KELLEY DRYE

KELLEY DRYE & WARREN LLP
www.kelleydrye.com

Premerger Antitrust Requirements

The 2014 Hart-Scott-Rodino Premerger Notification Sourcebook

3050 K Street, NW
Suite 400
Washington, DC 20007
TEL: (202) 342-8400
FAX: (202) 342-8451

KELLEY DRYE

Table of Contents

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:

Bill MacLeod
(202) 342-8811
WMacLeod@KelleyDrye.com

Joseph Price
(202) 342-8466
JPrice@KelleyDrye.com

KELLEY DRYE

TAB A: A PRACTICAL GUIDE TO MERGER AND ACQUISITION ANTITRUST CLEARANCE

KELLEY DRYE

As published in The Metropolitan Corporate Counsel (July 2010)

A Practical Guide To Merger And Acquisition Antitrust Clearance

W. Joseph Price
Associate
Kelley Drye & Warren LLP

The antitrust laws stand as a potential roadblock, if you will, to the successful completion of a strategic merger or acquisition. Strategic acquisitions – those involving horizontal competitors, or upstream and downstream suppliers and customers – draw the interest and curiosity of antitrust enforcement agencies that could make or break a transaction.

The Value Of Prospective Planning

The value of prospective antitrust planning cannot be overemphasized. The deal may or may not trigger a filing in the U.S. or other countries, but without preplanning 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.

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.

The following 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 Hart-Scott-Rodino (HSR) premerger notification 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? How do I conduct due diligence on a competitor?

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 receiving complaints from the public, including your competitors and customers.

The Federal Trade Commission (FTC) and the Department of Justice (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 they can analyze possible agency interest in divestitures of assets or other measures designed to solve any antitrust concerns the agency may have.

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 an agency issues.

Issuance of a second request extends the waiting period prior to closing until the parties to the transaction "substantially comply" with the document and information requests contained in it. Once the parties make substantial compliance, 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. Counsel can help structure an efficient document search and streamline substantial compliance with a second request.

Depending on the severity of the antitrust issues that arise in the analysis of the proposed transaction, and the mindset of the company regarding possible divestiture or other remedies, an early proposal to the agency to "fix" the competitive problem can positively affect the timing of the closing. If an early fix is not palatable, later agreed-to consent decree remedies can avoid a lawsuit. 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 a company begins contemplating a transaction, it is likely that business executives, consultants, and others are writing documents – and emails – 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:

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, business executives, investment bankers, and other consultants in contemplation of a proposed transaction will create 4(c) documents. 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 preplanning 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.

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 broadbased subpoena-type demand that 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.

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.

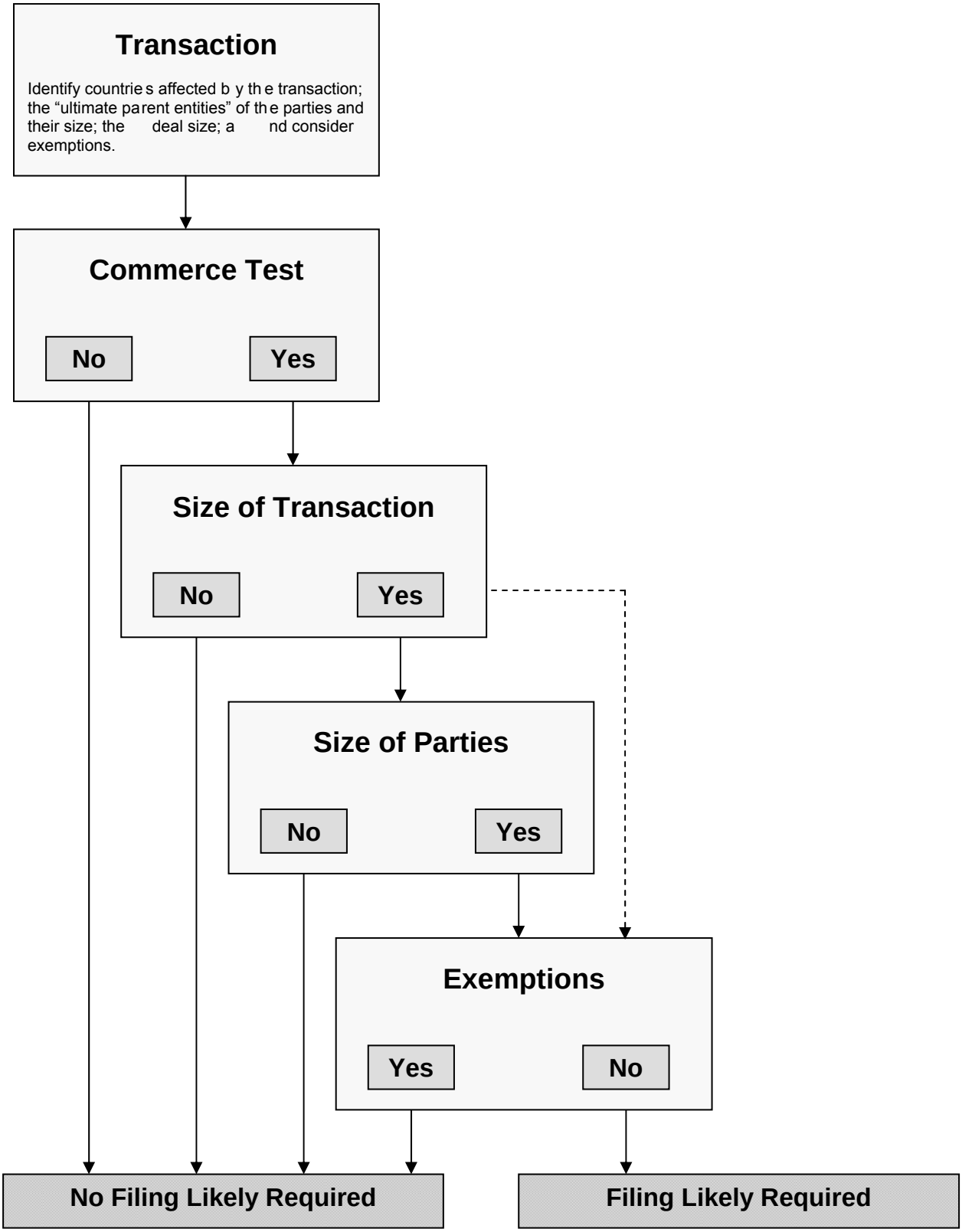
Additional Information

Kelley Drye's Antitrust and Trade Regulation practice issues a reference guide, "Premerger Antitrust Requirements: The 2010 Hart-Scott-Rodino Premerger Notification Sourcebook," designed to help executives and professionals stay abreast of developments that may impact their business or next deal. The Sourcebook, which includes antitrust clearance guidance and the HSR premerger notification form and instructions, is available for download at http://www.kelleydrye.com/news/articles_ publications/0607.

KELLEY DRYE

TAB B: HSR TRANSACTION ANALYSIS FLOWCHART

HSR TRANSACTION ANALYSIS FLOWCHART



KELLEY DRYE

TAB C: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? AN OVERVIEW (FTC GUIDE I)

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.

---

[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

---

[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

---

[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);

---

[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

---

[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.

---

[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]

---

[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]

---

[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

---

[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

---

[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.

---

[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

---

[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

---

[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,

---

[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

---

[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.

KELLEY DRYE

TAB D: TO FILE OR NOT TO FILE: WHEN YOU MUST FILE A PREMERGER NOTIFICATION FORM (FTC GUIDE II)

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.

---

[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.

---

[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?

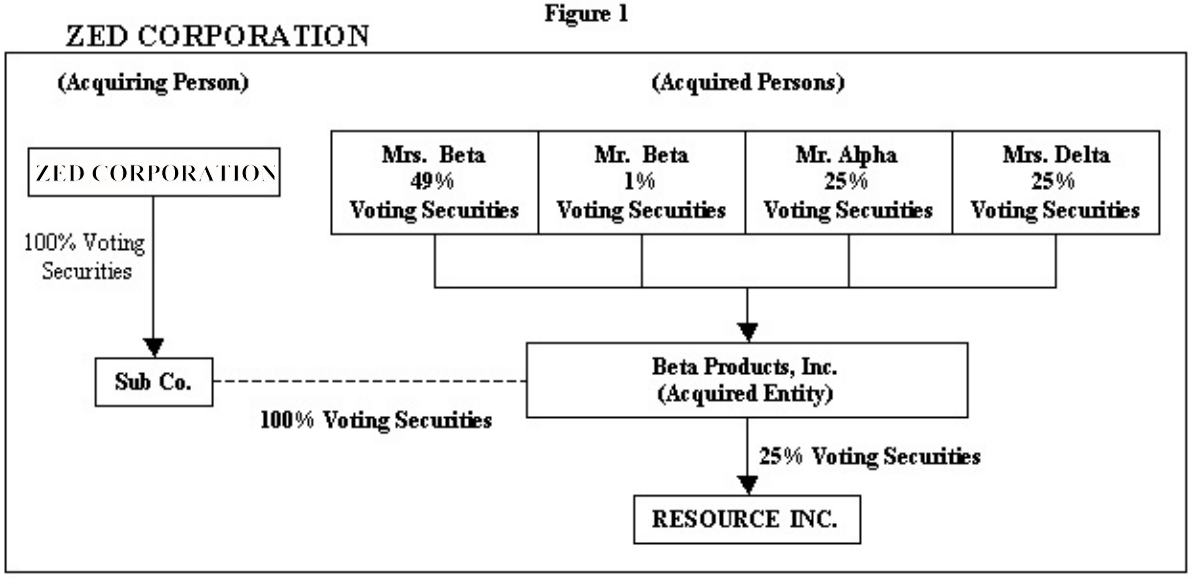
3) Who are the parties involved in the transaction?

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.

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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]

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

KELLEY DRYE

TAB E: HSR PREMERGER NOTIFICATION FORM

☐☐☐☐☐☐☐☐ TRANSACTION NUMBER ASSIGNED

FEE INFORMATION *(For Payer Only)*

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.

Attachment number:

TAXPAYER IDENTIFICATION NUMBER _____
OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

NAME OF PAYER *(if different from PERSON FILING)* _____

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. _____

FROM (NAME OF INSTITUTION) _____

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

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

(*voluntary*) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO
IF YES, list jurisdictions:

ITEM 1

1(a) PERSON FILING

NAME
HEADQUARTERS ADDRESS
ADDRESS LINE 2
CITY, STATE, COUNTRY
ZIP CODE
WEB SITE

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

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

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

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable

☐ 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
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

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)

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) %

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

CONTACT PERSON 1		CONTACT PERSON 2	
FIRM NAME		FIRM NAME	
BUSINESS ADDRESS		BUSINESS ADDRESS	
CITY, STATE, COUNTRY		CITY, STATE, COUNTRY	
ZIP CODE		ZIP CODE	
TELEPHONE NUMBER		TELEPHONE NUMBER	
FAX NUMBER		FAX NUMBER	
E-MAIL ADDRESS		E-MAIL ADDRESS	

1(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
FIRM NAME
BUSINESS ADDRESS
CITY, STATE, COUNTRY
ZIP CODE
TELEPHONE NUMBER
FAX NUMBER
E-MAIL ADDRESS

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 2

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

NAME	NON-REPORTABLE
	☐

LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

NAME	NON-REPORTABLE
	☐

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)*
- ☐ a consolidation (see § 801.2)
- ☐ an acquisition of voting securities
- ☐ a secondary acquisition
- ☐ an acquisition subject to § 801.31
- ☐ an acquisition of non-corporate interests
- ☐ other *(specify)*

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% ☐ N/A

2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD ($MM) $	**(v)** VALUE OF NON-CORPORATE INTERESTS ALREADY HELD ($MM) $	
(ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD %	**(vi)** PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD %	
(iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(vii)** TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(ix)** VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $
(iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION %	**(viii)** TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION %	**(x)** AGGREGATE TOTAL VALUE ($MM) $

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

ACQUIRING UPE(S)	
NAME	
ADDRESS	
ADDRESS LINE 2	
CITY, STATE	
ZIP CODE, COUNTRY	

ACQUIRED UPE(S)	
NAME	
ADDRESS	
ADDRESS LINE 2	
CITY, STATE	
ZIP CODE, COUNTRY	

ACQUIRING ENTITY(S)	
NAME	
ADDRESS	
ADDRESS LINE 2	
CITY, STATE	
ZIP CODE, COUNTRY	

ACQUIRED ENTITY(S)	
NAME	
ADDRESS	
ADDRESS LINE 2	
CITY, STATE	
ZIP CODE, COUNTRY	

TRANSACTION DESCRIPTION

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

(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE) ATTACHMENT NUMBER

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) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION ☐ None

	CENTRAL INDEX KEY NUMBER

4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

4(d) ADDITIONAL DOCUMENTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

Check None at the bottom of the page and provide explanation if you are not reporting revenue

6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE	DESCRIPTION	YEAR TOTAL DOLLAR REVENUES ($MM)	
Attachment:			
			☐ Overlap

NONE ☐ *(PROVIDE EXPLANATION)*

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

☒ Not Applicable

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

Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

Attachment:

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

Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

Attachment:

CODE	DESCRIPTION

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

Attachment:

NAME	CITY	STATE	COUNTRY

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

ISSUER/ UNINCORPORATED ENTITY	SHAREHOLDER/ INTEREST HOLDER	HQ ADDRESS	% HELD

6(c)(i) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

UPE OF FILING PERSON	ISSUER/ UNINCORPORATED ENTITY	% HELD

6(c)(ii) HOLDINGS OF ASSOCIATES *(ACQUIRING PERSON ONLY)*

Attachment:

TOP LEVEL ASSOCIATE	ISSUER/ UNINCORPORATED ENTITY	% HELD

ITEM 7

OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

☐ None

CODE	DESCRIPTION	PERSON / ASSOCIATE / BOTH

7(b)(i) LIST THE NAME OF EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

UPE OF OTHER FILING PERSON	ENTITY THAT OVERLAPS (IF DIFFERENT)

7(b)(ii) LIST THE NAME OF EACH ASSOCIATE OF THE ACQUIRING PERSON THAT ALSO DERIVED DOLLAR REVENUES (*ACQUIRING PERSON ONLY)*

TOP LEVEL ASSOCIATE	ENTITY THAT OVERLAPS (IF DIFFERENT)

7(c) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

CODE	GEOGRAPHIC MARKET INFORMATION

7(d) GEOGRAPHIC MARKET INFORMATION FOR ASSOCIATES OF THE ACQUIRING PERSON (*ACQUIRING PERSON ONLY)*

CODE	GEOGRAPHIC MARKET INFORMATION

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 8

PRIOR ACQUISITIONS *(ACQUIRING PERSON ONLY)*

NAICS Code			
Acquired Entity			
Former HQ Address			
Acquisition Type	☐ Securities	☐ Assets	☐ Non Corporate Interests Date of Acquisition:
Notes			

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 _____ [SEAL]

this _____ day of _____ , the year _____

Signature _____

My Commission expires _____

16 C.F.R. Part 803 - Appendix **NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS**	Approved by OMB 3084-0005 Expires 08/31/2014

Attach the Affidavit required by § 803.5 to the Form.

