next higher threshold. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value, because it indicates the acquisition of control.

Because Zed is acquiring 100% of the voting securities of Beta Products, it will indicate the 50% filing threshold in its filing regardless of the transaction value.

B. Identifying the Acquiring and Acquired Persons

If the hypothetical transaction were valued in excess of $200 million (as adjusted), the transaction would be reportable unless an exemption applied. But, because the hypothetical transaction is valued at $90 million, you must also turn to the size of person test, as you must for all transactions valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less. The first step in determining your size of person is to identify the "acquiring person" and the "acquired person." Under the Act, the obligation to report depends on the size of the "persons" involved. "Person" is defined in Rule 801.1 (a)(1) and is the "ultimate parent entity" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[31]

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[29] The notification thresholds do not apply to acquisitions of assets or NCI.

[30] *See* 803.7.

[31] *See* "control" under 801.1 (b).

1. The Ultimate Parent Entity

An ultimate parent entity or "UPE" is the company, individual or other entity that controls a party to the transaction and is not itself controlled by anyone else. For example, the UPE may be a corporate parent of a subsidiary company that has signed a contract to purchase a plant, or it could be a partnership or an individual that owns a majority of the voting securities of the acquiring company. The ultimate parent entity may be separated from the company whose name appears on the sale agreement by many layers of controlled subsidiaries, or the UPE may actually be entering into the transaction in its own name.

2. Control

Identifying the ultimate parent entity involves tracing the chain of "control," a term defined in Rule 801.1(b).[32] Control is established by the "holding" of 50 percent or more of the outstanding voting securities of an issuer. In the case of an entity that has no outstanding voting securities, control is established by the right to 50 percent or more of the profits, or the right, in the event of dissolution, to 50 percent or more of the assets of the entity. Control also is accomplished by having the contractual power presently to designate 50 percent or more of the board of directors of a corporation.

As a result, more than one person may be deemed to control an entity at the same time. For example, one person may hold 50 percent of the voting securities of the entity while another person has the contractual power to appoint 50 percent of the board of directors.

3. "Hold" and "Beneficial Ownership"

To determine control of a corporation you first must identify the individuals or entities that "hold" its voting securities. The holder of voting securities, according to Rule 801.1(c),[33] is the individual or entity that has beneficial ownership. Although the term "beneficial ownership" is not defined in the Rules, the Statement of Basis and Purpose accompanying the Rules provides examples of some indicators of beneficial ownership, including the right to receive an increase in the value of the voting securities, the right to receive dividends, the obligation to bear the risk of loss, and the right to vote the stock.[34] Thus, a person would be the "holder" of voting securities even though the shares were physically held by the person's stockbroker and listed under the broker's street name.

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[32] *See* 16 C.F.R. § 801.1(b).

[33] *See* 16 C.F.R. § 801.1(c).

[34] *See* The Statement of Basis and Purpose, 43 Fed. Reg. 33458 and subparts 2 through 8 of Rule 801.1(c), 16 C.F.R. § 801.1(c).

In the hypothetical, Sub Co. is not a UPE because Zed Corporation holds 50 percent or more of its outstanding voting securities. Assume that no one person holds as much as 50 percent of Zed Corporation's voting securities nor does anyone have the contractual power to appoint 50 percent of its board of directors. Under the Rules, therefore, Zed Corporation is not controlled by anyone else, and is the UPE of a "person" consisting of Zed Corporation and any other entities that it controls. In this situation, Beta Products, Inc., does not have a single 50 percent shareholder nor does any person have the contractual power to appoint 50 percent of its board of directors. However, our analysis cannot end here. Under Rule 801.1(c)(2),[35] the holdings of spouses and their minor children must be aggregated. Thus, Mrs. Beta and Mr. Beta hold 50 percent of Beta Products, Inc., (49 percent and one percent, respectively), and together are its ultimate parent entity. Because they are individuals, the Betas cannot be controlled by any other entity.

C. The Size of Person Test

1. The basic test

The next step in the analysis is to determine the size of the persons you have defined as the ultimate parent entities of the parties. The basic "size of person test" established by Section 7A(a)(2) of the Act requires a filing in transactions valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less only where at least one of the persons involved in the transaction has $100 million (as adjusted) or more in annual net sales or total assets, and the other has $10 million (as adjusted) or more.[36] If these size thresholds are not met, the transaction need not be reported. Thus, for example, filings would not be required for a merger between two $99 million companies.[37]

There is one exception to the basic size of person test. Where an acquired person is not engaged in manufacturing only its total assets (unless its sales are $100 million (as adjusted) or more) are considered in determining its size. In addition, you should be aware that the size of person test is eliminated in transactions valued in excess of $200 million (as adjusted).

2. Calculating annual net sales and total assets

The procedures for calculating the annual net sales and total assets of a person are set out in Rule 801.11.[38] In the majority of cases, you will easily be able to determine whether the size of

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[35] *See* 16 C.F.R. § 801.1(c)(2).

[36] *See* 15 U.S.C. § 18a(a)(2).

[37] Provided, of course, that GDP has not declined resulting in the size of person test consequently declining to less than $99 million.

[38] *See* 16 C.F.R. § 801.11.

person test is satisfied. Generally, a person's annual net sales[39] and total assets are as stated on its last regularly prepared annual statement of income and last regularly prepared balance sheet. These financial statements must be as of a date not more than 15 months old, and have been prepared in accordance with procedures normally used by the filing person.[40]

A person should continue to rely on its regularly prepared financial statements until the next regularly prepared statements are available, even if subsequent changes in income or assets have occurred. For example, the most recently prepared statements may show $9 million in annual net sales and $8 million in total assets in the previous year, although the person's sales have increased in the current fiscal year such that its annual revenue will exceed $10 million (as adjusted) when its next statement is issued. For premerger notification purposes, however, the person will not be considered a $10 million (as adjusted) person until the annual income statement reflecting the increased revenue is prepared. The same analysis would be applied, however, if sales in the current fiscal year have decreased. A company's sales and assets may not be relied on until they are reflected in regularly prepared financial statements.

a. Including controlled entities

The size of person test includes the sales and assets of all entities, both domestic and foreign, included within the person. Any entities controlled by the UPE whose sales and assets are not consolidated in its financial statements must be added to determine the total size of the person. Unconsolidated sales and assets should be added, however, only to the extent that such additions are "nonduplicative." If the UPE's interest in the subsidiary is already reflected on the parent's balance sheet as an asset, then adding together the total assets of the subsidiary and the total assets of the parent would result in double counting at least part of the value of the subsidiary's assets. Accordingly, you should add only the subsidiary's total assets after subtracting the value of the interest in the subsidiary as it is carried on the parent's balance sheet.[41]

b. Natural persons

The total assets of a natural person include his or her investment assets (cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations), voting securities, and other income-producing property, together with the total assets of any entity he or she controls. Property is income-producing if it is held either for

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[39] As used in the rule, "net sales" means gross revenues less returns, discounts, excise taxes, and the like. "Net sales" is not the equivalent of profits or "net income," however, and therefore the cost of raw materials, wages, interest, and other expenses may not be deducted. *See* The Statement of Basis and Purpose at 43 Fed. Reg. 33472-73.

[40] *See* 16 C.F.R. § 801.11(b)(2).

[41] *See* the statement of basis and purpose at 43 Fed. Reg. 33473 which provides additional information concerning consolidating a person's sales or assets.

investment or for the production of income, whether or not it actually produces income. You will have to refer to the definitions of "hold" and "control" to determine whether the individual (together with spouse and minor children) "holds" such property and to determine what entities he or she may "control." You may omit from the calculation the value of residences, cars, and personal property not held for the purpose of producing income. The annual net sales of an individual are the sum of the net sales of the entities he or she controls, including proprietorships, as well as income derived from investments.

c. Newly-formed person

A newly formed person, who has not yet prepared financial statements, may need to prepare a special statement of its sales and assets in order to calculate its size. Typically, these entities are formed for the purpose of making an acquisition. Under 801.11(e), a UPE without a regularly prepared balance sheet may exclude funds which will be used to make an acquisition in determining its size.[42] The Rule applies until the UPE, or any entity within it, has a regularly prepared balance sheet.

In the hypothetical, you have already identified Zed Corporation as its own ultimate parent entity and have concluded that Mr. and Mrs. Beta together are the ultimate parent entity of Beta Products, Inc. Assume that you also know that Zed Corporation is a large diversified company which probably has several hundred million dollars in annual sales. To be certain, you can consult Zed Corporation's annual report and refer to the 10-K and 10-Q reports that the company has filed with the Securities and Exchange Commission. In this instance, assume that Zed Corporation's annual report confirms that last year the company had annual revenues of $545 million. Since the current year has not yet ended and Zed Corporation used the calendar year for accounting purposes, there is no more recent annual income figure. Thus, Zed Corporation is clearly a $100 million (as adjusted) person. If it were necessary to consider total assets, you would want to look for the company's most recent regularly prepared balance sheet showing total assets. Note, however, that the balance sheets included in the firm's annual report or SEC filing may not be the company's most recent regularly prepared statements, since many corporations prepare quarterly or monthly statements of assets apart from those filed.

Applying the size of person test to Mr. and Mrs. Beta is a bit more involved since neither regularly prepares a financial statement. A good starting point, though, would be to add together the sales and assets of all the companies they control. You would not include the sales and assets of Resource Inc. because the Betas do not control that company but hold only a minority interest with no contractual power to appoint 50 percent or more of the board of directors. Assume here that Beta Products, Inc., is the only company controlled by Mr. and Mrs. Beta. Accordingly, you need not consolidate on one balance sheet the sales and assets of several entities. The minimum annual net sales for Mr. and Mrs. Beta can thus be found in the annual revenue figure from Beta Products' yearly statement of income. Assume that statement shows

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[42] *See* 16 C.F.R. § 801.11(e).

sales to be $9 million. It also shows total assets to be $9 million. If either figure had been $10 million (as adjusted), you could have stopped there and concluded that the size of person in the case of Mr. and Mrs. Beta was at least $10 million (as adjusted).

In the absence of such a simple solution, however, you must next consider the value of any additional investments owned by Mr. and Mrs. Beta, and any additional revenues these may generate. As provided by Rule 801.11 (d),[43] you should not consider Mr. Beta's country residence or the sports car he drives in computing his total assets; similarly, the value of Mrs. Beta's luxury condominium should be omitted from the calculation of her total assets. You should also exclude the value of the Resource Inc. voting securities because, although they are investment assets, their value is already reflected on Beta Products' balance sheet.

However, Mr. and Mrs. Beta also hold in their own names some voting securities in other corporations, a vacation cottage that is rented out during the summer months, and a racehorse. Since these assets are all held to produce income or as investments, you will have to determine their value and include them in your calculation of the value of Mr. and Mrs. Beta's total assets.

You determine that these additional voting securities and income producing properties are worth at least $10 million. Adding this to the total assets of Beta Products, Inc., puts Mr. and Mrs. Beta's total assets over $10 million (as adjusted). You conclude, therefore, that Mr. and Mrs. Beta together satisfy the size of person requirement. Because you have now determined that the acquiring person is a $100 million (as adjusted) person and the acquired person is a $10 million (as adjusted) person (they will need to stipulate to this size of person in their filing), you know that the parties to the proposed transaction meet the size of person test.

Zed's acquisition of Beta is valued at $90 million and the parties meet the size of person test. Thus, unless an exemption applies, the parties in this hypothetical transaction must file and observe the statutory waiting period.

VI. ADDITIONAL CONSIDERATIONS

Note that this Guide does not cover all reporting obligations. The formation of corporate joint ventures and unincorporated entities may be reportable if the parties and the newly-formed entities meet certain criteria.[44] Also, transactions involving foreign businesses are subject to distinct treatment under the Rules.[45]

You also should be aware of Rule 801.90, which is designed to limit the ability of parties to

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[43] *See* 16 C.F.R. § 801.11 (d).

[44] *See* Rule 801.40 - 801.50, 16 C.F.R. § 801.40 - 801.50.

[45] *See* Rules 802.50 - 802.53, 16 C.F.R. §§ 802.50 - 802.53.

evade the Act's filing requirements. It states that: "Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction."[46]

Finally, it is important to consider the many exemptions provided in the Act and the Rules. The Program is designed to facilitate antitrust review. It, therefore, does not require notification for transactions that have been determined to be unlikely to violate the antitrust laws. For example:

1) Stock splits that do not increase the percentages owned by any person are exempt;[47]

2) Acquisitions of small percentages of an issuer's voting securities solely for the purpose of investment are exempt;[48]

3) Acquisitions of additional voting securities by persons who already hold 50 percent of the voting shares of an issuer are not reportable;[49]

4) Acquisitions in the ordinary course of business, such as purchases of current supplies and used durable goods also are exempt;[50]

5) Acquisitions of several categories of real property, such as unproductive real property, office and residential property, and hotels are not reportable.[51]

6) Acquisitions in regulated industries, whose competitive effects are reviewed by other agencies, may be exempt or subject to modified reporting requirements.[52]

Although the premerger notification Rules tend to be complex and technical, the discussion in this Guide should help you determine whether a particular transaction must be reported. That

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[46] *See* Rule 801.90, 16 C.F.R. § 801.90.

[47] *See* § 7A(c)(10), 15 U.S.C. § 18a(c)(10), and Rule 802.10, 16 C.F.R.§ 802.10.

[48] *See* § 7A(c)(9), 15 U.S.C. § 18a(c)(9), and Rule 802.9, 16 C.F.R. § 802.9.

[49] *See* § 7A(c)(3), 15 U.S.C. § 18a(c)(3), and Rule 802.30, 16 C.F.R. § 802.30.

[50] *See* § 7A(c) (1), 15 U.S.C. § 18a (c)(1) and Rules 802.1(b), 802.1(c), 16 C.F.R. § 802.1(b), § 802.1(c)

[51] *See* § 7A(d)(2)(B), 15 U.S.C. § 18A(d)(2)(B); and Rules 802.2(c), 802.2(d), 802.2(e), 16 C.F.R. § 802.2(c), 802.2(d), 802.2(e).

[52] *See* § 7A(c)(6), 15 U.S.C. § 18a(c)(6), and Rule 802.6, 16 C.F.R. § 802.6.

said, you should not rely on this Guide alone to determine your filing obligation. As indicated earlier, you should refer to the Act, the relevant Rules and the Formal Interpretations of the Rules to understand points that are not discussed in this general introduction. Appendix 1, below, provides a quick reference to certain Rules relevant to determining reportability.

If you conclude that a transaction must be reported, you may want to consult the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr for help in completing the Form. In addition, take the time to read the instructions to the Form carefully. They have been written to help you avoid the most common mistakes.

After consulting each of the sources mentioned here and in Guide I, if you still have questions, contact the PNO at (202) 326-3100.

Appendix 1: Relevant Rule – Quick Reference

Identifying Acquiring and Acquired Persons	
"UPE"	§ 801.1(a)(3)
"Person"	§ 801.1(a)(1)
"Control"	§ 801.1(b)
"Hold"	§ 801.1(c)

Size of Transaction Test	
Aggregation of Holdings	§§ 801.13 - 801.15
Value of Acquisition	§ 801.10
Percentage of Voting Securities	§ 801.12
Notification Thresholds	§ 801.1(h)

Size of Person Test	
Annual Net Sales and Total Assets	§ 801.11

Other Considerations	
Exemptions:	
Investment Only	§ 7A(c)(9); § 802.9
Intraperson	§ 7A(c)(3); § 802.30
Ordinary Course of Business	§ 7A(c)(1); § 802.1
Real Property	§ 802.2; § 802.5
Regulated Industries	§ 7A(c)(6); § 802.6
Foreign Transactions	§ § 802.50 - 802.53
Secondary Acquisitions	§ 801.4
Joint Venture Formations:	
Corporations	§ 801.40
Unincorporated Entities	§ 801.50
Avoidance	§ 801.90

[BILLING CODE 6750-01S]

FEDERAL TRADE COMMISSION

REVISED JURISDICTIONAL THRESHOLDS FOR

SECTION 7A OF THE CLAYTON ACT

AGENCY: Federal Trade Commission

ACTION: Notice

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of Section 7A of the Clayton Act. Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390 ("the Act"), requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). The new thresholds, which take effect 30 days after publication in the Federal Register, are as follows:

SUBSECTION OF 7A	ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
7A(a)(2)(A)	$200 million	$253.7 million
7A(a)(2)(B)(i)	$50 million	$63.4 million
7A(a)(2)(B)(i)	$200 million	$253.7 million
7A(a)(2)(B)(ii)(I)	$10 million	$12.7 million

SUBSECTION OF 7A	ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
7A(a)(2)(B)(ii)(I)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(II)	$10 million	$12.7 million
7A(a)(2)(B)(ii)(II)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(III)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(III)	$10 million	$12.7 million
Section 7A note: Assessment and Collection of Filing Fees[1] (3)(b)(1)	$100 million	$126.9 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	$100 million	$126.9 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	$500 million	$634.4 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(3)	$500 million	$634.4 million

Any reference to these thresholds and related thresholds and limitation values in the HSR rules (16 C.F.R. Parts 801-803) and the Antitrust Improvements Act Notification and Report Form and its Instructions will also be adjusted, where indicated by the term "(as adjusted)", as follows:

ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
$10 million	$12.7 million
$50 million	$63.4 million
$100 million	$126.9 million
$110 million	$139.6 million
$200 million	$253.7 million
$500 million	$634.4 million
$1 billion	$1,268.7 million

[1]Pub. L 106-553, Sec. 630(b) amended Sec. 18a note.

EFFECTIVE DATE: [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: B. Michael Verne, Bureau of Competition, Premerger Notification Office (202) 326-3100.

Authority: 16 U.S.C. § 7A.

By direction of the Commission.

Donald S. Clark
Secretary

TRANSACTION NUMBER ASSIGNED ☐☐☐☐☐☐☐☐

16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
3084-0005
Expires 05/31/2010

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

↓ Attach the Affidavit required by § 803.5 to this page.

FEE INFORMATION

AMOUNT PAID $_____

In cases where your filing fee would be higher if based on acquisition price or where the acquisition price is undetermined to the extent that it may straddle a filing fee threshold, attach an explanation of how you determined the appropriate fee *(acquiring persons only).*

Attachment Number _____

TAXPAYER IDENTIFICATION NUMBER _____
or SOCIAL SECURITY NUMBER of payer _____
(*acquiring person (and payer if different from acquiring person)*)

CHECK ATTACHED ☐ MONEY ORDER ATTACHED ☐

WIRE TRANSFER ☐ CONFIRMATION NO. _____

FROM: NAME OF INSTITUTION _____

NAME OF PAYER (if different from PERSON FILING) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO

IS THIS ACQUISITION SUBJECT TO FOREIGN FILING REQUIREMENTS? ☐ YES ☐ NO
If YES, list jurisdictions: *(voluntary)* _____

IS THIS ACQUISITION A CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? *(Grants of early termination are published in the Federal Register AND on the FTC web site www.ftc.gov)*
☐ YES ☐ NO

ITEM 1 – PERSON FILING

1(a) NAME and
HEADQUARTERS ADDRESS
of PERSON FILING

1(b) PERSON FILING NOTIFICATION IS
☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE PERSON FILING NOTIFICATION
☐ Corporation ☐ Unincorporated Entity ☐ Other *(Specify):* _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)* _____ (month/year) to _____ (month/year)

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $11,000 for each day during which such person is in violation of 15 U.S.C. §18a.

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

Filing - Complete and return *two* copies (with one original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. *Three* copies (with one set of documentary attachments) should be sent to: Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, 950 Pennsylvania Avenue N.W., Room #3335, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice do not use the 20530 zip code; use zip code 20004.)

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 39 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:
Premerger Notification Office, H-303, Federal Trade Commission,
Washington, DC 20580 and
Office of Information and Regulatory Affairs, Office of Management and Budget,
Washington, DC 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears in the upper right-hand corner of the first page of this form.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $11,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

NAME OF PERSON FILING NOTIFICATION	DATE

1(e) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF ENTITY FILING NOTIFICATION (if other than ultimate parent entity)

☐ NA ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME OF ENTITY FILING NOTIFICATION	ADDRESS

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

1(g) IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS. (See § 803.20(b)(2)(iii))

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

2(b) THIS ACQUISITION IS *(put an X in all the boxes that apply)*

☐ an acquisition of assets
☐ a merger (see § 801.2)
☐ an acquisition subject to § 801.2(e)
☐ a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50)
☐ an acquisition subject to § 801.30 (*specify type*)
☐ other (*specify*) _____
☐ a consolidation (see § 801.2)
☐ an acquisition of voting securities
☐ a secondary acquisition
☐ an acquisition subject to § 801.31
☐ acquisition of non-corporate interests

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED *(acquiring person only in an acquisition of voting securities)*

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% (see Instructions) (as adjusted) ☐ 50%

2(d)(i) VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION	(ii) PERCENTAGE OF VOTING SECURITIES	(iii) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION	(iv) VALUE OF NONCORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION	(v) AGGREGATE TOTAL VALUE
$	%	$	$	$

2(e) If aggregate total value in 2(d)(v) is based in whole or in part on a fair market valuation pursuant to § 801.10(c)(3), identify the person or persons responsible for making the valuation *(acquiring persons only)*.

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

3(b)(i) ASSETS TO BE ACQUIRED (to be completed only for asset acquisitions)

3(b)(ii) ASSETS HELD BY ACQUIRING PERSON

3(b)(iii) ASSETS HELD BY UNINCORPORATED ENTITIES

3(c) VOTING SECURITIES TO BE ACQUIRED

3(c)(i) LIST AND DESCRIPTION OF VOTING SECURITIES AND LIST OF NON-VOTING SECURITIES:

3(c)(ii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY:

3(c)(iii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY BEING ACQUIRED:

3(c)(iv) IDENTITY OF PERSONS ACQUIRING SECURITIES:

3(c)(v) DOLLAR VALUE OF SECURITIES IN EACH CLASS BEING ACQUIRED:

3(c)(vi) TOTAL NUMBER OF EACH CLASS OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION:

3(d) SUBMIT A COPY OF THE MOST RECENT VERSION OF CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)

DO NOT ATTACH THIS DOCUMENT TO THIS PAGE ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGREEMENT _____

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4 PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See Item by Item instructions). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) DOCUMENTS FILED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION — ATTACHMENT OR REFERENCE NUMBER

4(b) ANNUAL REPORTS, ANNUAL AUDIT REPORTS, AND REGULARLY PREPARED BALANCE SHEETS — ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS — ATTACHMENT OR REFERENCE NUMBER

ITEM 5 (See "References" listed in the General Instructions to the Form. Refer to the *North American Industry Classification System-United States, 2002* (*2002 NAICS Manual*) for the 6-digit (NAICS) industry codes. Refer to the *2002 Numerical List of Manufactured and Mineral Products* (EC02M31R-NL) for the 7-digit product class codes and the 10-digit product codes. Report revenues for the 7-digit product class codes and 10-digit product codes using the codes in the columns labeled "Product code." For further information on NAICS-based codes visit the www.census.gov web site.)

5(a) DOLLAR REVENUES BY INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	2002 TOTAL DOLLAR REVENUES

ITEM 5(b)(i) DOLLAR REVENUES BY MANUFACTURED PRODUCTS

10-DIGIT PRODUCT CODE	DESCRIPTION	2002 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(ii) PRODUCTS ADDED OR DELETED

DESCRIPTION (10-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR I_____I TOTAL DOLLAR REVENUES

(Item 5(b)(iii) continued on page 10)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS - CONTINUED

7-DIGIT PRODUCT CLASS	DESCRIPTION	YEAR I_____I TOTAL DOLLAR REVENUES

ITEM 5(c) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY

6-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR I_____I TOTAL DOLLAR REVENUES

5(d) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY.

5(d)(i) NAME AND ADDRESS OF THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

(B) DESCRIPTION OF ANY CONTRACTS OR AGREEMENTS

(C) DESCRIPTION OF ANY CREDIT GUARANTEES OR OBLIGATIONS

(D) DESCRIPTION OF CONSIDERATION WHICH EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

5(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

5(d)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 7-DIGIT PRODUCT CLASS (manufacturing)

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) SHAREHOLDERS OF PERSON FILING NOTIFICATION

NAME OF PERSON FILING NOTIFICATION	DATE

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

ITEM 7 DOLLAR REVENUES

7(a) 6-DIGIT NAICS CODE AND DESCRIPTION

7(b) NAME OF EACH PERSON WHICH ALSO DERIVED DOLLAR REVENUES

7(c) GEOGRAPHIC MARKET INFORMATION

ITEM 8 PRIOR ACQUISITIONS (to be completed by acquiring person only)

NAME OF PERSON FILING NOTIFICATION	DATE

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the
City of _____, State of _____

this _____day of _____, the year _____

Signature _____

My Commission expires _____

[SEAL]

[BILLING CODE 6750-01S]

FEDERAL TRADE COMMISSION

REVISED JURISDICTIONAL THRESHOLDS FOR

SECTION 8 OF THE CLAYTON ACT

AGENCY: Federal Trade Commission

ACTION: Notice

SUMMARY: The Federal Trade Commission announces the revised thresholds for interlocking directorates required by the 1990 amendment of Section 8 of the Clayton Act. Section 8 prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product. The new thresholds, which take effect immediately, are $25,841,000 for Section 8(a)(1), and $2,584,100 for Section 8(a)(2)(A).

EFFECTIVE DATE: [Insert date of publication in Federal Register]

FOR FURTHER INFORMATION CONTACT: James F. Mongoven, Bureau of Competition, Office of Policy and Coordination, (202) 326-2879.

(Authority: 15 U.S.C. § 19(a)(5)).

By direction of the Commission.

Donald S. Clark
Secretary

ANTITRUST IMPROVEMENTS ACT
NOTIFICATION AND REPORT FORM
for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Notification and Report Form ("the Form") is required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). An electronic version of the Form is available at https://www.hsr.gov and may be used for the direct electronic submission of filings or used to generate a print version of the Form for paper copy submission.

These instructions specify the information which must be provided in response to the Items on the Form. The completed Form, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on the Form must submit a complete set of attachment pages with each copy of the Form.

The term "documentary attachments" refers to materials supplied in responses to Item 3(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.

Information-The central office for information and assistance concerning the rules, 16 CFR Parts 801-803, and the Form is Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, phone (202) 326-3100, e-mail HSRHelp@hsr.gov. Program information and the electronic version of the Form can be found at https://www.hsr.gov.

