FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802, and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: These rules amend the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition might violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. During the seven years the rules have been in effect, the Federal Trade Commission, with the concurrence of the Assistant Attorney General for Antitrust, has amended the premerger notification rules several times in order to improve the program's effectiveness and to lessen the burden of complying with the rules. These revisions are intended to reduce further the cost to the public of complying with the rules and to improve the program's effectiveness.

EFFECTIVE DATE: April 10, 1987.

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SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

These amendments to the Hart-Scott-Rodino premerger notification rules are largely technical or designed to reduce the burden to the public of reporting. The Commission has determined that none of the proposed rules is a major rule, as that term is defined in Executive Order 12291. The amendments will not result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments expands the coverage of the premerger notification rules in a way that would affect small business. Therefore, pursuant to section 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96-354 (September 19, 1980), the Federal Trade Commission has certified that these rules will not have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring a final regulatory flexibility analysis of these rules, is therefore inapplicable.

Paperwork Reduction Act

The Hart-Scott-Rodino Premerger Notification rules and report form contain information collection requirements as defined by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* These requirements have been reviewed and approved by the Office of Management and Budget (OMB Control No. 3084-0005). Because these amendments will affect the information collection requirements of the premerger notification program, they were submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act. They were approved by OMB on September 30, 1985.

Background

Section 7A of the Clayton Act ("the act"), 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain acquisitions of assets or voting securities to give advance notice to the Federal Trade Commission (hereafter referred to as "the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to as "the Assistant Attorney General") and to wait certain designated periods before the consummation of such acquisitions. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of section 7A. This amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

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

Subsection 7A(d)(1) of the act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, to require that the notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. Subsection 7A(d)(2) of the act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority: (A) To define the terms used in the act; (B) to exempt additional persons or transactions from the act's notification and waiting period requirements, and (C) to prescribe such other rules as may be necessary and appropriate to carry out the purposes of section 7A.

On December 15, 1976, the Commission issued proposed rules and a proposed Notification and Report Form ("the Form") to implement the act. This proposed rulemaking was published in the **Federal Register** of December 20, 1976, 41 FR 55488. Because of the volume of public comment, it became clear to the Commission that some substantial revisions would have to be made. On July 25, 1977, the Commission determined that additional public comment on the rules would be desirable and approved revised proposed rules and a revised proposed Notification and Report Form, which were published in the **Federal Register** of August 1, 1977, 42 FR 39040.

Additional changes were made after the close of the comment period. The Commission formally promulgated the final rules and Form and issued an accompanying Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The final rules and Form and the Statement of Basis and Purpose were published in the **Federal Register** of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts, which appear at 16 CFR Parts 801, 802, and 803. Part 801 defines a number of the terms used in the act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to Part 803 of the rules.

Changes of a substantive nature have been made in the premerger notification rules or Form on four occasions since they were first promulgated. The first was an increase in the minimum dollar value exemption contained in § 802.20 of the rules. This amendment was proposed in the **Federal Register** of August 10, 1979, 44 FR 47099, and was published in final form in the **Federal Register** of November 21, 1979, 44 FR 60781. The second amendment replaced the requirement that certain revenue data for the year 1972 be provided in the Notification and Report Form with a requirement that comparable data be provided for the year 1977. This change was made because total revenues for the year 1977 broken down by Standard Industrial Classification (SIC) codes became available from the Bureau of the Census. The amendment appeared in the **Federal Register** of March 5, 1980, 45 FR 14205, and was effective May 3, 1980.

The third set of changes was published by the Federal Trade Commission as proposed rules changes in the **Federal Register** of July 29, 1981, 46 FR 38710. These revisions were designed to clarify and improve the effectiveness of the rules and of the Notification and Report Form as well as to reduce the burden of filing notification. Several comments on the proposed changes were received during the comment period. Final rules, which adopted some of the suggestions received during the comment period but which were substantially the same as the proposed rules, were published in the **Federal Register** on July 29, 1983, 48 FR 34427, and became effective on August 29, 1983. The fourth change, replacing the requirement to provide 1977 revenue data with a requirement to provide 1982 data on the Form, was published in the **Federal Register** on March 26, 1986, 51 FR 10368.

In addition, the Notification and Report Form, found in 16 CFR 803 (Appendix), has undergone minor revisions on two other occasions. The new versions were approved by the Office of Management and Budget on December 29, 1981, and February 23, 1983, respectively. Since that time, the current version of the Notification and Report Form has been approved by the Office of Management and Budget. The most recent approval came on September 30, 1985; it is valid for a period of three years. This form was published in 50 FR 46633 (November 12, 1985).

The current set of changes to the premerger notification rules grows out of a continuing effort by the Commission to reduce the burden of filing premerger notifications. This effort was the focus of a Notice of Request for Comments that the Commission published in the **Federal Register** on July 2, 1982, 47 FR 29182. The Request for Comments outlined four approaches to reducing the burden of the notification program: Narrowing the coverage of the rules by raising the dollar thresholds that determine which acquisitions must be reported; allowing persons filing notifications to reference information and documents filed in previous notifications, rather than requiring them to resubmit those materials; setting separate higher dollar reporting thresholds for acquisitions in some industries; and eliminating one or more of the successive reporting requirements for additional acquisitions of voting securities.

On September 24, 1985, the Commission published in the **Federal Register**, 50 FR 38742, thirteen proposed amendments accompanied by a proposed Statement of Basis and Purpose. All but two of the proposals were based on the burden reduction efforts that began in 1982. The Commission has decided to adopt nine of the proposals, to reject one proposal for budgetary reasons, and temporarily to defer action on the other three. Since one of the two proposals that do not involve burden reduction is also one of the three being deferred for later consideration, all but one of these final rules are based on the 1982 Request for Comments and related burden reduction efforts. The amendments seek to reduce the burden on filing parties by narrowing the types of acquisitions that must be reported, reducing the volume of documents or information that must be filed, and clarifying the meaning of the notification rules. The only change that did not originate from the burden reduction efforts would eliminate the reporting exemption in § 802.70(b) for acquisitions subject to the approval of the Commission or a federal court. It is intended to solve an infrequently occurring administrative problem.

The Commission has deferred final action on: The proposal to require reporting by owners of interests in "acquisition vehicles" (Proposal 1 of the September 24, 1985, proposed amendments); the proposed exemption of certain asset acquisitions, including the acquisition of current supplies, new durable goods, and some types of real estate (Proposal 5); and the proposed increase in the "controlled issuer" threshold that would have expanded the exemption for transactions valued at $15 million or less in § 802.20(b) and for certain foreign transactions described in § 802.50 and § 802.51 (Proposal 6).