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

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 $16,000 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.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 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 above.

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 $16,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

NAME OF PERSON FILING NOTIFICATION	DATE

ENDNOTES

ENDNOTE NUMBER	PERTAINING TO	ENDNOTE TEXT

NAME OF PERSON FILING NOTIFICATION	DATE

ATTACHMENTS

AttachTotal:

ATTACHMENT NUMBER	ATTACHMENT DESCRIPTION		
		DESCRIPTION	
	ATTACHED TO ITEM		

KELLEY DRYE

TAB F: HSR PREMERGER NOTIFICATION FORM INSTRUCTIONS

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, 16 CFR Parts 801-803 ("the Rules").

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 ("the Agencies").

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

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.

Information

The central office for information and assistance concerning the Rules and the Form is:

Premerger Notification Office
Federal Trade Commission, Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
phone: (202) 326-3100 - e-mail: HSRHelp@hsr.gov

Copies of the Form, Instructions and Rules as well as materials to assist in completing the Form are available at www.ftc.gov/bc/hsr. An electronic version of the Form is available at www.hsr.gov and may be used for the direct electronic submission of filings or to generate a print version of the Form for paper copy submission.

Definitions

The definitions and other provisions governing this Form are set forth in the Rules, 16 CFR Parts 801-803. The governing statute ("the Act"), 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. See www.ftc.gov/bc/hsr for copies of these materials.

Affidavit

Attach the affidavit required by §803.5 to the Form. If filing electronically, submit an electronic version of the affidavit as attachment 1.

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.

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 or the unincorporated entity whose non-corporate interests 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 or non-corporate interests of the unincorporated entity; the specific notification threshold that the acquiring person intends to meet or exceed if an acquisition of voting securities; 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 by the Agencies; and the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act.

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)(3).

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

An affidavit is **not** required of an acquired person in a transaction covered by §801.30. (See §803.5(a)).

Responses

Each answer should identify the item to which it is addressed. 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.

Enter the name of the person filing notification as reported 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.

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.

North American Industry Classification System (NAICS) Data

The Form requests dollar revenues and lines of commerce for non-manufactured and manufactured products with respect to operations conducted within the United States and for products manufactured outside of the United States and sold into the United States. Filing persons must submit data at the 6-digit NAICS national industry code level to reflect non-manufacturing revenues. To the extent that dollar revenues (see §803.2(d)) are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must submit data at the 10-digit NAICS product code levels.

References

In reporting information by 6-digit NAICS industry code, refer to the most recent *North American Industry Classification System - United States* published by the Executive Office of the President, Office of Management and Budget. In reporting information by 10-digit NAICS product code, refer to the most recent *Numerical List of Manufactured and Mineral Products* published by the Bureau of the Census. Information regarding NAICS 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/bc/hsr.

Limited Response

Information need not be supplied regarding assets, non-corporate interests, or voting securities currently being acquired, when their acquisition is exempt under the statute or rules. (See §803.2(c)). The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are 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 acquired entities. 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 **ONE** original and **ONE** copy (with one notarized original affidavit and certification and one set of documentary attachments) of the Notification and Report Form ("Form") to:

Premerger Notification Office
Federal Trade Commission, Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Also, **THREE** copies (with one set of documentary attachments) should be sent to:

Office of Operations, Premerger Unit
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 www.hsr.gov; or

(3) Complete the electronic version of the Form and submit it electronically as directed at www.hsr.gov, while providing the documentary attachments in paper copy to the FTC and DOJ as in Option 1 above. Note that for Option 3, 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 alternate sites for delivery through the media and, if possible, at www.ftc.gov/bc/hsr and www.hsr.gov.

ITEM BY ITEM

Fee Information

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

Value of assets, voting securities and controlling non-corporate interests 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 or greater (as adjusted)	$280,000

For current thresholds and fee information, see www.ftc.gov/bc/hsr.

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.

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, if different, need be supplied.

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 filer's name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

When submitting an EWT, all payers should include a contact person and a phone number in the Comment Field.

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. See http://www.ftc.gov/bc/hsr/postconsumfilings.shtm for more information on how to proceed in the case of a corrective filing.

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 by a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11 USC §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. Note that if *either* party requests early termination, it may be granted and published.

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. 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.

ITEM 1

Item 1(a)

Provide the name, headquarters address and website (if one exists) of the person filing notification. The name of the person filing is the name of the ultimate parent entity.

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, natural person, 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 the 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 the 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 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 interests 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)

Provide the name and title, firm name, address, telephone number, fax number and e-mail address of the primary individual to contact regarding the Form and a backup contact. (See §803.20(b)(2)(ii)).

Item 1(h)

Foreign filing persons must provide the name, 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 persons that are parties to the acquisition, whether or not they are required to file notification. If not required to file, note as non-reportable.

Item 2(b)

Put an X in all the boxes that apply to this acquisition.

Item 2(c)

(Acquiring person only) 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)

Item 2(d)(i)

State the value of voting securities already held (see §801.10).

Item 2(d)(ii)

State the percentage of voting securities already held (see §801.12).

Item 2(d)(iii)

State the total value of voting securities to be held as a result of the acquisition (see §801.10).

Item 2(d)(iv)

State the total percentage of voting securities to be held as a result of the acquisition (overall voting power; see §801.12).

Item 2(d)(v)

State the value of non-corporate interests already held (§801.10).

Item 2(d)(vi)

State the percentage of non-corporate interests already held (economic interests).

Item 2(d)(vii)

State the total value of non-corporate interests to be held as a result of the acquisition (see §801.10).

Item 2(d)(viii)

State the total percentage of non-corporate interests to be held as a result of the acquisition (economic interests).

Item 2(d)(ix)

State the value of assets to be held as a result of the acquisition (see §801.10).

Item 2(d)(x)

State the aggregate total value 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 §§801.10, 801.12, 801.13, and 801.14).

ITEM 3

Item 3(a)

Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification, and the names of any acquired issuers or non-corporate entities. In an asset acquisition, provide a brief description of the business the assets to be acquired comprise. 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 there are additional filings, such as shareholder backside filings, associated with the transaction, list those, as well as any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Section 802.

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

Item 3(b)

Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose voting securities, non-corporate interests or assets are to be acquired. Also furnish Agreements Not to Compete. Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while Agreements Not to Compete may be provided in draft form if that is the most recent version. If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement. Note that transactions subject to §801.30 and bankruptcies under 11 USC §363 do not require an executed agreement or letter of intent. (For paper copy submissions, do not attach these documents to the Form).

ITEM 4

Item 4(a)

Provide the names of all entities, including the UPE, within the person filing notification that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission and provide the Central Index Key (CIK) number for each entity.

For Items 4(b) through 4(d), furnish one copy of each of the indicated documents.

Item 4(b)

Provide the most recent annual reports and/or annual audit reports

of the person filing notification and of each unconsolidated United States entity included within such person. Natural persons need only provide annual reports and/or annual audit reports for the highest level entity(s) they control. 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(b), 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).

If the annual report and/or annual audit report does not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Item 4(c)

Provide 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.

> **NOTE:** If the person filing notification withholds or redacts 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).

Item 4(d)

For each category below, indicate (if not contained in the document itself) the date of preparation, and the name of the company or organization that prepared each such document.

Item 4(d)(i): Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii): Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies 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. Financial models without stated assumptions need not be provided in response to this item.

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

ITEMS 5 through 7

For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be acquired, in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s), 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)).

> **NOTE:** See "References" listed in the General Instructions to the Form.

ITEM 5

This item requests information by NAICS code regarding non-manufacturing and manufacturing dollar revenues. All persons must submit data on non-manufacturing revenues 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 be submitted at the 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.

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 the Form is prepared. If no revenues are reported, check the "None" box and provide a brief explanation.

Item 5(a)

Provide 6-digit NAICS industry data concerning the aggregate operations of the person filing notification for the most recent year in NAICS Sectors other than 31-33 (non-manufacturing industries) in which the person engaged and 10-digit NAICS product code data

for each product code within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged, including revenues for each product manufactured outside the U.S. but sold in or into the U.S. Sales of any manufactured product should be reported in a manufacturing code only, even if sold through a separate warehouse or retail establishment. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry codes and 10-digit NAICS product codes 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 non-manufacturing NAICS codes.*

Item 5(b)

Supply the following information only if the acquisition is the formation of a joint venture corporation or unincorporated entity (see §§801.40 and 801.50). If the acquisition is not a formation, check the "Not Applicable" box.

Item 5(b)(i)

List the 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(b)(ii)

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(b)(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(b)(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 10-digit NAICS product code 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)

List the name and city and state/country of any U.S. entities and any foreign entities that have sales into the U.S. included within the person filing notification. Entities with total assets of less than $10 million may be omitted. In responding to Item 6(a), it is permissible for a filing person to report all entities within it.

Item 6(b)

For the acquired entity(s) and for the acquiring entity(s) and its UPE or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each other person that holds (See §801.1(c)) five percent or more of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person.

For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.

Item 6(c)

The person filing notification may rely on its regularly prepared financials that list its investments and those of its associates (for acquiring persons) that list their investments to respond to Items 6(c)(i) and (ii), provided the financials are no more than three months old.

Item 6(c)(i)

If the person filing notification holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, the unincorporated entity and the percentage of non-corporate interests held.

The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquired entity should limit its response, based on its knowledge or belief, to entities that derive revenues in the same 6-digit NAICS industry code as the acquiring person. If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the filing person, should be listed. In responding to Item 6(c)(i),it is permissible for a filing person to list all entities in which it holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings of issuers or unincorporated entities with total assets of less than $10 million may be omitted.

Item 6(c)(ii)

(Acquiring person only) For each associate (see §801.1(d)(2)) of the person filing notification holding five percent or more but less than fifty percent of the voting securities or non-corporate interests of the acquired entity(s) or five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year, list, based on the knowledge or belief of the acquiring person, the associate, the issuer or unincorporated entity and percentage held. If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c)(ii), it is permissible for the acquiring person to list all entities in which its associate(s) holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings of issuers or unincorporated entities 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, or any associate (see §801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year, or in which a joint venture corporation or unincorporated entity will derive dollar revenues (note that if the acquired entity is a joint venture the only overlaps will be between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture), 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)

Item 7(b)(i)

List the name of each person that is a party to the acquisition that also derived dollar revenues in the 6-digit industry and, if different, the name of the entity(s) that actually derived those revenues.

Item 7(b)(ii)

(Acquiring person only) List the name of each associate of the acquiring person that also derived dollar revenues in the 6-digit industry and, if different, the name of the entity(s) that actually derived those revenues.

Item 7(c)

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 industry 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 Nonmetallic Mineral Mining and Quarrying (2123); Concrete (32732); Concrete products (32733); Industrial gases (32512); 44-45 (retail trade), except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores); 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), except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses); 811 (repair and maintenance), except 8114 (Personal and Household Goods 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 442 (furniture and home furnishings stores), 443 (electronics and appliance stores); 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); 7212 (recreational vehicle parks and recreational camps), 7213 (rooming and boarding houses) and 8114 (personal and household goods repair and maintenance) 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.

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 7(d)

(Acquiring person only) Use the geographic markets listed in Items 7(c)(i) through 7(c)(vi) to respond to this item, providing the information for associates of the acquiring person. List separately responses for each associate of the acquiring person and, if different, the entity(s) that actually derived the revenues.

ITEM 8

(Acquiring person only). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the acquiring person derived dollar revenues of $1 million or more in the most recent year and in which either the acquired entity derived revenues of $1 million or more in the recent year (or 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, in the case of acquired assets, to which revenues of $1 million or more were attributable in

the most recent year. 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 or 50 percent or more of non-corporate interests of an unincorporated entity that 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 from which the voting securities, non-corporate interests or assets were acquired;

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

(c) whether voting securities, non-corporate interests 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.

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 $16,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

KELLEY DRYE

TAB G: HSR DOCUMENT PRODUCTION: EXAMPLES OF DOCUMENTS TO PROVIDE TO COUNSEL

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 Item 4 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.*

Language of Item 4(c):

Provide 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.

Language of Item 4(d):

Item 4(d)(i): Provide all *Confidential Information Memoranda* prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. *If no such Confidential Information Memorandum exists*, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced *up to one year before the date of filing*.

Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by *investment bankers, consultants or other third party advisors* ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced *up to one year before the date of filing*.

---

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

Item 4(d)(iii): Provide all studies, surveys, analyses and reports *evaluating or analyzing synergies and/or efficiencies* 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. Financial models without stated assumptions need not be provided in response to this item.

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.
- All Item 4 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.
- 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 Item 4; the presentations made to the Board are also required to be submitted if they contain Item 4 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, and 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. (Item 4 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 Item 4 documents.

KELLEY DRYE

TAB H: PREMERGER NOTIFICATION REGULATIONS

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

PART 801—COVERAGE RULES

Sec.

AUTHORITY: Sec. 7A(d), Clayton Act, 15 U.S.C. 18A(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

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 entity that has no outstanding voting securities, 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 corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

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 all surplus revenue from the hospital in excess of expenses and necessary capital investments is to be disbursed evenly to ''A'' and ''B.'' In the event of dissolution of the hospital corporation, the assets of the hospital are to be contributed to a local charitable medical facility then in need of financial assistance. Notwithstanding the hospital's designation of its disbursement funds as surplus rather than profits to maintain its charitable image, ''A'' and ''B'' would each be deemed to control C, pursuant to §801.1(b)(1)(ii), because each is entitled to 50 percent of the excess of the hospital's revenues over expenditures.