Definitions-The definitions and other provisions governing this Form are set forth in the rules, 16 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) 48 FR 34427 (July 29, 1983), 61 FR 13688 (March 28, 1996), 66 FR 8693 (February 1, 2001), 70 FR 4994 (January 31, 2005), 70 FR 11513 (March 8, 2005), 70 FR 73369 (December 12, 2005), 70 FR 77312 (December 30, 2005), 71 FR 2943 (January 18, 2006), and Pub. L. No. 106-533, 114 Stat. 2762.

Affidavit-Attach the affidavit required by § 803.5 to the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 803.5(a)).

For acquisitions to which § 801.30 does not apply, the affidavit must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction.

For acquisitions to which § 801.30 does apply, the affidavit must also attest that the issuer whose voting securities are to be acquired has received notice; the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer; the specific notification threshold that the acquiring person intends to meet or exceed; the fact that the acquisition may be subject to the act, and that the acquiring person will file notification under the act; the anticipated date of receipt of such notification; and the fact that the person within which the issuer is included may be required to file notification under the act.

In the case of a tender offer the affidavit must also attest that the intention to make the tender offer has been publicly announced.

The language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury may be used instead of notarization of the affidavit.

Responses-*Each answer* should identify the Item to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each Item. Each additional sheet should identify at the top of the page the Item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be identified.

For electronic filings, all Items are automatically identified within the Form. Electronic attachments and endnotes may be appended to the Form for any Item prior to submission.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any Item, and at the top of the first or cover page of each documentary attachment. For electronic filings, Items 1(a) and 1(b) must be completed before proceeding to pages 2-15 of the Form. Entering the date on page 2 will automatically fill out the date on all other pages of the Form.

If unable to answer any Item fully, give such information as is available and provide a statement of reasons for non-compliance as required by § 803.3. If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars. Estimated data should be followed by the notation, "est." For electronic filings, add an endnote with the notation, “est.” to any Item where data is estimated.

Year-All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

***Privacy Act Statement*--**Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $11,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

North American Industry Classification System (NAICS) Data-The Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS national industry code level. To the extent that dollar revenues are derived from *manufacturing operations* (NAICS Sectors 31-33), data must also be submitted at the 7-*digit NAICS product class and 10-digit NAICS product code levels.* The term "dollar revenues" is defined in § 803.2(d).

References-In reporting information by 6-digit NAICS industry code refer to the *North American Industry Classification System - United States, 2002 (2002 NAICS Manual*) published by the Executive Office of the President, Office of Management and Budget. In reporting information by 7-digit NAICS product class and 10-digit NAICS product code refer to the *2002 Numerical List of Manufactured and Mineral Products* (EC02M31R-NL) published by the Bureau of the Census. Information regarding NAICS also is available at www.census.gov.

Thresholds-Filing fee and notification thresholds are adjusted annually pursuant to Section 7A(a)(2) of the Clayton Act based on the change in gross national product, in accordance with Section 8(a)(5). The current threshold values can be found at www.ftc.gov.

Items 5, 7, 8-Supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. (See §§ 801.1(k); 803.2(c)(1).)

Information need not be supplied regarding assets or voting securities currently being acquired, when the acquisition is exempt under the statute or rules. (See § 803.2(c)(2).)

The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b) and (c).)

Filing- Filers have three options: (1) Complete and return two copies (with one notarized original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Three copies (with one set of documentary attachments) should be sent to: Director of Operations, Antitrust Division, Department of Justice, 950 Pennsylvania Avenue, N.W., Room #3335, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004); (2) Complete the electronic version of the Form and submit the completed Form with all electronic attachments as directed at https://www.hsr.gov; or (3) Complete the electronic version of the Form (with the electronic affidavit form) and submit it electronically while providing the documentary attachments in paper copy to the FTC and DOJ as in Option 1 above. Note that for option three, the attachments must be listed on the attachments page of the Form and classified as "paper to follow". If one or both delivery sites are unavailable, the agencies may announce, through the media and, if possible, www.ftc.gov and www.hsr.gov, alternate sites for delivery.

ITEM BY ITEM

Affidavit- Attach the affidavit required by § 803.5 to page 1 of the Form. If filing electronically, submit the electronic version of the affidavit as attachment 1. Acquiring persons in transactions covered by § 801.30 are required to also submit a copy of the notice served on the acquired person pursuant to § 803.5(a)(1). (See § 803.5(a)(3).)

Fee Information-The fee for filing the Notification and Report Form is based on the aggregate total amount of assets and voting securities to be held as a result of the acquisition:

Value of assets or voting securities to be held	Fee Amount
greater than $50 million but less than $100 million (as adjusted)	$45,000
$100 million or greater but less than $500 million (as adjusted)	$125,000
$500 million or greater (as adjusted)	$280,000

Amount Paid-Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges. Where an explanatory attachment is required, include in your explanation any adjustments to the acquisition price that serve to lower the fee from that which would otherwise be due. If there is no acquisition price or if the acquisition price may fall within a range that straddles two filing fee thresholds, state the transaction value on which the fee is based and explain the valuation method used. Include in your explanation a description of any exempt assets, the value assigned to each, and the valuation method used.

A Valuation Worksheet available from the Premerger Notification Office will be helpful in determining the value of a transaction for filing and fee purposes. This Worksheet need not be submitted with the Notification and Report Form, but it or something similar should be utilized and retained by the acquiring person in the event Commission staff has questions about the valuation of the transaction.

Payer Identification- Provide the 9-digit Taxpayer Identification Number (TIN) of the acquiring person and, if different from the filing person, the TIN of the payer(s) of the filing fee. A payer or filing person who is a natural person having no TIN must provide the name and social security number (SSN) of the payer. If the payer or filing person is a foreign person, only the name of the payer and the name of the filing person need be supplied if different.

Method of Payment-Check the box indicating the method of fee payment. If paying by electronic wire transfer (EWT), provide the name of the financial institution from which the EWT is being sent and the confirmation number.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification, the payer must provide the following information to the financial institution initiating the EWT:

The Department of Treasury's ABA Number: 021030004; and
The Federal Trade Commission's ALC Number: 29000001.

If the name used to transmit the EWT differs from the filer's name, provide the alternative name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

If paying by certified check or money order send the payment to the Premerger Notification Office at the address above.

Corrective Filing-Put an X in the appropriate box to indicate whether the notification is a corrective filing being made for an acquisition that has already taken place in violation of the statute. Attach a detailed, written explanation signed by a company official explaining (1) how the violation occurred, (2) when and how the violation was discovered and (3) what steps will be taken to ensure compliance in the future.

Transactions Subject to Foreign Antitrust Notification-If to the knowledge or belief of the filing person at the time of filing this notification, a foreign antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipated date of each such notification. Response to this item is voluntary.

Cash Tender Offer-Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy-Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11USC § 363).

Early Termination-Put an X in the yes box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by § 7A(b)(2) of the Clayton Act and on the FTC web site www.ftc.gov.

ITEM 1

Note: When using the electronic version of the Form, Items 1(a) and 1(b) must be completed before proceeding to pages 2-15 of the Form.

Item 1(a)-Give the name and headquarters address of the person filing notification. The name of the person is the name of the ultimate parent entity included within that person.

Item 1(b)-Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.)

Item 1(c)-Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity or other (specify).

Item 1(d)-Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(e)-Put an X in the appropriate box to indicate if this Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if this Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) of the Form.

Item 1(f)-If an entity within the person filing notification other than the ultimate parent entity listed in Item 1(a) is the entity which is making the acquisition, or if the assets, voting securities or non-corporate interests of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interest held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see § 801.1(b)).

Item 1(g)-Print or type the name and title, firm name, address, telephone number, fax number and e-mail address of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 1(h)-Foreign filing persons print or type the name and title, firm name, address, telephone number, fax number and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii).)

ITEM 2

Item 2(a)-Give the names of all ultimate parent entities of acquiring and acquired person which are parties to the acquisition whether or not they are required to file notification.

Item 2(b)-Put an X in all the boxes that apply to this acquisition.

Item 2(c)-*Acquiring persons* put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $50 million (as adjusted), $100 million (as adjusted), $500 million (as adjusted), 25% (if value of voting securities to be held is greater than $1 billion, as adjusted), or 50%. The notification threshold selected should be based on voting securities only that will be held as a result of the acquisition.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities (e.g. an acquisition of 100% of the voting securities of an issuer, valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

Item 2(d)-*Assets and voting securities held as a result of the acquisition* (to be completed by both acquiring and acquired persons). State:

Item 2(d)(i)-the value of voting securities;

Item 2(d)(ii)-the percentage of voting securities;

Item 2(d)(iii)-the value of assets;

Item 2(d)(iv)-the value of non-corporate interests;

Item 2(d)(v)-the aggregate total amount of voting securities, assets and non-corporate interests of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§ 801.12, 801.13, and 801.14).

Item 2(e)-Acquiring persons must provide the name(s) of the person(s) who performed any fair market valuation used to determine the aggregate total value of the transaction reported in Item 2(d)(v).

ITEM 3

Item 3(a)-*Description of acquisition*. Briefly describe the transaction. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification. Indicate for each party whether assets or voting securities (or both) are to be acquired. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction.

If the voting securities are to be acquired from a holder other than the issuer (or an entity within the same person as the issuer) separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons involved in tender offers should describe the terms of the offer.

Item 3(b)(i)-*Assets to be acquired*. This Item is to be completed only to the extent that the transaction is an acquisition of assets. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction, giving dollar values thereof.

Give the total value of the assets to be acquired in this transaction.

Examples of general classes of assets other than cash and securities are land, merchandising inventory, manufacturing plants (specify location and products produced), and retail stores. For each general class of assets, indicate the page or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.

Item 3(b)(ii)-*Assets held by acquiring person*. (To be completed by acquiring persons). If assets of the acquired person (see § 801.13) are presently held by the person filing notification, furnish a description of each general class of such assets in the manner required by Item 3(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 3(b)(iii) –*Assets held by unincorporated entities.* This item is to be completed only to the extent that the transaction is an acquisition of non-corporate interests. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction. For examples of general classes of assets refer to Item 3(b)(i).

Item 3(c)-*Voting securities to be acquired*. Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition: (If, as a result of the acquisition, the acquiring person will hold 100 percent of the voting securities of the acquired issuer or if the acquisition is a merger or consolidation (see § 801.2(d)), the parties may so state and provide the total dollar value of the transaction instead of responding to Items 3(c)(i)-3(c)(vi).

Item 3(c)(i)-List each class of voting securities (including convertible voting securities) which will be outstanding after the acquisition has been completed. If there is more than one class of voting securities, include a description of the voting rights of each class. Also list each class of non-voting securities which will be acquired in the acquisition;

Item 3(c)(ii)-Total number of shares of each class of securities listed which will be outstanding after the acquisition has been completed;

Item 3(c)(iii)-Total number of shares of each class of securities listed which will be acquired in this acquisition. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(iv)-Identity of each person acquiring any securities of any class listed. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(v)-Dollar value of securities of each class listed to be acquired in this transaction (see § 801.10). If there is more than one acquiring person of any class of securities, show data separately for each acquiring person (If the exact dollar value cannot be determined at the time of filing, provide an estimated value and indicate the basis on which the estimate was made);

Item 3(c)(vi)-Total number of each class of securities listed which will be held by acquiring person(s) after the acquisition has been accomplished. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(d)-Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired. (For paper copy submissions, do not attach these documents to the Form.)

ITEM 4

Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification, furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(a)-all of the following documents which have been filed with the United States Securities and Exchange Commission (or are to be filed contemporaneously in connection with this acquisition); the most recent proxy statement and Form 10-K, each dated not more than three years prior to the date of this Notification and Report Form; all Forms 10-Q and 8-K filed since the end of the period reflected by the Form 10-K being supplied; any registration statement filed in connection with the transaction for which notification is being filed; if the acquisition is a tender offer, Schedule TO. Alternatively, the person filing notification may incorporate a document by reference to an internet address directly linking to the document (see §803.2(e)(2));

NOTE: In response to Item 4(a), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in § 803.2(e).

Item 4(b)-the most recent annual reports and most recent annual audit reports (of person filing notification and of each unconsolidated United States issuer included within such person) and, if different, the most recently regularly prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person. Alternatively, the person filing notification may incorporate a document by reference to an internet address directly linking to the document (see §803.2(e)(2));

Item 4(c)-all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

ITEMS 5 through 8

NOTE: For Items 5 through 8, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be sold, in the case of an acquisition of non-corporate interests, to the unincorporated entity being acquired, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. A person filing as both acquiring and acquired may be required to provide a separate response to these items in each capacity so that it can properly limit its response as an acquired person. (See § 803.2(b) and (c).)

Items 5(a)-5(c): These items request information regarding dollar revenues and lines of commerce at three NAICS levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), data must also be submitted at the 7-digit product class level and 10-digit product code level (NAICS-based codes). Where certain published NAICS industry codes contain only 5 digits, the filing person should add a zero (0) after the fifth (5^{th}) digit.

NOTE: See "References" listed in the General Instructions to the Form. Refer to the *2002 NAICS Manual* for the 6-digit industry codes and the *2002 Numerical List of Manufactured and Mineral Products (2002 Numerical List)* for the 7-digit product classes and 10-digit product codes. Report revenues for the 7-digit NAICS product classes and 10-digit NAICS product codes using the codes in the columns labeled "Product code" in the *2002 Numerical List*.

Nondepository credit intermediation (NAICS Industry Group Code 5222); securities, commodity contracts, and other financial investments (NAICS Subsector 523); funds, trusts, and other financial vehicles (NAICS Subsector 525); real estate (NAICS Subsector 531); lessors of nonfinancial intangible assets, except copyright works (NAICS Subsector 533); and management of companies and enterprises (NAICS Subsector 551) should identify or explain the revenues reported (e.g. dollar sales receipts).

Persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 2002). For example, if the person filing notification acquired an entity in 2003, it must include that entity's 2002 revenues in items 5(a) and 5(b)(i). It must also include that entity's most recent year's revenues in Item 5(b)(iii) and/or Item 5(c).

Item 5(a)-*Dollar revenues by industry*. Provide aggregate 6-digit NAICS industry data for 2002.

Item 5(b)(i)-*Dollar revenues by manufactured product*. Provide the following information on the aggregate operations for the person filing notification for 2002 for each 10-digit NAICS product of the person in NAICS Sectors 31-33 (manufacturing industries).

NOTE: Where the *2002 Numerical List* denotes footnote 1 at the end of a specific Subsector, refer to Appendices A, and then B for detail collected in a specified Current Industrial Report. You must provide 10-digit NAICS product codes and descriptions listed in Appendix B.

Item 5(b)(ii)-*Products added or deleted*. Within NAICS Sectors 31-33 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 2002, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 10-digit NAICS product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 2002 by reason of mergers or acquisitions of entities occurring since 2002. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 2002 by the person filing notification (and now included within the person) itself has added any products since 2002, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets constituting less than substantially all of the assets of an entity since 2002 should also be listed here.

Item 5(b)(iii)-*Dollar revenues by manufactured product class*. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 7-digit NAICS product class within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 7-digit NAICS product class may be provided if a statement describing the method of estimation is furnished.

Item 5(c)-*Dollar revenues by non-manufacturing industry*. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 6-digit NAICS industry code in NAICS Sectors other than 31-33 (manufacturing industries) in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry code may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: *This million dollar minimum is applicable only to Item 5(c).*

JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY

Item 5(d)-Supply the following information only if the acquisition is the formation of a joint venture corporation or unincorporated entity. (See § 801.40.)

Item 5(d)(i)-List the name and mailing address of the joint venture corporation or unincorporated entity.

Item 5(d)(ii)(A)-List contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(d)(ii)(B)-Describe any contracts or agreements whereby the joint venture corporation or unincorporated entity will obtain assets or capital from sources other than the persons forming it.

Item 5(d)(ii)(C)-Specify whether and in what amount the persons forming the joint venture corporation or unincorporated entity have agreed to guarantee its credit or obligations.

Item 5(d)(ii)(D)-Describe fully the consideration which each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Item 5(d)(iii)-Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(d)(iv)-Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing also specify each 7-digit NAICS product class in which it will derive dollar revenues.

ITEM 6

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "document attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each Item the specific page(s) of the document that are responsive to that Item.

Item 6(a)-*Entities within the person filing notification*. List the name and headquarters mailing address of each entity included within the person filing notification. Entities with total assets of less than $10 million may be omitted.

Item 6(b)-*Shareholders of person filing notification*. For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (see § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds five percent or more of the outstanding voting securities of the class and the number and percentage held by that person. Holders need not be listed for entities with total assets of less than $10 million.

Item 6(c)-Holdings of person filing notification. If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage held, and (optionally) the entity within the person filing notification which holds the securities. Holdings of less than five percent of the outstanding voting securities of any issuers, and holding of issuers with total assets of less than $10 million may be omitted.

ITEM 7

If, to the knowledge or belief of the person filing notification, the acquiring person filing notification derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired person that is a party to the acquisition also derived dollar revenues in the most recent year (or in which a joint venture corporation or unincorporated entity will derive dollar revenues), then for each such 6-digit NAICS industry code:

Item 7(a)-supply the 6-digit NAICS industry code and description for the industry;

Item 7(b)-list the name of each person which is a party to the acquisition which also derived dollar revenues in the 6-digit industry;

Item 7(c)-*Geographic market information*:

Item 7(c)(i)-for each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a) above, list the states or, if desired, portions thereof in which, to the knowledge or belief of the person filing notification, the products in that 6-digit NAICS code produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(ii)- for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 11 (agriculture, forestry, fishing and hunting); 21 (mining); 22 (utilities); 23 (construction); 48-49 (transportation and warehousing); 511(publishing industries); 515 (broadcasting); 517 (telecommunications); and 71 (arts, entertainment and recreation) listed in item 7(a) above, list the states or, if desired, portions thereof in which the person filing notification conducts such operations;

Item 7(c)(iii)-for each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a) above, list the states or, if desired, portions thereof in which the customers of the person filing notification are located;

Item 7(c)(iv)-for each 6-digit NAICS industry code within NAICS Sectors or Subsectors 44-45 (retail trade); 512 (motion picture and sound recording industries); 521 (monetary authorities-central bank); 522 (credit intermediation and related activities); 532 (rental and leasing services); 62 (health care and social assistance); 72 (accommodations and food services); 811 (repair and maintenance); and 812 (personal and laundry services) listed in Item 7(a) above, provide the address, **arranged by state, county and city or town,** of each establishment from which dollar revenues were derived in the most recent year by the person filing notification;

Item 7(c)(v)- for each 6-digit NAICS industry code within NAICS Subsectors 516 (internet publishing & broadcasting); 518 (internet service providers); 519 (other information services); 523 (securities, commodity contracts and other financial investments and related activities); 525 (funds, trusts and other financial vehicles); 53 (real estate and rental and leasing); 54 (professional, scientific and technical services); 55 (management of companies and enterprises); 56 (administrative and support and waste management and remediation services); 61 (educational services); 813 (religious, grantmaking, civic, professional, and similar organizations); and NAICS Industry Group 5242 (insurance agencies and brokerages, and other insurance related activities) listed in Item 7(a) above, list the states or, if desired, portions thereof in which establishments were located from which the person filing notification derived revenues in the most recent year; and

Item 7(c)(vi)-for each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers**)** listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those NAICS major industries in the Sectors and Subsectors mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

ITEM 8

Item 8-*Previous acquisitions* (to be completed by acquiring persons). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the person filing notification derived dollar revenues of $1 million or more in the most recent year and in which either the acquired issuer derived revenues of $1 million or more in the recent year (or, in which, in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive revenues of $1 million or more), or revenues of $1 million or more in the most recent year were attributable to the acquired assets. For each such 6-digit NAICS industry code, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 6-digit NAICS industry code. List only acquisitions of 50 percent or more of the voting securities of an issuer which had annual net sales or total assets greater than $10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

(a) the name of the entity acquired;

(b) the headquarters address of the entity prior to the acquisition;

(c) whether securities or assets were acquired;

(d) the consummation date of the acquisition; and

(e) the 6-digit (NAICS code) industries by (number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION- (See § 803.6.)

The language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury may be used instead of notarization of the certification.

Hart-Scott-Rodino Document Production:
Examples of Documents to Provide to Counsel

The following provides examples of the types of documents to provide to legal counsel while preparing the HSR Premerger Notification form.

It is important to conduct a thorough search, because *failure to produce 4(c) documents has resulted* in filings being "bounced" and, *on occasion, in the imposition of multi-million dollar penalties*.

Documents provided to counsel will be reviewed before submitting along with the HSR Premerger Notification. Counsel should only submit those documents that are necessary to produce, and will review with you those documents we believe must be included with the filing.[1]

Language of 4(c):

All studies, surveys, analyses and reports that were prepared by or for any officer(s) or directors(s) (in the case of unincorporated entities, individuals exercising similar functions), for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.

Note:

- Officers and directors include those of subsidiaries;
- Include documents prepared by outside consultants and investment bankers;
- Review the working group list – identify the parties and their responsibilities;
- Do not forget e-mail, data on personal computers, and electronic databases; and
- All 4(c) documents may not be part of the due diligence material; so a separate search is likely necessary.

Examples of the types of documents to provide to counsel for review:

- Email messages to or from any officer (including Vice Presidents) providing information regarding competition in the Target firm's industry to be incorporated into presentation materials.
- Notes made by any officer for use in providing commentary to accompany a PowerPoint on the proposed transaction.
- Officer or Director notes from a presentation regarding the proposed transaction that include information about the content of the presentation and their own impressions of the competitive effects of the transaction.

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[1] Primary Source: Presentation by Bruce Prager, FTC Premerger notification Office Introduction to HSR Seminar.

- Board minutes summarizing the Board meeting at which the transaction was approved. (Only the relevant portions of the Board minutes need be provided in response to 4(c); the presentations made to the Board are also required to be submitted if they contain 4(c) subject matter.)

- Questions and answers prepared by a public relations firm for use by the acquiring company during an analysts' conference that address how the combined company intends to position itself in its competitive markets.

- An offering circular (banker's book) prepared on behalf of the seller and provided to all potential buyers.

- An investment bank or business broker prepares an offering circular on its own initiative and sends it unsolicited to a company (which never retains the banker or broker), but ultimately ends up buying the firm that is the subject of the offering memorandum.

- A report regarding the proposed transaction, prepared by a low-level employee, has an officer or director as the intended recipient.

- A marketing report, prepared in the ordinary course of business, relied on by an officer in evaluating the transaction.

- A presentation for potential bank syndicate participants analyzing the transaction prepared by the acquiring person *after* the transaction is announced for use in attracting additional investors or capital.

- Bankers' memoranda prepared *before* deal is announced, analyzing possible bidders or information relating to the transaction.

- Buyer prepared materials evaluating Target *months prior* to this transaction, including documents before and after any break in the transaction history (for example, if the parties broke off discussion for months, provide documents from before the hiatus in negotiations, regardless of the reason for the hiatus).

- A consultant's report addressing scenarios including possible re-capitalization of the company, a going private transaction, the sale of the company (including a possible LBO), and various acquisition transactions.

- Memoranda discussing the position of the combined company in countries outside of the United States. (4(c) documents are not limited to United States markets.)

- Documents listing comparable transactions involving the sale of other companies in the industry.

- Memoranda discussing the Target company, providing such things as a description of its product offerings, its production facilities, and its customers.

- Presentation to the Board of Directors describing the Target, or Target's market or product.
- Email from an Officer describing the Target and potential for sales growth.
- Financial reports factoring into equation winning new contracts, new product introductions, etc.

The foregoing list is not intended to be inclusive, please contact us at should you have any questions while collecting 4(c) documents.

SUBCHAPTER H—RULES, REGULATIONS, STATEMENTS AND INTERPRETATIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

PART 801—COVERAGE RULES

Sec.

AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33537, July 31, 1978, unless otherwise noted.

§ 801.1 Definitions.

When used in the act and these rules—

(a)(1) *Person*. Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means an ultimate parent entity and all entities which it controls directly or indirectly.

Examples: 1. In the case of corporations, ''person'' encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions (whether consolidated or unconsolidated, and whether incorporated or unincorporated), and all related corporations under common control with any of the foregoing.

2. Corporations A and B are each directly controlled by the same foreign state. They are not included within the same ''person,'' although the corporations are under common control, because the foreign state which controls them is not an ''entity'' (see § 801.1(a)(2)). Corporations A and B* are the ultimate parent entities within persons ''A'', and ''B'' which include any entities each may control.

3. Since a natural person is an entity (see § 801.1(a)(2)), a natural person and a corporation which he or she controls are part of the same ''person.'' If that natural person controls two otherwise separate corporations, both corporations and the natural person are all part of the same ''person.''

4. See the example to § 801.2(a).

(2) *Entity*. The term *entity* means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture or other corporation which has not been formed but the acquisition of the voting securities or other interest in which, if already formed, would require notification under the act and these rules: *Provided, however*, That the term ''entity'' shall not include any foreign state, foreign government, or agency thereof (other than a corporation engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation engaged in commerce).

(3) *Ultimate parent entity*. The term *ultimate parent entity* means an entity which is not controlled by any other entity.

*Throughout the examples to the rules, persons are designated (''A'', ''B,'' etc.) with quotation marks, and entities are designated (A, B, etc.) without quotation marks.

Examples: 1. If corporation A holds 100 percent of the stock of subsidiary B, and B holds 75 percent of the stock of its subsidiary C, corporation A is the ultimate parent entity, since it controls subsidiary B directly and subsidiary C indirectly, and since it is the entity within the person which is not controlled by any other entity.

2. If corporation A is controlled by natural person D, natural person D is the ultimate parent entity.

3. P and Q are the ultimate parent entities within persons ''P'' and ''Q.'' If P and Q each own 50 percent of the voting securities of R, then P and Q are both ultimate parents of R, and R is part of both persons ''P'' and ''Q.''

(b) *Control.* The term *control* (as used in the terms *control(s), controlling, controlled by* and *under common control with*) means:

(1) *Either.* (i) Holding 50 percent or more of the outstanding voting securities of an issuer or

(ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

(2) Having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation, or in the case of trusts described in paragraphs (c)(3) through (5) of this section, the trustees of such a trust.

Examples: 1. Corporation A holds 100 percent of the stock of corporation B, 75 percent of the stock of corporation C, 50 percent of the stock of corporation D, and 30 percent of the stock of corporation E. Corporation A controls corporations B, C and D, but not corporation E. Corporation A is the ultimate parent entity of a person comprised of corporations A, B, C and D, and each of these corporations (but not corporation E) is ''included within the person.''