The Commission has decided to adopt two approaches to narrow the coverage of the rules. Section 802.35 will exempt the acquisition of an employer's voting securities by certain employee trusts. Also, the aggregation rules of § 801.13 have been modified to reduce the number of successive asset acquisitions involving the same parties that are reportable.

In the September 24, 1985, proposed amendments, the Commission also proposed as a burden reduction measure expanding the permitted scope of incorporation by reference in response to items on the Form. Proposed rule § 803.9, which would have replaced § 803.2(e), would have expanded the ability to incorporate by reference. The implementation of this proposal would entail significant start up costs and require an ongoing commitment of resources to assure that filings could be fully reviewed within the statutory time periods. In view of the existing permission to incorporate by reference and given current budgetary stringencies, the Commission believes it is not appropriate at this time to undertake the kind of new program envisaged by the proposed rule. Although the proposal to expand incorporation by reference is not being adopted, the Commission has adopted several other proposals that have the effect of reducing the burden of filing the Notification and Report Form by both decreasing the amount of information required and narrowing the scope of the search for that information.

As noted when these amendments were proposed, the Commission has not found a basis for establishing separate reporting thresholds for different industries. However, Proposal 5, one of the three on which final action is deferred, would have established a higher threshold for, or exempted entirely, the acquisition of certain kinds of assets. The Commission is continuing to consider what kinds of asset acquisitions can receive separate treatment.

The Commission also has not proposed eliminating any of the sequential thresholds for reporting increased holdings of voting securities. The Commission continues to find that an increase in the percentage of securities held by a person may have competitive significance.

In addition to expanding reporting exemptions and reducing the information required by the Form, the Commission has also decided to reduce the burden of the notification program by adopting several amendments that clarify the meaning of the rules. These largely codify formal or informal interpretations of the Commission staff. These amendments include: A method of calculating the assets of an entity without a regularly prepared balance sheet; a method of calculating the percentage of voting securities a person holds; the requirements for giving notice to an acquired person; the time when the statutory waiting period begins for the formation of joint ventures; and a series of changes to examples in the rules to reflect prior amendments to the rules.

As mentioned above, the Commission has also addressed one matter in these amendments that is unrelated to burden reduction. The Commission has adopted a proposed amendment that deletes the exemption from reporting in § 802.70(b) for acquisitions subject to the prior approval of the Commission or a Federal court. This change will facilitate the administration of the premerger notification program and is expected to increase the volume of notifications only marginally. This proposal did not draw any adverse comment.

Three comments proposed that the Commission provide additional exemptions. One of the comments, comment 22, urged that the size-of-transaction test in § 802.20 of the rules be amended to exempt all acquisitions of less than 50 million. The 1982 Request for Comments had discussed raising the statutory $15 million minimum size-of-transaction criteria of section 7A(a)(3)(B) to $25 million. This discussion was premised in part on statistics from transactions filed in 1981 showing the enforcement agencies had demonstrated a lower level of interest in transactions of less than $25 million. It became clear from statistics covering 1982 and 1983, however, that the pattern of lower enforcement interest did not persist in subsequent years. Consequently, the Commission has not pursued that approach. Comment 14 suggested that § 802.8 be amended to exempt acquisitions of less than 10% of the shares of an air carrier, even though acquisitions at that level do not require the prior approval of the Department of Transportation. Comment 20 suggested more generally that the Commission exempt all acquisitions of less than 5% of the voting securities of an issuer. The Commission will consider whether these suggestions are justified. The Commission welcomes these and any other suggestions about the administration of the program.

Comments

The comment period for these rules was originally scheduled to end on October 24, 1985, but was extended by Commission action to November 29, 1985. The following comments were received:

No.	Date of letter	Organization
1	10-21-85	The RREEF Funds.
2	10-23-85	Anderson, Raymond & Lowenthal.
3	10-23-85	California Federal Savings and Loan Association.
4	10-23-85	Debevoise & Plimpton.
5	10-31-85	National Association of Manufacturers.
6	11-07-85	Shell Oil Company.
7	11-18-85	Association of the Bar of the City of New York, Committee on Antitrust and Trade Regulation.
8	11-19-85	Coldwell Banker Commercial Group, Inc.
9	11-22-85	Aetna Companies.
10	11-26-85	Exxon Corporation.
11	11-27-85	American Council of Life Insurance.
12	11-26-85	National Realty Committee.
13	11-26-85	State Teachers Retirement System of Ohio.
14	11-27-85	Texas Air Corporation.
15	11-27-85	Ropes & Gray.
16	11-28-85	American Bar Association, Section of Antitrust Law.
17	11-26-85	International Council of Shopping Centers.
18	11-29-85	Sullivan & Cromwell.
19	11-29-85	Weil, Gotshal & Manges.
20[1]	11-29-85	Akin, Gump, Strauss, Hauer & Feld.
21[1]	11-25-85	Trammell Crow Company.[2]
22[1]	12-09-85	ITT Corporation.
23[1]	01-13-86	Zaremba Corporation.
24[1]	02-13-86	Exxon Corporation.
25[1]	03-17-86	Pension Real Estate Association.
26[1]	04-21-86	American Council of Life Insurance.
27[1]	08-22-86	International Council of Shopping Centers.

[1] These comments were received after the close of the extended comment period. The Commission has, however, considered the issues raised by these comments in formulating these final rules.

[2] The Commission received several comments from individuals at the Trammell Crow Company.

Statement of Basis and Purpose for the Commission's Revised Premerger Notification Rules

Authority: The Federal Trade Commission, with the concurrence of the Assistant Attorney General, promulgates these amendments to the premerger notification rules pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

1. Section 801.11(e): Total Assets of a Person Without a Regularly Prepared Balance Sheet

Amended § 801.11 codifies a longstanding informal position of the Commission staff that a person without a regularly prepared balance sheet generally should not include funds used to make an acquisition in determining its size. This issue arises primarily in connection with newly-formed entities, not controlled by any other entity, that have not yet drawn up a balance sheet. Under this rule, if such an entity's only assets are cash that will be used to make an acquisition and securities of the entity it is acquiring, it generally will not have to file for that acquisition because it will be deemed too small to meet the act's size-of-person test. This rule is intended to limit the coverage of the premerger rules to those situations when an antitrust violation is most likely to be present, that is, when one business entity of a substantial size acquires another business entity of a substantial size. The basic rule is explained below. The rule also contains an exception when the entity acquires assets or voting securities of more than one person.