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) *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, or, with

respect to unincorporated entities, individuals exercising similar functions.

(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) Fifteen percent of the outstanding voting securities of an issuer, or an aggregate total amount of voting securities and assets of the acquired person valued in excess of $15 million;

(2) Fifteen percent of the outstanding voting securities of an issuer, if valued in excess of $15 million;

(3) Twenty-five percent of the outstanding voting securities of an issuer; or

(4) Fifty percent of the outstanding voting securities of an issuer.

(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 2000–3999 as coded in the Standard Industrial Classification Manual (1972 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. References to '' section 7A()'' refer to subsections thereof. References to ''this section'' refer to the section of these rules in which the term appears.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34429, July 29, 1983; 52 FR 20063, May 29, 1987]

§ 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 shall be both acquiring and acquired persons.

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, constituting less than 15% of A's outstanding voting securities. 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 $15 million and constitute less than 15% of the outstanding voting securities of A, however, 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 the consideration for Y is 50% of the voting securities of Z, a wholly-owned subsidiary of A which, together with all entities it controls, has annual net sales and total assets of less then $25 million. Suppose also that the value of these securities is less than $15 million. Since the acquisition of the voting securities of Z is exempt under the minimum dollar value exemption in §802.20, ''A'' will report in this transaction as an acquiring person only and ''B'' as an acquired person only.

4. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at $16 million. ''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.

5. 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.

(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.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34431, July 29, 1983]

§ 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 a result of an acquisition (the ''primary acquisition'') an acquiring person will obtain control of an issuer which holds voting securities of another issuer which it does not control, then the acquisition of the other 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 $15 million 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 example 4 above, suppose the consideration paid by A for the acquisition of B is $20 million 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]

§ 801.10 Value of voting securities 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. Note that since item 2(d)(i) of the Notification and Report Form only requests the approximate dollar value of assets, a second formal determination of the fair market value would not be necessary for that purpose.

§ 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 joint venture or other corporation at the time of its formation which shall be determined pursuant to § 801.40(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), 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, 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(c).

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 $5 million and does not meet the 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 $20 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 $25 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 $105 million.

3. Assume that company A will make a $200 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $211 million. A does not meet the size-of-person test in section 7A(a)(2) because its total assets are less than $10 million. $200 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.

4. Assume that A borrows $150 million to acquire $100 million of assets from person B and $45 million of voting securities of person C. To determine its size for purposes of its acquisition from person B, A subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $50 million for purposes of its acquisition from B. To determine its size with respect to its acquisition from person C, A subtracts the $45 million that will be paid for C's voting securities. Thus, for purposes of its acquisition from C, A has total assets of $105 million. In the first acquisition A meets the $10 million size-of-person test and in the second acquisition A meets the $100 million 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]

§ 801.12 Calculating percentage of voting securities or assets.

(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.

(c) *Assets.* Any person whose assets are being acquired shall be deemed an ''acquired person'' in calculating the percentage of assets to be held or acquired for purposes of section 7A(a)(3)(A).

Example: In the example to paragraph (a), for purposes of calculating the percentage of assets to be held, the ''acquired person'' is ''A.''

(d) *Percentage of assets.* Whenever the act or these rules require calculation of the percentage of assets of a person to be held or acquired, the percentage shall be the ratio, expressed as a percentage, which—

(1) The book value (on the books of the acquired person) of the assets to be acquired (see §801.13(b)(1)), bears to

(2) The total assets of the acquired person, determined in accordance with §801.11.

Example: In the example to paragraph (a), the percentage of assets to be acquired by ''B'' is determined by dividing the book value of A2's assets being acquired, by the total assets of ''A,'' determined in accordance with §801.11.

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

§801.13 Voting securities or assets to be held as a result of acquisition.

(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 $19 million of the voting securities of X, and is to acquire another $1 million of the same voting securities. Since under paragraph (a) of this rule all voting securities ''A'' will hold after the acquisition are held ''as a result of'' the acquisition, ''A'' will hold $20 million 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 $30 million 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)(i) If the acquiring person has signed a letter of intent or entered into a contract or agreement in principle to acquire assets from the acquired person, and

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired from the acquired person within the 180 calendar days preceding the signing of such agreement any assets which are presently held by the acquiring person, and the acquisition of which was not previously subject to the requirements of the act or the acquisition of which was subject to the requirements of the act but they were not observed, then only for purposes of section 7A(a)(3)(B) and § 801.1(h)(1), both the acquiring and the acquired persons shall treat such assets as though they had not previously been acquired and are being acquired as part of the present acquisition. The value of any assets previously acquired which are subject to this paragraph shall be determined in accordance with § 801.10(b) as of the time of their prior acquisition.

Example: Acquiring person ''A'' proposes to make two acquisitions of assets from acquired person ''B,'' 90 days apart, and wishes to determine whether notification is necessary prior to the second acquisition. For purposes of the percentage test of section 7A(a)(3)(A), ''A'' would hold only the assets it acquired in the second acquisition. For purposes of the $15 million test of section 7A(a)(3)(B), however, ''A'' must aggregate both of its acquisitions and must value each as of the time of its occurrence.

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987]

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of section 7A(a)(3)(B) and § 801.1(h)(1), 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 $6 million of the voting securities (not convertible voting securities) of corporation X. ''A'' now intends to acquire $8 million of X's assets. 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) at $8 million. Therefore, if the voting securities have a present value of more than $7 million, 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 $15 million.

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 by reason of section 7A(a)(3)(B) since the value of the securities to be acquired does not equal or exceed $15 million.

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

Notwithstanding § 801.13, for purposes of section 7A(a)(3) 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, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

(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, 802.50(a)(2), 802.50(b), 802.51(b) and 802.64 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.

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire $50 million of the convertible voting securities of X and $12 million (which is less than 15 percent) 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 $15 million, ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the common stock. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this rule, ''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 test of section 7A(a)(3) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock.

(Note, however, that the $50 million of 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 test of section 7A(a)(3) 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 $40 million. In the most recent year, sales into the United States attributable to the plants were $15 million, 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 of $12 million 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,'' and the $25 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, ''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 $15 million 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 exceed $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'' may 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 $7 million 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 $6 million. ''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 $15 million 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 Example 6, above, 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 $9 million, and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value of $8 million. 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 §§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 $15 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 $15 million, 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). 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, an assessment shows that the holdings of M and N now exceed the $200 million limitation for coal reserves in §802.3.

[43 FR 33537, July 31, 1978, as amended at 52 FR 7081, Mar. 6, 1987; 61 FR 13684, Mar. 28, 1996]

§ 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.

Examples: 1. Person ''A'' acquires $10 million of the voting securities of person ''B'' before the effective date of these rules. If ''A'' wishes to acquire an additional $6 million of the voting securities of ''B'' after the effective date of the rules, notification will be required by reason of section 7A(a)(3)(B).

2. In example 1, assume that the value of the voting securities of ''B'' originally acquired by ''A'' has reached a present value exceeding $15 million. If ''A'' wishes to acquire *any* additional voting securities or assets of ''B,'' notification will be required. See §801.13(a).

§ 801.21 Securities and cash not considered assets when acquired.

For purposes of section 7A(a)(3) and §§801.1(h)(1), 801.12(d)(1) and 801.13(b):

(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.

§ 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 10 a.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 $20 million 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]

§ 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, 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, wishes to tender its holdings of X and in exchange would receive shares of A valued at $16 million. 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.

§ 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 at $20 million. If ''A'' and ''X'' satisfy the criteria of section 7A(a)(1) and section 7A(a)(2), 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 these rules. Since §801.30 applies, the waiting period begins upon notification by ''A,'' and ''X'' must file notification within 15 days.

§ 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 (3) (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 or more;

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

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

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

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

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

(c) For purposes of paragraph (b) 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.

(d) 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.

Example: 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 in annual net sales. ''B'' has more than $10 million in total assets but less than $100 million in annual net sales and total assets. Both ''C''s total assets and its annual net sales are less than $10 million. ''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 $6 million in assets and each to make additional contributions of $6 million in each of the next three years. Under paragraph (c), the assets of the new corporation are $60 million. Under paragraph (b), only ''A'' must file notification. Note that ''A'' also meets the criterion of section 7A(a)(3) since it will be acquiring one third of the voting securities of the new entity for $20 million. N need not file notification; see §802.41.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987]

§ 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 $30 million in the joint venture; persons ''A'' and ''B'' each have total assets in excess of $100 million. 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 $1,000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $500. Thereafter, ''A'' and ''B'' each contribute $15 million 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 §802.30; its sale of A1 stock to ''B'' was exempt under §802.20; 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 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 $60 million. ''A'' proposes to sell the stores to ''B'' for $60 million. 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 §802.20(b) exempts the acquisition of control of each of the store corporations, 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.

PART 802—EXEMPTION RULES

Sec.

AUTHORITY: Sec. 7A(d), Clayton Act, 15 U.S.C. 18A(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

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 $15 million.

2. ''A,'' a manufacturer of airplane engines, agrees to pay $20 million 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, $25 million 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 $25 million a total of 10,000 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 $20 million 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 $15.5 million 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 $18 million 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 ship builder. 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 $18 million 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 $16 million 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]

§ 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, assets incidental to the ownership of such property and associated agricultural assets shall be exempt from the requirements of the act. Agricultural property is real property and assets that primarily generate revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (activities within SIC Major Groups 01 and 02).

(1) Associated agricultural assets are assets integral to the agricultural business activities conducted on the property. Associated agricultural assets include, but are not limited to, inventory (e.g., livestock, poultry, crops, fruit, vegetables, milk, eggs); structures that house livestock raised on the real property; and fertilizer and animal feed. Associated agricultural assets do not include processing facilities such as poultry and livestock slaughtering, processing and packing facilities.

(2) Agricultural property does not include any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition.

(3) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property, assets incidental to the ownership of such property or associated agricultural assets 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 $62 million. ''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 $100 million tract of wilderness land from ''B.'' Copper deposits valued at $17 million and timber reserves valued at $20 million 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 $40 million 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 at $16 million 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 $40 million. 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 approximately $50 million 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 $20 million, 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 fair market values of $12 million and $8 million, respectively. 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 is 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 $80 million. 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 business, 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 $15 million, ''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 $30 million. 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 $15 million, ''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 $50 million. 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]

§ 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 $16 million 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 $15 million.

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]

§ 802.4 Acquisitions of voting securities of issuers holding certain assets the direct acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirements of the act pursuant to section 7A(c)(2) of the act, § 802.2, § 802.3 or § 802.5 of these rules is exempt from the reporting requirements if the acquired issuer and all entities it controls do not hold other non-exempt assets with an aggregate fair market value of more than $15 million.

(b) As used in paragraph (a) of this section, *issuer* means a single issuer, or two or more issuers controlled by the same acquired person.

(c) In connection with paragraph (a) of this section and § 801.15 (b), the value of the assets of an issuer whose voting securities 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 $15 million 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 $20 million and a small manufacturing plant valued at $6 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 $15 million, 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]

§ 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 $15 million or less, the entire transaction may be exempted by that section.

[61 FR 13688, Mar. 28, 1996]

§ 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) Except as provided in § 802.6(b)(2), any transaction which requires approval by the Civil Aeronautics Board prior to consummation, pursuant to section 408 of the Federal Aviation Act, 49 U.S.C. 1378, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Civil Aeronautics Board are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General.

(2) The following will be considered assets held as a result of an acquisition requiring approval by the Civil Aeronautics Board pursuant to section 408 of the Federal Aviation Act, and such assets will not be exempt under § 802.6(b)(1):

(i) If the transaction is an acquisition of assets, the assets which are engaged in a business or businesses other than aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301;

(ii) If the transaction is an acquisition of voting securities, or is treated under the rules as an acquisition of voting securities, and the acquiring person will, as a result of the acquisition, hold voting securities of the acquired person valued in excess of $15 million, the business or businesses of the acquired issuer (and all entities which it controls) which are not engaged in aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301.

Example: Assume that A (an entity included within person ''A'') proposes to acquire voting securities of B (an entity included within person ''B'') for $100 million. A and B are both air carriers who meet the size-of-person test, but B also owns a commercial data processing business located in the United States with a value of $30 million. Assume that this transaction requires CAB approval under 49 U.S.C. 1378. Since the acquired person has a business other than aeronautics or air transportation, the parties must report under § 802.6(b)(2) because the parties meet the size-of-person test, no other exemption applies to the acquisition of the data processing business, and the acquisition of the non-aeronautic business is deemed to be an acquisition of assets valued at $30 million.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34435, July 29, 1983]

§ 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), it 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]

§ 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 at $30 million. 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).

§ 802.10 Stock dividends and splits.

The acquisition of voting securities, pursuant to a stock split or pro rata stock dividend, shall be exempt from the requirements of the act under section 7A(c)(10).

§ 802.20 Minimum dollar value.

An acquisition which would be subject to the requirements of the act and which satisfies section 7A(a)(3)(A), but which does not satisfy section 7A(a)(3)(B), shall be exempt from the requirements of the act if as a result of the acquisition the acquiring person would not hold:

(a) Assets of the acquired person valued at more than $15 million; or

(b) Voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of $25 million or more.

Examples: 1. Acquiring person ''A'' intends to acquire 66 percent of the voting securities of corporation X from X's ultimate parent entity, W, and ''A'' holds no other assets or voting securities of acquired persons ''W''. X has no subsidiaries and does not have annual net sales or total assets of $10 million. If the postacquisition value of ''A''s holdings of voting securities of X would be $15 million or less, the acquisition would be exempt under this section.

2. Assume that acquiring person ''B'' holds voting securities of corporation Q valued at $9 million. ''B'' now intends to acquire assets of Q valued at $7 million. Since the aggregate total amount of voting securities and assets of ''Q'' to be held by ''B'' would exceed $15 million, section 7A(a)(3)(B) would be satisfied, and the acquisition would not be exempt under this section.

3. Assume that acquiring person ''C'' holds $5 million of the voting securities of corporation R, an entity included within person ''T.'' ''C'' now proposes to acquire $8 million of the assets of corporation S, also an entity included within person ''T,'' representing 20 percent of ''T's'' total assets. Section 7A(a)(3)(B) is not satisfied because the aggregate total amount of ''C's'' holdings in acquired person ''T'' will be less than $15 million. Although section 7A(a)(3)(A) would be satisfied by the asset acquisition, it will nevertheless be exempt under paragraph (a) of this section.