2. A statutory limited partnership agreement provides as follows: The general partner ''A'' is entitled to 50 percent of the partnership profits, ''B'' is entitled to 40 percent of the profits and ''C'' is entitled to 10 percent of the profits. Upon dissolution, ''B'' is entitled to 75 percent of the partnership assets and ''C'' is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by subparagraph (1)(ii) of this paragraph. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate ''director'' or ''an individual exercising similar functions'' as required by §801.1(f)(1) below. Thus control of a partnership is not determined on the basis of either subparagraph (1)(i) or (2) of this paragraph. Consequently, ''A'' is deemed to control the partnership because of its right to 50 percent of the partnership's profits. ''B'' is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

3. ''A'' is a nonprofit charitable foundation that has formed a partnership joint venture with ''B,'' a nonprofit university, to establish C, a nonprofit hospital corporation that does not issue voting securities. Pursuant to its charter ''A'' and ''B'' are each entitled to appoint three of C's six directors. ''A'' and ''B'' would each be deemed to control C, pursuant to §801.1(b)(2) because each is deemed to have the contractual power presently to designate 50 percent or more of the directors of a not-for-profit corporation.

4. ''A'' is entitled to 50 percent of the profits of partnership B and 50 percent of the profits of partnership C. B and C form a partnership E with ''D'' in which each entity has a right to one-third of the profits. When E acquires company X, ''A'' must report the transaction (assuming it is otherwise reportable). Pursuant to §801.1(b)(1)(ii), E is deemed to be controlled by ''A,'' even though ''A'' ultimately will receive only one-third of the profits of E. Because B and C are considered as part of ''A,'' the rules attribute all profits to which B and C are entitled (two-thirds of the profits of E in this example) to ''A.''

(c) *Hold.* (1) Subject to the provisions of paragraphs (c) (2) through (8) of this section, the term *hold* (as used in the terms *hold(s), holding, holder* and *held*) means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means.

Example: If a stockbroker has stock in ''street name'' for the account of a natural person, only the natural person (who has beneficial ownership) and not the stockbroker (which may have record title) ''holds'' that stock.

(2) The holdings of spouses and their minor children shall be holdings of each of them.

(3) Except for a common trust fund or collective investment fund within the meaning of 12 CFR 9.18(a) (both of which are hereafter referred to in this paragraph as ''collective investment funds''), and any revocable trust or an irrevocable trust in which the settlor retains a reversionary interest in the corpus, a trust, including a pension trust, shall hold all assets and voting securities constituting the corpus of the trust.

Example: Under this paragraph the trust—and not the trustee—''holds'' the voting securities and assets constituting the corpus of any irrevocable trust (in which the settlor retains no reversionary interest, and which is not a collective investment fund). Therefore, the trustee need not aggregate its holdings of any other assets or voting securities with the holdings of the trust for purposes of determining whether the requirements of the act apply to an acquisition by the trust. Similarly, the trustee, if making an acquisition for its own account, need not aggregate its holdings with those of any trusts for which it serves as trustee. (However, the trustee must aggregate any collective investment funds which it administers; see paragraph (c)(6) of this section.)

(4) The assets and voting securities constituting the corpus of a revocable trust or the corpus of an irrevocable trust in which the settlor(s) retain(s) a reversionary interest in the corpus shall be holdings of the settlor(s) of such trust.

(5) Except as provided in paragraph (c)(4) of this section, beneficiaries of a trust, including a pension trust or a collective investment fund, shall not hold any assets or voting securities constituting the corpus of such trust.

(6) A bank or trust company which administers one or more collective investment funds shall hold all assets and voting securities constituting the corpus of each such fund.

Example: Suppose A, a bank or trust company, administers collective investment funds W, X, Y and Z. Whenever person ''A'' is to make an acquisition, whether of not on behalf of one or more of the funds, it must aggregate the holdings of W, X, Y and Z in determining whether the requirements of the act apply to the acquisition.

(7) An insurance company shall hold all assets and voting securities held for the benefit of any general account of, or any separate account administered by, such company.

(8) A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly.

(d) *Affiliate.* An entity is an affiliate of a person if it is controlled, directly or indirectly, by the ultimate parent entity of such person.

(e)(1)(i) *United States person.* The term *United States person* means a person the ultimate parent entity of which—

(A) Is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States; or

(B) If a natural person, either is a citizen of the United States or resides in the United States.

(ii) *United States issuer.* The term *United States issuer* means an issuer which is incorporated in the United States, is organized under the laws of the United States or has its principal offices within the United States.

(2)(i) *Foreign person.* The term *foreign person* means a person the ultimate parent entity of which—

(A) Is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or

(B) If a natural person, neither is a citizen of the United States nor resides in the United States.

(ii) *Foreign issuer.* The term *foreign issuer* means an issuer which is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States.

(f)(1)(i) *Voting securities.* The term voting securities means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer.

(ii) *Non-corporate interest.* The term ''non-corporate interest'' means an interest in any unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets after payment of its

debts. These unincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and business trusts; but these unincorporated entities do not include trusts described in paragraphs (c)(3) through (5) of this section and any interest in such a trust is not a non-corporate interest as defined by this rule.

(2) *Convertible voting security.* The term *convertible voting security* means a voting security which presently does not entitle its owner or holder to vote for directors of any entity.

(3) *Conversion.* The term *conversion* means the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner or holder to vote for directors of the issuer or of any entity included within the same person as the issuer.

Examples: 1. The acquisition of convertible debentures which are convertible into common stock is an acquisition of ''voting securities.'' However, § 802.31 exempts the acquisition of such securities from the requirements of the act, provided that they have no present voting rights.

2. Options and warrants are also ''voting securities'' for purposes of the act, because they can be exchanged for securities with present voting rights. Section 802.31 exempts the acquisition of options and warrants as well, since they do not themselves have present voting rights and hence are convertible voting securities. Notification may be required prior to exercising options and warrants, however.

3. Assume that X has issued preferred shares which presently entitle the holder to vote for directors of X, and that these shares are convertible into common shares of X. Because the preferred shares confer a present right to vote for directors of X, they are ''voting securities.'' (See § 801.1(f)(1).) They are not ''convertible voting securities,'' however, because the definition of that term excludes securities which confer a present right to vote for directors of any entity. (See § 801.1(f)(2).) Thus, an acquisition of these preferred shares issued by X would not be exempt as an acquisition of ''convertible voting securities.'' (See § 802.31.) If the criteria in section 7A(a) are met, an acquisition of X's preferred shares would be subject to the reporting and waiting period requirements of the Act. Moreover, the conversion of these preferred shares into common shares of X would also be potentially reportable, since the holder would be exercising a right to exchange particular voting securities for different voting securities having a present right to vote for directors of the issuer. Because this exchange would be a ''conversion,'' § 801.30 would apply. (See § 801.30(a)(6).)

(g)(1) *Tender offer.* The term *tender offer* means any offer to purchase voting securities which is a tender offer within the meaning of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n.

(2) *Cash tender offer.* The term *cash tender offer* means a tender offer in which cash is the only consideration offered to the holders of the voting securities to be acquired.

(3) *Non-cash tender offer.* The term *non-cash tender offer* means any tender offer which is not a cash tender offer.

(h) *Notification threshold.* The term ''notification threshold'' means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than $50 million (as adjusted) but less than $100 million (as adjusted);

(2) An aggregate total amount of voting securities of the acquired person valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted);

(3) An aggregate total amount of voting securities of the acquired person valued at $500 million (as adjusted) or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion (as adjusted); or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million (as adjusted).

(i)(1) *Solely for the purpose of investment.* Voting securities are held or acquired ''solely for the purpose of investment'' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

Example: If a person holds stock ''solely for the purpose of investment'' and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held ''solely for the purpose of investment.''

(2) *Investment assets.* The term *investment assets* means cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations.

(j) *Engaged in manufacturing.* A person is engaged in manufacturing if it produces and derives annual sales or revenues in excess of $1 million from products within industries in Sectors 31–33 as coded by the North American Industry Classification System (2002 Edition) published by the Executive Office of the President, Office of Management and Budget.

(k) *United States.* The term *United States* shall include the several States, the territories, possessions, and commonwealths of the United States, and the District of Columbia.

(l) *Commerce.* The term *commerce* shall have the meaning ascribed to that term in section 1 of the Clayton Act, 15 U.S.C. 12, or section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

(m) *The act.* References to ''the act'' refer to Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390, and as amended by Pub. L. 106–553, 114 Stat. 2762. References to ''Section 7A( )'' refer to subsections of Section 7A of the Clayton Act. References to ''this section'' refer to the section of these rules in which the term appears.

(n) (*as adjusted*). The parenthetical ''(as adjusted)'' refers to the adjusted values published in the FEDERAL REGISTER notice titled ''Revised Jurisdictional Threshold for Section 7A of the Clayton Act.'' This FEDERAL REGISTER notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the FEDERAL REGISTER notice and will remain effective until superseded in the next calendar year. The notice will also be available at *http://www.ftc.gov.* Such adjusted values will be calculated in accordance with Section 7A(a)(2)(A) and will be rounded up to the next highest $100,000.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34429, July 29, 1983; 52 FR 20063, May 29, 1987; 66 FR 8687, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 68 FR 2430, Jan. 17, 2003; 70 FR 4990, Jan. 31, 2005; 70 FR 11510, Mar. 8, 2005; 70 FR 73372, Dec. 12, 2005; 70 FR 77313, Dec. 30, 2005]

§ 801.2 Acquiring and acquired persons.

(a) Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person.

Example: Assume that corporations A and B, which are each ultimate parent entitles of their respective ''persons,'' created a joint venture, corporation V, and that each holds half of V's shares. Therefore, A and B each control V (see §801.1(b)), and V is included within two persons, ''A'' and ''B.'' Under this section, if V is to acquire corporation X, both ''A'' and ''B'' are acquiring persons.

(b) Except as provided in paragraphs (a) and (b) of §801.12, the person(s) within which the entity whose assets or voting securities are being acquired is included, is an acquired person.

Examples: 1. Assume that person ''Q'' will acquire voting securities of corporation X held by ''P'' and that X is not included within person ''P.'' Under this section, the acquired person is the person within which X is included, and is not ''P.''

2. In the example to paragraph (a) of this section, if V were to be acquired by X, then both ''A'' and ''B'' would be acquired persons.

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with respect to separate acquisitions which comprise a single transaction.

(d)(1)(i) Mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities.

(ii) In a merger, the person which, after consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan, agreement, or certificate of merger required to be filed with State authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2)(i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities or will become wholly owned subsidiaries of a newly formed entity shall be both acquiring and acquired persons. This includes any combination of corporations and unincorporated entities consolidating into any newly formed entity. In such transactions, each consolidating entity is deemed to be acquiring all of the voting securities (in the case of a corporation) or interests (in the case of an unincorporated entity) of each of the others.

Examples: 1. Corporation A (the ultimate parent entity included within person ''A'') proposes to acquire Y, a wholly-owned subsidiary of B (the ultimate parent entity included within person ''B''). The transaction is to be carried out by merging Y into X, a wholly-owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to ''A'' or ''B''. Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in ''A'' after consummation of the transaction, ''A'' will be deemed to have made an acquisition of voting securities. In this acquisition, ''A'' is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and ''B'' is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since §801.21 applies, this acquisition is not reportable. ''A'' is therefore an acquiring person only, and ''B'' is an acquired person only. ''B'' may, however, have a separate reporting obligation as an acquiring person in a separate transaction involving the voting securities of C.

2. In the above example, suppose the consideration for Y consists of $8 million worth of the voting securities of A. With regard to the transfer of this consideration, ''B'' is an acquiring person because it will hold voting securities it did not previously hold, and ''A'' is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than $50 million (as adjusted), the acquisition of these securities is not reportable. ''A'' will therefore report as an acquiring person only and ''B'' as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued in excess of $50 million (as adjusted). ''B'' is thus an acquiring person and ''A'' an acquired person in a reportable acquisition of assets. ''A'' and ''B'' will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

4. Corporations A (the ultimate parent entity in person ''A'') and B (the ultimate parent entity in person ''B'') propose to consolidate into C, a newly formed corporation. All shareholders of A and B will receive shares of C, and both A and B will lose their separate pre-acquisition identities. ''A'' and ''B'' are both acquiring and acquired persons because they are parties to a transaction in which all parties lose their separate pre-acquisition identities

5. Partnership A and Corporation B form a new LLC in which they combine their businesses. A and B cease to exist and partners of A and shareholders of B receive membership interests in the new LLC. For purposes of determining reportability, A is deemed to be acquiring 100 percent of the voting securities of B and B is deemed to be acquiring 100 percent of the interests of A. Pursuant to §803.9(b) of this chapter, even if such a transaction consists of two reportable acquisitions, only one filing fee is required.

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act.

(f)(1)(i) In an acquisition of non-corporate interests which results in an acquiring person controlling the entity, that person is deemed to hold all of the assets of the entity as a result of the acquisition. The acquiring person is the person acquiring control of the entity and the acquired person is the pre-acquisition ultimate parent entity of the entity.

(ii) The value of an acquisition described in paragraph (f)(1)(i) of this section is determined in accordance with §801.10(d).

(2) Any contribution of assets or voting securities to an existing unincorporated entity or to any successor thereof is deemed an acquisition of such voting securities or assets by the ultimate parent entity of that entity and is not subject to § 801.50.

Examples: 1. A, B and C each hold 33⅓ percent of the interests in Partnership X. D contributes assets valued in excess of $50 million (as adjusted) to X and as a result D receives 40 percent of the interests in X and A, B and C are each reduced to 20 percent. Partnership X is deemed to be acquiring the assets from D, in a transaction which may be reportable. This is not treated as a formation of a new partnership. Because no person will control Partnership X, no additional filing is required by any of the four partners.

2. LLC X is its own ultimate parent entity. A contributes a manufacturing plant valued in excess of $200 million (as adjusted) to X which issues new interests to A resulting in A having a 50% interest in X. A is acquiring non-corporate interests which confer control of X and therefore will file as an acquiring person. Because A held the plant prior to the transaction and continues to hold it through its acquisition of control of LLC X after the transaction is completed no acquisition of the plant has occurred and LLC X is therefore not an acquiring person.

(3) Any person who acquires control of an existing not-for-profit corporation which has no outstanding voting securities is deemed to be acquiring all of the assets of that corporation.

Example: A becomes the sole corporate member of not-for-profit corporation B and accordingly has the right to designate all of the directors of B. A is deemed to be acquiring all of the assets of B as a result.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34431, July 29, 1983; 66 FR 8688, Feb. 1, 2001; 70 FR 4990, Jan. 31, 2005; 70 FR 11510, Mar. 8, 2005]

§ 801.3 Activities in or affecting commerce.

Section 7A(a)(1) is satisfied if any entity included within the acquiring person, or any entity included within the acquired person, is engaged in commerce or in any activity affecting commerce.

Examples: 1. A foreign subsidiary of a U.S. corporation seeks to acquire a foreign business. The acquiring person includes the U.S. parent corporation. If the U.S. corporation, or the foreign subsidiary, or any entity controlled by either one of them, is engaged in commerce or in any activity affecting commerce, section 7A(a)(1) is satisfied. Note, however, that §§ 802.50–802.52 may exempt certain acquisitions of foreign businesses or assets.

2. Even if none of the entities within the acquiring person is engaged in commerce or in any activity affecting commerce, the acquisition nevertheless satisfies section 7A(a)(1) if any entity included within the acquired person is so engaged.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978]

§ 801.4 Secondary acquisitions.

(a) Whenever as the result of an acquisition (the ''primary acquisition'') an acquiring person controls an entity which holds voting securities of an issuer that entity does not control, then the acquiring person's acquisition of the issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

(b) *Exemptions.* (1) No secondary acquisition shall be exempt from the requirements of the act solely because the related primary acquisition is exempt from the requirements of the act.

(2) A secondary acquisition may itself be exempt from the requirements of the act under section 7A(c) or these rules.

Examples: 1. Assume that acquiring person ''A'' proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by ''A.'' Thus, if B holds more than $50 million (as adjusted) of the voting securities of corporation X (but does not control X), and ''A'' and ''X'' satisfy Sections 7A (a)(1) and (a)(2), ''A'' must file notification separately with respect to its secondary acquisition of voting securities of X. ''X'' must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after ''A'' files, pursuant to § 801.30.

2. If in the previous example ''A'' acquires only 50 percent of the voting securities of B, the result would remain the same. Since ''A'' would be acquiring control of B, all of B's holdings in X would be attributable to ''A.''

3. In the previous examples, if ''A's'' acquisition of the voting securities of B is exempt, ''A'' may still be required to file notification with respect to its secondary acquisition of the voting securities of X, unless that acquisition is itself exempt.

4. In the previous examples, assume A's acquisition of B is accomplished by merging B into A's subsidiary, S, and S is designated

the surviving corporation. B's voting securities are cancelled, and B's shareholders are to receive cash in return. Since S is designated the surviving corporation and A will control S and also hold assets or voting securities it did not hold previously, ''A'' is an acquiring person in an acquisition of voting securities by virtue of §§ 801.2 (d)(1)(ii) and (d)(2)(i). A will be deemed to have acquired control of B, and A's resulting acquisition of the voting securities of X is a secondary acquisition. Since cash, the only consideration paid for the voting securities of B, is not considered an asset of the person from which it is acquired, by virtue of § 801.2(d)(2) ''A'' is an acquiring person only. The acquisition of the minority holding of B in X is therefore a secondary acquisition by ''A,'' but since ''B'' is an acquired person only, ''B'' is not deemed to make any secondary acquisition in this transaction.

5. In previous Example 4, suppose the consideration paid by A for the acquisition of B is in excess of $50 million (as adjusted) worth of the voting securities of A. By virtue of § 801.2(d)(2), ''A'' and ''B'' are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although ''B'' is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

6. Assume that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. Since no participating corporation in existence prior to consummation is the designated surviving corporation, ''A'' and ''B'' are each both acquiring and acquired persons by virtue of § 801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other.

(c) Where the primary acquisition is—

(1) A cash tender offer, the waiting period procedures established for cash tender offers pursuant to sections 7A(a) and 7A(e) of the act shall be applicable to both the primary acquisition and the secondary acquisition;

(2) A non-cash tender offer, the waiting period procedures established for tender offers pursuant to section 7A(e)(2) of the act shall be applicable to both the primary acquisition and the secondary acquisition.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34432, July 29, 1983; 52 FR 7080, Mar. 6, 1987; 66 FR 8688, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 4990, Jan. 31, 2005; 70 FR 11511, Mar. 8, 2005]

§ 801.10 Value of voting securities, non-corporate interests and assets to be acquired.

Except as provided in § 801.13, the value of voting securities and assets to be acquired shall be determined as follows:

(a) *Voting securities.* (1) If the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission—

(i) And the acquisition price has been determined, the value shall be the market price or the acquisition price, whichever is greater; or if

(ii) The acquisition price has not been determined, the value shall be the market price.

(2) If paragraph (a)(1) of this section is inapplicable—

(i) But the acquisition price has been determined, the value shall be the acquisition price; or if

(ii) The acquisition price has not been determined, the value shall be the fair market value.

(b) *Assets.* The value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price.

(c) For purposes of this section and § 801.13(a)(2):

(1) *Market price.* (i) For acquisitions subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 calendar days prior to the receipt of the notice required by § 803.5(a) or prior to the consummation of the acquisition.

(ii) For acquisitions not subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 or fewer calendar days which are prior to

the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire.

(iii) When the security was not traded within the period specified by this paragraph, the last closing quotation or closing bid price preceding such period shall be used. If such closing quotations are available in more than one market, the person filing notification may select any such quotation.

(2) *Acquisition price.* The acquisition price shall include the value of all consideration for such voting securities or assets to be acquired.

(3) *Fair market value.* The fair market value shall be determinded in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition.

Example: Corporation A, the ultimate parent entity in person ''A,'' contracts to acquire assets of corporation B, and the contract provides that the acquisition price is not to be determined until after the acquisition is effected. Under paragraph (b) of this section, for purposes of the act, the value of the assets is to be the fair market value of the assets. Under paragraph (c)(3), the board of directors of corporation A must in good faith determine the fair market value. That determination will control for 60 days whether ''A'' and ''B'' must observe the requirements of the act; that is, ''A'' and ''B'' must either file notification or consummate the acquisition within that time. If ''A'' and ''B'' neither file nor consummate within 60 days, the parties would no longer be entitled to rely on the determination of fair market value, and, if in doubt about whether required to observe the requirements of the act, would have to make a second determination of fair market value.

(d) *Value of interests in an unincorporated entity.* In an acquisition of noncorporate interests that confers control of either an existing or a newly-formed unincorporated entity, the value of the non-corporate interests held as a result of the acquisition is the sum of the acquisition price of the interests to be acquired (provided the acquisition price has been determined), and the fair market value of any of the interests in the same unincorporated entity held by the acquiring person prior to the acquisition; or, if the acquisition price has not been determined, the fair market value of interests held as a result of the acquisition.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8688, Feb. 1, 2001; 70 FR 11511, Mar. 8, 2005]

§ 801.11 Annual net sales and total assets.

(a) The annual net sales and total assets of a person shall include all net sales and all assets held, whether foreign or domestic, except as provided in paragraphs (d) and (e) of this section.

(b) Except for the total assets of a corporation or unincorporated entity at the time of its formation which shall be determined pursuant to Sec. 801.40(d) or 801.50(c) the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c) of this section: *Provided:*

(1) That the annual net sales and total assets of each entity included within such person are consolidated therein. If the annual net sales and total assets of any entity included within the person are not consolidated in such statements, the annual net sales and total assets of the person filing notification shall be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such entity; and

(2) That such statements, and any restatements pursuant to paragraph (b)(1) of this section (insofar as possible), have been prepared in accordance with the accounting principles normally used by such person, and are of a date not more than 15 months prior to the date of filing of the notification required by the act, or the date of consummation of the acquisition.

Example: Person ''A'' is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries C1 and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of B1, C1, and C2, but not B2 or C3. In

order to determine whether person ''A'' meets the criteria of Section 7A(a)(2)(B), as either an acquiring or an acquired person, A must recompute its annual net sales and total assets to reflect consolidation of the nonduplicative annual net sales and nonduplicative total assets of B2 and C3.

(c) Subject to the provisions of paragraph (b) of this section:

(1) The annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of that person; and

(2) The total assets of a person shall be as stated on the last regularly prepared balance sheet of that person.

Example: Suppose ''A'' sells assets to ''B'' on January 1. ''A's'' next regularly prepared balance sheet, dated February 1, reflects that sale. On March 1, ''A'' proposes to sell more assets to ''B.'' ''A's'' total assets on March 1 are ''A's'' total assets as stated on its February 1 balance sheet.

(d) No assets of any natural person or of any estate of a deceased natural person, other than investment assets, voting securities and other income-producing property, shall be included in determining the total assets of a person.

(e) Subject to the limitations of paragraph (d) of this section, the total assets of:

(1) An acquiring person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be, for acquisitions of each acquired person:

(i) All assets held by the acquiring person at the time of the acquisition,

(ii) Less all cash that will be used by the acquiring person as consideration in an acquisition of assets from, or in an acquisition of voting securities issued by, or in an acquisition of noncorporate interests of, that acquired person (or an entity within that acquired person) and less all cash that will be used for expenses incidental to the acquisition, and less all securities of the acquired person (or an entity within that acquired person); and

(2) An acquired person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be either

(i) All assets held by the acquired person at the time of the acquisition, or

(ii) Where applicable, its assets as determined in accordance with § 801.40(d).

Examples: For examples 1–4, assume that A is a newly-formed company which is not controlled by any other entity. Assume also that A has no sales and does not have the balance sheet described in paragraph (c)(2) of this section.

1. A will borrow $105 million in cash and will purchase assets from B for $100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $105 million that A will have at the time of the acquisition. Therefore, A has total assets of less than $10 million (as adjusted) and does not meet any size-of-person test of Section 7A(a)(2).

2. Assume that A will acquire assets from B and that, at the time it acquires B's assets, A will have $85 million in cash and a factory valued at $60 million. A will exchange the factory and $80 million cash for B's assets. To determine A's total assets, A should subtract from the $85 million cash the $80 million that will be used to acquire assets from B and add the remainder to the value of the factory. Thus, A has total assets of $65 million. Even though A will use the factory as part of the consideration for the acquisition, the value of the factory must still be included in A's total assets. Note that A and B may also have to report the acquisition by B of A's non-cash assets (i.e., the factory). For that acquisition, the value of the cash A will use to buy B's assets is not excluded from A's total assets. Thus, in the acquisition by B, A's total assets are $145 million.

3. Assume that company A will make a $150 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than $10 million (as adjusted). $150 million is excluded because it will be consideration for the acquisition and $5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a $6 million person. Note that if A were making an acquisition valued at over $200 million (as adjusted), the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that ''A'' borrows $195 million to acquire $100 million of assets from ''B'' and $60 million of voting securities of ''C.'' The balance of the loan will be used for working capital. To determine its size for purposes of its acquisition from ''B,'' ''A'' subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $95 million for purposes of its acquisition from ''B.'' To determine its size with respect to its acquisition from ''C,'' ''A'' subtracts the $60

million that will be paid for ''C's'' voting securities. Thus, for purposes of its acquisition from ''C'', ''A'' has total assets of $135 million. In the first acquisition ''A'' meets the $10 million (as adjusted) size-of-person test and in the second acquisition ''A'' meets the $100 million (as adjusted) size-of-person test of Section 7A(a)(2).

[43 FR 33537, July 31, 1978, as amended at 48 FR 34429, July 29, 1983; 52 FR 7080, Mar. 6, 1987; 66 FR 8688, Feb. 1, 2001; 70 FR 4990, Jan. 31, 2005; 70 FR 11511, Mar. 8, 2005; 70 FR 73372, Dec. 12, 2005]

§ 801.12 Calculating percentage of voting securities.

(a) *Voting securities.* Whenever the act or these rules require calculation of the percentage of voting securities to be held or acquired, the issuer whose voting securities are being acquired shall be deemed the ''acquired persons.''

Example: Person ''A'' is composed of corporation A1 and subsidiary A2; person ''B'' is composed of corporation B1 and subsidiary B2. Assume that A2 proposes to sell assets to B1 in exchange for common stock of B2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the ''acquired person'' is B2. For all other purposes, the acquired person is ''B.'' (For all purposes, the ''acquiring persons'' are ''A'' and ''B.'')