The Purpose of the Rule

A notification must be filed prior to an acquisition only if the acquiring and acquired persons meet the minimum size criteria of section 7A(a)(2) of the act. In general, the act requires one of the parties to have annual net sales or total assets of at least $10 million and the other annual net sales or total assets of at least $100 million. Section 801.11 establishes the procedure by which the parties to an acquisition must determine their size. Section 801.11(c) provides that the annual net sales of a person shall be as stated on its last regularly prepared income statement, and its total assets shall be as stated on its last regularly prepared balance sheet. It does not directly address the question of how to calculate the total assets of a person that does not have a regularly prepared balance sheet. However, in instances in which a party has no regulary prepared balance sheet and does not have an income statement demonstrating that the act's size criteria for annual sales is met, the 1978 Statement of Basis and Purpose states a balance sheet must be prepared to determine whether the act applies. See 43 FR 33474 (July 31, 1978).

In advising such persons of their obligation to prepare balance sheets, the Commission staff has for some time stated that acquiring persons should not include as assets cash or loans that will be used to make an acquisition. The Commission now adopts this staff position and incorporates it in § 801.11(e). The new rule does not alter the manner in which firms with regularly prepared balance sheets determine whether they meet the act's size-of-person criteria; as provided in § 801.11(a) through (d), they continue to be governed by those regularly prepared statements, which may or may not include such cash or loans.

The distinction between the calculation of assets for business entities with regularly prepared balance sheets and those without them is based on the difference in their competitive significance and on the certainty and simplicity of the 1978 balance sheet rule. First, the size of an acquiring person can provide some measure of its competitive importance, and the act reflects Congress's conclusion that the amount of sales and assets are useful measurements of size. These size criteria can be misleading, however, when applied to entities without regularly prepared balance sheets, which are generally either newly-formed entities or shell corporations being used to make an acquisition. Such entities typically have had no sales and frequently have no assets other than the cash or loans used to make the acquisition. Thus, when they are not controlled by any other entity, the acquiring person has no competitive presence. In such instances the acquisition does not combine businesses but merely changes the ownership of a single ongoing business; it therefore cannot reduce competition. Accordingly, the Commission has concluded that no purpose is served by requiring such acquisitions to be reported.

Similarly, when an entity that is not an operating company acquires voting securities of one person in several sequential transactions, its prior possession of other securities of that person generally does not enhance the anticompetitive potential of the transaction. The already acquired securities do not constitute an independent business that, when combined with additional securities of that issuer, could lessen competition. Only one business is being bought. However, if the acquiring entity purchases assets or voting securities of more than one person, an anticompetitive combination could result. For that reason, § 801.11(e) includes an exception that requires counting cash, loans, and securities in those circumstances.

Although it might be argued that operating companies with regular balance sheets should also be directed to deduct from their total assets any cash or loans earmarked for making the acquisition and any securities issued by the acquired person, the Commission does not believe it advisable to do so. First, to direct that such deductions be made would require many persons to prepare a new balance sheet to determine the reportability of acquisitions. Rules explaining how to prepare that balance sheet would introduce needless complexity into the process of complying with the rules, a problem that the Commission largely obviated when it promulgated the existing financial statements rule of § 801.11 (see 43 FR 33473–33474 (July 31, 1978)).

Second, in most instances, the application of § 801.11(a) through (d) automatically reaches the same result for ongoing companies as § 801.11(e) does for newly-formed and other nonoperating companies. Loans made to ongoing businesses for the purpose of making an acquisition are normally made just prior to consummation of the acquisition and are therefore not reflected on the person's last regularly prepared balance sheet. Thus, under paragraphs (a) through (d), such loans usually are not included when calculating an acquiring person's total assets.

Finally, the Commission regards the predictability and convenience of the balance sheet approach as valuable even if it results in small inconsistencies in measuring a person's size. The approach allows the vast majority of firms to rely on their balance sheets to determine whether they have an obligation to file notification. Businesses can quickly determine from existing records whether they must file and that determination can be reviewed quickly and objectively by the enforcement agencies. This convenience outweighs the value of trying to make more precise or more uniform calculations of the dollar size criteria, which are at best only very preliminary measures of competitive significance. Accordingly, the Commission will continue to require ongoing businesses to determine their size on the basis of regularly prepared balance sheets.

Section 801.11(e)

General rule. Section 801.11(e) states that it applies only when the person does not have a regularly prepared balance sheet. This section applies only to entities not controlled by any other entity, and as a practical matter, it applies primarily to newly formed entities that have not yet drawn up balance sheets. Persons with regularly prepared balance sheets are still required to calculate their size in accordance with paragraphs (a) through (d) of § 801.11. Section 801.11(e) also does not alter the method set forth in § 801.40(c) for determining the size of a joint venture in its formation transaction. Subsection (e)(1) sets forth the general rule that assets including cash or securities are always included on a person's balance sheet, except for cash that will be used to make an acquisition, securities issued by the acquired person (or an entity within the acquired person), and expenses incidental to the acquisition.

This exclusion continues until the acquiring person has a regularly prepared balance sheet. For example, if a newly-formed person buys voting securities of a single acquired person in a series of acquisitions, that series of acquisitions will be treated the same as a single acquisition of those voting securities. Neither the cash to be used to acquire additional voting securities nor any securities of the same acquired person already held by the acquiring person are counted as assets until the acquiring person prepares its first regularly prepared balance sheet. Thus, even if an acquiring person without a regularly prepared balance sheet accumulated $200 million in voting securities of one person in a four-month period, it would not meet the size-of-person test in acquisitions of that acquired person's voting securities as a result of holding those $200 million of voting securities until it had a regularly prepared balance sheet.

In contrast, the rule treats sequential asset acquisitions differently. Assets must be reflected on the acquiring entity's balance sheet as soon as they are acquired. The acquisition of assets by a previously non-operating entity, unlike the infusion of cash into such an entity and unlike its acquisition of a portion of a person's voting securities, can represent the establishment of an operating business. Further purchases of assets, even from the prior owner, can thus be tantamount to the combination of discrete businesses.

The first two examples illustrate the general way in which § 801.11(e) measures size. Example 1 illustrates the application of paragraph (e) when only cash is used in the acquisition. Example 2 illustrates the application of the rule when the acquiring person has non-cash assets.

Exception to the general rule. As explained above, the exclusion provided in § 801.11(e) is appropriate because transactions that may pose an antitrust concern are those in which two or more entities of significant size combine. When an entity without a regularly-prepared balance sheet acquires assets or voting securities of two or more persons, two or more entities of significant size may be combined; therefore § 801.11(e)(1) requires separate size calculations by the acquiring entity "for acquisitions of each acquired person." This means that if the entity will acquire assets or voting securities of person A and of person B, then, in determining whether it is large enough to have to report the acquisition of A, it must include as part of its total assets the cash it will use to acquire B and any securities of B it may hold. Similarly, in measuring its size to determine whether it must report the acquisition of B, the entity must include the cash it will use to acquire A and any securities of A it may hold. Example 4 illustrates the calculation of total assets when the acquiring entity will make two (or more) acquisitions.