[43 FR 33544, July 31, 1978, as amended at 44 FR 66782, Nov. 21, 1979]

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold.

An acquisition of voting securities shall be exempt from the requirements of the act if:

(a) 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;

(b) 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

(c) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples: 1. Corporation A acquires 15 percent of the voting securities of corporation B and both ''A'' and ''B'' file notification as required. 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 25 percent of the voting securities of B. No additional notification is required.

2. In example 1, ''A'' continues to acquire B's securities. Before ''A's'' holdings meet or exceed 25 percent of B's outstanding voting securities, ''A'' and ''B'' must file notification and wait the prescribed period, regardless of whether the acquisition occur within five years after the expiration of the earlier waiting period.

3. In example 2, suppose that ''A'' and ''B'' file notification at the 25 percent level and that, within 5 years after expiration of the waiting period, ''A'' continues to acquire voting securities of B. No further notification is required until ''A'' plans to make the acquisition that will give it 50 percent ownership of B. (Once ''A'' holds 50 percent, further acquisitions of voting securities are exempt under section 7A(c)(3).

4. Assume that ''C'' is an institutional investor whose prior acquisitions of corporation D's voting securities were exempt under § 802.64. ''C'' now proposes to purchase additional voting securities of D which will result in holdings exceeding 15 percent and $25 million. ''C'' and ''D'' therefore file notification and observe the waiting period. Under this section within the 5 years following the expiration of the waiting period ''C'' may further increase its holdings in D to any amount below 25 percent (regardless of dollar value) without again filing notification. Section 802.64 exempted ''C'' from filing notification at the thresholds defined in subparagraphs (1) or (2) of § 801.1(h); thereafter, since ''C'' filed notification with respect to an acquisition which resulted in its holding more than 15 percent of D's voting securities valued at more than $25 million, the next notification threshold ''greater than the greatest notification threshold met or exceeded in the earlier acquisition'' is 25 percent of D's voting securities. (See paragraph (c) of this section and § 801.1(h)(3).)

5. This section also allows a person to recross any of the threshold notification levels—15 percent/$15 million, 15 percent if greater than $15 million, 25 and 50 percent—any number of times within 5 years of the expiration of the waiting period following notification for that level. Thus, if in example 1, ''A'' had disposed of some voting securities so that it held less than 15 percent of the voting securities of B, and thereafter had increased its holdings to more than 15 percent but less than 25 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period. Similarly, in examples 2 and 3, ''A'' could decrease its holdings below, and then increase its holdings above, 25 percent and 50 percent, respectively without filing notification, if done within 5 years of the expiration of those respective waiting periods.

§ 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. 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]

§ 802.30 Intraperson transactions.

An acquisition (other than the formation of a joint venture or other corporation the voting securities of which will be held by two or more persons) in which, by reason of holdings of voting securities, the acquiring and acquired persons are (or as a result of formation of a wholly owned entity will be) the same person, shall be exempt from the requirements of the act.

Examples: 1. Corporation A merges its two wholly owned subsidiaries S1 and S2. The transaction is exempt under this section.

2. Corporation B creates a new wholly owned subsidiary. The transaction is exempt under this section.

3. Corporation A, which controls corporation B by a contract giving A the power to name a majority of B's directors, but which holds no voting securities of B, proposes to acquire 15 percent of B's voting securities. The transaction is not exempt under this section, since ''A'' and ''B'' are not the same person ''by reason of holdings of voting securities.''

4. Corporation A repurchases a portion of its voting securities in a series of transactions involving numerous sellers. All of these acquisitions are exempt under this section. The redemption or retirement of securities would likewise be exempt under this section.

5. Corporations A and B (which are not included within the same person) form a new corporation, C. A and B will each hold C's voting securities upon formation. This section is inapplicable, and the acquisitions of C's voting securities by A and B are not exempt.

§ 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 and even though they may be converted into 15 percent or more of the issuer's voting securities. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See §801.32.

§ 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 $30 million. Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for $20 million. Neither acquisition is reportable.

2. Assume that in the example above, ''A'' has total assets of $100 million. ''C'' also has total assets of $100 million 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 $40 million. 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]

§ 802.40 Exempt formation of joint venture or other corporations.

Acquisitions of the voting securities of a joint venture or other corporation at the time of formation under § 801.40 shall be exempt from the requirements of the act if the joint venture or other corporation 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.

§ 802.41 Joint venture or other corporations at time of formation.

Whenever any person(s) contributing to the formation of a joint venture or other corporation are subject to the requirements of the act by reason of § 801.40, the joint venture or other corporation need not file the notification required by the act and § 803.1.

Examples: 1. Corporations A and B, each having sales of $100 million, each propose to contribute $20 million 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 above, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for $15 million. 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]

§ 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 or of voting securities of a foreign issuer by United States persons.

(a) *Assets.* In a transaction in which assets located outside the United States are being acquired by a U.S. person:

(1) The acquisition of assets located outside the United States, to which no sales in or into the United States are attributable, shall be exempt from the requirements of the act; and

(2) The acquisition of assets located outside the United States, to which sales in or into the United States are attributable, shall be exempt from the requirements of the act unless as a result of the acquisition the acquiring

person would hold assets of the acquired person to which such sales aggregating $25 million or more during the acquired person's most recent fiscal year were attributable.

Examples: 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 $8 million in the most recent fiscal year. The transaction is exempt under this paragraph.

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 totaled $20 million 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'' now held by ''B''. See §801.13(b)(2). Since the total annual sales in or into the United States exceed $215 million, the acquisition of the second plant would not be exempt under this paragraph.

(b) *Voting securities.* An 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:

(1) 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(c)(2)) having an aggregate book value of $15 million or more; or

(2) Made aggregate sales in or into the United States of $25 million or more in its most recent fiscal year.

Example: ''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 $27 million in the most recent fiscal year. The transaction is not exempt under this section.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34437, July 29, 1983]

§ 802.51 Acquisitions by foreign persons.

An acquisition by a foreign person shall be exempt from the requirements of the act if:

(a) The acquisition is of assets located outside the United States;

(b) The acquisition is of voting securities of a foreign issuer, and will not confer control of:

(1) An issuer which 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(c)(2)) having an aggregate book value of $15 million or more, or

(2) A U.S. issuer with annual net sales or total assets of $25 million or more;

(c) The acquisition is of less than $15 million of assets located in the United States (other than investment assets); or

(d) The acquired person is also a foreign person, the aggregate annual sales of the acquiring and acquired persons in or into the United States are less than $110 million, and 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(c)(2)) are less than $110 million.

Examples: 1. Assume that ''A'' and ''B'' are foreign persons with aggregate annual sales in or into the United States of $200 million. If ''A'' acquires the assets of ''B,'' and if no assets in the United States or voting securities of U.S. issuers will be acquired, the transaction is exempt under paragraphs (a) and (c).

2. In example 1, assume that ''A'' is acquiring ''B's'' stock and that included within ''B'' is issuer C, a U.S. issuer whose total assets are valued at $27 million. Since C's voting securities will be acquired indirectly, and since ''A'' thus will be acquiring control of a U.S. issuer with total assets of more than $25 million, the acquisition cannot be exempt under this section.

3. In the previous examples, assume that ''A'' is a U.S. person. This section does not apply, since the acquiring person must be a foreign person.

[43 FR 33544, July 31, 1978, as amended at 48 FR 34437, July 29, 1983]

§ 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 annual sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate annual sales were less than $10 million, the transaction would also be exempt under § 802.50.)

§ 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;

(4) As a result of the acquisition the acquiring person would not control the issuer; and

(5) As a result of the acquisition the acquiring person would hold either:

(i) Fifteen percent or less of the outstanding voting securities of the issurer; or

(ii) Voting securities of the issuer valued at $25 million or less.

(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 subparagraphs (2), (3) and (4) of paragraph (b) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $25 million as long as the aggregate amount held by person ''A'' as a result of the acquisition does not equal or exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would equal or exceed 15 percent, ''A'' may acquire no more than $25 million 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.

§ 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.

PART 803—TRANSMITTAL RULES

AUTHORITY: Sec. 7A(d), Clayton Act, 15 U.S.C. 18A(d), as added by sec. 201, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

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, or a photostatic or other equivalent reproduction thereof, in accordance with the instructions thereon and these rules. Copies of the Notification and Report Form may be obtained in person from the Public Reference Branch, Room 130, Federal Trade Commission, Sixth Street and Pennsylvania Avenue NW., Washington, D.C., or by writing to the Premerger Notification Office, Room 303, Federal Trade Commission, Washington, DC 20580.

(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.

§ 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 of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the ''ultimate parent entity'' of a ''person'' composed to herself (or her husband or minor child) and F; see paragraphs (a)(3), (b) and (c)(2) of § 801.1. If corporation F is to acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband and minor child collectively.

(b)(1) Except as provided in paragraph (b)(2) of this section and paragraph (c) of this section, items 5–9 and the appendix to the Notification and Report Form must be completed—

(i) By acquiring persons, with respect to all entities included within the acquiring person;

(ii) By acquired persons, in the case of an acquisition of assets, only with respect to the assets to be acquired;

(iii) By acquired persons, in the case of an acquisition of voting securities, with respect to only the issuer whose voting securities are being acquired, and all entities controlled by such issuer; and

(iv) By persons which are both acquiring and acquired persons, separately in the manner that would be required of acquiring and acquired persons under this paragraph, if different.

(2) For purposes of items 7–9 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in paragraphs (b)(1) (ii) and (iii) of this section.

Example: Person ''A'' is comprised of entities separately engaged in grocery retailing, auto rental, and coal mining. Person ''B'' is comprised of entities separately engaged in wholesale magazine distribution, auto rental and book publishing. ''A'' proposes to purchase 100 percent of the voting securities of ''B''s book publishing subsidiary. For purposes of item 5, under clause (b)(1)(i), ''A'' reports, the activities of all its entities; under clause (b)(1)(iii), ''B'' reports only the operations of its book publishing subsidiary. For purposes of items 7–9, under subparagraph (2) of this paragraph ''A'' must regard ''B'' as consisting only of its book publishing subsidiary, and must disregard the fact that ''A'' and ''B'' are both engaged in the auto rental business.

(c) In response to items 5, 7, 8, and 9 and the appendix to the Notification and Report Form—

(1) Information shall be supplied only with respect to operations conducted within the United States; and

(2) Information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

(d) The term *dollar revenues,* as used in the Notification and Report Form, means value of shipments for manufacturing operations, and sales, receipts, revenues, or other appropriate dollar value measure for operations other than manufacturing, f.o.b. the plant or establishment less returns, after discounts and allowances and excluding freight charges and excise taxes. Dollar revenues including delivery may be supplied if delivery is an integral part of the sales price. Dollar revenues include interplant transfers.

(e) A person filing notification may incorporate by reference only documentary materials required to be filed in response to item 4(a) of the Notification and Report Form and annual reports required to be filed in response to item 4(b), which were previously submitted with a filing by the same person and which are the most recent versions available; except that when the same parties file for a higher notification threshold no more than 90 days after having made filings with respect to a lower threshold, each party may incorporate by reference in the subsequent filing any documents or information in its earlier filing provided that the documents and information are the most recent available.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34438, July 29, 1983]

§ 803.3 Statement of reasons for noncompliance.

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to section 7A(e) and § 803.20. Whenever the person filing notification is unable to supply a complete response, that person shall provide, for each item for which less than a complete response has been supplied, a statement of reasons for noncompliance. The statement of reasons for noncompliance shall contain all information upon which a person relies in explanation of its noncompliance and shall include at least the following:

(a) Why the person is unable to supply a complete response;

(b) What information, and what specific documents or categories of documents, would have been required for a complete response;

(c) Who, if anyone, has the required information, and specific documents or categories of documents; and a description of all efforts made to obtain such information and documents, including the names of persons who searched for required information and documents, and where the search was conducted. If no such efforts were made, provide an explanation of the reasons why, and a description of all efforts necessary to obtain required information and documents;

(d) Where noncompliance is based on a claim of privilege, a statement of the claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, addressee, date, subject matter, all recipients of the original and of any copies, its present location, and who has control of it.

[48 FR 34439, July 29, 1983]

§ 803.4 Foreign persons refusing to file notification.

(a) In an acquisition to which § 801.30 does not apply, and in which no assets (other than investment assets) located in the United States and no voting securities of a United States issuer will be acquired directly or indirectly, if a foreign acquired person refuses to file notification, then any other person which is a party to the acquisition may file notification on behalf of the foreign person. Such notification shall constitute the notification required of the foreign person by the act and these rules.

(b) Any person filing on behalf of the foreign person pursuant to this section must state in the affidavit required by § 803.5(b) that such foreign person has refused to file notification and must explain all efforts made by the person filing on behalf of the foreign person to obtain compliance with the act and these rules by such foreign person.

(c) Any notification filed on behalf of a foreign person pursuant to this section must contain all information and documentary material reasonably available to the person filing on behalf of the foreign person which such foreign person would be required to provide. Whenever information or documentary material is not reasonably available, the person filing on behalf of the foreign person shall so indicate on the Notification and Report Form, and need not supply the statement of reasons for noncompliance required by § 803.3.

(d) Any foreign person on whose behalf notification has been filed by another person pursuant to this section shall be a ''person filing notification'' for purposes of the act and these rules. Nothing in this section shall exempt a foreign person from the requirements of the act or these rules with respect to a request for additional information or an extension of the waiting period pursuant to section 7A(e) and these rules.

§ 803.5 Affidavits required.

(a)(1) *Section 801.30 acquisitions.* For acquisitions to which § 801.30 applies, the notification required by the act from each acquiring person shall contain an affidavit, attached to the front of the notification, attesting that the issuer whose voting securities are to be acquired has received notice in writing by certified or registered mail, by wire or by hand delivery, at its principal executive offices, of:

(i) The identity of the acquiring person;

(ii) The fact that the acquiring person intends to acquire voting securities of the issuer;

(iii) The specific classes of voting securities of the issuer sought to be acquired; and if known, the number of securities of each such class that would be held by the acquiring person as a result of the acquisition or, if the number is not known, the specific notification threshold that the acquiring person intends to meet or exceed; and, if designated by the acquiring person, a higher threshold for additional voting securities it may hold in the year following the expiration of the waiting period;

(iv) The fact that the acquisition may be subject to the act, and that the acquiring person will file notification under the act with the Federal Trade Commission and Assistant Attorney General;

(v) The anticipated date of receipt of such notification under § 803.10(c); and

(vi) The fact that the person within which the issuer is included may be required to file notification under the act.