(b) *Percentage of voting securities.* (1) Whenever the act or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired, the percentage shall be the sum of the separate ratios for each class of voting securities, expressed as a percentage. The ratio for each class of voting securities equals:

(i)(A) The number of votes for directors of the issuer which the holder of a class of voting securities is presently entitled to cast, and as a result of the acquisition, will become entitled to cast, divided by,

(B) The total number of votes for directors of the issuer which presently may be cast by that class, and which will be entitled to be cast by that class after the acquisition, multiplied by,

(ii)(A) The number of directors that class is entitled to elect, divided by (B) the total number of directors.

Examples: In each of the following examples company X has two classes of voting securities, class A, consisting of 1000 shares with each share having one vote, and class B, consisting of 100 shares with each share having one vote. The class A shares elect four of the ten directors and the class B shares elect six of the ten directors.

In this situation, §801.12(b) requires calculations of the percentage of voting securities held to be made according to the following formula:

Number of votes of class A held divided by Total votes of class A times Directors elected by class A stock divided by Total number of directors

Plus

Number of votes of class B held divided by Total votes of class B times Directors elected by class B stock divided by Total number of directors

1. Assume that company Y holds all 100 shares of class B stock and no shares of class A stock. By virtue of its class B holdings, Y has all 100 of the votes which may be cast by class B stock and can elect six of company X's ten directors. Applying the formula which results from the rule, Y calculates that it holds $100/100 \times 6/10$ or 60 percent of the voting securities of company X because of its holdings of class B stock and no additional percentage derived from holdings of class A stock. Consequently, Y holds a total of 60 percent of the voting securities of company X.

2. Assume that company Y holds 500 shares of class A stock and no shares of class B stock. By virtue of its class A holdings, Y has 500 of the 1000 votes which may be cast by class A to elect four of company X's ten directors. Applying the formula, Y calculates that it holds $500/1000 \times 4/10$ or 20 percent of the voting securities of company X from its holdings of class A stock and no additional percentage derived from holdings of class B stock. Consequently, Y holds a total of 20 percent of the voting securities of company X.

3. Assume that company Y holds 500 shares of class A stock and 60 shares of class B stock. Y calculates that it holds 20 percent of the voting securities of company X because of its holdings of class A stock (see example 2). Additionally, as a result of its class B holdings Y has 60 of the 100 votes which may be cast by class B stock to elect six of company X's ten directors. Applying the formula, Y calculates that it holds $60/100 \times 6/10$ or 36 percent of the voting securities of company X because of its holdings of class B stock. Since the formula requires that a person that holds different classes of voting securities of the same issuer add together the separate percentages calculated for each class, Y holds a total of 56 percent (20 percent plus 36 percent) of the voting securities of company X.

(2) Authorized but unissued voting securities and treasury voting securities shall not be considered securities presently entitled to vote for directors of the issuer.

(3) For purposes of determining the number of outstanding voting securities of an issuer, a person may rely upon the most recent information set forth in filings with the U.S. Securities and Exchange Commission, unless such person knows or has reason to believe that the information contained therein is inaccurate.

Examples: 1. In the example to paragraph (a), to determine the percentage of B2's voting securities which will be held by ''A'' after the transaction, all voting securities of B2 held by ''A,'' the ''acquiring person'' (including A2 and all other entities included in person ''A''), must be aggregated. If ''A'' holds convertible securities of B2 which meet the definition of voting securities in § 801.1(f), these securities are to be disregarded in calculating the percentage of voting securities held by ''A.''

2. Under this formula, any votes obtained by means of proxies from other persons are also disregarded in calculating the percentage of voting securities to be held or acquired.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 66 FR 8689, Feb. 1, 2001]

§ 801.13 Aggregation of voting securities, assets and non-corporate interests.

(a) *Voting securities.* (1) Subject to the provisions of § 801.15, and paragraph (a)(3) of this section, all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition. The value of such voting securities shall be the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10(a), and the value of the voting securities held by the acquiring person prior to the acquisition, determined in accordance with paragraph (a)(2) of this section.

(2) The value of voting securities of an issuer held prior to an acquisition shall be—

(i) If the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission, the market price calculated in accordance with § 801.10(c)(1); or

(ii) If paragraph (a)(2)(i) of this section is not applicable, the fair market value determined in accordance with § 801.10(c)(3).

Examples: 1. Assume that acquiring person ''A'' holds in excess of $50 million (as adjusted) of the voting securities of X, and is to acquire another $1 million of the same voting securities. Since under paragraph (a) of this section all voting securities ''A'' will hold after the acquisition are held ''as a result of'' the acquisition, ''A'' will hold in excess of $50 million (as adjusted) of the voting securities of X as a result of the acquisition. ''A'' must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under Section 7A(c), § 802.21 or any other rule.

2. See § 801.15 and the examples to that rule.

3. See § 801.20 and the examples to that rule.

4. On January 1, company A acquired in excess of $50 million (as adjusted) of voting securities of company B. ''A'' and ''B'' filed notification and observed the waiting period for that acquisition. Company A plans to acquire $1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), ''A'' and ''B'' do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is $1 million and it is not reportable.

(3) Voting securities held by the acquiring person prior to an acquisition shall not be deemed voting securities held as a result of that subsequent acquisition if:

(i) The acquiring person is, in the subsequent acquisition, acquiring only assets; and

(ii) The acquisition of the previously acquired voting securities was subject to the filing and waiting requirements of the act (and such requirements were observed) or was exempt pursuant to § 802.21.

(b) *Assets.* (1) All assets to be acquired from the acquired person shall be assets held as a result of the acquisition. The value of such assets shall be determined in accordance with § 801.10(b).

(2) If the acquiring person signs a letter of intent or agreement in principle

to acquire assets from an acquired person, and within the previous 180 days the acquiring person has

(i) Signed a letter of intent or agreement in principle to acquire assets from the same acquired person, which is still in effect but has not been consummated, or has acquired assets from the same acquired person which it still holds; and

(ii) The previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act; then for purposes of the size-of-transaction test of Section 7A(a)(2), both the acquiring and the acquired persons shall treat the assets that were the subject of the earlier letter of intent or agreement in principal as though they are being acquired as part of the present acquisition. The value of any assets which are subject to this paragraph is determined in accordance with § 801.10(b).

Examples: 1. On day 1, A enters into an agreement with B to acquire assets valued at $45 million. On day 90, A and B sign a letter of intent pursuant to which A will acquire additional assets from B, valued at $45 million. The original transaction has not closed, however, the agreement is still in effect. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions and file prior to acquiring the assets if the aggregate value exceeds $50 million (as adjusted).

2. On March 30, A enters into a letter of intent to acquire assets of B valued at $45 million. On January 31, earlier the same year, A closed on an acquisition of assets of B valued at $45 million. For purposes of the size-of-transaction test in Section 7A(a)(2), A must aggregate the value of both of its acquisitions and file prior to acquiring the assets of B if the aggregate value exceeds $50 million (as adjusted).

3. On day 1, A enters into an agreement with B to acquire assets valued in excess of $50 million (as adjusted). A and B file notification and observe the waiting period. On day 60, A signs a letter of intent to acquire an additional $40 million of assets from B. Because the earlier acquisition was subject to the requirements of the Act, A does not aggregate the two acquisitions of assets and is free to acquire the additional assets of B without filing an additional notification.

4. On day 1, A consummates an acquisition of assets of B valued at $45 million. On day 60, A consummates a sale of the same assets to an unrelated third party. On day 120, A enters into an agreement to acquire additional assets of B valued at $45 million. Because A no longer holds the assets from the previous acquisition, no aggregation of the two asset acquisitions is required and A may acquire all of the additional assets without filing notification.

(c)(1) *Non-corporate interests.* In an acquisition of non-corporate interests, any previously acquired non-corporate interests in the same unincorporated entity is aggregated with the newly acquired interests. The value of such an acquisition is determined in accordance with § 801.10(d) of these rules.

(2) *Other assets or voting securities of the same acquired person.* An acquisition of non-corporate interests which does not confer control of the unincorporated entity is not aggregated with any other assets or voting securities which have been or are currently being acquired from the same acquired person.

Examples: 1. A currently has the right to 30 percent of the profits in LLC. B has the right to the remaining 70 percent. A acquires an additional 30 percent interest in LLC from B for $90 million in cash. As a result of the acquisition, A is deemed to now have a 60 percent interest in LLC. The current acquisition is valued at $90 million, the acquisition price. The value of the 30 percent interest that A already holds is the fair market value of that interest. The value for size-of-transaction purposes is the sum of the two.

2. A acquires the following from B: (1) All of the assets of a subsidiary of B; (2) all of the voting securities of another subsidiary of B; and (3) a 30 percent interest in an LLC which is currently wholly-owned by B. In determining the size-of-transaction, A aggregates the value of the voting securities and assets of the subsidiaries that it is acquiring from B, but does not include the value of the 30 percent interest in the LLC, pursuant to § 801.13(c)(2).

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 66 FR 8689, Feb. 1, 2001; 70 FR 4991, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005]

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of Section 7A(a)(2) and § 801.1(h), the aggregate total amount of voting securities and assets shall be the sum of:

(a) The value of all voting securities of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(a); and

(b) The value of all assets of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(b).

Examples: 1. Acquiring person ''A'' previously acquired less than $50 million (as adjusted) of the voting securities (not convertible voting securities) of corporation X. ''A'' now intends to acquire additional assets of X. Under paragraph (a) of this section, ''A'' looks to § 801.13(a) and determines that the voting securities are to be held ''as a result of'' the acquisition. Section 801.13(a) also provides that ''A'' must determine the present value of the previously acquired securities. Under paragraph (b) of this section, ''A'' looks to § 801.13(b)(1) and determines that the assets to be acquired will be held ''as a result of'' the acquisition, and are valued under § 801.10(b). Therefore, if the voting securities have a present value which when combined with the value of the assets would exceed $50 million (as adjusted), the asset acquisition is subject to the requirements of the act since, as a result of it, ''A'' would hold an aggregate total amount of the voting securities and assets of ''X'' in excess of $50 million (as adjusted) .

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. ''A'' now looks to § 801.13(b)(2) and determines that because the second acquisition is of voting securities and not assets, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the $50 million (as adjusted) size-of-transaction test.

(c) The value of all non-corporate interests of the acquired person which the acquiring person would hold as a result of the acquisition, determined in accordance with § 801.13(c).

[43 FR 33537, July 31, 1978, as amended at 66 FR 8689, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 4991, Jan. 31, 2005; 70 FR 73372, Dec. 12, 2005]

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under—

(1) Sections 7A(c) (1), (5), (6), (7), (8), and (11)(B);

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70 of this chapter;

(b) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under Section 7A(c)(9) and §§ 802.3, 802.4, and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

(c) Voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under section 7A(c)(11)(A) unless additional voting securities of the same issuer have been or are being acquired; and

(d) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under §§ 802.50(a), 802.51(a), 802.51(b) of this chapter unless the limitations, in aggregate for §§ 802.50(a), 802.51(a), 802.51(b) , do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held.

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire in excess of $50 million (as adjusted) of the convertible voting securities of X and less than $50 million (as adjusted) of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than $50 million (as adjusted), ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, ''A''

would not hold the convertible voting securities as a result of the acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock. (Note, however, that the value of the convertible voting securities would be reflected in ''A's'' next regularly prepared balance sheet, for purposes of § 801.11).

2. In the previous example, the rule was applied to voting securities the present acquisition of which is exempt. Assume instead that ''A'' had acquired the convertible voting securities prior to its acquisition of the common stock. ''A'' still would not hold the convertible voting securities as a result of the acquisition of the common stock, because the rule states that voting securities the previous acquisition of which was exempt also fall within the rule. Thus, the size-of-transaction tests of Section 7A(a)(2) would again not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock.

3. In example 2, assume instead that ''A'' acquired the convertible voting securities in 1975, before the act and rules went into effect. Since the rule applies to voting securities the acquisition of which would have been exempt had the act and rules been in effect, the result again would be identical. If the rules had been in effect in 1975, the acquisition of the convertible voting securities would have been exempt under § 802.31.

4. Assume that acquiring person ''B,'' a United States person, acquired from corporation ''X'' two manufacturing plants located abroad, and assume that the acquisition price was in excess of $50 million (as adjusted). In the most recent year, sales into the United States attributable to the plants were less than $50 million (as adjusted), and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, ''B'' would hold all three plants of ''X,''if the $50 million (as adjusted) limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this section, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, ''B'' would hold assets of ''X'' exceeding $50 million (as adjusted) in value, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant

5. ''A'' acquires producing oil reserves valued at $400 million from ''B.'' Two months later, ''A'' agrees to acquire oil and gas rights valued at $75 million from ''B.'' Paragraph (b) of this section and § 801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceed the $500 million limitation on the exemption for oil and gas reserves in § 802.3(a), ''A'' and ''B'' will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when aggregated, is less than $500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceeds $500 million, ''A'' need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of ''A.'' Instead, ''A'' is directed by § 801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with § 801.10(b).

6. ''X'' acquired 55 percent of the voting securities of M, an entity controlled by ''Z,'' six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by ''Z.'' M's assets consist of $150 million worth of producing coal reserves plus less than $50 million (as adjusted) worth of non-exempt assets and N's assets consist of a producing coal mine worth $100 million together with non-exempt assets with a fair market value of less than $50 million (as adjusted). ''X's'' acquisition of the voting securities of M was exempt under § 802.4(a) because M held exempt assets pursuant to § 802.3(b) and less than $50 million (as adjusted) of non-exempt assets. Because ''X'' acquired control of M in the earlier transaction, M is now within the person of ''X,'' and the assets of M need not be aggregated with those of N to determine if the subsequent acquisition of N will exceed the limitation for coal reserves or for non-exempt assets. Since the assets of N alone do not exceed these limitations, ''X's'' acquisition of N also is not reportable.

7. In previous Example 6, assume that ''X'' acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ''Z.'' Assume also that M's assets at the time of ''X's'' acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of less than $50 million (as adjusted), and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value which when aggregated with M's non-exempt assets would exceed $50 million (as adjusted). Since ''X'' acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ''Z,'' the

assets of M and N must be aggregated, pursuant to Secs. 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt. ''X'' is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt. If ''X'' proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million (as adjusted), the acquisition would not be exempt.

8. ''A'' acquired 49 percent of the voting securities of M and 45 percent of the voting securities of N. Both M and N are controlled by ''B.'' At the time of the acquisition, M held rights to producing coal reserves worth $90 million and N held a producing coal mine worth $90 million. This acquisition was exempt since the aggregated holdings fell below the $200 million limitation for coal in § 802.3(b) of this chapter. A year later, ''A'' proposes to acquire an additional 10 percent of the voting securities of both M and N. In the intervening year, M has acquired coal reserves so that its holdings are now valued at $140 million, and the value of N's assets remained unchanged. ''A's'' second acquisition would not be exempt. ''A'' is required to determine the value of the exempt assets and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless ''A'' already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the $200 million exemption for acquisitions of coal reserves in § 802.3 of this chapter, and thus do not qualify for the exemption of voting securities provided by § 802.4(a) of this chapter.

9. A acquires assets of B located outside of the U.S. with sales into the U.S. of $45 million. It also acquires voting securities of B's foreign subsidiary X which has sales into the U.S. of $45 million. Both the assets and the voting securities of X are exempt under §§ 802.50 and 802.51 respectively when analyzed separately. However, because § 801.15(d) requires that the sales into the U.S. for both the assets and the voting securities be aggregated to determine whether the $50 million (as adjusted) limitation has been exceeded, both are held as a result of the acquisition because the aggregate sales into the U.S. total in excess of $50 million (as adjusted).

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 61 FR 13684, Mar. 28, 1996; 66 FR 8689, Feb. 1, 2001; 67 FR 11902, Mar. 18, 2002; 70 FR 11512, Mar. 8, 2005]

§ 801.20 Acquisitions subsequent to exceeding threshold.

Acquisitions meeting the criteria of section 7A(a), and not otherwise exempted by section 7A(c) or § 802.21 or any other of these rules, are subject to the requirements of the act even though:

(a) Earlier acquisitions of assets or voting securities may have been subject to the requirements of the act;

(b) The acquiring person's holdings initially may have met or exceeded a notification threshold before the effective date of these rules; or

(c) The acquiring person's holdings initially may have met or exceeded a notification threshold by reason of increases in market values or events other than acquisitions.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.21 Securities and cash not considered assets when acquired.

For purposes of determining the aggregate total amount of assets under Section 7A(a)(2)(A), Section 7A(a)(2)(B)(i), Sec. 801.13(b), and Sec. 802.4:

(a) Cash shall not be considered an asset of the person from which it is acquired; and

(b) Neither voting or nonvoting securities nor obligations referred to in section 7A(c)(2) shall be considered assets of another person from which they are acquired.

Examples: 1. Assume that acquiring person ''A'' acquires voting securities of issuer X from ''B,'' a person unrelated to X. Under this paragraph, the acquisition is treated only as one of voting securities, requiring ''A'' and ''X'' to comply with the requirements of the act, rather than one in which ''A'' acquires the assets of ''B,'' requiring ''A'' and ''B'' to comply. See also example 2 to § 801.30. Note that for purposes of section 7A(a)(2)—that is, for the next regularly prepared balance sheet of ''A'' referred to in § 801.11—the voting securities of X must be reflected after their acquisition; see § 801.11(c)(2).

2. In the previous example, if ''A'' acquires nonvoting securities of X from ''B,'' then under this section the acquisition would be treated only as one of nonvoting securities of X (and would be exempt under section 7A(c)(2)), rather than one in which ''A'' acquires assets of ''B,'' requiring ''A'' and ''B'' to comply. Again, the nonvoting securities of X would have to be reflected in ''A's'' next regularly prepared balance sheet for purposes of section 7A(a)(2).

3. In example 1, assume that ''B'' receives only cash from ''A'' in exchange for the voting securities of X. Under this section, ''B's'' acquisition of cash is *not* an acquisition of the ''assets'' of ''A,'' and ''B'' is not required to file notification as an acquiring person.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 68 FR 2430, Jan. 17, 2003; 70 FR 4992, Jan. 31, 2005]

§ 801.30 Tender offers and acquisitions of voting securities from third parties.

(a) This section applies to:

(1) Acquisitions on a national securities exchange or through an interdealer quotation system registered with the United States Securities and Exchange Commission;

(2) Acquisitions described by § 801.31;

(3) Tender offers;

(4) Secondary acquisitions;

(5) All acquisitions (other than mergers and consolidations) in which voting securities are to be acquired from a holder or holders other than the issuer or an entity included within the same person as the issuer;

(6) Conversions; and

(7) Acquisitions of voting securities resulting from the exercise of options or warrants which are—

(i) Issued by the issuer whose voting securities are to be acquired (or by any entity included within the same person as the issuer); and

(ii) The subject of a currently effective registration statement filed with the United States Securities and Exchange Commission under the Securities Act of 1933.

(b) For acquisitions described by paragraph (a) of this section:

(1) The waiting period required under the act shall commence upon the filing of notification by the acquiring person as provided in § 803.10(a); and

(2) The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by § 803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. Should the 15th (or, in the case of cash tender offers, the 10th) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 5 p.m. Eastern Time on the next following business day.

Examples: 1. Acquiring person ''A'' proposes to acquire from corporation B the voting securities of B's wholly owned subsidiary, corporation S. Since ''A'' is acquiring the shares of S from its parent, this section does not apply, and the waiting period does not begin until both ''A'' and ''B'' file notification.

2. Acquiring person ''A'' proposes to acquire in excess of $50 million (as adjusted) of the voting securities of corporation X on a securities exchange. The waiting period begins when ''A'' files notification. ''X'' must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

3. Suppose that acquiring person ''A'' proposes to acquire 50 percent of the voting securities of corporation B which in turn owns 30 percent of the voting securities of corporation C. Thus ''A's'' acquisition of C's voting securities is a secondary acquisition (see § 801.4) to which this section applies because ''A'' is acquiring C's voting securities from a third party (B). Therefore, the waiting period with respect to ''A's'' acquisition of C's voting securities begins when ''A'' files its separate Notification and Report Form with respect to C, and ''C'' must file within 15 days (or in the case of a cash tender offer, 10 days) thereafter. ''A's'' primary and secondary acquisitions of the voting securities of B and C are subject to separate waiting periods; see § 801.4.

[43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.31 Acquisitions of voting securities by offerees in tender offers.

Whenever an offeree in a noncash tender offer is required to, and does, file notification with respect to an acquisition described in § 801.2(e):

(a) The waiting period with respect to such acquisition shall begin upon filing of notification by the offeree, pursuant to §§ 801.30 and 803.10(a)(1);

(b) The person within which the issuer of the shares to be acquired by the offeree is included shall file notification as required by § 801.30(b);

(c) Any request for additional information or documentary material pursuant to section 7A(e) and § 803.20 shall extend the waiting period in accordance with § 803.20(c); and

(d) The voting securities to be acquired by the offeree may be placed into escrow, for the benefit of the offeree, pending expiration or termination of the waiting period with respect to the acquisition of such securities; *Provided however*, That no person may vote any voting securities placed into escrow pursuant to this paragraph.

Example: Assume that ''A,'' which has annual net sales exceeding $100 million (as adjusted), makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. ''S,'' a shareholder of X with total assets exceeding $10 million (as adjusted), wishes to tender its holdings of X and in exchange would receive shares of A valued in excess of $50 million (as adjusted). Under this section, ''S's'' acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before ''S'' may acquire the voting securities of A, ''S'' must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to ''A'' and ''X.'' Since § 801.30 applies, the waiting period applicable to ''A'' and ''S'' begins upon filing by ''S,'' and ''A'' must file with respect to ''S's'' acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to ''A'' and ''X'' expire or be terminated prior to the waiting period with respect to ''S'' and ''A,'' ''S'' may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.32 Conversion and acquisition.

A conversion is an acquisition within the meaning of the act.

Example: Assume that acquiring person ''A'' wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued in excess of $50 million (as adjusted). If ''A'' and ''X'' satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then ''A'' and ''X'' must file notification and observe the waiting period before ''A'' completes the acquisition of the X common stock, unless exempted by Section 7A(c) or the regulations in this part. Since § 801.30 applies, the waiting period begins upon notification by ''A,'' and ''X'' must file notification within 15 days.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.33 Consummation of an acquisition by acceptance of tendered shares of payment.

The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act.

[48 FR 34433, July 29, 1983]

§ 801.40 Formation of joint venture or other corporations.

(a) In the formation of a joint venture or other corporation (other than in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.

(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

(1)(i) The acquiring person has annual net sales or total assets of $100 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of $10 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more; or

(2)(i) The acquiring person has annual net sales or total assets of $10 million (as adjusted) or more;

(ii) The joint venture or other corporation will have total assets of $100 million (as adjusted) or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

Examples: 1. Persons ''A,'' ''B,'' and ''C'' agree to create new corporation ''N,'' a joint venture. ''A,'' ''B,'' and ''C'' will each hold one third of the shares of ''N.'' ''A'' has more than $100 million (as adjusted) in annual net sales. ''B'' has more than $10 million (as adjusted) in total assets but less than $100 million (as adjusted) in annual net sales and total assets. Both ''C's'' total assets and its annual net sales are less than $10 million (as adjusted). ''A,'' ''B,'' and ''C'' are each engaged in commerce. ''A,'' ''B,'' and ''C'' have agreed to make an aggregate initial contribution to the new entity of $18 million in assets and each to make additional contributions of $21 million in each of the next three years. Under paragraph (d) of this section, the assets of the new corporation are $207 million. Under paragraph (c) of this section, ''A'' and ''B'' must file notification. Note that ''A'' and ''B'' also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for in excess of $50 million (as adjusted). N need not file notification; see § 802.41.

2. In the preceding example ''A'' has over $10 million (as adjusted) but less than $100 million (as adjusted) in sales and assets, ''B'' and ''C'' have less than $10 million (as adjusted) in sales and assets. ''N'' has total assets of $500 million. Assume that ''A'' will acquire 50 percent of the voting securities of ''N'' and ''B'' and ''C'' will each acquire 25 percent. Since ''A'' will acquire in excess of $200 million (as adjusted) in voting securities of ''N'', the size-of-person test in § 801.40(c) is inapplicable and ''A'' is required to file notification.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]

§ 801.50 Formation of unincorporated entities.

(a) In the formation of an unincorporated entity (other than in connection with a consolidation), even though the persons contributing to the formation of the unincorporated entity and the unincorporated entity itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only and the unincorporated entity shall be deemed the acquired person only.

(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity. Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1), the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a consolidation), a person is subject to the requirements of the Act if:

(1)(i) The acquiring person has annual net sales or total assets of $100 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of $10 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity; or

(2)(i) The acquiring person has annual net sales or total assets of $10 million (as adjusted) or more;

(ii) The newly-formed entity has total assets of $100 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity.

(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with § 801.40(d).

(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with § 801.10(d).

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.

Example: A and B form a new partnership (LP) in which each will acquire a 50 percent interest. A contributes a plant valued at $250 million and $100 million in cash. B contributes $350 million in cash. Because each is acquiring non-corporate interests, valued in excess of $50 million (as adjusted) which confer control of LP both A and B are acquiring persons in the formation. Each must now determine if the exemption in § 802.4 is applicable to their acquisitions of non-corporate interests in LP. For A, LP's exempt assets consist of all of the cash contributed by A and B (pursuant to § 801.21) and A's contribution of the plant (pursuant to § 802.30(c)). Because all of the assets of LP are exempt with regard to A, A's acquisition of non-corporate interests in LP is exempt under § 802.4. For B, LP's exempt assets include only the cash contributions by A and B. The plant contributed by A, valued at $250 million is not exempt under § 802.30(c) with regard to B. Because LP has non-exempt assets in excess of $50 million (as adjusted) with regard to B, B's acquisition of non-corporate interests in LP is not exempt under § 802.4. B must now value its acquisition of non-corporate interests pursuant to § 801.10(d) and because the value of the non-corporate interests is the same as B's contribution to the formation ($350 million), the value exceeds $200 million (as adjusted) and B must file notification prior to acquiring non-corporate interests in LP. See additional examples following §§ 802.30(c) and 802.4.

[70 FR 11512, Mar. 8, 2005]

§ 801.90 Transactions or devices for avoidance.