Acquired persons without regularly prepared balance sheets. In most circumstances, newly-formed or other non-operating entities without regularly prepared balance sheets are not created or used for the purpose of becoming acquired persons, and the Commission is unaware of any need to give special treatment to such entities when the situation arises. The one exception of which the Commission is aware occurs in connection with the formation of joint venture corporations under § 801.40. Under § 801.40(a), the newly-formed joint venture is considered an acquired person, and § 801.40(c) sets forth a special rule that is used in calculating its size in the formation transaction. This calculation includes, *inter alia*, all assets contributed or to be contributed to the venture plus any credit that any person contributing to the joint venture has agreed to extend and any obligation of the joint venture firm that any contributor has agreed to guarantee. Unlike the calculation in § 801.11(e)(1), this test does not exclude cash.

Accordingly, § 801.11(e)(2) provides that the assets of an acquired person without a regularly prepared balance sheet ordinarily include all assets held, and that in the formation of a joint venture or other corporation, the special size test of § 801.40(c) governs. In either case, the exclusion of cash and voting securities provided in § 801.11(e)(1) does not apply to acquired persons. The text of § 801.11(e) has been altered in the final version of the rule to reflect the relationship of the new rule to § 801.40.

Modifications of the proposed rule. The Commission has made two other modifications of the proposed version of § 801.11(e). The final rule has been changed to make clear that funds used to pay expenses incidental to the acquisition are not included in calculating the acquiring entity's size. Incidental expenses are payments or fees for services rendered in connection with the acquisition, such as bank commitment fees, loan origination fees, investment banking fees, and counsel fees. This expansion of the exemption is a further application of its underlying rationale. Because the cash used to pay these expenses is exhausted by the acquisition, it cannot be combined with the newly-acquired entity to create a competitive problem. Example 3 illustrates the exclusion of acquisition-related expenses. The language of subparagraph (e)(1)(ii) of the rule has also been changed slightly for the sake of clarity.

Comments. Several comments made explicit or implicit reference to proposed § 801.11(e). No comments objected to the general purpose of the rule, and some (16, 18) specifically endorsed the approach taken in the rule. Therefore, the Commission has promulgated § 801.11(e) in substantially the same form as proposed.

Most of the comments dealing with § 801.11(e) revolved around its relationship with proposed § 801.5, the "acquisition vehicle" rule. Comment 2 expressed the view that taking the opposite approach, *i.e.*, counting cash and securities in these circumstances, could eliminate the need for a rule like proposed § 801.5. As stated above, the Commission is continuing to examine the best way to deal with the problems the "acquisition vehicle" proposal was intended to address. While reversal of the approach taken in § 801.11(e) would address these problems and has not been ruled out as a possible solution, the Commission does not believe it is likely that it will ultimately adopt an acquisition vehicle rule that will require acquiring companies without balance sheets to include cash as an asset.

Comment 16 suggested that the term "financial statements" that appeared in the proposed rule be changed to "balance sheet." The comment noted that the rule deals only with balance sheets and has no effect on a person's statement of annual income and expense. The Commission has adopted this suggestion.

2. Section 801.12(b): Calculating Percentage of Voting Securities To Be Held or Acquired

Section 801.12(b) sets out a formula by which persons are to calculate the percentage of voting securities of an issuer that they hold or will hold as a result of an acquisition. This amendment, which codifies an informal interpretation by the Commission staff, modifies the formula to reflect more accurately the amount of voting influence one person has over another where the acquired person has issued separate classes of voting securities with different voting rights.

The voting strength formula is important to the administration of the premerger notification program. Several key concepts in the rules and in the act turn on the percentage of a particular company's voting securities another person holds. For instance, a person is deemed to control a corporation when it holds at least 50 percent of that corporation's voting securities (§ 801.1(b)); the proper notification threshold is usually determined by the percentage of voting securities held (§ 801.1(h)); and the "investment only" exemption is available only for voting securities holdings of 10 percent or less (section 7A(c)(9) of the act and § 802.9). Accordingly, it is important that determinations of the percentage of voting securities held reflect the actual power of the person holding the shares and be made on an objective and readily ascertainable basis.

The formula in § 801.12(b) of the original rules directed an acquiring person to divide the number of votes for directors that it may cast after the acquisition by the total number of votes for directors that anyone may cast after the acquisition. In many cases the resulting ratio accurately portrayed the amount of influence the buyer had over the acquired firm. In some instances, however, the literal application of this formula significantly misrepresented the voting power of the buyer. This discrepancy occurred when there were several classes of voting securities, and one class of voting stock had voting power disproportionate to another class. In such instances, the Commission staff had responded to inquiries by advising persons filing notifications to weigh the number of votes that each class of stock may cast by the number of directors that each class may elect. In this amendment to § 801.12(b), the Commission has adopted that formula, which recognizes both that different classes of stock may exist and that each class may elect different numbers of directors.

The following example illustrates the problem with the literal application of the language in the original rule. Assume Company X has two classes of voting stock, A and B. Class A has 1,000 shares outstanding and elects four of company X's ten directors. Each share of class A stock has one vote in each of these elections. Class B has 100 shares outstanding and elects six of company X's ten directors. Each share of class B stock has one vote in each of these elections. Company Y proposes to acquire all class B shares. Under the language of original § 801.12(b), since Y can only cast 100 votes for directors, the percentage of X's voting securities held by Y after the acquisition would have been 100 divided by 1,100 (the total number of votes for directors that may be cast) or about 9 percent. Using that formula, Y's acquisition would not have crossed the 15 percent threshold; furthermore, the acquisition would be below the threshold for the "solely for the purpose of investment" exemption of section (c)(9) of the act since it would not have exceeded 10 percent of X's voting securities. And since Y would not have held 50 percent or more of X's voting securities, the conclusive presumption of control in § 801.1(b)(1) would not have applied.

Revised § 801.12(b)(1) calculates, more realistically, that company Y holds 60 percent of the voting securities of company X. It reflects Y's influence more accurately by adopting a new formula that first determines Y's voting power within each individual class of stock, and then determines Y's total voting power by summing the ratios calculated for each individual class of stock. Moreover, since the number of directors each class elects can be different, the individual ratios are calculated by weighting Y's voting power over each class by the proportion of the total number of directors that each class may elect. In the example above, the percentage of voting securities held by Y would then be determined by the following formula:

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

Plus

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

Example 1 following new § 801.12(b)(1) applies this formula to that hypothetical acquisition.

The 1978 version of § 801.12(b)(i) referred to voting securities that "presently" entitle the holder to vote for directors. This terminology was intended to make clear that convertible voting securities were not included in the computations in that section. Since the Commission is not changing the treatment of convertible voting securities, the term, which had been inadvertently deleted in the proposed rule, has been restored to the final rule.