(2) The affidavit required by this paragraph must also state the good faith intention of the person filing notification to make the acquisition, and, in the case of a tender offer, that the intention to make the tender offer has been publicly announced.

Example: 1. This paragraph permits the tender offeror to file notification at any time after the intention to make the tender offer has been publicly announced.

In examples 2–5 assume that one percent of B's shares are valued at $15 million.

2. ''A'' holds 100,000 shares of the voting securities of Company B. ''A'' has a good faith intention to acquire an additional 900,000 shares of Company B's voting securities. ''A'' states in its notice to B, inter alia, that as a result of the acquisition it will hold 1,000,000 shares. If 1,000,000 shares of Company B represents 20 percent of Company B's outstanding voting securities, the statement will be deemed by the enforcement agencies a notification for the 15 percent threshold.

3. Company A intends to acquire voting securities of Company B. ''A'' does not know exactly how many shares it will acquire, but it knows it will definitely acquire 15 percent and may acquire 50 percent of Company B's shares. ''A'''s notice to the acquired person would meet the requirements of §803.5(a)(1)(iii) if it states, inter alia, either: ''Company A has a present good faith intention to acquire 15 percent of the outstanding voting securities of Company B, and depending on market conditions, may acquire more of the voting securities of Company B and thus designates the 50 percent threshold'' or ''Company A has a present good faith intention to acquire 15 percent of the outstanding voting securities of Company B, and depending on market conditions may acquire 50 percent or more of the voting securities of Company B.'' The Commission would deem either of these statements as intending to give notice for the 50 percent threshold.

4. ''A'' states, inter alia, that, ''depending on market conditions, it may acquire 100 percent of the shares of B.'' ''A'''s notice does not comply with §803.5 because it does not state an intent to meet or exceed any notification threshold. ''A'''s filing will be considered deficient within the meaning of §803.10(c)(2).

5. ''A'' states, inter alia, that it has commenced a tender offer for ''up to 55 percent of the outstanding voting securities of Company B.'' ''A'''s notice does not comply with §803.5 because use of the term ''up to'' does not state an intent to meet or exceed any notification threshold. The filing will therefore be considered deficient within the meaning of §803.10 (c)(2).

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which §801.30 does not apply, the notification required by the act shall contain an affidavit, attached to the front of the notification, attesting that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34439, July 29, 1983; 52 FR 7082, Mar. 6, 1987]

§ 803.6 Certification.

(a) The notification required by the act shall be certified:

(1) In the case of a partnership, by any general partner thereof;

(2) In the case of a corporation, by any officer or director thereof;

(3) In the case of a person lacking officers, directors, or partners, by any individual exercising similar functions;

(4) In the case of a natural person, by such natural person or his or her legal representative;

(5) In the case of the estate of a deceased natural person, by any duly authorized legal representative of such estate.

(b) Additional information or documentary material submitted in response to a request pursuant to section 7A(e) and §803.20 shall be accompanied by a certification in the format appearing at the end of the Notification and Report Form, completed in accordance with paragraph (a) of this section by the person or individual to whom it was directed.

(c) In all cases, the certifying individual must possess actual authority to make the certification on behalf of the person filing notification.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34429, July 29, 1983]

§ 803.7 Expiration of notification.

Notification with respect to an acquisition shall expire 1 year following the expiration of the waiting period. If the acquiring person's holdings do not, within such time period, meet or exceed the notification threshold with respect to which the notification was filed, the requirements of the act must thereafter be observed with respect to any notification threshold not met or exceeded.

Example: A files notification that 26 percent of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, A has acquired only 22 percent of B's voting securities. Although §802.21 will permit ''A'' to purchase any amount of B's voting securities short of 25 percent within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the 25 percent notification threshold without ''A'' and ''B'' again filing notification and observing a waiting period.

§ 803.8 Foreign language documents.

(a) Whenever at the time of filing a Notification and Report Form there is

an English language outline, summary, extract or verbatim translation of any information or of all or portions of any documentary materials in a foreign language required to be submitted by the act or these rules, all such English language versions shall be filed along with the foreign language information or materials.

(b) Documentary materials or information in a foreign language required to be submitted in responses to a request for additional information or documentary material shall be submitted with verbatim English language translations, or all existing English language versions, or both, as specified in such request.

[48 FR 34440, July 29, 1983]

§ 803.10 Running of time.

(a) *Beginning of waiting period.* The waiting period required by the act shall begin on the date of receipt of the notification required by the act, in the manner provided by these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with § 803.3) from:

(1) In the case of acquisitions to which § 801.30 applies, the acquiring person;

(2) In the case of the formation of a joint venture or other corporation covered by § 801.40, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

(3) In the case of all other acquisitions, all persons required by the act and these rules to file notification.

(b) *Expiration of waiting period.* (1) For purposes of section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 30th (or in the case of a cash tender offer, the 15th) calendar day (or if § 802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to section 7A(e) and § 803.20, or section 7A(g)(2), or unless terminated pursuant to section 7A(b)(2) and § 803.11.

(2) Unless further extended pursuant to section 7A(g)(2), or terminated pursuant to section 7A(b)(2) and § 803.11, any waiting period which has been extended pursuant to section 7A(e)(2) and § 803.20 shall expire at 11:59 p.m. Eastern Time—

(i) On the 20th (or, in the case of a cash tender offer, the 10th) day following the date of receipt of all additional information or documentary material requested from all persons to whom such requests have been directed (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in paragraph (c) of this section, or

(ii) As provided in paragraph (b)(1) of this section, whichever is later.

(c)(1) *Date of receipt and means of delivery.* For purposes of this section the date of receipt shall be the date on which delivery is effected to the designated offices (Premerger Notification Office, Room 303, Federal Trade Commission, Washington, DC 20580, and Director of Operations, Antitrust Division, Room 3214, Department of Justice, Washington, DC 20530) during normal business hours. Delivery effected after 5 p.m. eastern time on a regular business day, or at any time on any day other than a regular business day, shall be deemed effected on the next following regular business day. Delivery should be effected directly to the designated office(s), either by hand or by certified or registered mail. If delivery of all required filings to all offices required to receive such filings is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected.

Examples: 1. In an acquisition other than a cash tender offer, assume that a request for additional information is issued to a person on the second day of the waiting period, and that the person supplies the response 5 days later. Under subparagraph (b)(2)(ii), the waiting period remains in effect through the 30th day, even though the 20th day after receipt of such additional information would occur earlier.

2. In an acquisition other than a tender offer, assume that requests for additional information are issued to both the acquiring and acquired persons on the 26th day of the waiting period. One person submits the additional information on the 35th day, while the other responds on the 44th day. Under this section, the waiting period expires twenty days following the last receipt of additional information, that is, it expires on the 64th day.

(2) *Deficient filings.* If notification or a response to a request for additional information or documentary material received by the Commission or Assistant Attorney General does not comply with these rules, the Commission or the Assistant Attorney General shall promptly notify the person filing such notification or response of the deficiencies in such filing, and the date of receipt shall be the date on which a filing which complies with these rules is received.

[43 FR 33548, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7083, Mar. 6, 1987]

§ 803.11 Termination of waiting period.

(a) Except as provided in paragraph (c) of this section, no waiting period shall be terminated pursuant to section 7A(b)(2) unless—

(1) All notifications required to be filed with respect to the acquisition by the act and these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with § 803.3) have been received,

(2) It has been determined that no additional information or documentary material pursuant to section 7A(e) and § 803.20 will be requested, or, if such additional information or documentary material has been requested, it (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3) has been received, and

(3) The Federal Trade Commission and the Assistant Attorney General have concluded that neither intends to take any further action within the waiting period.

(b) Any request for additional information or documentary material pursuant to section 7A(e) and § 803.20 shall constitute a denial of all pending requests for termination of the waiting period.

(c) The Federal Trade Commission and the Assistant Attorney General may in their discretion terminate a waiting period upon the written request of any person filing notification or, notwithstanding paragraph (a) of this section, sua sponte. A request for termination of the waiting period shall be sent to the offices designated in § 803.10(c). Termination shall be effective upon notice to any requesting person by telephone, and such notice shall be given as soon as possible. Such notice shall also be confirmed in writing to each person which has filed notification, and notice thereof shall be published in the FEDERAL REGISTER in accordance with section 7A(b)(2). The Federal Trade Commission and the Assistant Attorney General also may use other means to make the termination public, prior to publication in the FEDERAL REGISTER in a manner that will make the information equally accessible to all members of the public.

[43 FR 33548, July 31, 1978, as amended at 54 FR 21427, May 18, 1989]

§ 803.20 Requests for additional information or documentary material.

(a)(1) *Persons and individuals subject to request.* Pursuant to section 7A(e)(1), the submission of additional information or documentary material relevant to the acquisition may be required from one or more persons required to file notification, and, with respect to each such person, from one or more entities included therein, or from one or more officers, directors, partners, agents, or employees thereof, if so required by the same request.

Example: A request for additional information may require a corporation and, in addition, a named officer or employee to provide certain information or documents, if both the corporation and the officer or employee are named in the same request. See subparagraph (b)(3) of this section.

(2) All the information and documentary material required to be submitted pursuant to a request under paragraph (a)(1) of this section shall be supplied to the Commission or to the Assistant Attorney General, whichever made such request, at such location as may

be designated in the request, or, if no such location is designated, at the office designated in §803.10(c). If such request is not fully complied with, a statement of reasons for noncompliance pursuant to §803.3 shall be provided for each item or portion of such request which is not fully complied with.

(b)(1) *Who may require submission.* A request for additional information or documentary material with respect to an acquisition may be issued by the Federal Trade Commission or its designee, or by the Assistant Attorney General or his or her designee, but not by both to the same person, any entities included therein, or any officers, directors, partners, agents, or employees of that person.

(2) *When request effective.* A request for additional information or documentary material shall be effective—

(i) In the case of a written request, upon receipt of the request by the ultimate parent entity of the person to which the request is directed, (or, if another entity included within the person filed notification pursuant to §803.2(a), then by such entity), within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if §802.23 applies, such other period as that section provides); or

(ii) In the case of a written request, upon notice of the issuance of such request to the person to which it is directed within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if §802.23 applies, such other period as that section provides), provided that written confirmation of the request is mailed to the person to which the request is directed within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if §802.23 applies, such other period as that section provides). Notice to the person to which the request is directed may be given by telephone or in person. The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period through the telephone number supplied on the certification page of the Notification and Report Form. Notice of a request for additional information or documentary material need be given by telephone only to that individual or to the individual designated in accordance with paragraph (b)(2)(iii) of this section. Upon the request of the individual receiving notice of the issuance of such a request, the full text of the request will be read. The written confirmation of the request shall be mailed to the ultimate parent entity of the person filing notification, or if another entity within the person filed notification pursuant to §803.2(a), then to such entity.

(iii) When the individual designated in accordance with paragraph (b)(2)(ii) of this section is not located in the United States, the person filing notification shall designate an additional individual located within the United States to be reasonably available during normal business hours throughout the waiting period through a telephone number supplied on the certification page of the Notification and Report Form. This individual shall be designated for the limited purpose of receiving notification of the issuance of requests for additional information or documentary material in accordance with the procedure described in paragraph (b)(2)(ii) of this section.

(3) *Requests to natural persons.* A request addressed to an individual, requiring that he or she submit additional information or documentary material, shall be transmitted to the person filing notification of which the individual is an ultimate parent entity, officer, director, partner, agent or employee, and shall be effective as to that individual when effective as to the person filing notification pursuant to paragraph (b)(2) of this section. A written copy of the request shall also be delivered to the individual by hand, or by registered or certified mail at his or her home or business address.

Example: A designee of the Federal Trade Commission sends, by certified letter which is received within the 30-day waiting period, a written request for additional information to corporation W, the ultimate parent entity within a person which filed notification. The request is effective under clause (b)(2)(i). If the letter also addressed a request for documentary material to the secretary of corporation W, a named individual, under paragraph (b)(3), the request would likewise be effective as to the individual upon receipt of

the letter by W. In the latter case, the Federal Trade Commission also would send a copy of the request to the Secretary of the corporation at his or her home or business address.

(c) *Waiting period extended.* (1) During the time period when a request for additional information or documentary material remains outstanding to any person other than, in the case of a tender offer, the person whose voting securities are sought to be acquired by the tender offeror (or any officer, director, partner, agent or employee thereof), the waiting period shall remain in effect, even though the waiting period would have expired (see §803.10(b)) if no such request had been made.

(2) A request for additional information or documentary material to any person other than, in the case of a tender offer, the person whose voting securities are being acquired pursuant to the tender offer (or any officer, director, partner, agent or employee thereof) shall in every instance extend the waiting period for a period of 20 (or, in the case of a cash tender offer, 10) calendar days from the date of receipt (as determined under §803.10) of the additional information or documentary material requested.

Example: Acquiring person ''A'' desires to acquire voting securities of corporation X on a securities exchange, and files notification. Under §801.30, the waiting period begins upon filing by ''A,'' and ''X'' must file within 15 days thereafter. Assume that before the end of the waiting period, the Assistant Attorney General issues a request for additional information to ''X.'' Since the transaction is not a tender offer, under paragraph (c)(1) the waiting period is extended until ''X'' supplies the requested information; under paragraph (c)(2), the waiting period is extended for 20 days beyond the date on which ''X'' responds.

Note that under §803.21 ''X'' is obliged to respond to the request within a reasonable time; nevertheless, the Federal Trade Commission and Assistant Attorney General could, notwithstanding the pendency of the request for additional information, terminate the waiting period sua sponte pursuant to §803.11(c).

(d)(1) *Identification of requests.* Every request for additional information or documentary material shall be clearly identified as such, whether communicated in person, by telephone or in writing, and shall clearly identify the person, entity or entities, or individual(s) to which it is addressed.

(2) *Request for clarification.* No request for clarification or amplification of a response to any item on the Notification and Report Form, whether communicated in person, by telephone or in writing, shall be considered a request for additional information or documentary material within the meaning of section 7A(e) and this section.