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

Examples: 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over $100 million (as adjusted) in the joint venture; persons ''A'' and ''B'' each have total assets in excess of $100 million (as adjusted). Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of $3000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $1500. Thereafter, ''A'' and ''B'' each contribute in excess of $50 million (as adjusted) to A1 in exchange for the remaining authorized A1 stock (one-fourth each to ''A'' and ''B''). A's creation of A1 was exempt under Sec. 802.30; its $1500 sale of A1 stock to ''B'' did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by ''A'' and ''B'' was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by ''A'' and ''B'' having over $10 million (as adjusted) in assets. Such a transaction would be covered by § 801.40 and ''A'' and ''B'' must file notification and observe the waiting period.

2. Suppose ''A'' wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than $10 million. The aggregate fair market value of the assets of the twenty store corporations is in excess of $50 million (as adjusted). ''A'' proposes to sell the stores to ''B'' for in excess of $50 million (as adjusted). For various reasons it is decided that ''B'' will buy the stock of each of the store corporations from ''A.'' Instead of filing notification and observing the waiting period as contemplated by the act, ''A'' and ''B'' enter into a series of five stock purchase-sale agreements for $12 million each. Under the terms of each contract, the stock of four stores will pass from ''A'' to ''B''. The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because $12 million is

below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8691, Feb. 1, 2001; 67 FR 11903, Mar. 18, 2002; 70 FR 4992, Jan. 31, 2005]

PART 802—EXEMPTION RULES

Sec.

AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33544, July 31, 1978, unless otherwise noted.

§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

Pursuant to section 7A(c)(1), acquisitions of goods and realty transferred in the ordinary course of business are exempt from the notification requirements of the act. This section identifies certain acquisitions of goods that are exempt as transfers in the ordinary course of business. This section also identifies certain acquisitions of goods and realty that are not in the ordinary course of business and, therefore, do not qualify for the exemption.

(a) *Operating unit.* An acquisition of all or substantially all the assets of an operating unit is not an acquisition in the ordinary course of business. *Operating unit* means assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.

(b) *New goods.* An acquisition of new goods is in the ordinary course of business, except when the goods are acquired as part of an acquisition described in paragraph (a) of this section.

(c) *Current supplies.* An acquisition of current supplies is in the ordinary course of business, except when acquired as part of an acquisition described in paragraph (a) of this section. The term ''current supplies'' includes the following kinds of new or used assets:

(1) Goods acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person (e.g., inventory),

(2) Goods acquired for consumption in the acquiring person's business (e.g., office supplies, maintenance supplies or electricity), and

(3) Goods acquired to be incorporated in the final product (e.g., raw materials and components).

(d) *Used durable goods.* A good is ''durable'' if it is designed to be used repeatedly and has a useful life greater than one year. An acquisition of used durable goods is an acquisition in the ordinary course of business if the goods are not acquired as part of an acquisition described in paragraph (a) of this section and any of the following criteria are met:

(1) The goods are acquired and held solely for the purpose of resale or leasing to an entity not within the acquiring person; or

(2) The goods are acquired from an acquired person who acquired and has held the goods solely for resale or leasing to an entity not within the acquired person; or

(3) The acquired person has replaced, by acquisition or lease, all or substantially all of the productive capacity of the goods being sold within six months of that sale, or the acquired person has in good faith executed a contract to replace within six months after the sale, by acquisition or lease, all or substantially all of the productive capacity of the goods being sold; or

(4) The goods have been used by the acquired person solely to provide management and administrative support services for its business operations, and the acquired person has in good faith executed a contract to obtain substantially similar services as were provided by the goods being sold. Management and administrative support services include services such as accounting, legal, purchasing, payroll, billing and repair and maintenance of the acquired person's own equipment. Manufacturing, research and development, testing and distribution (i.e., warehousing and transportation) are not considered management and administrative support services.

Examples: 1. Greengrocer Inc. intends to sell to ''A'' all of the assets of one of the 12 grocery stores that it owns and operates throughout the metropolitan area of City X. Each of Greengrocer's stores constitutes an operating unit, *i.e.*, a business undertaking in a particular location. Thus ''A's'' acquisition is not exempt as an acquisition in the ordinary course of business. However, the acquisition will not be subject to the notification requirements if the acquisition price or fair market value of the store's assets does not exceed $50 million (as adjusted).

2. ''A,'' a manufacturer of airplane engines, agrees to pay in excess of $50 million (as adjusted) to ''B,'' a manufacturer of airplane parts, for certain new engine components to be used in the manufacture of airplane engines. The acquisition is exempt under § 802.1(b) as new goods as well as under § 802.1(c)(3) as current supplies.

3. ''A,'' a power generation company, proposes to purchase from ''B,'' a coal company, in excess of $50 million (as adjusted) of coal under a long-term contract for use in its facilities to supply electric power to a regional public utility and steam to several industrial sites. This transaction is exempt under § 802.1(c)(2) as an acquisition of current supplies. However, if ''A'' proposed to purchase coal reserves rather than enter into a contract to acquire output of a coal mine, the acquisition would not be exempt as an acquisition of goods in the ordinary course of business. The acquisition may still be exempt pursuant to § 802.3(b) as an acquisition of reserves of coal if the requirements of that section are met.

4. ''A,'' a national producer of canned fruit, preserves, jams and jellies, agrees to purchase from ''B'' for in excess of $50 million (as adjusted) a total of 20,000 acres of orchards and vineyards in several locations throughout the U.S. ''A'' plans to harvest the fruit from the acreage for use in its canning operations. The acquisition is not exempt under § 802.1 because orchards and vineyards are real property, not ''goods.'' If, on the other hand, ''A'' had contracted to acquire from ''B'' the fruit and grapes harvested from the orchards and vineyards, the acquisition would qualify for the exemption as an acquisition of current supplies under § 802.1(c)(3). Although the transfer of orchards and vineyards is not exempt under § 802.1, the acquisition would be exempt under § 802.2(g) as an acquisition of agricultural property.

5. ''A,'' a railcar leasing company, will purchase in excess of $50 million (as adjusted) of new railcars from a railcar manufacturer in order to expand its existing fleet of cars available for lease. The transaction is exempt under § 802.1(b) as an acquisition of new goods and § 802.1(c), as an acquisition of current supplies. If ''A'' subsequently sells the railcars to ''C,'' a commercial railroad company, that acquisition would be exempt under § 802.1(d)(2), provided that ''A'' acquired and held the railcars solely for resale or leasing to an entity not within itself.

6. ''A,'' a major oil company, proposes to sell two of its used oil tankers for in excess of $50 million (as adjusted) to ''B,'' a dealer who purchases oil tankers from the major U.S. oil companies. ''B's'' acquisition of the used oil tankers is exempt under § 802.1(d)(1)

provided that ''B'' is actually acquiring beneficial ownership of the used tankers and is not acting as an agent of the seller or purchaser.

7. ''A,'' a cruise ship operator, plans to sell for in excess of $50 million (as adjusted) one of its cruise ships to ''B,'' another cruise ship operator. ''A'' has, in good faith, executed a contract to acquire a new cruise ship with substantially the same capacity from a manufacturer. The contract specifies that ''A'' will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to ''B.'' Since ''B'' is acquiring a used durable good that ''A'' has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3).

8. ''A,'' a luxury cruise ship operator, proposes to sell to ''B,'' a credit company engaged in the ordinary course of its business in lease financing transactions, its fleet of six passenger ships under a 10-year sale/leaseback arrangement. That acquisition is exempt pursuant to § 802.1(d)(1), used durable goods acquired for leasing purposes. The acquisition is also exempt under § 802.63(a) as a bona fide credit transaction entered into in the ordinary course of ''B's'' business. ''B'' now proposes to sell the ships, subject to the current lease financing arrangement, to ''C,'' another lease financing company. This transaction is exempt under §§ 802.1(d)(1) and 802.1(d)(2).

9. Three months ago ''A,'' a manufacturing company, acquired several new machines that will replace equipment on one of its production lines. ''A's'' capacity to produce the same products increased modestly when the integration of the new equipment was completed. ''B,'' a manufacturing company that produces products similar to those produced by ''A,'' has entered into a contract to acquire for in excess of $50 million (as adjusted) the machinery that ''A'' replaced. Delivery of the equipment by ''A'' to ''B'' is scheduled to occur within thirty days. Since ''A'' purchased new machinery to replace the productive capacity of the used equipment, which it sold within six months of the purchase of the new equipment, the acquisition by ''B'' is exempt under § 802.1(d)(3).

10. ''A'' will sell to ''B'' for in excess of $50 million (as adjusted) all of the equipment ''A'' uses exclusively to perform its billing requirements. ''B'' will use the equipment to provide ''A's'' billing needs pursuant to a contract which ''A'' and ''B'' executed 30 days ago in conjunction with the equipment purchase agreement. Although the assets ''B'' will acquire make up essentially all of the assets of one of ''A's'' management and administrative support services divisions, the acquisition qualifies for the exemption under § 802.1(d)(4) because a company's internal management and administrative support services, however organized, are not an operating unit as defined by § 802.1(a). Management and administrative support services are not a ''business undertaking'' as that term is used in § 802.1(a). Rather, they provide support and benefit to the company's operating units and support the company's business operations. However, if the assets being sold also derived revenues from providing billing services for third parties, then the transfer of these assets would not be exempt under § 802.1(d)(4), since the equipment is not being used solely to provide management and administrative support services to ''A''.

11. ''A,'' a manufacturer of pharmaceutical products, and ''B'' have entered into a contract under which ''B'' will provide all of ''A's'' research and development needs. Pursuant to the contract, ''B'' will also purchase all of the equipment that ''A'' formerly used to perform its own research and development activities. The sale of the equipment is not an exempt transaction under § 802.1(d)(3) because ''A'' is not replacing the productive capacity of the equipment being sold. The sale is also not exempt under § 802.1(d)(4), because functions such as research and development and testing are not management and administrative support services of a company but are integral to the design, development or production of the company's products.

12. ''A,'' an automobile manufacturer, is discontinuing its manufacture of metal seat frames for its cars. ''A'' enters into a contract with ''B,'' a manufacturer of various fabricated metal products, to sell its seat frame production lines and to purchase from ''B'' all of its metal seat frame needs for the next five years. This transfer of productive capacity by ''A'' is not exempt pursuant to § 802.1(d)(3), since ''A'' is not replacing the productive capacity of the equipment being sold. The acquisition is also not exempt under § 802.1(d)(4). ''A's'' sale of production lines is not the transfer of goods that provide management and administrative services to support the business operations of''A''; this manufacturing equipment is an integral part of ''A's'' production operations.

[61 FR 13684, Mar. 28, 1996, as amended at 66 FR 8691, Feb. 1, 2001; 70 FR 4993, Jan. 31, 2005]

§ 802.2 Certain acquisitions of real property assets.

(a) *New facilities.* An acquisition of a new facility shall be exempt from the requirements of the act. A new facility is a structure that has not produced income and was either constructed by the acquired person for sale or held at all times by the acquired person solely for resale. The new facility may include realty, equipment or other assets incidental to the ownership of the new

facility. In an acquisition that includes a new facility, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) *Used facilities.* An acquisition of a used facility shall be exempt from the requirements of the act if the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor's business by a lessee that has had sole and continuous possession and use of the facility since it was first built as a new facility. The used facility may include realty, equipment or other assets associated with the operation of the facility. In an acquisition that includes a used facility that meets the requirements of this paragraph, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were acquired in a separate transaction.

(c) *Unproductive real property.* An acquisition of unproductive real property shall be exempt from the requirements of the act. In an acquisition that includes unproductive real property, the transfer of any assets that are not unproductive real property shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(1) Subject to the limitations of (c)(2), unproductive real property is any real property, including raw land, structures or other improvements (but excluding equipment), associated production and exploration assets as defined in § 802.3(c), natural resources and assets incidental to the ownership of the real property, that has not generated total revenues in excess of $5 million during the thirty-six (36) months preceding the acquisition.

(2) Unproductive real property does not include the following:

(i) Manufacturing or non-manufacturing facilities that have not yet begun operation;

(ii) Manufacturing or non-manufacturing facilities that were in operation at any time during the twelve (12) months preceding the acquisition; and

(iii) Real property that is either adjacent to or used in conjunction with real property that is not unproductive real property and is included in the acquisition.

(d) *Office and residential property.* (1) An acquisition of office or residential property shall be exempt from the requirements of the act. In an acquisition that includes office or residential property, the transfer of any assets that are not office or residential property shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(2) Office and residential property is real property that is used primarily for office or residential purposes. In determining whether real property is used primarily for office or residential purposes, all real property, the acquisition of which is exempt under another provision of the act and these rules, shall be excluded from the determination. Office and residential property includes:

(i) Office buildings,

(ii) Residences,

(iii) Common areas on the property, including parking and recreational facilities, and

(iv) Assets incidental to the ownership of such property, including cash, prepaid taxes or insurance, rental receivables and the like.

(3) If the acquisition includes the purchase of a business conducted on the office and residential property, the transfer of that business, including the space in which the business is conducted, shall be subject to the requirements of the act and these rules as if such business were being transferred in a separate acquisition.

(e) *Hotels and motels.* (1) An acquisition of a hotel or motel, its improvements such as golf, swimming, tennis, restaurant, health club or parking facilities (but excluding ski facilities), and assets incidental to the ownership and operation of the hotel or motel (e.g., prepaid taxes or insurance, management contracts and licenses to use trademarks associated with the hotel or motel being acquired) shall be exempt from the requirements of the act. In an acquisition that includes a hotel or motel, the transfer of any assets that are not a hotel or motel, its improvements such as golf, swimming,

tennis, restaurant, health club or parking facilities (but excluding ski facilities) and assets incidental to the ownership of the hotel or motel, shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(2) Notwithstanding paragraph (1) of the section, an acquisition of a hotel or motel that includes a gambling casino shall be subject to the requirements of the act and these rules.

(f) *Recreational land.* An acquisition of recreational land shall be exempt from the requirements of the act. Recreational land is real property used primarily as a golf course or a swimming or tennis club facility, and assets incidental to the ownership of such property. In an acquisition that includes recreational land, the transfer of any property or assets that are not recreational land shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the Act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (certain activities within NAICS sector 11).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition; or

(iii) Timberland or other real property that generates revenues from activities within NAICS subsector 113 (Forestry and logging) or NAICS industry group 1153 (Support activities for forestry and logging).

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property (cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

(h) *Retail rental space; warehouses.* An acquisition of retail rental space (including shopping centers) or warehouses and assets incidental to the ownership of retail rental space or warehouses shall be exempt from the requirements of the act, except when the retail rental space or warehouse is to be acquired in an acquisition of a business conducted on the real property. In an acquisition that includes retail rental space or warehouses, the transfer of any assets that are neither retail rental space nor warehouses shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

Examples. 1. ''A,'' a major automobile manufacturer, builds a new automobile plant in anticipation of increased demand for its cars. The market does not improve and ''A'' never occupies the facility. ''A'' then sells the facility, which is fully equipped and ready for operation, to ''B,'' another automobile manufacturer. The acquisition of this plant, including any equipment and assets associated with its operation, is not exempt as an acquisition of a new facility, even though the facility has not produced any income, since ''A'' did not construct the facility for sale or hold it at all times solely for resale. Also, the acquisition is not exempt as an acquisition of unproductive property, because manufacturing facilities that have not yet begun operations are explicitly excluded from that exemption.

2. ''B,'' a subsidiary of ''A,'' a financial institution, acquired a newly constructed power plant, which it leased to ''X'' pursuant to a lease financing arrangement. ''A's'' acquisition of the plant through B was exempt under §802.63(a) as a bona fide credit transaction entered into in the ordinary course of ''A's'' business. ''X'' operated the plant as sole lessee for the next eight years and now proposes to exercise an option to buy the plant for in excess of $50 million (as adjusted). ''X's'' acquisition of the plant is exempt pursuant to §802.2(b). The plant is being acquired from B, the lessor, which held title to the plant for financing purposes, and the purchaser, ''X,'' has had sole and continuous possession and use of the plant since its construction.

3. ''A'' proposes to acquire a tract of wilderness land from ''B'' for consideration in excess of $50 million (as adjusted). Copper deposits valued in excess of $50 million (as adjusted) and timber reserves valued in excess of $50 million (as adjusted) are situated on the land and will be conveyed as part of this

transaction. During the last three fiscal years preceding the sale, the property generated $50,000 from the sale of a small amount of timber cut from the reserves two years ago. ''A's'' acquisition of the wilderness land from ''B'' is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding $5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. ''A'' proposes to purchase from ''B'' for in excess of $200 million (as adjusted) an old steel mill that is not currently operating to add to ''A's'' existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued in excess of $50 million (as adjusted) that ''A'' plans to refurbish for use in its operations. ''A's'' acquisition of the mill and the land on which it is located is exempt as unproductive real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

5. ''A'' proposes to purchase two downtown lots, Parcels 1 and 2, from ''B'' for in excess of $50 million (as adjusted). Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated $9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, *i.e.*, it has not generated annual revenues in excess of $5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

6. ''A'' plans to purchase from ''B,'' a manufacturer, a newly-constructed building that ''B'' had intended to equip for use in its manufacturing operations. ''B'' was unable to secure financing to purchase the necessary equipment and ''A'', also a manufacturer, will be required to invest in excess of $50 million (as adjusted) in order to equip the building for use in its production operations. This building is not a new facility under § 802.2 (a), because it was not constructed or held by ''B'' for sale or resale. However, the acquisition of the building qualifies for exemption as unproductive real property pursuant to § 802.2(c)(1). The building is not yet a manufacturing facility since it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility.

7. ''A'' proposes to purchase from ''B,'' for in excess of $50 million (as adjusted), a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by ''B'' for storage of supplies and equipment. The factory and the unimproved acreage have an aggregate fair market value of in excess of $50 million (as adjusted). The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

8. ''X'' proposes to buy a five-story building from ''Y.'' The ground floor of this building houses a department store, and ''X'' currently leases the third floor to operate a medical laboratory. The remaining three floors are used for offices. ''X'' is not acquiring the business of the department store. Because the ground floor is rental retail space, the acquisition of which is exempt under § 802.2(h), this part of the building is excluded from the determination of whether the building is used primarily for office purposes. The laboratory is therefore the only non-office use, and, since it makes up 25 percent of the remainder of the building, the building is used 75 percent for offices. Thus the building qualifies as an office building and its acquisition is therefore exempt under § 802.2(d).

9. ''A'' intends to acquire three shopping centers from ''B'' for a total of in excess of $200 million (as adjusted). The anchor stores in two of the shopping centers are department stores, the businesses of which ''A'' is buying from ''B'' as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, ''A's'' acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds $50 million (as adjusted), ''A'' must comply with the requirements of the act for this part of the transaction.

10. ''A'' wishes to purchase from ''B'' a parcel of land for in excess of $50 million (as adjusted). The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than $50 million (as adjusted), ''A'' will have to file notification for the purchase of the race track.

11. ''A'' intends to purchase a poultry farm from ''B.'' The acquisition of the poultry farm is a transfer of agricultural property that is exempt pursuant to § 802.2(g). If, however, ''B'' has a poultry slaughtering and

processing facility on his farm that is included in the acquisition, ''A's'' acquisition of the farm is not exempt as an acquisition of agricultural property because agricultural property does not include property or assets adjacent to or used in conjunction with a processing facility that is included in an acquisition.

12. ''A'' proposes to purchase the prescription drug wholesale distribution business of ''B'' for in excess of $50 million (as adjusted). The business includes six regional warehouses used for ''B's'' national wholesale drug distribution business. Since ''A'' is acquiring the warehouses in connection with the acquisition of ''B's'' prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

[61 FR 13686, Mar. 28, 1996, as amended at 66 FR 8692, Feb. 1, 2001; 66 FR 23565, May 9, 2001; 67 FR 11903, Mar. 18, 2002; 70 FR 4993, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005]

§ 802.3 Acquisitions of carbon-based mineral reserves.

(a) An acquisition of reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands together with associated exploration or production assets shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed $500 million. In an acquisition that includes reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(b) An acquisition of reserves of coal, or rights to reserves of coal and associated exploration or production assets, shall be exempt from the requirements of the act if the value of the reserves, the rights and the associated exploration or production assets to be held as a result of the acquisition does not exceed $200 million. In an acquisition that includes reserves of coal, rights to reserves of coal and associated exploration or production assets, the transfer of any other assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate acquisition.

(c) Associated exploration or production assets means equipment, machinery, fixtures and other assets that are integral and exclusive to current or future exploration or production activities associated with the carbon-based mineral reserves that are being acquired. Associated exploration or production assets do not include the following:

(1) Any pipeline and pipeline system or processing facility which transports or processes oil and gas after it passes through the meters of a producing field located within reserves that are being acquired; and

(2) Any pipeline or pipeline system that receives gas directly from gas wells for transportation to a natural gas processing facility or other destination.

Examples: 1. ''A'' proposes to purchase from ''B'' for $550 million gas reserves that are not yet in production and have not generated any income. ''A'' will also acquire from ''B'' for $280 million producing oil reserves and associated assets such as wells, compressors, pumps and other equipment. The acquisition of the gas reserves is exempt as a transfer of unproductive property under § 802.2(c). The acquisition of the oil reserves and associated assets is exempt pursuant to § 802.3(a), since the value of the reserves and associated assets does not exceed the $500 million limitation.

2. ''A,'' an oil company, proposes to acquire for $180 million oil reserves currently in production along with field pipelines and treating and metering facilities which serve such reserves exclusively. The acquisition of the reserves and the associated assets are exempt. ''A'' will also acquire from ''B'' for in excess of $50 million (as adjusted) a natural gas processing plant and its associated gathering pipeline system. This acquisition is not exempt since § 802.3(c) excludes these assets from the exemption in § 802.3 for transfers of associated exploration or production assets.

3. ''A,'' an oil company, proposes to acquire a coal mine currently in operation and associated production assets for $90 million from ''B,'' an oil company. ''A'' will also purchase from ''B'' producing oil reserves valued at $100 million and an oil refinery valued at $13 million. The acquisition of the coal mine and the oil reserves is exempt pursuant to § 802.3. Although § 802.3(c) excludes the refinery from the exemption in § 802.3 for transfers of associated exploration and production assets, ''A's'' acquisition of the refinery is not subject to the notification requirements of the act because its value does not exceed $50 million (as adjusted).

4. ''X'' proposes to acquire from ''Z'' coal reserves which, together with associated exploration assets, are valued at $230 million. Since the value of the reserves and the assets exceeds the $200 million limitation in § 802.3(b), this transaction is not exempt under § 802.3. However, if the coal reserves qualify as unproductive property under the requirements of § 802.2(c), their acquisition, along with the acquisition of their associated assets, would be exempt.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8692, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to Section 7A(c) of the Act, this part 802, or pursuant to § 801.21 of this chapter, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted). The value of voting or non-voting securities of any other issuer or interests in any non-corporate entity not included within the acquired issuer does not count toward the $50 million (as adjusted) limitation for non-exempt assets.

Example: A and B form a new corporation as an acquisition vehicle to acquire all of the voting securities of C. Each contributes $250 million in cash. Because all of the cash is considered to be exempt assets pursuant to § 801.21, the new corporation does not have non-exempt assets valued in excess of $50 million (as adjusted), and the acquisition of its voting securities by A and B is exempt under § 802.4. Note that the result is the same if the acquisition vehicle is formed as an unincorporated entity. Also see the examples to § 802.30(c) for additional applications of § 802.4.

(b) For purposes of paragraph (a) of this section, the assets of all issuers and unincorporated entities that are being acquired from the same acquired person are included in determining if the limitation for non-exempt assets is exceeded.

(c) In connection with paragraph (a) of this section and § 801.15 (b), the value of the assets of an issuer whose voting securities or an unincorporated entity whose non-corporate interests are being acquired pursuant to this section shall be the fair market value, determined in accordance with § 801.10(c).

Examples: 1. ''A,'' a real estate investment company, proposes to purchase 100 percent of the voting securities of C, a wholly-owned subsidiary of ''B,'' a construction company. C's assets are a newly constructed, never occupied hotel, including fixtures, furnishings and insurance policies. The acquisition of the hotel would be exempt under § 802.2(a) as a new facility and under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a) since C holds assets whose direct purchase would be exempt under § 802.2 and does not hold non-exempt assets exceeding $50 million (as adjusted) in value.

2. ''A'' proposes to acquire 60 percent of the voting securities of C from ''B.'' C's assets consist of a portfolio of mortgages valued at $55 million and a small manufacturing plant valued at $26 million. The manufacturing plant is an operating unit for purposes of § 802.1(a). Since the acquisition of the mortgages would be exempt pursuant to Section 7A(c)(2) of the act and since the value of the non-exempt manufacturing plant is less than $50 million (as adjusted), this acquisition is exempt under § 802.4(a).

3. ''A'' proposes to acquire from ''B'' 100 percent of the voting securities of each of three issuers, M, N and O, simultaneously. M's assets consist of oil reserves worth $160 million and coal reserves worth $40 million. N has assets consisting of $130 million of gas reserves and $100 million of coal reserves. O's assets are oil shale reserves worth $140 million and a coal mine worth $80 million. Since ''A'' is simultaneously acquiring the voting securities of three issuers from the same acquired person, it must aggregate the assets of the issuers to determine if any of the limitations in § 802.3 is exceeded. As a result of aggregating the assets of M, N and O, ''A's'' holdings of oil and gas reserves are below the $500 limitation for such assets in § 802.3(a). However, the aggregated holdings exceed the $200 million limitation for coal reserves in § 802.3(b). ''A's'' acquisition therefore is not exempt, and it must report the entire transaction.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005; 70 FR 11513, Mar. 8, 2005]

§ 802.5 Acquisitions of investment rental property assets.

(a) Acquisitions of investment rental property assets shall be exempt from the requirements of the act.

(b) Investment rental property assets. ''Investment rental property assets'' means real property that will not be rented to entities included within the acquiring person except for the sole purpose of maintaining, managing or supervising the operation of the real property, and will be held solely for rental or investment purposes. In an acquisition that includes investment rental property assets, the transfer of any property or assets that are not investment rental property assets shall be subject to the requirements of the act and these rules as if they were being acquired in a separate transaction. Investment rental property assets include:

(1) Property currently rented,

(2) Property held for rent but not currently rented,

(3) Common areas on the property, and

(4) Assets incidental to the ownership of property, which may include cash, prepaid taxes or insurance, rental receivables and the like.