Although the revision in § 801.12(b) is a major improvement in many situations, the Commission recognizes that it does not always describe fully the degree of influence over a corporation's affairs that may result from the acquisition or holding of voting securities. For example, holdings of voting securities can be subject to constraints that increase or decrease the actual or potential influence of the holder. These may include staggered elections of corporate directors, cumulative voting rights, voting trusts or agreements, supermajority provisions, and convertible securities.

The Commission has, however, found no objective and administrable criteria that will accurately reflect a holder's degree of influence over a corporation's affairs in all situations. The Commission has been unable to translate these myriad factors into a single proportional measure of voting power. While even after this revision of § 801.12(b), voting power may be measured only roughly in some circumstances, the rule sets forth objective criteria that are quickly ascertainable in most instances. Such certainty of application was an essential consideration in the formulation of the premerger notification rules, which rely primarily and in the first instance on business entities being able to identify for themselves whether they have an obligation to file notification.

The Commission solicited suggestions of a more exact method for calculating the degree of control stemming from holdings of voting securities, but no comments addressed the point. The only comment (16) that mentioned the issue at all simply endorsed this revision of § 801.12(b) as proposed. The Commission thus has concluded that this revision is preferable to an alternative that might measure voting power more precisely in some instances but would be much more difficult to apply. The Commission has promulgated this amendment in the same form as proposed.

3. Section 801.13: Aggregation of Assets and Voting Securities

Sections 801.13 and 801.14 state the circumstances under which parties must aggregate their purchases of voting securities and assets from the same person to determine their obligations under the act and rules. The purpose of aggregation is to treat acquisitions that are split into separate transactions the same as acquisitions that are consummated in a single transaction. The 1978 aggregation rules sometimes required repeated and burdensome reporting of even small asset acquisitions that had no anticompetitive potential. For example, the 1978 rules required the aggregation of two asset purchases from the same person if the purchases occurred within 180 days of each other, even though the first purchase had already been reported and the second was very small. A similar problem arose when a small purchase of assets followed a reportable acquisition of voting securities. To reduce this problem, amended § 801.13 eliminates aggregation when the later acquisition is an asset purchase, as long as the earlier acquisition (whether of assets or voting securities) was reported.

The previous version of § 801.13(b) required a person acquiring assets to add the value of any assets acquired within the past 180 days from the same seller to determine whether the present purchase was reportable. The rule worked well, for example, in requiring notification when a person acquired $10 million worth of assets following a $10 million purchase from the same person the previous month. Similarly, if the original acquisition was of voting securities and the present acquisition was of assets, § 801.14 operated to require aggregation, although in this case without the 180-day time limit. For example, a person that had previously acquired $8 million of a company's stock and a year later planned to purchase $8 million of assets from the same company had to file notification prior to the asset purchase (assuming that the acquisition was otherwise reportable). These results are not altered by this amendment to § 801.13.

The 1978 aggregation rules did not, however, work well in other circumstances. They could, for example, cause acquiring and acquired persons to file multiple notifications for tiny transactions. Once a person made a reportable acquisition by buying more than $15 million of another person's voting securities or assets, the aggregation requirement (which required the inclusion of the prior transaction) often meant that any additional asset purchase, however small, would also satisfy the act's size-of-transaction criteria. Consequently the transaction would again be subject to the notification and waiting requirements of the act (unless otherwise exempted). The Commission recognizes that repeated filings could be quite burdensome to the parties in such transactions, and that little antitrust purpose was served by receiving the subsequent report for the small transaction.

The new rule alleviates this burden by creating a separate reporting obligation for each cluster of transactions that amounts to an aggregate $15 million. Thus, after one acquisition has been reported, the parties are not required to report subsequent asset acquisitions until they again amount to $15 million in the aggregate. With this modification, the small subsequent transactions are no longer reportable.

The aggregation problem does not arise when the later transaction is an acquisition of voting securities only. Under § 801.13(b)(2), an earlier acquisition of assets is only aggregated with a subsequent asset acquisition, not with a later acquisition of voting securities. In addition, in a series of acquisitions involving only voting securities, § 802.21 exempts from the reporting requirements all acquisitions except those that meet or exceed the notification thresholds defined in § 801.1(h).

No comments objected to the Commission's proposal to amend § 801.13, and the Commission is promulgating the rule in substantially the same form as proposed. One comment (16) suggested three technical changes. First, the comment suggests that § 801.13 explicitly require that the earlier acquisition was in fact reported, not merely "subject to the filing and waiting requirements of the act." This change would require a person to continue to aggregate prior asset purchases if they had been reportable under the act but were not actually reported. This suggestion seems sound, and the Commission has adopted it.

The second suggestion is that new § 801.13(a)(3)(ii) explicitly reference § 802.21 (exemption for subsequent acquisitions of voting securities that do not exceed a higher threshold). The Commission believes that the relationship with § 802.21 is clear. Nevertheless, to avoid any possible confusion, explicit reference to the exemption has been added to § 801.13(a)(3)(ii).

The third point raised by the comment is outside the scope of this rulemaking. The comment asserts that the 1978 language of § 801.13 falls "short of [its] goal" of requiring aggregation of all asset acquisitions between the same parties occurring within 180 days of each other. The comment suggests changes intended to make § 801.13 more consistent with its stated goal. Since the point raised in the comment appears to be a useful suggestion, the Commission will study it and will, if appropriate, propose a change in § 801.13 in the future.

4. Section 802.35: Acquisitions by Employee Trusts

New § 802.35 exempts from the act's reporting provisions acquisitions of an employer's voting securities by an employee trust pursuant to an Employee Stock Ownership Plan ("ESOP"). Frequently a pension plan, profit sharing plan, or bonus plan that an employer organizes as an ESOP acquires shares of employer's stock on behalf of its employees. The plan typically holds the shares in trust for the employees. The original rules did not exempt such acquisitions of the employer's voting securities even in the case of an ESOP that the employer controlled by having the contractual right to designate its trustee or trustees. This new rule provides such an exemption. It does not exempt acquisitions by ESOPs of voting securities of persons other than the employer.

Under the 1978 rules, acquisitions of an employer's securities pursuant to an ESOP were likely to be subject to the notification requirements of the act. Such acquisitions are often large enough to satisfy the $15 million size-of-transaction criterion of section 7A(a)(3)(B). Furthermore, the ESOP trust is likely to meet the $10 million size-of-person criterion of section 7A(a)(2) because the trust is ordinarily considered to be controlled by the employer and must, pursuant to § 801.1(a)(1), include the total assets and annual net sales of the employer in determining its size. The intraperson exemption in § 802.30 does not apply, however, because the ESOP is not within the same person as the employer "by reason of holdings of voting securities." No other exemption applied under the original rules.