[43 FR 33548, July 31, 1978, as amended at 48 FR 34441, July 29, 1983]

§ 803.21 Additional information shall be supplied within reasonable time.

All additional information or documentary material requested pursuant to section 7A(e) and §803.20 (or, if such request is not fully complied with, the information or documentary material submitted and a statement of the reasons for such noncompliance in accordance with §803.3) shall be supplied within a reasonable time.

§ 803.30 Formal and informal interpretations of requirements under the Act and the rules.

(a) The Commission staff may consider requests for formal or informal interpretations as to the obligations under the act and these rules of any party to an acquisition. A request for a formal interpretation shall be made in writing to the offices designated in §803.10(c), and shall state: (1) all facts which the applicant believes to be material, (2) the reasons why the requirements of the act are or may be applicable and (3) the question(s) that the applicant wishes resolved. The Commission staff may, in its discretion, render a formal or informal response to any request, however made, or may decline to render such advice.

(b) In the sole discretion of the staff, any request for interpretation may be referred to the Commission.

(c) Formal interpretations by the Commission staff or by the Commission shall be rendered with the concurrence of the Assistant Attorney General or his or her designee.

(d) Any formal interpretation shall be without prejudice to the right of either the Commission or the Assistant Attorney General to rescind any such

interpretation rendered pursuant to this section. In the event of such rescission, the party which requested the interpretation shall be so notified in writing.

(e) The Commission shall publish a summary of formal interpretations by the Commission, and any rescissions thereof, in the FEDERAL REGISTER.

§ 803.90 Separability.

If any provision of the rules in this subchapter (H) (including the Notification and Report Form) or the application of any such provision to any person or circumstances is held invalid, neither the other provisions of the rules nor the application of such provision to other persons or circumstances shall be affected thereby.

APPENDIX TO PART 803

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

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-16) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filing persons need not, however, record their responses on the Form.

These Instructions specify the information which must be provided in response to the items on the Answer Sheets. *Only* the completed Answer Sheets, 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 answer sheets 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 2(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, 6th St. & Pa. Avenue, N.W., Washington, D.C. 20580, phone (202) 326-3100.

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) and 48 FR 34427 (July 29, 1983).

Affidavit-Attach the affidavit required by § 803.5 to page 1 of 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).)

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 so identified.

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.

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. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

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.

SIC Data-This Notification and Report 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 4-digit (SIC code) *industry* level. To the extent that dollar revenues are derived from *manufactured operations* (SIC major groups 20-39), data must also be submitted at the *5-digit product class* and *7-digit product levels* (SIC based codes).
The term "dollar revenues" is defined in § 803.2(d).

References- In reporting information by "4-digit (SIC code) industry" refer to the 1987 edition of the *Standard Industrial Classification Manual* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by "5-digit product class" and "7-digit product" refer to the following reference publication published by the U.S. Bureau of the Census:
Numerical List of Manufactured and Mineral Products, 1992 *Census of Manufactures and Census of Mineral Industries* (MC92-R-1). Make sure that the Numerical List you use has MC92-R-1 printed on the cover.

Furthermore, when the Numerical List cites footnote 3, which refers to Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using the 7-digit product codes listed in Appendix A.

Privacy Act Statement - Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws. Furnishing the information on this 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 $10,000 per day.

Items 5, 7, 8, 9 and the Insurance Appendix —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).)

Limited or separate responses may be required from the person filing notification. (See § 803.2(b).)

Filing—Complete and return two notarized copies (with *one set* of documentary attachments) of this Notification and Report Form to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, and *three* notarized copies (with *one* set of documentary attachments) to Director of Operations, Antitrust Division, Department of Justice, Room 3218, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530.

ITEM BY ITEM

Affidavit—Attach the affidavit required by § 803.5 to page 1 of the Answer Sheets. 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).)

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

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.

ITEM 1

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)—Give the names of all ultimate parent entities of acquiring and acquired persons which are parties to the acquisition whether or not they are required to file notification.

Item 1(d)—Put an X in all the boxes that apply to this acquisition.

Item 1(e)—*Acquiring* persons put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $15 million, 15%, 25%, or 50%.

Item 1(f)—All persons state the value of voting securities held as a result of the acquisition and/or the value of assets held as a result of the acquisition. (Insert responses to Item 3(c).)

Item 1(g)—Put an X in the appropriate box to indicate whether the entity in Item 1(a) is a corporation, partnership, or other (specify).

Item 1(h)—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(i)—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) on the Form.

Item 1(j)—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 or voting securities 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 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 2

Item 2(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 in tender offers should describe the terms of the offer.

Item 2(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 approximate dollar values thereof. If the transaction is the formation of a joint venture or other corporation (see § 801.40), include assets to be acquired by the joint venture or other corporation.

Give the approximate total value or estimated 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 2(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 2(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 2(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 2(c)(i) - 2(c)(viii). However, this procedure may not be used if the acquiring person currently holds 15 percent or more than $15 million worth of the voting securities of the acquired person or of any entity included within the acquired person.)

Item 2(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 2(c)(ii)—Total number of shares of each class of securities listed on page 3 which will be outstanding after the acquisition has been completed;

Item 2(c)(iii)—Total number of shares of each class of securities listed on page 3 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 2(c)(iv)—Identity of each person acquiring any securities of any class listed on page 3. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 2(c)(v)—Dollar value of securities of each class listed on page 3 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 2(c)(vi)—Total number of each class of securities listed on page 3 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 2(c)(vii)—Percentage of each class of securities listed under 2(c)(vi) above which will be held by the acquiring person(s) after the acquisition has been completed (see § 801.12(b)). If there is more than one acquiring person for any class of security, show data separately for each acquiring person;

Item 2(c)(viii)—Dollar value (or estimated dollar value) of securities to be held as a result of the acquisition (see § 801.13).

Item 2(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. (Do not attach these documents to page 4 of the Answer Sheets.)

ITEM 3

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

Item 3(a)- the percentage of the assets;

Item 3(b)- the percentage of the voting securities;

Item 3(c)- the aggregate total dollar amount of voting securities and assets 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 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 14D-1. Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

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 recent regularly prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person;

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 on page 5 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 9 and the Appendix

NOTE: *For Items 5 through 9 and the Appendix limited or separate responses may be required of the person filing notification. (See § 803.2(b) and (c).)*

ITEM 5(a) - 5(c): These Items request 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 4-digit (SIC code) *industry* level. To the extent that dollar revenues are derived from *manufacturing operations* (SIC major groups 20-39), data must also be submitted at the 5-digit product class and 7-digit product levels (SIC based codes).

NOTE: See the "References" listed in the General Instructions to the Form. Refer to the 1987 edition of the *Standard Industrial Classification Manual* for the 4-digit (SIC code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, 1992 *Census of Manufactures and Census of Mineral Industries* (MC92-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code."

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; holding and other investment offices, and real estate companies (2-digit SIC major groups 61, 62, 67 and 65) should identify or explain the revenues reported (e.g., dollar sales, receipts).

Persons filing notification should include the total dollar revenues for 1992 derived by 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 1992). For example, if the person filing notification acquired an entity in 1994, it must include that entity's 1992 revenues in Items 5(a) and 5(b)(i).

Item 5(a)-*Dollar revenues by industry.* Provide aggregate 4-digit (SIC code) industry data for 1992.

Item 5(b)(i)-*Dollar revenues by manufactured product.* Provide the following information on the aggregate operations for the person filing notification for 1992 for each 7-digit product of the person in 2-digit SIC major groups 20-39 (manufacturing industries)

NOTE: When the Numerical List refers to footnote 3, which cites Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using 7-digit product codes listed in Appendix A.

Item 5(b)(ii)-*Products added or deleted.* Within 2-digit SIC major groups 20-39 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1992, 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 7-digit product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1992 by reason of mergers or acquisition occurring since 1992. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 1992 by the person filing notification(and now included within the person) itself has added any products since 1992, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets or voting securities since 1992 should also be listed here.

Item 5(b)(iii)-*Dollar revenues by manufactured product class.* Provide the following information about the aggregate operations of the person filing notification for the most recent year for each 5-digit product class of the person within SIC major groups 20-39 (manufacturing industries). If such data have not been compiled for the most recent year, estimates of dollar revenues by 5-digit 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 4-digit (SIC code) industry in SIC major groups other than 20-39 in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 4-digit industry 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).*

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within SIC major group 63, and, if voting securities of an insurance carrier are being acquired directly or indirectly should complete the Insurance Appendix to this Form.

JOINT VENTURE OR OTHER CORPORATIONS

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

Item 5(d)(i)—List the name and mailing address of the joint venture or other corporation.

Item 5(d)(ii)(A)—List contributions that each person forming the joint venture or other corporation 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 or other corporation 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 or other corporation have agreed to guarantee its credit or obligations.

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

Item 5(d)(iii)—Describe generally the business in which the joint venture or other corporation 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 4-digit (SIC code) *industry* in which the joint venture or other corporation will derive dollar revenues. If the joint venture or other corporation will be engaged in manufacturing, also specify each 5-digit *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 "documentary 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 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 holdings 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 person filing notification derived dollar revenues in the most recent year from operations in any 4-digit (SIC code) industries in which any other person which is a party to the acquisition also derived dollar revenues in the most recent year (or in which a joint venture or other corporation will derive dollar revenues), then for each such 4-digit (SIC code) industry:

Item 7(a)—supply the 4-digit SIC 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 4-digit industry;

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

Item 7(c)(i)—for each 4-digit industry within SIC major groups 20-39 (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 4-digit industry 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 4-digit industry within SIC major groups 01-17 and 40-49 (agriculture, forestry and fishing, mining, construction, transportation, communications, electric, gas and sanitary services) 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 4-digit industry within SIC major groups 50-51 (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 4-digit industry within SIC major groups 52-61, 70, 75, 78, and 80 (retail trade, banking, and certain 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 4-digit industry within SIC major group 62, 64-67, 72, 73, 76, 79, and 81-89 (certain finance, insurance and real estate groups and certain services) 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 4-digit industry within SIC 63 (insurance) 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 SIC major industry groups 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—Put an X in the appropriate box to indicate if the acquired person and an acquiring person maintained a vendor-vendee relationship during the most recent year with respect to any manufactured product (or, if the acquisition is the formation of a joint venture or other corporation (see § 801.40), if the joint venture or other corporation will supply to any of the persons forming it any manufactured product which such person purchased from another such person during the most recent year) which the vendee either resells or consumes in or incorporates into the manufacture of any product. Persons filing notification which are *vendees* of such product(s) should list each product purchased, identify each vendor which is a party to the acquisition from which the product was purchased and state the dollar amount of the product purchased from that vendor during the most recent year.

Manufactured products are those within 2-digit SIC major groups 20-39. Any product purchased from the vendor in an aggregrate annual amount not exceeding $1 million, or the manufacture, consumption or use of which is not attributable to the assets to be acquired, or to the issuer whose voting securities are to be acquired (including entities controlled by the issuer), may be omitted.

ITEM 9

Item 9—*Previous acquisitions* (to be completed by acquiring persons). Determine each 4-digit (SIC code) industry 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 most recent year, (or in which, in the case of the formation of a joint venture or other corporation, the joint venture or other corporation reasonably can be expected to derive dollar 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 4-digit industry, 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 4-digit industry. List only acquisitions of more than 50 percent of the voting securities or assets of entities which had annual net sales or total assets greater than $10 million in the year prior to the 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;

(e) the annual net sales of the acquired entity for the year prior to the acquisition;

(f) the total assets of the acquired entity in the year prior to the acquisition; and

(g) the 4-digit (SIC code) industries (by number and description) identified above in which the acquired entity derived dollar revenues.

ITEM 10

Item 10(a)—Print or type the name and title, firm name, address, and telephone number of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 10(b)—Foreign filing persons print or type the name and title, firm name, address, and telephone number 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).)

Certification—(See § 803.6.)

APPENDIX TO NOTIFICATION AND REPORT FORM: INSURANCE

Insurance carriers (2-digit SIC major group 63) are required to complete this Appendix if voting securities of an insurance carrier are being acquired directly or indirectly.

ITEM 1

Item 1(A)—*Life Insurance.* Provide for the most recent year the amount of premium receipts (calulated on the accrual basis) for each of the lines of insurance listed on page 16 of the Answer Sheets.

Item 1(B)—*New Business.* Provide for the most recent year the amount of new life insurance business issued in the United States (exclusive of revivals, increases, dividend additions and reinsurance ceded) for each of the lines of insurance listed on page 16 of the Answer Sheets.

ITEM 2

Item 2(A)—*Property Liability Insurance.* Provide for the most recent year the amount of direct premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

Item 2(B)—Provide for the most recent year the amount of net premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

ITEM 3

Item 3(A)—*Title Insurance.* Provide for the most recent year the amount of net direct title insurance premiums written in the United States.

Item 3(B)—Provide for the most recent year the amount of direct title insurance premiums earned in the United States.

16 C.F.R. Part 803 - Appendix

NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
3084-0005
Expires 9-30-88

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.

FOR OFFICE USE ONLY
TRANSACTION NUMBER

Is this Acquisition a CASH TENDER OFFER? ☐ YES ☐ NO ☐ CTO ☐ ETR

Do you request Early Termination of the Waiting Period? ☐ YES ☐ NO
(Grants of early termination are published in the Federal Register.)

ITEM 1

(a) NAME AND HEADQUARTERS ADDRESS OF PERSON FILING NOTIFICATION *(ultimate parent entity)*

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

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

(d) 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)
☐ formation of a joint venture or other corporation (see § 801.40)
☐ a consolidation (see § 801.2)
☐ an acquisition of voting securities
☐ a secondary acquisition
☐ an acquisition subject to § 801.31
☐ an acquisition subject to § 801.30 (*specify type*): _____
☐ other (*specify*) _____

(e) INDICATE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED (*acquiring person only*)
☐ $15 million ☐ 15% ☐ 25% ☐ 50%

(f) VALUE OF VOTING SECURITIES	VALUE OF ASSETS

(g) PUT AN X IN THE APPROPRIATE BOX TO DESCRIBE ENTITY FILING NOTIFICATION
☐ corporation ☐ partnership ☐ other (*specify*) _____

(h) DATA FURNISHED BY
☐ calendar year ☐ fiscal year (*specify period*): _____ (*month/day*) to _____ (*month/day*)

(i) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF THE 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

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 $10,000 for each day during which such person is in violation of 15 U.S.C. § 18a.