Example: 1. ''X'', a corporation, proposes to purchase a sports/entertainment complex which it will rent to professional sports teams and promoters of special events for concerts, ice shows, sporting events and other entertainment activities. ''X'' will provide office space in the complex for ''Y'', a management company which will maintain and manage the facility for ''X.'' This acquisition is an exempt acquisition of investment rental property assets since ''X'' intends to rent the facility to third parties and is providing space within the facility to a management company solely to maintain, manage or supervise the operation of the facility on its behalf. If, however, ''X'' controls Z, a concert promoter to whom it also intends to rent the complex, the acquisition would not be exempt under § 802.5, since the property would not meet the requirements of § 802.5(b)(1).

2. ''X'' intends to buy from ''Y'' a development commonly referred to as an industrial park. The industrial park contains a warehouse/distribution center, a retail tire and automobile parts store, an office building, and a small factory. The industrial park also contains several parcels of vacant land. If ''X'' intends to acquire this industrial park as investment rental property, the acquisition will be exempt pursuant to § 802.5. If, however, ''X'' intends to use the factory for its own manufacturing operations, this exemption would be unavailable. The exemptions in § 802.2 for warehouses, rental retail space, office buildings, and undeveloped land may still apply and, if the value of the factory is $50 million (as adjusted) or less, the entire transaction may be exempted by that section.

[61 FR 13688, Mar. 28, 1996, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.6 Federal agency approval.

(a) For the purposes of section 7A (c)(6) and (c)(8), the term *information and documentary material* includes one copy of all documents, application forms, and all written submissions of any type whatsoever. In lieu of providing all such information and documentary material, or any portion thereof, one copy of an index describing such information and documentary material may be provided, together with a certification that any such information or documentary material not provided will be provided within 10 calendar days upon request by the Federal Trade Commission or Assistant Attorney General, or a delegated official of either. Any material submitted pursuant to this section shall be submitted to the offices specified in § 803.10(c).

(b)(1) A mixed transaction is one that has some portion that is exempt under Section 7A (c)(6), (c)(7) or (c)(8) because it requires regulatory agency premerger competitive review and approval, and another portion that does not require such review.

(2) The portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is subject to the act and these rules as if it were being acquired in a separate acquisition.

Example: Bank ''A'' acquires Bank ''B'', which owns a financial subsidiary engaged in securities underwriting. ''A''s acquisition of ''B'' requires agency approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System or Federal Deposit Insurance Corporation (depending on whether ''A'' is a national bank, state member bank, or state non-member bank under section 18(c) of the FDI Act), and therefore is exempt from filing under Section 7A (c)(7). However, the acquisition of the financial subsidiary is subject to HSR reporting requirements, and ''A'' and

''B'' each must make a filing for that portion of the transaction and observe the waiting period if the act's thresholds are met.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983; 66 FR 8693, Feb. 1, 2001; 67 FR 11903, Mar. 18, 2002]

§ 802.8 Certain supervisory acquisitions.

(a) A merger, consolidation, purchase of assets, or acquisition requiring agency approval under sections 403 or 408(e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, shall be exempt from the requirements of the act, including specifically the filing requirement of Section 7A(c)(8), if the agency whose approval is required finds that approval of such merger, consolidation, purchase of assets, or acquisition is necessary to prevent the probable failure of one of the institutions involved.

(b)(1) A merger, consolidation, purchase of assets, or acquisition which requires agency approval under 12 U.S.C. 1817(j) or 12 U.S.C. 1730(q) shall be exempt from the requirements of the act if copies of all information and documentary materials filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed acquisition.

(2) A transaction described in paragraph (b)(1) of this section shall be exempt from the requirements of the act, including specifically the filing requirement, if the agency whose approval is required finds that approval of such transaction is necessary to prevent the probable failure of one of the institutions involved.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34436, July 29, 1983; 67 FR 11903, Mar. 18, 2002]

§ 802.9 Acquisition solely for the purpose of investment.

An acquisition of voting securities shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held.

Examples: 1. Suppose that acquiring person ''A'' acquires 6 percent of the voting securities of issuer X, valued in excess of $50 million (as adjusted). If the acquisition is solely for the purpose of investment, it is exempt under Section 7A(c)(9).

2. After the acquisition in example 1, ''A'' decides to acquire an additional 7 percent of the voting securities of X. Regardless of ''A''s intentions, the acquisition is not exempt under section 7A(c)(9).

3. After the acquisition in example 1, acquiring person ''A'' decides to participate in the management of issuer X. Any subsequent acquisitions of X stock by ''A'' would not be exempt under section 7A(c)(9).

[43 FR 33544, July 31, 1978, as amended at 66 FR 8693, Feb. 1, 2001; 70 FR 4994, Jan. 31, 2005]

§ 802.10 Stock dividends and splits; reorganizations.

(a) The acquisition of voting securities pursuant to a stock split or pro rata stock dividend is exempt from the requirements of the Act under section 7A(c)(10).

(b) An acquisition of non-corporate interests or voting securities as a result of the conversion of a corporation or unincorporated entity into a new entity is exempt from the requirements of the Act if:

(1) No new assets will be contributed to the new entity as a result of the conversion; and

(2) Either:

(i) As a result of the transaction the acquiring person does not increase its per centum holdings in the new entity relative to its per centum holdings in the original entity; or

(ii) The acquiring person controlled the original entity.

Examples: 1. Partners A and B hold 60 percent and 40 percent respectively of the partnership interests in C. C is converted to a corporation in which A and B hold 60 percent and 40 percent respectively of the voting securities. No new assets are contributed. The conversion to a corporation is exempt from notification for both A and B.

2. Shareholder A holds 55% and B holds 45% of the voting securities of corporation C. C is converted to a limited liability company in which A holds 60% and B holds 40% of the membership interests. No new assets are contributed. The conversion to a limited liability company is exempt from notification because A controlled the corporation. If however, B holds 55% and A holds 45% in the new

limited liability company, the conversion is not exempt for B and may require notification because control changes.

3. Shareholders A, B and C each hold one third of the voting securities of corporation X. Pursuant to a reorganization agreement, A and B each contribute new assets to X and C contributes cash. X is then being reincorporated in a new state. Each of A, B and C receive one third of the voting securities of newly reincorporated C. The reincorporation is not exempt from notification and may be reportable for A, B and C because of the contribution of new assets.

[70 FR 11513, Mar. 8, 2005]

§ 802.20 [Reserved]

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to §803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples: 1. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both ''A'' and ''B'' filed notification as required, indicating the $50 million threshold. Within five years of the expiration of the original waiting period, ''A'' acquires additional voting securities of B but not in an amount sufficient to meet or exceed $100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required.

2. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both ''A'' and ''B'' filed notification as required, indicating the $50 million threshold. Suppose that in year three following the expiration of the waiting period, the $50 million notification threshold has been adjusted to $56 million pursuant to Section 7A(a)(2)(a) of the Act. ''A'' now intends to acquire an additional $5 million of the voting securities of B. ''A'' is not required to file another notification even though it now holds voting securities in excess of the $56 million notification threshold (which is greater than the $50 million notification threshold indicated in its filing), because it has not met or exceeded a notification threshold (as adjusted) greater than the notification threshold exceeded in the earlier acquisition (*i.e.* $100 million (as adjusted) or 50% notification thresholds).

3. Same facts as in Example 2 above except now the five year period has expired. Suppose that, the $50 million notification threshold has been adjusted to $57 million pursuant to Section 7A(a)(2)(a) of the Act. ''A'' now holds $58 million of voting securities of B. Because §802.21(a)(2) is no longer satisfied, the acquisition of any additional voting securities of B will require a new filing because ''A'' will hold voting securities valued in excess of the $57 million notification threshold. If, however, the $50 million notification threshold had been adjusted to $60 million at the end of the five-year period, A could acquire up to that threshold without a new filing.

4. This section also allows a person to recross any of the threshold notification levels that were in effect at the time of filing notification any number of times within five years of the expiration of the waiting period following notification. Thus, if in Example 1, ''A'' had disposed of some voting securities so that it held less than $50 million of the voting securities of B, and thereafter had increased its holdings to more than $50 million but less than $100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period.

5. A files notification at the $50 million notification threshold and acquires $51 million of the voting securities of B in the year following expiration of the waiting period. The next greater notification threshold at the time of filing was $100 million. In year three, the $100 million notification threshold has been adjusted to $106 million. A can now acquire up to, but not meet or exceed, voting securities of B valued at $106 million. As the original $100 million threshold is adjusted upward in years four and five, A can acquire up to those new thresholds as the adjustments are effected.

6. A files notification at the $50 million threshold in January of year one. In February of year one, the $50 million threshold is adjusted to $52 million. A only needs to acquire in excess of $50 million of voting securities of B, not in excess of $52 million, to have exceeded the threshold which was filed for in the year following expiration of the waiting period (*see* §803.7). It may then acquire up to the next greater notification

threshold (as adjusted) during the five years following expiration of the waiting period.

(b) *Year 2001 transition.* For transactions filed using the 1978 thresholds where the waiting period expired after February 1, 1996, an acquiring person may, during the five-year period following expiration of the waiting period, acquire up to what was the next percentage threshold at the time it made its filing without filing another notification, even if in doing so it crosses a 2001 notification threshold in § 801.1(h) of this chapter. However, after the end of that period, any additional acquisition will be the subject of a new notification if it meets or exceeds a 2001 threshold in § 801.1(h) of this chapter.

Examples: 1. Corporation A filed to acquire 20 percent of the voting securities of corporation B and indicated the 15 percent threshold. The waiting period expired on October 3, 1999. ''A'' acquired the 20 percent within the year following expiration of the waiting period. ''A'' has until October 3, 2004, to acquire additional securities up to 25 percent of ''B'''s voting securities, and need not make another filing before doing so, even though such acquisition by ''A'' may cross the $50 million, $100 million or $500 million notification threshold in § 801.1(h) of this chapter. After October 3, 2004, ''A'' and ''B'' must observe the 2001 notification thresholds set forth in § 801.1(h) of this chapter.

2. Prior to February 1, 2001, ''A'' filed to acquire 12 percent of the voting securities of corporation B, valued at $120 million, and indicated the $15 million notification threshold. After February 1, 2001, ''A'' determines that it will make an additional acquisition which will result in its holding 16 percent of the voting securities of B, valued at $160 million. ''A'' is required to file notification at the $100 million notification threshold prior to making the acquisition since it is now crossing the next higher 1978 threshold (15 percent).

3. Prior to February 1, 2001, ''A'' filed to acquire 26 percent of the voting securities of ''B'' and indicated the 25 percent notification threshold. After the end of the five-year period following expiration of the waiting period, ''A'' will acquire additional shares of ''B'' which will result in its holding 30 percent of the voting securities of ''B'', valued at $125 million. ''A'' is required to file notification at the $100 million notification threshold prior to making the acquisition. ''A'' could, however, have reached this level (30 percent valued at $125 million) prior to the end of the five-year period without making an additional filing since it would not have crossed the next higher threshold at the time it filed (50 percent) and the acquisition would have been exempted by this § 802.21(b).

[43 FR 33544, July 31, 1978, as amended at 66 FR 8693, Feb. 1, 2001; 67 FR 11906, Mar. 18, 2002; 70 FR 4995, Jan. 31, 2005]

§ 802.23 Amended or renewed tender offers.

Whenever a tender offer is amended or renewed after notification has been filed by the offeror, no new notification shall be required, and the running of the waiting period shall be unaffected, except as follows:

(a) If the number of voting securities to be acquired pursuant to the offer is increased such that a greater notification threshold would be met or exceeded, only the acquiring person need again file notification, but a new waiting period must be observed;

(b) If a noncash tender offer is amended to become a cash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of § 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is earlier; or

(c) If a cash tender offer is amended to become a noncash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of § 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (as determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is later.

Examples: 1. Assume that corporation A makes a tender offer for 20 percent of the voting securities of corporation B and that ''A'' files notification. Under this section, if A subsequently amends its tender offer only as to the amount of consideration offered, the waiting period so commenced is not affected, and no new notification need be filed.

2. In the previous example, assume that A makes an amended tender offer for 27 percent

of the voting securities of B, valued at greater than $1 billion. Since a new notification threshold will be crossed, this section requires that ''A'' must again file notification and observe a new waiting period. Paragraph (a) of this section, however, provides that ''B'' need not file notification again.

3. Assume that ''A'' makes a tender offer for shares of corporation B. ''A'' includes its voting securities as part of the consideration. ''A'' files notification. Five days later, ''A'' changes its tender offer to a cash tender offer, and on the same day files copies of its amended tender offer with the offices designated in §803.10(c). Under paragraph (b) of this section, the waiting period expires (unless extended or terminated) 15 days after the receipt of the amended offer (on the 20th day after filing notification), since that occurs earlier than the expiration of the original waiting period (which would occur on the 30th day after filing).

4. Assume that ''A'' makes a cash tender offer for shares of corporation B and files notification. Six days later, ''A'' amends the tender offer and adds voting securities as consideration, and on the same day files copies of the amended tender offer with the offices designated in §803.10(c). Under paragraph (c) of this section, the waiting period expires (unless extended or terminated) on the 30th day following the date of filing of notification (determined under §803.10(c)), since that occurs later than the 15th day after receipt of the amended tender offer (which would occur on the 21st day).

[43 FR 33544, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 66 FR 8694, Feb. 1, 2001]

§ 802.30 Intraperson transactions.

(a) An acquisition (other than the formation of a corporation or unincorporated entity under §801.40 or §801.50 of this chapter) in which the acquiring and at least one of the acquired persons are, the same person by reason of §801.1(b)(1) of this chapter, or in the case of a not-for-profit corporation which has no outstanding voting securities, by reason of §801.1(b)(2) of this chapter, is exempt from the requirements of the Act.

Examples to paragraph (a)*:* 1. A and B each have the right to 50% of the profits of partnership X. A also holds 100% of the voting securities of corporation Y. A pays B in excess of $50 million in cash (as adjusted) and transfers certain assets of X to Y. Because A is the acquiring person through its control of Y, pursuant to §801.1(b)(1)(i), and one of the acquired persons through its control of X pursuant to §801.1(b)(1)(ii), the acquisition of assets is exempt under §802.30(a).

2. A and B each have the right to 50% of the profits of partnership X. A contributes assets to X valued in excess of $50 million (as adjusted). B contributes cash to X. Because B is an acquiring person but not an acquired person, its acquisition of the assets contributed to X by A is not exempt under §802.30(a). However, A is both an acquiring and acquired person, and its acquisition of the assets it is contributing to X is exempt under §802.30(a).

(b) The formation of any wholly owned entity is exempt from the requirements of the Act.

(c) For purposes of applying Sec. 802.4(a) to an acquisition that may be reportable under Sec. 801.40 or Sec. 801.50, assets or voting securities contributed by the acquiring person to a new entity upon its formation are assets or voting securities whose acquisition by that acquiring person is exempt from the requirements of the Act.

Examples to paragraph (c)*:* 1. A and B form a new partnership to which A contributes a manufacturing plant valued at $102 million and acquires a 51% interest in the partnership. B contributes $98 million in cash and acquires a 49% interest. B is not acquiring non-corporate interests which confer control of the partnership and therefore is not making a reportable acquisition. A is acquiring non-corporate interests which confer control of the partnership, however, the manufacturing plant it is contributing to the formation is exempt under §802.30(c) and the cash contributed by B is excluded under §801.21, therefore, the acquisition of non-corporate interests by A is exempt under §802.4.

2. A and B form a new corporation to which A contributes a plant valued at $120 million and acquires 60% of the voting securities of the new corporation. B contributes a plant valued at $80 million and acquires 40% of the voting securities of the new corporation. While the assets contributed to the formation are exempted by §802.30(c) for each of A and B, the new corporation holds more than $50 million (as adjusted) in non-exempt assets (the plant contributed by the other person) with respect to both acquisitions. A is now acquiring voting securities of an issuer which holds $80 million in non-exempt assets (the plant contributed by B), and B is acquiring voting securities of an issuer which holds $120 million in non-exempt assets (the plant contributed by A). Therefore neither acquisition of voting securities is exempt under §802.4. Note that in contrast to the formation of the partnership in Example 1, B is not required to acquire a controlling interest in the corporation in order to have a reportable transaction.

3. A and B form a 50/50 partnership. A contributes a plant valued at $100 million and B contributes a plant valued at $40 million and $60 million in cash. Because with respect to A, the new partnership has non-exempt assets of $40 million (the plant contributed by B), A's acquisition of non-corporate interests is exempt under § 802.4. With respect to B, the new partnership holds in excess of $50 million (as adjusted) in non-exempt assets (the plant contributed by A), therefore B's acquisition of non-corporate interests would not be exempt under § 802.4.

[70 FR 11513, Mar. 8, 2005]

§ 802.31 Acquisitions of convertible voting securities.

Acquisitions of convertible voting securities shall be exempt from the requirements of the act.

Example: This section applies regardless of the dollar value of the convertible voting securities held or to be acquired. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See § 801.32.

[43 FR 33544, July 31, 1978, as amended at 66 FR 8694, Feb. 1, 2001]

§ 802.35 Acquisitions by employee trusts.

An acquisition of voting securities shall be exempt from the notification requirements of the act if:

(a) The securities are acquired by a trust that meets the qualifications of section 401 of the Internal Revenue Code;

(b) The trust is controlled by a person that employs the beneficiaries and,

(c) The voting securities acquired are those of that person or an entity within that person.

Examples: 1. Company A establishes a trust for its employees that meets the qualifications of section 401 of the Internal Revenue Code. Company A has the power to designate the trustee of the trust. That trust then acquires 30% of the voting securities of Company A for in excess of $50 million (as adjusted). Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for in excess of $50 million (as adjusted). Neither acquisition is reportable.

2. Assume that in the example above, ''A'' has total assets of $100 million (as adjusted). ''C'' also has total assets of $100 million (as adjusted) and is not controlled by Company A. The trust controlled by Company A plans to acquire 40 percent of the voting securities of Company C for in excess of $50 million (as adjusted). Since Company C is not included within ''A,'' ''A'' must observe the requirements of the act before the trust makes the acquisition of Company C's shares.

[52 FR 7082, Mar. 6, 1987, as amended at 66 FR 8694, Feb. 1, 2001; 70 FR 4995, Jan. 31, 2005]

§ 802.40 Exempt formation of corporations or unincorporated entities.

The formation of an entity is exempt from the requirements of the Act if the entity will be not-for-profit within the meaning of sections 501(c)(1)–(4), (6)–(15), (17)–(20) or (d) of the Internal Revenue Code.

[70 FR 11514, Mar. 8, 2005]

§ 802.41 Corporations or unincorporated entities at time of formation.

Whenever any person(s) contributing to the formation of an entity are subject to the requirements of the Act by reason of § 801.40 or § 801.50 of this chapter, the new entity need not file the notification required by the Act and § 803.1 of this chapter.

Examples: 1. Corporations A and B, each having sales of in excess of $100 million (as adjusted), each propose to contribute in excess of $50 million (as adjusted) in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both ''A'' and ''B'' must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in Example 1 of this section, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for in excess of $50 million (as adjusted). Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, ''A,'' ''B'' and ''C'' must file with respect to the proposed acquisition of C and must observe the waiting period.

[43 FR 33544, July 31, 1978, as amended at 52 FR 7082, Mar. 6, 1987; 70 FR 4995, Jan. 31, 2005; 70 FR 11514, Mar. 8, 2005]

§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.

(a) Whenever one or more of the contributors in the formation of a joint venture or other corporation which otherwise would be subject to the requirements of the act by reason of

§ 801.40 are exempt from these requirements under section 7A(c)(8), any other contributor in the formation which is subject to the act and not exempt under section 7A(c)(8) need not file a Notification and Report Form, provided that no less than 30 days prior to the date of consummation any such contributor claiming this exemption has submitted an affidavit to the Federal Trade Commission and to the Assistant Attorney General stating its good faith intention to make the proposed acquisition and asserting the applicability of this exemption.

(b) Persons relieved of the requirement to file a Notification and Report Form pursuant to paragraph (a) of this section remain subject to all other provisions of the act and these rules.

[48 FR 34436, July 29, 1983]

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in paragraph (a) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to § 802.50: 1. Assume that ''A'' and ''B'' are both U.S. persons. ''A'' proposes selling to ''B'' a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled $13 million in the most recent fiscal year. The transaction is exempt under this paragraph (a) of this section.

2. Sixty days after the transaction in example 1, ''A'' proposes to sell to ''B'' a second manufacturing plant located abroad; sales in or into the United States attributable to this plant, when combined with the sales into the United States of the first plant, totaled in excess of $50 million (as adjusted) in the most recent fiscal year. Since ''B'' would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of ''A'' held by ''B'' as a result of the second acquisition (*see* § 801.13(b)(2) of this chapter). Since the total sales in or into the United States exceed $50 million (as adjusted), the acquisition of the second plant would not be exempt under this paragraph (a) of this section.

3. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of in excess of $110 million (as adjusted). If ''A'' acquires only foreign assets of ''B,'' and if those assets generated $50 million (as adjusted) or less in sales in or into the United States, the transaction is exempt.

4. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $110 million (as adjusted). If ''A'' acquires only foreign assets of ''B,'' and those assets generated in excess of $50 million (as adjusted) in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at $200 million (as adjusted) or less, but is reportable if valued at greater than $200 million (as adjusted).

[67 FR 11903, Mar. 18, 2002, as amended at 70 FR 4995, Jan. 31, 2005]

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* (1) The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If interests in multiple foreign issuers are being acquired from the

same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(c) Where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

Example to §802.51 1. ''A,'' a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of in excess of 50 million (as adjusted) in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States in excess of $110 million (as adjusted), and that ''A'' is acquiring 100% of the voting securities of ''B.'' Included within ''B'' is U.S. issuer C, whose total U.S. assets are valued in excess of $50 million (as adjusted). Since ''A'' will be acquiring control of an issuer, C, with total U.S. assets of more than $50 million (as adjusted), and the parties' aggregate sales in or into the U.S. in the relevant time period exceed $110 million (as adjusted), the acquisition is not exempt under this section.

3. ''A,'' a foreign person, intends to acquire 100 percent of the voting securities of two wholly owned subsidiaries of ''B'' for a total of in excess of $50 million (as adjusted). BSUB1 is a foreign issuer with less than $50 million (as adjusted) in sales into the U.S. in its most recent fiscal year and with assets of less than $50 million (as adjusted) located in the U.S. Less than $50 million (as adjusted) of the acquisition price has been allocated to BSUB1. BSUB2 is a U.S. issuer with more than $50 million (as adjusted) in U.S. sales and more than $50 million (as adjusted) in assets located in the U.S. Less than $50 million (as adjusted) of the acquisition price is allocated to BSUB2. Since BSUB1 does not exceed the $50 million (as adjusted) limitation for U.S. sales or assets in §802.51(b), its voting securities are not held as a result of the acquisition (*see* §801.15(b) of this chapter). Since the acquisition price for BSUB2 alone would not result in ''A'' holding in excess of $50 million (as adjusted) of voting securities of the acquired person, the transaction is non-reportable in its entirety. Note that the U.S. sales and assets of BSUB1 are not aggregated with those of BSUB2 for purposes of determining whether the limitations in paragraph (b) of this section are exceeded. If BSUB2 were also a foreign issuer, such aggregation would be required under paragraph (b)(2) of this section, and the transaction in its entirety would be reportable.

[67 FR 11904, Mar. 18, 2002; 67 FR 13716, Mar. 26, 2002, as amended at 70 FR 4996, Jan. 31, 2005]

§ 802.52 Acquisitions by or from foreign governmental corporations.

An acquisition shall be exempt from the requirements of the act if:

(a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and

(b) The acquisition is of assets located within that foreign state or of

voting securities of an issuer organized under the laws of that state.

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is ''A,'' a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were $50 million (as adjusted) or less, the transaction would also be exempt under § 802.50).

[43 FR 33544, July 31, 1978, as amended at 67 FR 11904, Mar. 18, 2002; 70 FR 4996, Jan. 31, 2005]

§ 802.53 Certain foreign banking transactions.

An acquisition which requires the consent or approval of the Board of Governors of the Federal Reserve System under section 25 or section 25(a) of the Federal Reserve Act, 12 U.S.C. 601, 615, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Board of Governors are contemporaneously filed with the Federal Trade Commission and Assistant Attorney General at least 30 days prior to consummation of the acquisition. In lieu of such information and documentary material or any portion thereof, an index describing such material may be provided in the manner authorized by § 802.6(a).

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983]

§ 802.60 Acquisitions by securities underwriters.

An acquisition of voting securities by a person acting as a securities underwriter, in the ordinary course of business, and in the process of underwriting, shall be exempt from the requirements of the act.

§ 802.63 Certain acquisitions by creditors and insurers.

(a) *Creditors.* An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, or in connection with the establishment of a lease financing, or in connection with a bona fide debt work-out shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business.

(b) *Insurers.* An acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations shall be exempt from the requirements of the act if made by an insurer in the ordinary course of business.

Examples: 1. A bank makes a loan and takes actual or constructive possession of collateral in any form. Since the bank is not the beneficial owner of the collateral, the bank's receipt of it is not an acquisition which is subject to the requirements of the act. However, if upon default the bank becomes the beneficial owner of the collateral, that acquisition is exempt under this section.

2. This section exempts only the acquisition by the creditor or insurer, and not the subsequent disposition of the assets or voting securities. If a creditor or insurer sells voting securities or assets that have come into its possession in a transaction which is exempt under this section, the requirements of the act may apply to that disposition.

§ 802.64 Acquisitions of voting securities by certain institutional investors.

(a) *Institutional investor.* For purposes of this section, the term *institutional investor* means any entity of the following type:

(1) A bank within the meaning of 15 U.S.C. 80b–2(a)(2);

(2) Savings bank;

(3) Savings and loan or building and loan company or association;

(4) Trust company;

(5) Insurance company;

(6) Investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.);

(7) Finance company;

(8) Broker-dealer within the meaning of 15 U.S.C. 78c(a)(4) or (a)(5);

(9) Small Business Investment Company or Minority Enterprise Small Business Investment Company regulated by the U.S. Small Business Administration pursuant to 15 U.S.C. 662;

(10) A stock bonus, pension, or profit-sharing trust qualified under section 401 of the Internal Revenue Code;

(11) Bank holding company within the meaning of 12 U.S.C. 1841;

(12) An entity which is controlled directly or indirectly by an institutional investor and the activities of which are in the ordinary course of business of the institutional investor;

(13) An entity which may supply incidental services to entities which it controls directly or indirectly but which performs no operating functions, and which is otherwise engaged only in holding controlling interests in institutional investors; or

(14) A nonprofit entity within the meaning of sections 501(c) (1) through (4), (6) through (15), (17) through (20), or (d) of the Internal Revenue Code.