The conclusion that some ESOP transactions should be exempt is based on the distinctive characteristics of ESOP trusts. If complete ownership of voting securities, rather than just voting rights, were attributed to the individual employee beneficiaries of the ESOP, such acquisitions almost certainly would be too small to meet the $10 million size-of-person and $15 million size-of-transaction criteria of the act. If the securities were held by an entity that was controlled by the employer "by reason of holding voting securities" rather than appointing trustees, then the transaction would be exempted by § 802.30 as an intraperson transaction. The rationales for not requiring small acquisitions to be reported and for exempting intraperson transactions both apply to an ESOP trust's acquisition of an employer's voting securities. The Commission has therefore created a new exemption for such acquisitions based on the mixture of stock ownership characteristics of ESOP trusts discussed below.

Acquisitions of an employer's securities pursuant to an ESOP represent an inexpensive source of financing for the employer because the ESOP is accorded advantageous tax treatment when the securities are acquired with borrowed money. See generally 26 U.S.C. 401 *et seq.* For this reason, the employer, not its employees, generally initiates the formation of an ESOP. In doing so, the employer typically retains the power to appoint and remove the trustee who manages the assets of an ESOP trust, although the trustee may have the authority to appoint a co-trustee as the custodian for the voting securities. Once a trust is established by a publicly held corporation, the employees, not the trustees, vote the employer securities held by the trust that are allocated to their account. 26 U.S.C. 409A(e)(2). The trustees, however, often retain the power to purchase and sell the employer securities.

Under § 801.1(c)(3), the ESOP trust, like any trust, is deemed to hold the employer securities. For most irrevocable trusts, this result serves to guard against a possible antitrust problem because trustees usually have certain indicia of beneficial ownership, including the right to vote and the authority to dispose of all securities. From an antitrust viewpoint, therefore, competition would be threatened if a non-ESOP trust acquired substantial blocks of voting securities of the employer and of a competing firm. If an ESOP trust were to hold securities of both the employer and a competing company, however, the two sets of securities would not necessarily be voted by the ESOP trust. In a publicly held company, the employees would typically vote the securities of their employer. Consequently, one usual situation that causes antitrust concern—the possibility that one entity might control two competing firms—is unlikely to pose a problem when an ESOP holds the shares of both the employer and of a competing firm.

Nevertheless, an acquisition by an ESOP trust of a competing firm's voting securities could restrain competition in other ways. For example, an employer that controls the trust by retaining the power to appoint and remove trustees might cause the trust to acquire a competitor. The existing premerger rules recognize the possibility of exercising influence through the power to appoint trustees. Section 801.1(b) declares that a person controls an entity if it has the right to "designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions" (*e.g.*, trustees). Accordingly, when an employer controls the trust, the employer is considered the acquiring person and must report the trust's acquisition of shares in another firm. Because this provision ensures that the competitive implications of acquiring another firm's voting securities will continue to be reviewed, the Commission does not believe that it is also necessary to make the acquisition by the ESOP of an employer's securities reportable.

The provisions of the new rule take into account these distinctive features of ESOP trusts. Subsection (a) Of the rule explicitly limits the exemption to trusts that are part of qualified stock bonus, pension, or profit sharing plans as defined in the Internal Revenue Code. These plans are most likely to make acquisitions large enough to be reportable. Subsection (b) limits the exemption to those trusts in which the employer has the right to appoint and remove the trustees or which the employer otherwise controls under § 801.1(b). Subsection (c) provides further that the exemption applies only to acquisitions of voting securities issued by the employer (or by entities it controls).

The examples emphasize that the ESOP exemption applies only to the acquisition of an employer's voting securities. In example 1 the acquisition illustrates that voting securities issued by more than one entity (but not more than one person) can qualify for the exemption. The acquisition in example 2 is not exempt because the issuer is neither the employer nor an entity within the person of the employer.

The Commission considered as alternatives means of exempting employee trust acquisitions either expanding the intraperson exemption in § 802.30 or changing the definition of "hold" in § 801.1(e). The Commission rejected both approaches for the reasons stated in the Notice of Proposed Rulemaking published on September 24, 1985, 50 FR 38760–38761.

Comment 16, the only one that dealt with this proposal, pointed out certain difficulties that may arise in determining whether an ESOP trust is controlled by the employer. The comment noted that some ESOP agreements provide that the collective bargaining representative of the employee-beneficiaries of the trust may have a veto over the employer's appointment or removal of the trustee(s). Whether this type of veto dilutes the employer's influence over the trust so as to negate the element of control of § 801.1(b) is a factual issue that will need to be determined in each instance. The comment also pointed out that some ESOP trustees appoint a custodian, sometimes designated as a trustee or co-trustee, for the voting securities held by the trust. Again, the question of control under these circumstances is a factual one that will require individual analysis.

Because all acquisitions of employer voting securities by ESOPs are exempt, it would not be appropriate to aggregate such acquisitions in the calculations under § 801.13. Such aggregation can be avoided by listing § 802.35 in § 801.15(a)(2), and that section has been amended accordingly.

5. Section 802.70(b): Acquisitions Subject to Prior Approval

The Commission has deleted paragraph (b) of § 802.70, which had exempted from the notification and waiting requirements of the act certain acquisitions that require prior approval by the Federal Trade Commission or by a federal court. The Commission has concluded that although the principle of this rule—to eliminate duplicative notification requirements—was sound, the rule could well have troublesome practical effects for both the enforcement agencies and the parties subject to an order. The Commission wants to assure that the rule, which exempted only a few transactions each year, does not create a barrier to voluntary settlements of antitrust actions by unnecessarily requiring public disclosures of information about acquisitions. As a consequence, the Commission has concluded that the administration of the premerger program would be better served by eliminating the exemption.

Previously, § 802.70(b) exempted an entire acquisition from the requirements of the act if, pursuant to an order entered in an action brought by the Commission or the Department of Justice, the acquiring person was required to obtain approval of the Commission or a federal court prior to making an acquisition. For example, a diversified company engaged in both the lumber and the cement businesses might, as a result of an acquisition of a cement firm, have become subject to a prior approval order requiring it to submit all future cement acquisitions for review. The company, when contemplating a subsequent cement and lumber acquisition, would have been required to submit both the cement and lumber portions of the acquisition for approval under the order.

When the § 802.70(b) exemption existed, the enforcement agencies were required to insist upon their right to review under a prior approval order all portions of a transaction, not merely those portions relevant to the order. However, this position could, in some instances, become an obstacle to obtaining consensual orders with companies because of the public disclosure procedures that are a part of prior approval orders. In contrast to the confidentiality required by section 7A(h) of the act for filings under the normal premerger notification program, review under an order typically requires the person requesting approval to place on the public record business information demonstrating that the acquisition is not anticompetitive. Thus, in the example from the previous paragraph, the diversified company would be required to disclose information about the lumber, as well as the cement, business. The Commission is concerned that the prospect of such broad disclosures of business information might unnecessarily provoke a company to resist an order settling an antitrust matter.