All 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.

Complete and return *two* notarized copies (with *one set* of documentary attachments) of this **Notification and Report Form** to Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580, and *three* notarized copies (with *one set* of documentary attachments) to Director of Operations, Antitrust Division, Room 3218, Department of Justice, Washington, D.C. 20530. The central office for information and assistance with respect to matters in connection with this **Notification and Report Form** is Room 303, Federal Trade Commission, Washington, D.C. 20580, phone (202) 326-3100.

FTC Form C 4 (rev. 2/87) 1

NAME OF PERSON FILING NOTIFICATION	DATE

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

PERCENT OF VOTING SECURITIES HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

ITEM 2

2(a) DESCRIPTION OF ACQUISITION

NAME OF PERSON FILING NOTIFICATION	DATE

2(b)(i) ASSETS TO BE ACQUIRED *(to be completed only for assets acquisitions)*

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

2(c) VOTING SECURITIES TO BE ACQUIRED

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

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

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

(Item 2(c) continued on next page)

NAME OF PERSON FILING NOTIFICATION	DATE

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

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

(c)(vi) TOTAL NUMBER OF EACH CLASS OF SECURITIES HELD BY ACQUIRING PERSON AS A RESULT OF THE ACQUISITION:

(c)(vii) PERCENTAGE OF EACH CLASS OF SECURITIES HELD BY ACQUIRING PERSON AS A RESULT OF THE ACQUISITION:

(c)(viii) DOLLAR VALUE OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION

(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 AGGREEMENT _____

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 3
ASSETS AND VOTING SECURITIES HELD AS A RESULT OF THE ACQUISITION

(a) PERCENTAGE OF ASSETS _____

(b) PERCENTAGE OF VOTING SECURITIES _____

(c) AGGREGATE TOTAL VALUE _____

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.

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

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

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

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5 (See the "References" listed in the General Instructions to the Form. Refer to the 1987 editon of the *Standard Industiral Classification Manual* for the 4-digit (SIC Code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, *1992 Census of Manufactures and Census of Mineral Industries* (MC92-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code.")

5(a) DOLLAR REVENUES BY INDUSTRY

4-DIGIT INDUSTRY CODE *Product code published*	DESCRIPTION	1992 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

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

7-DIGIT PRODUCT CODE *Product code published*	DESCRIPTION	1992 TOTAL DOLLAR REVENUES

FTC Form C 4 (rev. 07/95) 7

NAME OF PERSON FILING NOTIFICATION	DATE

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

DESCRIPTION (7-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

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

5-DIGIT PRODUCT CLASS CODE *Product code published*	DESCRIPTION	YEAR ____ TOTAL DOLLAR REVENUES

(item 5(b)(iii) continued on page 9)

B

NAME OF PERSON FILING NOTIFICATION		DATE
5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS - CONTINUED		
5-DIGIT PRODUCT CLASS CODE	DESCRIPTION	YEAR TOTAL DOLLAR REVENUES
5(c) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY		
4-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR TOTAL DOLLAR REVENUES

9

NAME OF PERSON FILING NOTIFICATION	DATE

5(d) COMPLETE ONLY IF ACQUISITION IS THE FORMATION OF A JOINT VENTURE OR OTHER CORPORATION

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

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION 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 OR OTHER CORPORATION WILL RECEIVE

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

5(d)(iv)SOURCE OF DOLLAR REVENUES BY 4-DIGIT SIC CODE (*non-manufacturing*) AND BY 5-DIGIT PRODUCT CLASS (*manufacturing*).

NAME OF PERSON FILING NOTIFICATION

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) 4-DIGIT SIC CODE AND DESCRIPTION

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

NAME OF PERSON FILING NOTIFICATION	DATE
7(c) GEOGRAPHIC MARKET INFORMATION	

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 8 VENDOR-VENDEE RELATIONSHIP

☐ NO ☐ YES (*If yes and you are the vendee, complete the following*)

PRODUCT PURCHASES	VENDOR	DOLLAR AMOUNT

ITEM 9 PRIOR ACQUISITIONS (*to be completed by acquiring person only*)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 10 IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

10(a) NAME OF CONTACT PERSON	TITLE OF CONTACT PERSON
FIRM NAME AND BUSINESS ADDRESS	BUSINESS TELEPHONE NUMBER

10(b) 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	TITLE
ADDRESS	BUSINESS TELEPHONE NUMBER

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 _____, 19__

Signature _____ _____

My Commission expires _____

(SEAL)

NAME OF PERSON FILING NOTIFICATION	DATE

APPENDIX: INSURANCE

ITEM 1

A PREMIUM RECEIPTS	YEAR ____ AMOUNT
1 LIFE INSURANCE	
1a. ORDINARY LIFE INSURANCE	
1b. GROUP LIFE INSURANCE (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance).	
1c. INDUSTRIAL LIFE INSURANCE	
1d. CREDIT LIFE INSURANCE	
2 ANNUITY CONSIDERATIONS	
2a. INDIVIDUAL ANNUITY CONSIDERATIONS	
2b. GROUP ANNUITY CONSIDERATIONS	
3 HEALTH INSURANCE	
3a. INDIVIDUAL HEALTH INSURANCE	
3b. GROUP HEALTH INSURANCE	
TOTAL	

B NEW BUSINESS	YEAR ____ AMOUNT
1 ORDINARY LIFE INSURANCE	
2 GROUP LIFE INSURANCE	
3 INDUSTRIAL LIFE INSURANCE	
4 CREDIT LIFE INSURANCE	
TOTAL	

ITEM 2 PROPERTY LIABILITY INSURANCE — YEAR ____

LINE OF INSURANCE	A. DIRECT PREMIUMS	B. NET PREMIUMS

ITEM 3 TITLE INSURANCE — YEAR ____

A. NET DIRECT PREMIUMS WRITTEN	B. DIRECT PREMIUMS EARNED

16

[52 FR 7083, Mar. 6, 1987; as amended at 55 FR 31374, Aug. 2, 1990; 60 FR 40706, Aug. 9, 1995]

KELLEY DRYE

TAB I: RECENT KELLEY DRYE ANTITRUST CLIENT ADVISORIES

KELLEY DRYE

Revised Hart-Scott-Rodino ("HSR") Premerger Notification Thresholds

January 22, 2014 | KELLEY DRYE CLIENT ADVISORY

On January 17, 2014 the Federal Trade Commission ("FTC") announced revised thresholds that determine whether companies are required to notify federal antitrust authorities about a transaction under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") and for the jurisdictional thresholds that trigger the prohibition on interlocking directorates.

New HSR Thresholds

Size-of-Transaction Thresholds. Premerger notification must be filed if – among other things – the value of a transaction exceeds the filing thresholds, which are revised annually, based on the change in gross national product. For 2014, the threshold for reporting proposed mergers and acquisitions subject to enforcement under Section 7A of the Clayton Act increased from $70.9 million to $75.9 million.

Size-of-Person Thresholds. If the value of the securities and assets held as a result of the transaction is between $75.9 million and $303.4 million, the transaction must be reported in most cases if either the acquired or acquiring person has annual net sales or total assets of at least $15.2 million and the other party to the transaction has at least $ 151.7 million in annual net sales or total assets. If the value of the securities or assets exceeds $303.4 million, then the parties must report the transaction notwithstanding the size of the parties.

New Interlocking Directorates Thresholds. Section 8 of the Clayton Act prohibits the same person from serving as an officer or director of competing corporations if certain thresholds are met. The new thresholds for the Act's prohibition on interlocking directorates are $29,945,000 for Section 8(a)(1) and $2,994,500 for Section 8(a)(2)(A).

Effective Dates. The revised thresholds will apply to all transactions that close on or after the effective date of the FTC's notice, which is 30 days after its publication in the Federal Register. The interlocking directorates threshold revisions will be effective upon publication in the Federal Register.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and competition 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.

For more information, please contact:

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

W. Joseph Price
(202) 342-8466
jprice@kelleydrye.com

Practice Area

- Antitrust and Competition

Contacts

- William C. MacLeod
- W. Joseph Price

Office

- Washington, D.C.

KELLEY DRYE

Federal Trade Commission Chairwoman Edith Ramirez Names Deborah L. Feinstein to Serve as Director of the Bureau of Competition

June 25, 2013 | KELLEY DRYE CLIENT ADVISORY

Federal Trade Commission Chairwoman Edith Ramirez has named Deborah L. Feinstein to serve as Director of the Bureau of Competition with an expected start date of July 1st. Ms. Feinstein will join the agency from private practice where she represents a broad range of companies in merger and acquisition matters, and conduct investigations. From 1989 to 1991, she served as an Assistant to the Bureau of Competition Director, before returning to private practice. She is a graduate of Harvard Law School and the University of California at Berkeley.

The Bureau of Competition shares jurisdiction over civil antitrust matters with the Department of Justice Antitrust Division and often works jointly with the Antitrust Division to provide regulatory guidance to businesses. Ms. Feinstein's appointment does not require U.S. Senate confirmation. The head of the Antitrust Division is Assistant Attorney General for Antitrust, William Baer, whom the U.S. Senate confirmed on December 30, 2012.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier Antitrust and Competition 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.

For more information about this client advisory, please contact:

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

W. Joseph Price
(202) 342-8466
jprice@kelleydrye.com

Practice Area

- Antitrust and Competition

Contacts

- William C. MacLeod
- W. Joseph Price

Office

- Washington, D.C.

KELLEY DRYE

President Obama To Designate Edith Ramirez as Chairman of the FTC

March 1, 2013 | KELLEY DRYE CLIENT ADVISORY

As announced yesterday, President Obama plans to name Edith Ramirez, a Democrat and current Federal Trade Commission ("FTC") Commissioner, to serve as Chairman of the FTC, effective March 4, 2013. This appointment indicates continuity with the Consumer Protection and Competition policies the Commission followed under her predecessor, Jon Leibowitz. While Commissioner, she has voted, almost without exception, with the majority of her colleagues. When she takes over as Chairman on Monday, no confirmation hearings will be necessary because she is a sitting Commissioner who previously received Senate approval.

Consumer Protection Policy

Since her appointment as a Commissioner in April 2010, Ramirez seldom has distanced herself from Commission decisions. Where she has, she has indicated a reluctance to depart from precedent. For example, she opposed the addition of a deception count to a complaint alleging unfair and deceptive practices by a payday lender, a dissent indicating a more rigorous deception standard than her colleagues applied in the case. As a Commissioner, she has specifically supported the Commission's focus on privacy and data security and advocated industry self-regulation as a complement to government regulation.

Privacy and Data Security

In a June 2012 speech, Commissioner Ramirez endorsed the FTC's final Privacy Report, which calls on companies to implement best practices to protect consumer information ("Privacy-By-Design"), Congress to enact baseline privacy and data security legislation with civil penalties, and industry to accelerate the pace of self-regulation. She noted that, while the vision of Privacy-By-Design is not new, it now has "greater urgency as a result of the nearly constant collection and sharing of consumer data that changes in technology have made possible."

The FTC has aggressively enforced "Privacy-By-Design" in the mobile arena. It is likely that, as Chairman, Commissioner Ramirez and the FTC will continue to address the Report's recommendations in the manner that she outlined in June, including urging Congress to enact "comprehensive privacy legislation to better address the privacy challenges of the digital age," while actively enforcing existing privacy and data security laws.

Commissioner Ramirez also has expressed support for the final amendments to the Children's Online Privacy Protection Act ("COPPA") Rule, which go into effect July 1, 2013. In October, Commissioner Ramirez highlighted positive changes to the Rule, such as the requirement that companies obtain parental consent prior to collecting a child's information and the Rule's applicability to mobile apps, third-party plug-ins, and online tracking. She also pointed out that the Commission had filed its twentieth COPPA case, underscoring that the defendant in that case operated a website with a general audience, but had knowledge of its use by children. Given Commissioner Ramirez's position on privacy protection for children, and the FTC's recent enforcement activity – especially in the mobile arena – companies should expect continued Commission enforcement of the COPPA Rule both before and after the amendments take effect in July.

Self-Regulation

Commissioner Ramirez also has supported industry self-regulation. In November 2012, she encouraged the use of self-regulation and voluntary codes of conduct, stressing that such codes should be transparent, implemented by industry, civil society, and government, and contain strong monitoring and enforcement provisions. She was involved with the APEC Cross-Border Privacy Rules System and its attempt to create voluntary consumer data safeguards. She also supports industry "Do Not Track" self-regulation.

Competition Policy

Commissioner Ramirez has supported the vast majority of the Commission's competition agenda, including Chairman Leibowitz' signature program challenging settlements between generic and branded-

Practice Areas

- Advertising and Marketing
- Antitrust and Competition
- Privacy and Information Security
- FTC and State AG Investigations

Contacts

- Christie Grymes Thompson
- David J. Ervin
- Alysa Zeltzer Hutnik
- William C. MacLeod
- Gonzalo E. Mon
- Sarah Roller
- Lewis Rose
- Dana B. Rosenfeld
- John E. Villafranco

Office

- Washington, D.C.

drug manufacturers that involve payments allegedly delaying the marketing of generic drugs when branded drugs lose patent protection. The Supreme Court will decide the antitrust rules governing these settlements. Should the decision favor challengers like the Commission and private plaintiffs, this enforcement program will intensify.

On topics from mergers to concerted action to monopolization, Commissioner Ramirez has staked positions in alignment with the current Commission. She supported the Commission's decision to close the Google competition probe (although she objected to the form of the disposition). She has supported the Commissions challenges against mergers and concerted action in the health care industry, an area that should see increasing attention from the Commission during her tenure. One intriguing suggestion she recently floated – that the Commission use its authority to subpoena entire industries to examine the effects of mergers and acquisitions – could now become enforcement policy. Her experience as an antitrust and intellectual-property practitioner is evident in her speeches and votes in cases involving the intersection between the disciplines.