(b) *Exemption.* An acquisition of voting securities shall be exempt from the requirements of the act, except as provided in paragraph (c) of this section, if:

(1) Made directly by an institutional investor;

(2) Made in the ordinary course of business;

(3) Made solely for the purpose of investment; and

(4) As a result of the acquisition the acquiring person would hold fifteen percent or less of the outstanding voting securities of the issuer.

(c) *Exception to exemption.* Notwithstanding paragraph (b) of this section:

(1) No acquisition of voting securities of an institutional investor of the same type as any entity included within the acquiring person shall be exempt under this section; and

(2) No acquisition by an institutional investor shall be exempt under this section if any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired.

Examples: 1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this section, that X is not, and that the conditions set forth in paragraphs (b)(2), (3) and (4) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $50 million (as adjusted) as long as the aggregate amount held by person ''A'' as a result of the acquisition does not exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would exceed 15 percent, ''A'' may acquire no more than $50 million (as adjusted) worth of voting securities without being subject to the requirements of the act.

2. In example 1, assume that B plans to make the acquisition, but that corporation B's parent, corporation A, is not an institutional investor and is engaged in manufacturing. Subparagraph (c)(2) provides that acquisitions by B can never be exempt under this section if A owns any amount of X's voting securities.

3. In example 1, the exemption does not apply if X is also an institutional investor of the same type as either A or B.

4. Assume that H is a holding company which controls a life insurance company, a casualty insurer and a finance company. The life insurance company controls a data processing company which performs services for the two insurers. Any acquisition by any of these entities could qualify for exemption under this section.

5. In example 4, if H also controls a manufacturing entity, H is not an institutional investor, and only the acquisitions made by the two insurance companies, the finance company and the data processing company can qualify for the exemption under this section.

[43 FR 33544, July 31, 1978, as amended at 66 FR 8694, Feb. 1, 2001; 70 FR 4996, Jan. 31, 2005]

§ 802.65 Exempt acquisition of non-corporate interests in financing transactions.

An acquisition of non-corporate interests that confers control of a new or existing unincorporated entity is exempt from the notification requirements of the Act if:

(a) The acquiring person is contributing only cash to the unincorporated entity;

(b) For the purpose of providing financing; and

(c) The terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return.

[70 FR 11514, Mar. 8, 2005]

§ 802.70 Acquisitions subject to order.

An acquisition shall be exempt from the requirements of the act if the voting securities or assets are to be acquired from an entity pursuant to and in accordance with:

(a) An order of the Federal Trade Commission or of any Federal court in an action brought by the Federal Trade Commission or the Department of Justice;

(b) An Agreement Containing Consent Order that has been accepted by the Commission for public comment,

pursuant to the Commission's Rules of Practice; or

(c) A proposal for a consent judgment that has been submitted to a Federal court by the Federal Trade Commission or the Department of Justice and that is subject to public comment.

[63 FR 34594, June 25, 1998]

§ 802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

Acquisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust shall be exempt from the requirements of the act.

§ 802.80 Transitional rule for transactions investigated by the agencies.

§§ 801.2 and 801.50 shall not apply to any transaction that has been the subject of investigation by either the Federal Trade Commission or the Antitrust Division of the Department of Justice in which, prior to the effective date of that section, the reviewing agency obtained documentary material and information under compulsory process from all parties that would be required to submit a Notification and Report Form for Certain Mergers and Acquisitions under Section 801.50 but for this transitional rule.

[70 FR 11514, Mar. 8, 2005]

PART 803—TRANSMITTAL RULES

Sec.

AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33548, July 31, 1978, unless otherwise noted.

§ 803.1 Notification and Report Form.

(a) The notification required by the act shall be the Notification and Report Form set forth in the appendix to this part (803), as amended from time to time. All acquiring and acquired persons required to file notification by the act and these rules shall do so by completing and filing the Notification and Report Form, in accordance with the instructions thereon and these rules. The current version of the Form can be obtained at *http://www.ftc.gov* or *https://www.hsr.gov*.

(b) Any person filing notification may, in addition to the submissions required by this section, submit any other information or documentary material which such person believes will be helpful to the Federal Trade Commission and Assistant Attorney General in assessing the impact of the acquisition upon competition.

[43 FR 33548, July 31, 1978, as amended at 66 FR 8695, Feb. 1, 2001; 71 FR 35998, June 23, 2006]

§ 803.2 Instructions applicable to Notification and Report Form.

(a) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding §§ 801.1(c)(2) and 801.2, only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example: Jane Doe, her husband and minor child collectively hold more than 50 percent

KELLEY DRYE

Antitrust and Trade Regulation Practice Group

Kelley Drye's Antitrust and Trade Regulation attorneys guide companies, trade groups and individuals through this intricate legal terrain that can determine success or failure in today's competitive global marketplace. Our clients benefit from the deep experience of our group in each of the major areas of antitrust and competition law and consumer protection: transactions, government investigations, civil litigation, and counseling and compliance. A number of our lawyers served in government, including former officials at the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC). Our Washington-based consulting arm, Georgetown Economic Services, augments our legal analysis with its expertise in industrial economics.

Kelley Drye's Antitrust and Trade Regulation practice group brings together the talents of lawyers in these areas:

- **Mergers and Acquisitions** – Kelley Drye handles the antitrust counseling and filing requirements in complex transactions for industrial and financial companies around the world. Our teams complement Kelley Drye's own transactional lawyers and/or the transaction teams of the firm's non-U.S. clients. The firm has handled the antitrust dimensions of transactions across multiple jurisdictions for *Fortune* 500 and other major multinational companies.

- **Joint Ventures and Alliances** – Kelley Drye works with trade associations, buyers groups, and businesses that collaborate with others to structure their ventures and alliances in ways that avoid triggering DOJ and FTC scrutiny.

- **Investigations and Litigation** – Kelley Drye litigates competition issues in a variety of forums, defending against government challenges and handling private antitrust litigation for plaintiffs and defendants. Our lawyers also have substantial experience in criminal investigations, trials, and leniency and amnesty applications. When clients face criminal charges or government investigations, Kelley Drye lawyers draw on extensive experience working with investigators and prosecutors in the United States and abroad.

- **Consumer Protection** – Kelley Drye represents clients in all areas of consumer protection law, including false and deceptive advertising, unfair trade practices and privacy issues related to the use of personal information. We have an excellent record in advertising litigation and National Advertising Division proceedings, and substantive experience at the FTC, the offices of State Attorneys General and the broadcast networks.

- **Counseling and Compliance** – Kelley Drye provides counseling that ranges from quick advice on urgent issues, to full-scale antitrust compliance programs, to antitrust audits. We help businesses minimize antitrust risk when implementing dual-distribution plans, establishing exclusive contracts and restrictions, resolving disputes and encountering other issues. In cases of joint ventures, licensing and other arrangements, the firm helps clients extract the benefits of collaboration without triggering antitrust issues.

The firm's clients also can tap into the deep economic resources of Georgetown Economic Services, a subsidiary of Kelley Drye, that identifies issues, shapes technical and public policy positions, and provides the economic analysis so important to most antitrust issues.

Experience

Transactional

- Represented Ranbaxy in a merger that created one of the world's largest pharmaceutical companies, combining India's largest pharmaceutical company with Daiichi, Japan's second largest. The merger came in the context of a serious FDA investigation and a pending FDA lawsuit against Ranbaxy. We were responsible for and obtained worldwide clearances where necessary. We have recently been engaged to represent Ranbaxy in its proposed acquisition of U.S. assets from GlaxoSmithKline.

- Represented the Germany-based Boehringer Ingelheim group – one of the world's 20 leading pharmaceutical companies – in its milestone acquisition of Actimis, a U.S. pharmaceutical company, owned by an equity fund.

- Represented Tata Consultancy Services in its cash acquisition of Citigroup Global Services Limited. We were responsible for obtaining international approvals for the transaction (the European Union clearances were coordinated through Kelley Drye's office in Belgium). Our representation included extensive advice with respect to antitrust issues in China.

Litigation and Investigations

- Settled conspiracy claims related to domestic active matrix flat panel display markets on behalf of Samsung Electronics.

- Obtained a defense jury verdict on behalf of a Japanese trading company after a four-month jury trial, in a class action alleging a conspiracy to depress the prices of Alaskan salmon.

- Successfully negotiated a favorable resolution of price-fixing charges against a leading manufacturer of specialty papers, its foreign parent, and certain executives in the first joint sovereign, international criminal antitrust investigation. In related civil class actions, obtained dismissal of foreign parent on jurisdictional grounds, and defeated class certification in two state indirect purchaser cases.

- Represented a major international manufacturer in a successful bid to qualify under the Department of Justice's amnesty program, and in related class action litigation.

- Successfully litigated and settled antitrust claims against a *Fortune* 500 publisher and its subsidiary involving exclusive contracts with magazine publishers in the school fundraising industry.

- Obtained modification of an FTC Consent Order for a leading manufacturer of audio equipment, with regard to resale price maintenance and related promotional programs.

- Obtained first known award of attorneys' fees in New York under the Health Care Quality Improvement Act, after summary dismissal of antitrust claims against a hospital and seven administrators and physicians.

- Defended a major New York City hospital against antitrust class action charges arising out of its alleged participation in a conspiracy to restrict the board certification of emergency medicine practitioners.

- Defeated a government motion for a preliminary injunction blocking, on antitrust grounds, an acquisition by an industrial gas producer.

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KELLEY DRYE

Ramirez and Brill Confirmed as FTC Commissioners

03/04/10

Late last night, the Senate unanimously confirmed Edith Ramirez and Julie Brill to fill the two vacant seats on the Federal Trade Commission (FTC).[1] Ms. Ramirez will replace Republican Deborah Majoras, who stepped down from the Commission in March 2008, and Ms. Brill will replace Independent Pamela Jones Harbour, whose term ended in September 2009. Their positions start immediately upon confirmation. A brief background on each new Commissioner is provided below.

Julie Brill

Since February 2009, Ms. Brill has been a Senior Deputy Attorney General and Chief of the Consumer Protection and Antitrust Division for the North Carolina Department of Justice. Prior to joining North Carolina's Department of Justice, Ms. Brill served as an Assistant Attorney General for the Vermont Attorney General's Consumer Protection and Antitrust Divisions for over 20 years. Ms. Brill's experience at the Vermont Attorney General's office included a wide-variety of consumer protection litigation, legislative, and regulatory matters in the fields of privacy, credit reporting, financial services, tobacco, food, drugs and other health-related industries. As an Assistant Attorney General for the state of Vermont, Ms. Brill also testified before Congress regarding data security breach legislation and consumer privacy issues.

Ms. Brill has served as a Vice-Chair of the Consumer Protection Committee of the American Bar Association Antitrust Section since 2004 - the ABA committee chaired by John Villafranco (2002 to 2005) and August Horvath (2005-2009) of Kelley Drye. She has received several honors for her consumer protection and privacy work, including the National Association of Attorneys General Privacy Subcommittee Award in 2001 for drafting proposed privacy principles, Privacy International's 2001 Brandies award for work on state and federal privacy issues, and the National Association of Attorneys General Marvin Award in 1995 for her "outstanding leadership, expertise, and achievement in advancing the goals of the association." Additionally, she is also a Lecturer-in-Law at Columbia Law School.

Before beginning her career in law enforcement, Ms. Brill was an associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York and she clerked for Vermont Federal District Court Judge Franklin S. Billings Jr. Ms. Brill is a graduate of New York University School of Law, where she received a Root-Tilden Scholarship for her commitment to public service. She received her bachelor's degree from Princeton University.

Edith Ramirez

Ms. Ramirez is currently a partner in the Los Angeles office of Quinn Emanuel Urquhart Oliver & Hedges, LLP where she specializes in intellectual property and complex business litigation matters. She has represented a diverse range of clients in actions involving copyright and trademark infringement, antitrust and unfair competition claims, business tort, and other general

business litigation cases. Notable litigation includes *Hathaway Dinwiddie Construction Co. v. United Air Lines, Inc.*, where Ms. Ramirez successfully represented Hathaway Dinwiddie Construction on breach of contract claims, and *Christian v. Mattel, Inc.*, where Ms. Ramirez helped obtain a $500,000 sanction against Mattel's opposing counsel pursuant to Federal Rule of Civil Procedure 11 for filing a frivolous copyright infringement action against Mattel. Ms. Ramirez has also represented American Broadcasting Companies, The Walt Disney Company, The Scotts Company, and Northrop Grumman in a variety of intellectual property, antitrust, and contract litigation matters.

Ms. Ramirez is also involved with a number of community outreach activities. She has served as the Vice President on the Board of Commissioners for the Los Angeles Department of Water and Power, a member of the Board of Directors for Volunteers of America, and the California Deputy Political Director and Director of Latino Outreach for Obama for America.

Previously, Ms. Ramirez served as a law clerk to the Honorable Alfred T. Goodwin, United States Court of Appeals for the Ninth Circuit. She also worked as an associate at Gibson, Dunn & Crutcher, LLP. Ms. Ramirez attended Harvard Law School, where she was an editor for the *Harvard Law Review*, and she received her bachelor's degree from Harvard-Radcliffe College.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's Advertising and Marketing practice group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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[1] http://senatus.wordpress.com/2010/03/03/nominations-confirmed-march-3/

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DOJ Approves Ticketmaster-Live Nation Merger, With Conditions

02/08/10

The Department of Justice Antitrust Division ("DoJ"), along with 17 state attorneys general, reached an agreement with the parties last week that allows the merger of Ticketmaster Entertainment, Inc. ("Ticketmaster") and Live Nation, Inc. ("Live Nation") to proceed. The parties agreed to a combination of conditions – licensing, divestiture and conduct restrictions – to settle DoJ's concerns. Although it is still early to draw conclusions about the new administration's antitrust enforcement policies, this action shows that DoJ was willing to negotiate a solution to replace the competition that had been provided by Live Nation, the second largest, up-and-coming competitor in the market, rather than sue to block the deal.

Background

DoJ concluded that a combination of Ticketmaster and Live Nation would lead to an unlawful concentration among providers of primary ticketing for major concert venues. Ticketmaster has the vast share of the primary ticketing business. By the time Live Nation entered the primary ticketing market, Ticketmaster had an 82 percent market share.

Live Nation had been Ticketmaster's largest primary ticketing client for a number of years. In 2007, however, Live Nation announced that it would not renew its contract with Ticketmaster. Instead, Live Nation launched its own primary ticketing service, lowering service fees and offering something Ticketmaster was not able to offer – access to concert tours (in its role as a promoter). With Live Nation ticketing its own venues and taking some of Ticketmaster's significant customers, Ticketmaster's market share was threatened, according to DoJ.

In February 2009, Ticketmaster and Live Nation announced their plans to merge.

Settlement Terms Approving Merger

DoJ explained, in its Competitive Impact Statement, that the proposed settlement will eliminate the anticompetitive effects of the proposed transaction in three material ways:

Establishing a new Competitor with Compulsory Licensing. Positioning Anschutz Entertainment Group, Inc. ("AEG"), the second largest promoter in the U.S. (behind Live Nation), to become a new, independent, economically viable, and vertically integrated competitor in the market by requiring Ticketmaster to provide AEG a license to its primary ticketing software; AEG will be able to purchase the Ticketmaster ticketing software within five years, decide to create its own software, or partner with a ticketing company other than Ticketmaster.

Establishing a new Competitor with a Divestiture of Assets. Positioning Comcast-Spectacor, L.P. ("Comcast-Spectacor") to become another new, independent, economically viable, and vertically integrated competitor in the market by requiring Ticketmaster to divest its entire

Paciolan business (a “self-enablement” model, which allows a venue to manage its own ticketing platform) to Comcast-Spectacor, so that the combination of (1) the Paciolan business; (2) New Era’s ticketing business (a subsidiary of Comcast-Spectator); and (3) Comcast-Spectacor’s venue presence will provide Comcast-Spectacor sufficient scale to compete effectively and independently with the merged firm in the market for primary ticketing services to major concert venues.

Limiting the Advantages of Vertical Integration. The merged firm will be forbidden from retaliating against any venue owner that chooses to use a competing company’s ticketing or promotional services, including restrictions on anticompetitive bundling of services. Also, to prevent the combined company from abusing its new market position to impede competition among promoters and artists managers, the new Ticketmaster must allow any client that chooses to use another primary ticketing service to take a copy of the ticketing data related to that client’s sales. In addition, the combined company must set up firewalls to prevent it from leveraging confidential and valuable competitor data gleaned from its ticketing business in the day-to-day operations of its promotions or artist management businesses.

The combined company must also notify the DoJ before acquiring any assets of or any interest in any firm engaged in providing primary ticketing services in the U.S., regardless of Hart Scott Rodino Act requirements. Unless an extension is granted, the obligations imposed by the settlement expire in ten years.

DoJ reported that it cooperated closely with the Canadian Competition Bureau throughout the course of its investigation, and to obtain the same remedy in both countries. The settlement must now be approved by the Court after a period in which comments are accepted from interested parties.

Implications

The first takeaway is that, after almost a one-year investigation, the merger between a dominant firm and its nearest competitive threat was allowed to proceed. DoJ was willing to accept a negotiated solution, hereby applying a creative combination of licensing, divestiture and conduct restrictions in an effort to position two competitors to replace Live Nation’s competitive presence.

The second takeaway is that DOJ treated the vertical aspects of the combination with a set of conduct restrictions designed to protect competitors – restrictions to prevent the firm from retaliating against competitors, as well as restrictions from taking advantage of information acquired in the course of running the integrated businesses. These are constraints that its competitors will not have.

What does this tell us about DoJ’s approach to future transactions? It is hard to draw conclusions from one disputed merger, but the Ticketmaster resolution indicates that DOJ will give serious consideration to vertical integration as well as horizontal overlaps between merging parties; it also appears the government is willing to settle its differences with the parties and allow a merger that increases already high concentration.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and trade regulation firm. Our national reputation stems from our proven track record of successfully representing clients in complex competition issues arising under federal and state antitrust laws. Our professionals include officials from the ABA Antitrust Section, and former officials of the United States Department of

Justice Antitrust Division and the FTC. Our firm is also supported by Georgetown Economic Services, an economic consulting firm.

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KELLEY DRYE

DOJ Announces $900,000 Settlement with Smithfield Foods and Premium Standard Farms For Gun-Jumping

01/25/10

On January 21, 2010, the United States Department of Justice (DOJ) Antitrust Division announced that it had settled charges against pork packing and processing companies Smithfield Foods and Premium Standard Farms for in effect acting as a single entity prior to the expiration of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) waiting period. Under the proposed settlement filed with the United States District Court for the District of Columbia, the companies will pay $900,000 in total civil penalties.

The Settlement

The DOJ alleges that after entering into a merger agreement in September 2006 and before the expiration of the waiting period in March 2007, Premium Standard Farms asked for Smithfield Foods' consent for each Premium Standard Farms hog procurement contract negotiated during the waiting period, thereby ceasing to exercise independent business judgment concerning those contracts. Premium Standard Farms provided Smithfield Foods with the contracts' terms, including price and quantity. According to DOJ's complaint, in all there were three multi-year contracts requiring Premium Standard Farms to purchase between 400,000 to 475,000 hogs per year for a total cost of roughly $57 million to $67 million, thus acquiring assets valued at more than $56.7 million, the operative threshold at the time. The DOJ alleged that since the contracts were a vital part of Smithfield Foods' ongoing business and were entered in the ordinary course of business, the parties prematurely transferred operational control, in violation of the requirement that parties wait for expiration of the waiting period before consummating the transaction.

Implications

It is important that for transactions reportable under the HSR Act, parties maintain independent operations until after the expiration of the waiting period. Parties should recognize that gun-jumping can happen whether or not there is a contract in place. While in the Smithfield Foods case the DOJ does not allege that the merger agreement's provisions were problematic, the DOJ claims that the parties' interdependent decision making behavior was anticompetitive. In other cases, antitrust regulators have obtained settlements of charges that contract provisions were anticompetitive because they granted the right to control the target prior to expiration of the waiting period.

Certain types of contract provisions do not pose antitrust risk. For example, parties may safely employ a provision that requires the target to continue operating its business in the ordinary course, and in general may agree to any provision that is a legitimate means for the buyer to protect the value of the target company without acquiring control over it. Other types of provisions may create the potential for gun-jumping and thus raise antitrust risk. Thus, antitrust counsel should be consulted before an agreement is in place, and consulted during the pendency

of the HSR review process.

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Kelley Drye is recognized as a premier antitrust and trade regulation firm. Our national reputation stems from our proven track record of successfully representing clients in complex competition issues arising under federal and state antitrust laws. Our professionals include officials from the ABA Antitrust Section, and former officials of the United States Department of Justice Antitrust Division and the FTC. Our firm is also supported by Georgetown Economic Services, an economic consulting firm.

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DOJ Warns of Fraud and Collusion in Procuring Economic Recovery Funds

04/27/09

On April 13, 2009, the United States Department of Justice (DOJ) Antitrust Division issued a note on its web site warning of the potential for fraud and collusion among vendors applying for the over $500 billion in funds to be provided by the American Recovery and Reinvestment Act of 2009 (ARRA).

The ARRA, signed into law by President Obama in February 2009, aims to revitalize the national economy by allocating funds to be granted to private procurement vendors through a competitive application process. The DOJ has issued a reminder that it is a crime to make false statements in applications or to work with other vendors to fill out applications for funds, and has called upon federal agency procurement and grant officers, as well as agency auditors and investigators, to help identify and report such misconduct. In addition, the DOJ has established a Citizen Complaint Center, whose contact information is on the DOJ web site, to enable people to contact DOJ regarding suspected collusion.

To assist agency employees, auditors, and investigators in spotting collusive behavior, the DOJ has published resources including a list titled "Red Flags of Collusion" that identifies the following possible indicators of collusion:

1) **Market Participants**:

- small number of vendors
- small group of major vendors make up a large market share
- the good or service is standardized so that the award turns on price rather than other factors (e.g. design, quality, service)

2) **Applications or Proposals of Vendors are Similar**:

- similar handwriting, typographical errors, or math errors
- mailed from the same postal address, email address, fax, or overnight courier number
- same last minute changes whited-out or crossed-out to change price quotes
- same vendor created or edited the document, as shown by electronic document properties

3) **Patterns in Awards Repeated Over Time**:

- competing vendors rotate over time (i.e. each vendor gets a turn to win)
- each competing vendor continues winning similar amounts of work
- one vendor continues to win, regardless of how much competition the vendor faces
- winning vendor subcontracts work to a losing vendor or to a company which refrained from competing for funds or dropped out of the competition
- number of competing vendors decreases after an award

4) **Suspicious Behavior**:

- vendor proposes providing a good or service you know they cannot provide
- a single vendor submits more than one proposal or brings more than one proposal to an in-person procurement or grant process
- vendor makes statements implying knowledge of a competitor's likelihood of winning an award or advance knowledge of a competitor's prices

Procurement vendors should also bear in mind that one vendor's *invitation* to another vendor to collude may be a criminal action, even if the second vendor does not accept the invitation and thereby reach an agreement. The DOJ has previously brought antitrust and mail and wire fraud charges against companies in such circumstances. For example, American Airlines was found to have asked Braniff Airlines to raise prices at the same time American did. See *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985). Braniff tape-recorded the conversation and "blew the whistle" on American. The court found American guilty of attempting to monopolize their market by inviting Braniff to collude.

Implications for Vendors

Vendors should compete independently for ARRA funds rather than pooling their efforts with other vendors. A vendor who receives an invitation from another to collude should reject the overture, and memorialize its rejection. It may be tempting to cooperate with other companies in these tough economic times, but the DOJ has signaled its seriousness in preventing collusion so that our economy can benefit from vigorous competition among vendors. Vendors seeking to procure ARRA grant awards should ensure that employees responsible for the grant applications are trained to avoid the red flags identified by the DOJ. In addition, vendors contemplating the formation of joint ventures to procure funds should consult with antitrust counsel.

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FTC Chairman Appoints New Director of the Bureau of Consumer Protection

04/16/09

On April 14, 2009, Federal Trade Commission Chairman (the "FTC") Jon Leibowitz appointed David Vladeck as Director of the Bureau of Consumer Protection. Mr. Vladeck's appointment is consistent with the expectation that the FTC under the Obama Administration will increase consumer protection regulation and enforcement across industries to levels not seen by American businesses in years.

Professional Background

Prior to his appointment, Mr. Vladeck was a Professor of Law at Georgetown University Law Center. At Georgetown, he taught federal courts, government processes, civil procedure and First Amendment litigation. In addition, Mr. Vladeck co-directed the Center's Institute for Public Representation (the "Institute"), a clinical law program for civil rights, civil liberties, First Amendment, open government and regulatory litigation. Under Mr. Vladeck's direction, the Institute has urged the FTC to strengthen regulations in order to ensure that consumers are protected from unlawful business practices.

At the outset of his legal career, Mr. Vladeck spent almost 30 years with Public Citizen Litigation Group (the "Litigation Group"), including 10 years as Director. Public Citizen Litigation Group is the litigating arm of Public Citizen, which is a national, nonprofit consumer advocacy organization established by Ralph Nader to represent consumer interests in Congress, the executive branch and the courts. The Litigation Group specializes in cases involving health and safety regulation, consumer rights, access to the courts, open government and the First Amendment, including Internet free speech.

Mr. Vladeck is a graduate of Columbia University School of Law and obtained his L.L.M. from Georgetown University Law Center. He received his bachelor's degree from New York University.

Involvement in Federal Trade Commission Rulemaking and Guidance

While serving as co-director of the Institute, Mr. Vladeck worked to strengthen consumer protections and rights, in particular those of children. During his tenure, the Institute submitted comments to the FTC on a number of subjects related to children's privacy and security. Specifically, it submitted comments on the Online Behavioral Advertising principles recommending that all data collected about the online activities of persons under the age of 18 be considered sensitive and requesting the Commission consider flatly prohibiting collection of such information.[1] In addition, the Institute also submitted comments to the FTC regarding food marketing. These comments called for greater disclosure of information by food and beverage companies related to their marketing activities targeted to children and adolescents.[2] Chairman Leibowitz has expressed a similar concern with food and beverage marketing to children,

including calling on industry to limit marketing of higher-calorie foods and beverages and encouraging restaurants to offer healthier low-cost menu items. We believe it is almost certain that this will be an area of significant interest for the Bureau of Consumer Protection.