The Commission considered two approaches to this problem: (1) To require concurrent prior notifications under the order and the premerger notification program, or (2) to require separate notifications for different portions of an acquisition—those that will be reviewed within the terms of the order and those that will be reviewed under the normal premerger notification procedures. The latter resolution, although logically superior, could require extremely complex definitions to include all transactions that might be relevant to the order. Such definitions could result in some transactions being placed in the wrong category and quite possibly would result in others not being adequately reported under either procedure.

Accordingly, the Commission has decided to eliminate the exemption. This change will not significantly increase the number of filings (fewer than a dozen transactions were exempted under § 802.70(b) in 1984), nor the burden of compliance, since a firm would in any case have compiled much of the information required for its premerger filing in order to comply with the prior approval order. The Commission has decided that on balance, the administration of the premerger notification program and the enforcement of the antitrust laws will be enhanced by eliminating the exemption contained in § 802.70(b). No comments addressed this proposal.

The considerations underlying this rules change do not apply to divestitures subject to prior approval because in those orders the Commission or a federal court will have identified the transfers of assets that are relevant to those orders. There is, therefore, no reason to delete the exemption in § 802.70(a) for divestitures pursuant to orders.

8. Section 803.5: Affidavit Obligations of the Acquiring Person

Section 803.5(a) requires that the acquiring person give notice to the acquired person in certain transactions. The Commission has modified this rule (1) to permit the notice to state the notification threshold the acquiring person will meet or exceed in lieu of the number of shares to be acquired and (2) to require the person to state, where applicable, the total number of shares to be held as a result of the acquisition.

This rule requires an acquiring person in transactions subject to § 801.30 (tender offers, open market purchases and other acquisitions of stock from persons other than the issuer) to submit with its Notification and Report Form an affidavit attesting that the issuer has received the notice required by § 803.5(a). The notice procedure serves two related purposes: To inform the issuer of its obligation to file the notification required by the act, and to provide the issuer and the antitrust agencies with evidence that the acquiring person seriously intends to consummate the transaction.

When first promulgated, § 803.5(a) required the acquiring person to disclose in the notice to the issuer, among other things, the identity of the acquiring person and the number of securities of each class to be acquired. Because some acquiring persons could not state their intentions in terms of numbers of securities to be acquired, the Commission, by formal interpretation on December 28, 1978, permitted such persons to state instead which of the reporting thresholds of § 801.1(h) they intended to meet or exceed.

This interpretation did not, however, address a different problem in the 1978 version of § 803.5(a). That rule required the acquiring person to state only the number of securities to be acquired and not the number that would be held as a result of an acquisition. Since § 801.13(a) requires the acquiring person to aggregate the voting securities it plans to acquire with all voting securities of the issuer that it already holds, it is this total number of shares that would give rise to a filing obligation. If the acquiring person had substantial holdings in the issuer before the acquisition, merely stating the number of shares it would acquire would not always make clear to the issuer that the acquisition was reportable.

This amendment both codifies the 1978 formal interpretation on notification thresholds and amends the rule to require the acquiring person to state, in instances in which the number of voting securities is specified, the number of voting securities that would be held as a result of the acquisition.

Notice to the acquired issuer. These changes will assist in fulfilling the principal purpose of § 803.5(a)—to inform the acquired person of its obligation to file a Notification and Report Form with the antitrust enforcement agencies. In the transactions covered by this rule, the issuer may have no reason to know that some or all of its shares are being acquired, because the voting securities are to be acquired from persons other than the issuer or an entity within the same person as the issuer. Section 803.5(a) cures this potential problem by requiring the acquiring person to serve the notice before filing its notification.

These amendments refine that process. By requiring that the notice state either the notification threshold the acquiring person will meet or exceed or the total number of voting securities to be held as a result of an acquisition, the amendments insure that the acquired person will receive notice of the acquiring person's intention to make an acquisition that meets or exceeds the $15 million, or the 15, 25 or 50 percent of voting securities thresholds of § 801.1(h). From this statement and from knowledge about its own voting securities, the acquired person will have a basis for determining whether it has a notification obligation.

The requirement that the notice include nonvoting securities has been deleted because they do not affect the notification obligation.

Credibility of the acquisition plan. This amendment will also aid in fulfilling the second objective of § 803.5(a)—to provide evidence of the seriousness of the acquiring person's plan of action. The antitrust screening process initiated by the acquiring person requires the expenditure of significant resources by the issuer and the antitrust agencies. The rule therefore requires that the acquiring person provide evidence that it intends to make a reportable transaction and is not merely considering the possibility of making one. The evidence required falls into three categories:

(1) The statement that the acquiring person has a "good faith intention . . . to make [an] acquisition" (§ 803.5(a)(2));

(2) The statement of the specific number of securities that the person intends to hold or the filing threshold it intends to meet or exceed (§ 803.5(a)(1)(iii)); and

(3) The communication of these and other facts to the acquired person (§ 803.5(a)(1)).

The statement of "good faith" intent is but one part of the evidence the rules require to establish that an acquiring person intends to make a reportable acquisition. That general statement gains greater credibility when the acquiring person declares the exact number of securities it intends to buy or the filing threshold it intends to cross. The greater specificity suggests that a plan has developed beyond the conceptual stage at least to the point where it could be implemented. In requiring a definite written declaration of a plan to acquire shares, this provision parallels the requirements that agreements to merge be executed (§ 803.5(b)) and that tender offers be publicly announced (§ 803.5(a)(2)) before filing notification.

Because the acquired person and the enforcement agencies are entitled to be reasonably certain that a reportable acquisition will be made, § 803.5(a)(1)(iii) requires the acquiring person to state in the notice a present intention to make such a reportable acquisition of voting securities. Accordingly, the Commission does not accept a statement in a notice, for instance, that the acquiring person intends to make an acquisition that "may exceed" a reporting threshold, because that statement does not specify either a threshold that the person intends to meet or a current intention to acquire any shares. See Example 4. Similarly, the Commission does not accept a statement that a person will acquire "up to" a certain percentage or number of shares, since such a statement does not clearly express a present intent to acquire a percentage or number of shares that is reportable. See Example 5.