Professional Background

Prior to becoming Commissioner in 2010, Commissioner Ramirez was appointed by Mayor Antonio Villaraigosa to the board of commissioners for the Los Angeles Department of Water and Power. Commissioner Ramirez worked for Quinn Emanuel Urquhart & Sullivan and, before then, at Gibson, Dunn & Crutcher in the firms' Los Angeles offices. While in private practice, she handled antitrust, unfair competition, intellectual property, and Lanham Act issues. She clerked for the Honorable Alfred T. Goodwin on the Ninth Circuit from 1992 to 1993.

The Other Current Commissioners

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 Julie Brill, a Democrat; Maureen K. Ohlhausen, a Republican; and Joshua D. Wright, a Republican. With Chairman Leibowitz's departure, there is an opening for a third Democratic Commissioner. While each Commissioner has one vote on issues of substantive policy, the Chairman exercises more influence charting the FTC's course.

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.

Kelley Drye is recognized as a premier antitrust and competition 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.

For more information about this Client Advisory, please contact:

Christie Grymes Thompson
(202) 342-8633
cgthompson@kelleydrye.com

David J. Ervin
(202) 342-8436
dervin@kelleydrye.com

Alysa Zeltzer Hutnik
(202) 342-8603
ahutnik@kelleydrye.com

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

Gonzalo E. Mon
(202) 342-8576
gmon@kelleydrye.com

Sarah Roller
(202) 342-8582
sroller@kelleydrye.com

KELLEY DRYE

Supreme Court Narrows the Application of State-Action Doctrine Immunity with Ruling Against a State Hospital Authority in *FTC v. Phoebe Putney Health System, Inc.*

February 19, 2013 | KELLEY DRYE CLIENT ADVISORY

The Supreme Court today unanimously ruled that a purchase-and-lease transaction involving a county hospital authority acting under state law authority was not immune from federal antitrust laws and Federal Trade Commission (FTC) challenge. The Court's decision reverses the 11th U.S. Circuit Court of Appeals in Atlanta that upheld dismissal of a FTC federal court complaint seeking a temporary restraining order and preliminary injunction.

The case is the first by the Court considering the doctrine of "state action" immunity in 20 years. Under the state action doctrine, a state's laws must reflect a clear articulate affirmative policy, among other factors, to allow private parties, state agencies and authorities, to act with immunity from federal antitrust laws. Unresolved, until now, was how articulate the state's legislation must be and whether a court could infer a state's intent to displace competition if anti-competitive actions will "foreseeably result" from the state's policy.

Writing for the Court, Justice Sotomayor found "no evidence the state affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." "The state legislature's objective of improving access to affordable healthcare does not logically suggest that the state intended that hospital authorities pursue that end through mergers that create monopolies," she wrote. Nor, the Court found, does "Georgia's grant of general corporate powers to hospital authorities . . . include permission to use those powers anticompetitively."

"Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns." But legislation that grants power to a state agent to do something does not mean it may do so anticompetitively, without explicit authorization, according to the Court.

State authorities that rely upon similarly broad statutory authorizations to avoid federal antitrust challenges, without language clearly articulating potential anticompetitive consequences, will have to consider its laws against the new standard set by the Supreme Court. A reviewing court will not err on the side of recognizing immunity to avoid improper interference with state policy choices. It will look for state legislation indicating "the substate governmental entity . . . has been delegated authority to act or regulate anticompetitively."

Practice Areas

- Antitrust and Competition
- Mergers and Acquisitions

Contacts

- William C. MacLeod
- W. Joseph Price

Office

- Washington, D.C.

KELLEY DRYE

Revised Hart-Scott-Rodino ("HSR") Premerger Notification Thresholds

January 10, 2013 | KELLEY DRYE CLIENT ADVISORY

On January 10, 2013 the Federal Trade Commission ("FTC") announced revised thresholds that determine whether companies are required to notify federal antitrust authorities about a transaction under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") and for the jurisdictional thresholds that trigger the prohibition on interlocking directorates.

New HSR Thresholds

Size-of-Transaction Thresholds. Premerger notification must be filed if – among other things – the value of a transaction exceeds the filing thresholds, which are revised annually, based on the change in gross national product. For 2013, the threshold for reporting proposed mergers and acquisitions subject to enforcement under Section 7A of the Clayton Act increased from $68.2 million to $70.9 million.

Size-of-Person Thresholds. If the value of the securities and assets held as a result of the transaction is between $70.9 million and $283.6 million, the transaction must be reported in most cases if either the acquired or acquiring person has annual net sales or total assets of at least $14.2 million and the other party to the transaction has at least $ 141.8 million in annual net sales or total assets. If the value of the securities or assets exceeds $283.6 million, then the parties must report the transaction notwithstanding the size of the parties.\

New Interlocking Directorates Thresholds. Section 8 of the Clayton Act prohibits the same person from serving as an officer or director of competing corporations if certain thresholds are met. The new thresholds for the Act's prohibition on interlocking directorates are $28,883,000 for Section 8(a)(1) and $2,888,300 for Section 8(a)(2)(A).

Effective Dates. The revised thresholds will apply to all transactions that close on or after the effective date of the FTC's notice, which is 30 days after its publication in the Federal Register. The interlocking directorates threshold revisions will be effective upon publication in the Federal Register.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and competition 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.

For more information about this client advisory, please contact:

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

W. Joseph Price
(202) 342-8466
jprice@kelleydrye.com

Practice Area

- Antitrust and Competition

Contacts

- William C. MacLeod
- W. Joseph Price

Office

- Washington, D.C.

KELLEY DRYE

Senate Confirms Key Administration Posts at the Federal Trade Commission and Antitrust Division of the Department of Justice

January 3, 2013 | KELLEY DRYE CLIENT ADVISORY

The Senate recently confirmed Dr. Joshua D. Wright to a seven-year term as Commissioner of the Federal Trade Commission and William J. Baer as Assistant Attorney General of the Antitrust Division, Department of Justice.

Joshua Wright, a Republican, joins the FTC from the George Mason University where he was a Professor at the School of Law and member of the Department of Economics. Professor Wright previously served as the inaugural Scholar in Residence at the FTC's Bureau of Competition and is known for his expertise antitrust law and economics, consumer protection, empirical law and economics, intellectual property and the law and economics of contracts. Professor Wright has testified at the joint Department of Justice/ Federal Trade Commission Hearings; his publications have appeared in leading academic journals. Professor Wright received both a J.D. and a Ph.D. in economics from UCLA, and a B.A. in economics with highest departmental honors at the University of California, San Diego.

Bill Baer joins DOJ from private practice where he represented a broad range of companies in U.S. and international cartel investigations, mergers and acquisition reviews, and in antitrust litigation. From 1995 to 1999, he served as the Director for the Bureau of Competition at the FTC, where he began his legal career in 1975 as a trial attorney for the Bureau of Consumer Protection. A Wisconsin native, Mr. Baer holds a B.A. from Lawrence University and a J.D. from Stanford Law School. The Justice Department has not had a permanent antitrust chief since August 2011.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and competition 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.

For more information about this client advisory, please contact:

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

Richard E. Donovan
(212) 808-7756
rdonovan@kelleydrye.com

August T. Horvath
(212) 808-7528
ahorvath@kelleydrye.com

W. Joseph Price
(202) 342-8466
jprice@kelleydrye.com

Practice Areas

- Antitrust and Competition
- FTC and State AG Investigations

Contacts

- William C. MacLeod
- Richard E. Donovan
- August T. Horvath
- W. Joseph Price

Offices

- Washington, D.C.
- New York

KELLEY DRYE

FTC and DOJ Agree with Indian Competition Authorities to Increase Cooperation and Communication: An Increasing Relevance of India and China in Global Transactions

October 15, 2012 | KELLEY DRYE CLIENT ADVISORY

The U.S. Federal Trade Commission (FTC) and the Department of Justice (DOJ) recently signed an antitrust memorandum of understanding (MOU) with the Government of India Ministry of Corporate Affairs and the Competition Commission of India (CCI), promising to increase cooperation and communication among competition agencies in both countries.[1] It is the 12th cooperation agreement for the U.S.

Key provisions establish a framework for formal cooperation on transactions that may be in their common interests and a means to keep each other informed of significant competition policy and enforcement developments in their jurisdictions. The agreement does not change existing law in either country.

Increasing Relevance of India and China in Transaction Reviews

The agreement with India marks an increasing relevance of countries with emerging economies in transactions and merger enforcement, as a growing number of international mergers affect India and the People's Republic of China. China signed a similar agreement with the U.S. last year.

India and China also have new competition laws and practices. India adopted its modern competition law in 2002 with main provisions in effect between 2009 and 2011. China recently passed the fourth year since it adopted a new Anti-Monopoly Law (AML), after more than 10 years of drafting.

The merger control regimes of India and China have been known to take tough stances, especially when a transaction affects a core part of their economy or key domestic industry. While M&A activity continues to recover from the global financial crisis, it appears that antitrust and competition enforcers in many countries are placing a priority on merger enforcement, a pattern that is likely to continue for the foreseeable future. Transactions affecting markets that are global in nature may require country-specific issue resolution and additional time before closing.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and competition 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.

For more information about this client advisory, please contact:

William C. MacLeod
(202) 342-8811
wmacleod@kelleydrye.com

W. Joseph Price
(202) 342-8466
jprice@kelleydrye.com

Practice Area

- Antitrust and Competition

Contacts

- William C. MacLeod
- W. Joseph Price

Office

- Washington, D.C.

KELLEY DRYE

Recent DOJ Settlement Highlights The Risks Associated With Certain Joint Bid Or Non-Bid Arrangements

February 28, 2012 | KELLEY DRYE CLIENT ADVISORY

Two natural gas developers this month agreed to pay a total of $550,000 to settle claims that they violated the Sherman Act and the False Claims Act by engaging in an anticompetitive bidding arrangement.[1] This action should serve as a reminder to unaffiliated companies who engage in joint bidding that while the practice can be pro-competitive and therefore legal, under some circumstances it can be viewed as anticompetitive and illegal.

The DOJ Proceeding

The two companies involved in the action filed by the Department of Justice, Antitrust Division ("DOJ") were unaffiliated entities, separately engaged in the exploration and development of natural gas resources in western Colorado. In order to settle litigation between them, the companies entered into negotiations to collaborate on developing this particular area, including the joint acquisition of certain assets and improvements to existing pipelines. Those discussions were not successful.

Subsequently, in response to an expression of interest by one of the companies, the federal government announced a lease sale for the rights to develop three particular tracts. According to the allegations by DOJ, the two companies were independently interested in those tracts and likely would have bid against each other at the auction. Instead, just two days before the auction, the parties entered into a memorandum of understanding with each other which provided that one of the companies would bid at auction up to a maximum price agreed on by both companies. If the company was successful at auction, it would assign a 50% interest in the lease to the other company. Both companies attended the auction but, as agreed, only one of them bid. With respect to at least one parcel, the parties had agreed to bid as high as $300 per acre, but the bid was won by the one defendant with a bid of only $2 per acre. In its Complaint, the DOJ alleged that the United States received less revenue than it would have received had the two companies competed for the leases.

A whistleblower suit was filed under the False Claims Act (presumably by an employee), which led the DOJ to investigate. Simultaneously with the filing of its civil Complaint, the DOJ and the defendants filed papers with the court seeking approval of a settlement in the total amount of $550,000, which DOJ alleged "reflects the likely additional bid revenue that the Bureau of Land Management would have received" had the defendants acted independently. The settlement is now subject to public comment before review by the U.S. District Court.

Minimizing Risk in Arrangements With Others Relating to Bidding

The Sherman Act prohibits any form of agreement or understanding that unreasonably restrains trade in a particular market. Arrangements between otherwise competing entities relating to bidding, a common practice in many industries, can be either pro-competitive or anticompetitive (an unreasonable restraint of trade), depending on the circumstances. Generally true joint bidding is where two firms pool their resources and submit a bid jointly; it is usually considered to be pro-competitive. An agreement that one or more firms will not submit a bid is much more likely to be considered anticompetitive. An agreement to "rig" a bid by agreeing which bidder will submit the low bid is always anticompetitive, and usually prosecuted as a criminal offense. Characterizing which type of agreement is involved is not always clear.

First, it is significant whether both of the entities would otherwise have submitted separate bids. If one or both companies would not have bid, for example because of the size of the job or the risk profile, and the arrangement allowed them to participate by pooling resources and/or expertise, that would be viewed as pro-competitive, working to benefit the seller and the public. On the other hand, if the entities could have bid separately but wanted to avoid competition with each other so as to win the bid at a lower price, that would be viewed as anticompetitive because the seller was deprived of the benefits of full and fair competition. For this reason, a joint arrangement is less likely to be perceived as anticompetitive if there are multiple firms bidding on the contract or asset, since they will normally generate sufficient competition to result in a fair award.

If joint bidders share the risk of a project and/or jointly provide assets or services to the project, that is another indication that the joint arrangement is pro-competitive. For example, if parties bid jointly to acquire the asset but then intend to proceed separately, that would be more suspicious than the situation

Practice Area

- Antitrust and Competition

Contacts

- Richard E. Donovan
- August T. Horvath

Office

- New York

where the joint bidders intend to jointly fund and manage or develop a project. Thus the DOJ explicitly noted in the papers filed with the court that, at the time they agreed to a single bid, the parties had not entered into an agreement to jointly develop the leases and pipelines, suggesting that if they had, DOJ might have viewed the matter differently. Accordingly, parties can reduce their antitrust risk by making any agreement related to a bid ancillary to (combined with) an agreement to engage in joint development of the project should the bid be successful.

Finally, joint bidders can reduce risk by disclosing to the seller that they are engaged in a joint bid. In the DOJ case, to the contrary, one party submitted the bid but the other also attended the auction, giving the appearance of being interested in its own bid. This is much more likely to be viewed as an agreement that one company will not bid, which is more likely to be characterized as anticompetitive than a true joint bid.

Joint arrangements can be a necessary and pro-competitive activity. Because of the risks, however, it is prudent, particularly in circumstances involving arrangements whereby a competitor agrees not to bid, to engage experienced legal counsel early on to help plan the negotiations, communications, and information exchanges so as to minimize antitrust exposure.

For more information on this advisory, please contact:

Richard E. Donovan
(212) 808-7756
rdonovan@kelleydrye.com

August Horvath
(212) 808-7528
ahorvath@kelleydrye.com

---

1 *U.S. v. SG Interests I, Ltd.*, Competitive Impact Statement, 77 Fed. Reg. 10775-81 (Feb. 23, 2012)