During his time at Public Citizen Litigation Group, Mr. Vladeck co-authored a petition for rulemaking to amend the regulations implementing the Gramm-Leach-Bliley Act. These recommendations included providing consumers with improved notice and more convenient means of exercising their right to opt-out of information sharing.[3] In particular, the petition called for a standardized or tightly modeled format for disclosures explaining the law and consumers' rights and for these disclosures to be clear and conspicuous, in consumer-friendly language, and located at the beginning of consumer notices. In addition, the petition requested the consumers' right to opt-out be indicated clearly on the top of the first page. As this example indicates, Mr. Vladeck's experience demonstrates a great interest in improving business communications with and disclosures to consumers, and further ensuring they occur in a consumer-friendly manner.

Relevant Litigation Experience

Mr. Vladeck has argued or participated as *amicus curiae* in a number of cases before the U.S. Supreme Court and federal courts of appeal focusing on the First Amendment, federal preemption, and consumer protection. His work has generally addressed increasing the protections provided consumers, expanding public access to government records, and protecting the rights of free speech.

First Amendment

Mr. Vladeck addressed First Amendment issues, particularly those involving commercial speech, in a number of cases before the Supreme Court. In one such case, Mr. Vladeck successfully argued that broad rules suppressing free expression, including legitimate commercial speech, infringe upon the free speech guarantees of the Constitution.[4] In addition, he has submitted *amicus curiae* on behalf of Public Citizen in a number of cases, including one in which he unsuccessfully argued that the Florida state Bar's restriction on advertising violated the First Amendment.[5] These cases demonstrate Mr. Vladeck's interest in protecting the free speech guarantees of the Constitution, particularly those with implications on commercial speech.

Freedom of Information Act

Mr. Vladeck's litigation experience has also addressed Freedom of Information Act ("FOIA") issues. In cases before both the U.S. Supreme Court and the D.C. Court of Appeals he has argued for disclosure of information held by Federal Agencies. On behalf of the Public Citizen, Mr. Vladeck argued for the disclosure of certain commercial documents. However, the D.C. Circuit found that, while Public Citizen may have been entitled, under FOIA, to some documents submitted to the FDA where trade secrets were not involved, it was not entitled to documents containing confidential commercial information.[6] In a separate case, Mr. Vladeck submitted an *amicus curiae* brief on behalf of Public Citizen arguing for disclosure of agency documents. The Supreme Court disagreed, finding that the information requested under FOIA qualified for the law enforcement exception even though the information was not originally compiled for law enforcement purposes when the response to the request was made.[7]

Cigarette Labeling

Mr. Vladeck has also been involved in a number of matters involving cigarette labeling, generally arguing for additional health warnings and potential consumer redress. In a case before

the Supreme Court, Mr. Vladeck submitted an *amicus curiae* brief on behalf of the American Cancer Society arguing against preemption by federal cigarette labeling statutes. The Court found that, although federal cigarette labeling statutes preempted certain state common law claims, claims based upon the breach of an express warranty, intentional fraud and conspiracy were not preempted.[8] In a case on behalf of Public Citizen, Mr. Vladeck successfully argued that, absent specific statutory authority, the FTC did not have the discretionary power to eliminate certain utilitarian items used for promotional purposes from carrying health warnings pursuant to the Smokeless Tobacco Act.[9]

Food and Drug

In line with his advocacy on behalf of the Institute requesting limits on food and beverage marketing, Mr. Vladeck previously represented the Secretary of the Department of Agriculture, supporting the Secretary's restrictions imposed on the sale of soft drinks in public schools.[10] The D.C. Circuit found that, while the Secretary's decision to regulate soft drink sales was not arbitrary and capricious, the Secretary had exceeded his authority under the Child Nutrition Act by unduly restricting the time and place at which soft drinks could be sold.

Congressional Testimony

Mr. Vladeck has written extensively on the subject of administrative law and in particular, federal agency preemption. In congressional testimony, Mr. Vladeck has generally argued against broad federal preemption of state laws. In particular, he has indicated that "recent assertions of preemption of state law by federal regulatory agencies are, in the main, nothing less than an effort by the Executive Branch to arrogate power that properly belongs to Congress."[11]

Mr. Vladeck has also addressed preemption with regard to the FDA's regulation of drugs and medical devices. In particular, he has indicated the FDA's view that "FDA regulation of drugs and certain medical devices broadly displaces state liability law — is wrong as a legal matter" and that the ultimate decision about preemption is for Congress, not the courts, to make.[12] He noted that the FDA's position is also wrong as a public policy matter. Mr. Vladeck believes the FDA cannot single-handedly assure the safety of all drugs and medical devices on the market, thus, consumers cannot depend on FDA regulation alone to protect them from unsafe or defective drugs and medical devices. He believes the potential for tort liability places an essential discipline on the market and is an essential complement to the FDA's work. Mr. Vladeck's congressional testimony demonstrates his confidence in private rights of action and the need for multiple enforcement mechanisms to improve consumer protection.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's Advertising Law practice group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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[1]Available at:
http://www.ftc.gov/os/comments/behavioraladprinciples/080411childadvocacy.pdf.

[2]Available at: *Food Industry Marketing to Children Report: Paperwork Comment*, FTC File No. P064504, on behalf of members of the Children's Media Policy Coalition, specifically Action Coalition for Media Education, American Academy of Pediatrics, Benton Foundation, Children Now, National PTA, and the Office of Communication of the United Church of Christ, Inc., filed May 18, 2007, available at http://www.ftc.gov/os/comments/foodmktgtokidspra-3/529477-00009.pdf; *Food Marketing to Children Report: Paperwork Comment*, FTC File No. P064504, on behalf of members of the Children's Media Policy Coalition, specifically Action Coalition for Media Education, Benton Foundation, Children Now, National PTA, and the Office of Communication of the United Church of Christ, Inc., filed Dec. 21, 2006, available at http://www2.ftc.gov/os/comments/foodmktgtokids-pra/526194-00021.pdf; *Food Marketing to Children and Adolescents Report to Congress Comment*, Project No. P064504, on behalf of members of the Children's Media Policy Coalition, including Action Coalition for Media Education, Benton Foundation, Children Now, National Institute on Media and the Family, and Office of Communication of the United Church of Christ, Inc., filed Apr. 3, 2006, available at http://www.ftc.gov/os/comments/foodmarketingstudy/521602-00010.pdf.

[3]Available at: http://www.ftc.gov/bcp/workshops/glb/comments/nader.pdf.

[4]*Edenfield v. Fane*, 507 U.S. 761 (1993).

[5]*Fla. Bar v. Went for It*, 515 U.S. 618 (1995).

[6]*Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280 (D.C. Cir. 1983).

[7]*John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

[8]*Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

[9]*Public Citizen v. Federal Trade Comm'n*, 869 F.2d 1541 (D.C. Cir. 1989).

[10]*National Soft Drink Ass'n v. Block*, 721 F.2d 1348 (D.C. Cir. 1983).

[11]*Regulatory Preemption: Hearing Before the S. Comm. on the Judiciary*, 110th Cong., Sept. 12, 2007 (Statement of David C. Vladeck, Geo. U L. Center) (CIS-No. 2008-S521-10), available at http://judiciary.senate.gov/pdf/07-09-12VladeckTestimony.pdf.

[12]*Should FDA Drug and Medical Device Regulation Bar State Liability Claims?: Hearing before the H. Comm. on Oversight and Government Reform*, 110th Cong., May 14, 2008 (Statement of David C. Vladeck, Geo. U. L. Center), available at http://oversight.house.gov/documents/20080514123701.pdf.

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DOJ Antitrust Division Answers Questions Under Leniency Program

By Richard E. Donovan

It would be hard to argue with the success of the revised Leniency Program that the Department of Justice Antitrust Division ("Division") introduced 15 years ago. The program (sometimes referred to as the Amnesty Program) has brought in record fines from corporate defendants, increasing the number and length of jail terms for individuals, and provided free passes for those fortunate enough to qualify.

The Division recently issued an interesting policy paper that clarifies its position on certain issues under the program, which positions previously may have been known only to those who practice regularly in the field of criminal antitrust. The paper, titled "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letter" ("Paper"), was authored by Scott Hammond, Deputy Assistant Attorney General ("DAAG") for Criminal Enforcement, and Belinda Barnett, Senior Counsel in the Division. In the form of answers to 33 questions, the Paper also restates the Division's position on various points regarding the program, and attaches copies of revised individual and corporate model leniency letters used by the Division. Copies are available on the Division's Web site. Mr. Hammond subsequently published an article on the Web site of the Cartel and Criminal Practice Committee of the ABA Section of Antitrust Law, which summarizes the 22-page Paper. The Paper states that "it is meant to be a comprehensive and updated resource" and will be periodically updated with input from the private bar and business community.

Following are the points most likely to be of interest to corporate counsel:

Who You Gonna Call?

Since only the first company or individual to contact the Division to apply for leniency may receive a complete pass from criminal penalties, time is of the essence. As the Paper notes, "on a number of occasions, the second company to apply for leniency has been beaten by a prior applicant by only a number of hours." Those few hours can cost a company millions of dollars in fines and cost individuals jail time. So it is helpful to the average reader that the Division makes clear as to whom a leniency applicant should contact to initiate the process, and provides the actual phone numbers of the contacts. Mr. Hammond, the Criminal DAAG, reviews all requests for leniency and so should be the first person to call in most cases. However, counsel may also contact any one of the seven Division field offices or the National Criminal Enforcement Section in Washington, especially if counsel knows that there is already an existing investigation in one of those offices involving the subject matter of the application.

The Marker System

The Paper explains the process following the initial call, from market to conditional leniency letter to final letter. Because a company may not know definitively at first whether it has actually participated in a criminal violation of the antitrust laws, the Division developed a marker system to allow a potential applicant to hold a place in line for a finite period of time while its counsel gathers more information to support the application. Once an applicant secures a marker from the Division, no other potential applicant can "leap frog" over the applicant that has the marker. The Paper confirms Division practice that, to obtain a marker, counsel must "(1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client."

As the Paper notes, "the evidentiary standard for obtaining a marker is relatively low … ." However, it would not be enough to state that the client has received a grand jury subpoena or been the subject of a search warrant; there must be some information or evidence to suggest a possible violation. The Paper goes on to explain the factors that determine the length of time an applicant is given to perfect its application, notes that 30 days for an initial marker is common, and confirms that the marker may be extended at the Division's discretion if the applicant can demonstrate a good faith effort to proceed in a timely manner.

The Scope of Leniency

In the Paper, the Division emphasizes that in order to obtain a conditional leniency letter, the applicant must admit to participation in a criminal antitrust violation (*i.e.*, price-fixing, bid-rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes). Because the marker system allows a company to investigate its conduct more thoroughly before receiving a conditional leniency letter, it is no longer sufficient for the applicant to say that there

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is a "possible" violation.

The Paper also answers a recurring question in affirming that the leniency protection applies not just to the antitrust offense, but to any other offense committed "in connection with the anticompetitive activity being reported." The Paper notes, however, that the leniency letter issued by the Division does not bind other prosecuting agencies. On the other hand, it points out that since the original leniency program was introduced in 1978, there have been no instances in which another prosecuting agency has prosecuted a leniency applicant for offenses consisting of conduct integral to the commission of the antitrust violation.

The Paper explains that the grant of conditional leniency usually applies to any act or offense committed "prior to the date of" the leniency letter. In the rare case in which significant time has elapsed between discovery of the anticompetitive activity and the report to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant represents that it terminated its participation in the activity.

Conditions for Leniency

DAAG Hammond represents that the Paper and the revised model letters are an attempt to make as transparent as possible the conditions that must be satisfied to obtain amnesty/leniency, and the process the Division will follow to revoke it as the circumstances require. First, the revised model letter now explicitly states that the burden is on the applicant to prove the accuracy of its representations to qualify for leniency. A letter granting unconditional leniency will follow only after the applicant: 1) establishes its eligibility for leniency; and 2) cooperates in the Division's investigation. The revised letters make clear that the Division may revoke an applicant's conditional acceptance into the program if it determines that either of these conditions have not been met. Before making a final decision to revoke leniency, the Division will provide notice to the applicant of the recommendation of the Division staff and provide counsel an opportunity to meet with the Division regarding the potential revocation.

Learning a lesson from its saga with Stolt-Nielsen (*see* 442 F.3d 177 (3d Cir. 2006)), the Division now requires in its leniency letter that the applicant agree not to seek judicial review of any decision by the Division to revoke conditional leniency "unless and until [the applicant] has been charged by indictment or information." The Division contends that this is not a diminution of an applicant's rights because no defendant has a right to seek judicial review of a Division decision to indict prior to the indictment. If a corporation's conditional leniency is revoked, the Division represents that it would not elect to prosecute individual employees so long as they had fully cooperated prior to the revocation and did not continue to participate in the anticompetitive activity being reported, or obstruct or attempt to obstruct an investigation of such activity.

Applicant's Role in the Offense

A party is disqualified from receiving leniency if it was "the leader in, or the originator of" the anticompetitive activity being reported. The Paper makes clear that just because a company is the largest in the industry or has the greatest market share, this will not disqualify it from receiving leniency on these grounds. Likewise, the Paper gives an example of two ringleaders in a five-firm conspiracy, noting that all of the firms, including the two leaders, are potentially eligible for leniency since there is no single leader.

Termination of the Anticompetitive Activity

Another condition to receiving leniency is that the applicant "take prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity." Questions often arise as to just what steps are required in a particular situation. Discovery of the activity is defined to mean when the board of directors or inside or outside counsel was first informed of the conduct at issue. The Paper then clarifies that a "primary consideration is what steps are taken by management in response to the discovery of the anticompetitive activity being reported." Among other things, the company must not use those individuals who were involved in the activity to conduct the investigation, formulate the company's response, or determine appropriate disciplinary action against the participants.

The Paper states the obvious in instructing that a company must stop further participation in the activity being reported, unless the Division staff request otherwise in order to assist with the investigation (*e.g.*, to monitor and record discussions with other participants). So long as a company stops the activity, it will not be disqualified "merely because the applicant did not take some particular action."

The Division also notes that it would not revoke a company's conditional acceptance into the leniency program because a lower level employee, in a remote office, continued for some short period of time to have conspiratorial contacts with his or her counterpart. The company has not met its burden, however, if it allows the culpable employees to remain in the same position with no repercussions or inadequate supervision and fails to prevent them from continuing to engage in the actual anticompetitive activity.

Other Clarifications

The Paper reiterates the Division's policy, in accord with current DOJ procedure, that the applicant is not required to provide, as part of its cooperation, documents or communications that are protected by the attorney-client privilege or work product immunity. Similarly, disclosures made by counsel in furtherance of a leniency application are not deemed to constitute a waiver of any privilege.

The Paper also warns that unauthorized disclosures about the application or the investigation could constitute obstruction, so an applicant should discuss with the Division staff the details of informing others within the company or outside it. Other topics covered include: 1) what happens when during the investigation the company discovers that the scope of the activity is greater than initially believed, either in duration or markets involved; 2) what happens when individual executives refuse to cooperate; 3) whether present and former officers, directors, and employees are covered; 4) the need to make restitution; and 5) whether the Division may disclose information from an applicant to a foreign government.

The Division has made efforts to be transparent about its Leniency Program by issuing papers and making speeches from time to time. The Paper is the latest and most comprehensive effort in that direction, for which the Division deserves credit.

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Client Advisory

KELLEY DRYE

ADVERTISING LAW AND ANTITRUST PRACTICE GROUPS FEBRUARY 27, 2009

President Obama Appoints Jon Leibowitz Chairman of the FTC

Multiple media outlets have reported that President Obama plans to name Jon Leibowitz – a Democrat who is currently a Commissioner of the Federal Trade Commission ("FTC") – to serve as the Chairman of the FTC. Commissioner Leibowitz was appointed to the Commission by President George W. Bush in 2004. Since he is a sitting Commissioner and has previously received the Senate's approval, no confirmation hearings will be required. This memorandum provides an overview of both his professional background and publicly expressed views on specific consumer protection and antitrust issues, with an eye towards predicting several of his primary enforcement goals as FTC Chairman.

FTC COMMISSIONERS IN GENERAL

The Commission is headed by five Commissioners who are nominated by the President and confirmed by the Senate, each for a term of seven years. To preserve balance, at most three Commissioners can be of the same political party. The other Commissioners are William E. Kovacic, a Republican; Pamela Jones Harbour, an Independent; and J. Thomas Rosch, a Republican. There is one unfilled vacancy. While each Commissioner has one vote on issues of substantive policy, the Chairman exercises more influence in charting the FTC's course.

PROFESSIONAL BACKGROUND

Commissioner, Federal Trade Commission

During his tenure as a Commissioner at the FTC from 2004 to the present, Commissioner Leibowitz has concurred or dissented 15 times from the issuance of FTC complaints, orders, or reports, reflecting his perspective that in many instances the FTC did not go far enough in its enforcement efforts.

Vice President for Congressional Affairs, Motion Picture Association of America

From 2000 to 2004, Commissioner Leibowitz lobbied on behalf of the Motion Picture Association of America.

Chief Counsel and Staff Director, U.S. Senate Antitrust Subcommittee

From 1997 to 2000, Commissioner Leibowitz served as the Democratic chief counsel and staff director for the U.S. Senate Antitrust Committee, where he focused on competition policy and telecommunications matters.

Chief Counsel and Staff Director, Senate Subcommittee on Terrorism and Technology (1995–96)

Chief Counsel and Staff Director, Senate Subcommittee on Juvenile Justice (1991–94)

Chief Counsel, Senator Herb Kohl (1989–2000)

Staff, Senator Paul Simon (1986–87)

Private Law Practice (1984–86)

Education

Commissioner Leibowitz is a 1984 graduate of the New York University School of Law. He received his bachelor's degree from the University of Wisconsin in 1980.

VIEWS ON CONSUMER PROTECTION

Online Privacy

Commissioner Leibowitz has been called "a leader on privacy issues" by the Internet Advertising Bureau. In reviewing the Google/Doubleclick acquisition, he advo-

cated a requirement that consumers must "opt in" for websites to share consumer information across web-based services, and cautioned that failure to self-regulate would risk "a far greater response from government." With a new Democratic administration in place, Commissioner Leibowitz may persuade a like-minded Congress to establish tough general privacy legislation that extends to online marketing. In a concurring statement issued this month in connection with the release of the FTC Staff Report on Online Behavioral Advertising Principles, Commissioner Leibowitz stated that "this could be the last clear chance to show that self-regulation can – and will – effectively protect consumers' privacy in a dynamic online marketplace." The implication is that the Commission is close to proposing or supporting legislation governing the behavioral advertising industry.

Civil Penalties, Disgorgement, and Consumer Redress

Commissioner Leibowitz has issued a number of concurring and dissenting statements expressing his view that the amount of money paid by defendants in consumer protection cases has been inadequate to compensate victims of the unlawful behavior and deter bad actors from violating the law. For example, in a dissenting statement in connection with the settlement in Adteractive, Inc., a case involving offers of "free gifts" such as laptop or flat-screen television displays through unsolicited emails and banner advertisements, Commissioner Leibowitz lamented the "downward departure" in civil penalties obtained by the FTC in settlements. Similarly, in a settlement with Kmart to resolve charges that Kmart misrepresented material aspects of its gift cards by failing to disclose "dormancy fees" and monthly charges, Commissioner Leibowitz suggested that the Commission should have required Kmart to disgorge its "ill-gotten profits" since many consumers had lost the opportunity for reimbursement because they had discarded their seemingly worthless gift cards in frustration long ago.

In his new role, Commissioner Leibowitz can influence the staff to seek larger financial contributions by those who violate the Federal Trade Commission Act.

Secondary Liability/Affiliate Marketing

Commissioner Leibowitz has indicated that he favors increasing the agency's law enforcement efforts to target those companies who assist or facilitate others to violate the law. As Commissioner, Leibowitz has said it is a "dirty little secret" that legitimate companies too often "fuel the problem" of spyware that bugs consumers and may even cripple computers. As Chairman, it is expected that he will seek amendments to expand the FTC's authority to pursue those who assist and facilitate unfair or deceptive acts or practices. These powers will be used as part of the agency's tools to police those who contract with individuals or companies that engage in Internet fraud, have insufficient procedures to guard against data security breaches, or otherwise invade a consumer's privacy. Rather than pursue the fraudsters (many of whom are located overseas and virtually untraceable), the FTC will seek to hold U.S. companies liable upon proof that they aided those bad actors through the expansion of so-called "secondary liability" theories.

Marketing to Children and Adolescents

Commissioner Leibowitz has advocated that full-calorie soft drink marketers curtail television and Internet advertising, and that fast food companies offer healthier low-cost menu items. Look for Commissioner Leibowitz to seek closer regulation of food and beverage advertising and more enforcement to ensure adequate disclosures of nutritional content.

VIEWS ON ANTITRUST

Pharmaceuticals

Commissioner Leibowitz has displayed special concern for anticompetitive conduct that harms consumers of pharmaceutical products. For example, while the Commission has focused more on the role of brand-name pharmaceuticals, Commissioner Leibowitz has taken generic drug companies to task for agreeing to delay bringing their low-cost products to market.

Monopolization

One can also expect that Commissioner Leibowitz will continue the FTC's disagreement with the Bush-era

Department of Justice's report on monopolization, which in his view places "a thumb on the scales in favor of firms with monopoly or near-monopoly power." Thus, even though neither the FTC nor the Department of Justice has brought a major monopolization case in eight years, one can expect the FTC to look more closely at unilateral behavior by dominant companies. He has advocated greater use of the FTC's authority to prohibit unfair methods of competition that the other antitrust laws may not reach.

Mergers

Merging companies can expect the FTC with Leibowitz at the helm to remain in the mainstream of theory, but to give closer scrutiny to the deals that come before the agency. As Commissioner, he has been known to ask hard questions of merging parties and to confirm for himself the results of the staff's investigations.

KELLEY DRYE & WARREN LLP

The attorneys in Kelley Drye & Warren's Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

Kelley Drye is recognized as a premier antitrust and trade regulation firm. Our national reputation stems from our proven track record of successfully representing clients in complex competition issues arising under federal and state antitrust laws. Our professionals include officials from the ABA Antitrust Section, and former officials of the United States Department of Justice Antitrust Division and the FTC. Our firm is also supported by Georgetown Economic Services, an economic consulting firm.

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KELLEY DRYE

ANTITRUST PRACTICE GROUP FEBRUARY 27, 2009

Christine Varney Nominated as Assistant Attorney General for Antitrust

Christine Varney – a former FTC Commissioner – was recently nominated by President Obama to serve as the Assistant Attorney General ("AAG") for Antitrust (i.e., the head of the Antitrust Division of the Department of Justice). Ms. Varney is an extremely well-connected Democrat who worked on the Obama-Biden campaign and subsequently served as a member of the President Obama's transition team. Although she is best known for her work in the privacy and consumer protection fields, Ms. Varney has significant antitrust expertise developed as both a government enforcer and a private practitioner. This memorandum provides an overview of both her professional background and publicly expressed views on specific antitrust issues, with the goal of anticipating her enforcement interests and priorities at the Department of Justice ("DOJ").

PROFESSIONAL BACKGROUND

Partner, Hogan & Hartson LLP

Both before and after her term as an FTC Commissioner, Ms. Varney was a partner in the Washington office of Hogan & Hartson. Her practice encompassed antitrust, privacy, corporate governance, and intellectual property issues. She represented a broad spectrum of *Fortune* 500 firms but, as head of the firm's Internet Practice Group, developed a special niche in the technology field.

Commissioner, Federal Trade Commission

From 1994 to 1997, Ms. Varney served as an FTC Commissioner. Her tenure coincided with that of Chairman Robert Pitofsky, whom she continues to regard as "the greatest antitrust lawyer of his generation." During Ms. Varney's tenure at the agency, the FTC reviewed and approved such major mergers as Exxon/Mobil, AOL/Time Warner, and Glaxo Wellcome/Smith Kline Beecham. It also brought such major enforcement actions as a monopolization case against Intel, a successful challenge to the Heinz/Beech Nut baby food merger, and a price-fixing case targeting Toys R Us.

Education

Ms. Varney is a 1986 graduate of the Georgetown University Law Center. She received her bachelor's degree from the State University of New York at Albany in 1977, as well as a masters of public administration from Syracuse University in 1978.

VIEWS ON ANTITRUST

Ms. Varney has an extensive record of publicly-expressed views on antitrust which, taken together, suggest an individual inclined toward aggressive, yet analytically sophisticated, enforcement.

On the merger front, President Obama has been openly critical of what he regards as a lack of enforcement by the Bush Administration DOJ. It is, therefore, safe to assume that Ms. Varney will feel pressure to challenge more deals than her three most recent predecessors as AAG – Tom Barnett, R. Hewitt Pate, and Charles James. However, Ms. Varney shares her three predeces-

sors' interest in improving and streamlining the merger review process. Specifically, she has applauded efforts to make the Second Request process – an intensive information-gathering phase triggered by deals that raise competitive red flags – less burdensome and expensive. She has also advocated reforms to the "clearance" process – the process by which DOJ and the Federal Trade Commission determine which agency will review a particular transaction – to make it more transparent and predictable.

In the press release announcing Ms. Varney's nomination, the White House expressly referred to her credentials as a "vigorous" antitrust enforcer in the health care sector. This will also clearly be an area of stepped-up DOJ enforcement. However, it is notable that in the same press release the White House described Ms. Varney as a "pioneer" in the application of innovation market theory analysis to transactions in a variety of fields, including biotechnology. This suggests that she may be more receptive to technology and R&D-based justifications for transactions than enforcers focused exclusively on price and output.

Ms. Varney is also likely to focus on the competitive implications of the acquisition and enforcement of intellectual property rights. Although many in the intellectual property bar were alarmed by the FTC's decision to hold hearings on reforms to the patent process, and even the U.S. Patent and Trademark Office declined to actually participate in the hearings, Ms. Varney has been publicly supportive of the resulting recommendations. She urged Congress to implement the patent reform proposals of both FTC and the National Academy of Sciences, particularly those targeting the competitive harms resulting from "poor quality" patents.

Marking a significant break with the Bush Administration's antitrust enforcers, a focus on single firm conduct is likely to rank high among Ms. Varney's enforcement priorities. While neither DOJ or FTC has brought a major monopolization case in the past eight years, Ms. Varney continues to point to *U.S. v. Microsoft* as one of the seminal events of her career. Ms. Varney participated in that case as counsel for Netscape, and was an enthusiastic supporter of applying antitrust principles to emerging and dynamic markets, even where such markets are nascent and not well-understood.

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