The Commission had proposed requiring a statement of the specific present intent to meet or exceed a higher notification threshold once the person had established an intent to make a reportable acquisition. The effect of such an extension would have been, for example, to treat a filing in which the acquiring person states in its notice to the acquired person an intention "that it will acquire more than 15% of the acquired person's voting securities and it may acquire more than 50% of those voting securities" as a filing solely for the 15% threshold. This proposal drew a mixed response from commenters. Comments 7 and 16 objected to the proposal, arguing that requiring a subsequent filing prior to crossing the 25 or 50 percent thresholds would be unnecessary and burdensome. Comment 18, in contrast, supported the proposal, noting that because the percentage of voting securities acquired can be relevant to antitrust analysis, multiple filings can conserve Commission resources and permit smaller acquisitions that otherwise might be blocked if the transaction were analyzed at the 50 percent level.

While the Commission agrees on balance with Comment 18 and does not believe this aspect of its original proposal would have imposed a major burden, it concedes that some additional burden would have resulted. Moreover, since the current practice, which treats the above language as a filing for the 50% threshold, has not created substantial antitrust enforcement problems, the Commission has decided not to adopt this change.

The Commission will thus continue its policy that requires the notice affidavit to demonstrate a firm intention to make a reportable acquisition, but allows filing for a higher threshold even when the intention to make that additional acquisition has not yet become fixed. Example 3 illustrates that when a person files for a threshold it plans to meet or exceed, it may also designate a higher threshold. The less stringent standard for designating the filing threshold accommodates the interest of the parties to a transaction and the antitrust agencies in most circumstances. Once the premerger review process is undertaken, the additional burden on the acquired person and the enforcement agencies occasioned by a review of a transaction at a higher threshold is usually relatively minor in comparison with the burden of conducting a completely separate review based on a subsequent filing by the acquiring person for that higher threshold.

It should be noted, however, that it is unlikely to be advantageous for acquiring persons to file for a higher threshold if they do not expect to cross it within the period provided by § 803.7. As comment 18 noted, there are circumstances in which the antitrust agencies would permit a smaller holding of voting securities, but would challenge larger holdings. By filing for the higher threshold in such a transaction, the acquiring person might make it necessary for one of the agencies to seek to enjoin an acquisition based on the designated threshold, even though the immediate transaction contemplated would not have been challenged.

Comment 2 noted that in many acquisitions to which § 801.30 applies the acquiring and acquired persons have executed an agreement in principle or a letter of intent to merge or acquire. It argues that in such instances it is pointless and burdensome to also require the acquiring person to deliver to the acquired person the notice required by § 803.5(a). While the Commission agrees that the notice can be redundant, it does not agree that delivery of the notice is a substantial burden or unnecessary. Acquisitions to which § 801.30 applies are by definition acquisitions of voting securities from persons other than the acquired person. Consequently, even if the agreement lapses for some reason, the rules still permit the acquiring person to proceed with the acquisition. In such circumstances, since the agreement is no longer in force, the acquired person might not be aware of its continuing responsibility to file. The Commission believes that the current notice requirement makes clear that the acquired person's responsibility to file is based on the acquiring person's intent to make a reportable acquisition and is independent of any agreement. Accordingly, it has not adopted the suggestion.

7. Section 803.10(a): Running of Time in § 801.40 Transactions

The Commission has amended § 803.10(a) in order to clarify when the waiting period begins in connection with the formation of a joint venture or other corporation (hereinafter "joint venture") subject to § 801.40 of the rules. The amendment makes explicit that the waiting period does not begin until all venturers who are required to file have done so. This is consistent with the Commission staff's interpretation of the 1978 version of § 803.10(a).

Before this amendment to § 803.10(a), it was possible to read the rule to provide for a separate waiting period for each individual venturer that began when each filed its notification. The Commission has amended the rule to eliminate this possible misinterpretation, which it believes would preclude effective review by the antitrust agencies of the formation of joint ventures. Separate waiting periods for individual venturers would mean that in some instances one venturer's waiting period could expire before another venturer's filing alerted the antitrust agencies to the need to issue requests for additional information to all venturers. To eliminate any possible ambiguity, the Commission has amended § 803.10(a) to state explicitly that in the case of acquisitions covered by § 801.40, the waiting period begins when all venturers required to file a notification have done so.

Although the Commission is adopting this amendment as proposed, it believes that the staff's prior position correctly interpreted previous § 803.10. Old § 803.10 provided, in relevant part, that the waiting period for all acquisitions, other than those subject to § 801.30, began on the "date of receipt of the notification . . . from: . . . all persons required by the act and these rules to file notification." In other words, the waiting period began only when all venturers required to file had done so. It was, however, possible to argue that the "all persons" language of § 803.10 refers only to those persons required to file notification in connection with a particular "acquisition" and that § 801.40 was intended to treat each individual venturer's acquisition of stock of the joint venture corporation as a discrete acquisition. Since in each such "acquisition" only the venturer is required to file (the joint venture itself need not file), the result would be that the "all persons" requirement would be satisfied whenever an individual venturer filed notification. Thus, according to the argument, each venturer would have a separate waiting period beginning as soon as it filed its notification.

While this argument had support in some language of the rules, it was not consistent with the antitrust enforcement agencies' need to conduct an analysis of the competitive relationships among the persons forming the joint venture corporation. As the Statement of Basis and Purpose to § 802.41 notes, "it is the combination of the persons that form the new entity (and not the new entity standing alone) that presents antitrust issues when a new corporation is formed . . . ." 43 FR 33496 (July 31, 1978). Accordingly, to ensure that the enforcement agencies have the opportunity to evaluate the competitive relationships among all the venturers required to file, the agencies must be able to review all their notifications at the same time. It was on this basis that the Commission staff interpreted the language of the 1978 version of § 803.10(a) to mean that the waiting period for acquisitions subject to § 801.40 began when all acquiring persons that were required to report had done so. To avoid any possible ambiguity, however, the rule has been amended to state this requirement explicitly.

The relationship between this amendment and § 803.10(b), (explaining when the waiting period ends) and § 803.20(c) (setting out the rules for an extended waiting period) is as follows: in acquisitions subject to § 801.40 in which a request for additional information is issued, the extended waiting period begins on the date the additional information or documentary material requested is received from all contributors to the joint venture corporation who received a request.

Comment 16, the only comment to discuss this proposal, suggested that item 5(d) instead be revised to require the participants in the joint venture to identify the other persons participating. However, as discussed below in connection with the changes in the Form, the agencies have not had difficulty in ascertaining the identity of joint venture parties. Rather, the problem is that without having the filings of all the participants available at one time, the agencies might fail to notice possible anticompetitive consequences of the venture that would justify a second request. The Commission regards this amendment as an adequate resolution of the problem and believes no further changes are necessary at this time.

8. Changes in Examples To Conform With Prior Amendments to the Rules

On November 21, 1979 and July 29, 1983, the Commission published several changes in the premerger rules. See 44 FR 66781 *et seq.* and 48 FR 34427 *et seq.* Our experience with those changes has indicated that it would be helpful to make several amendments to the examples appearing elsewhere in the premerger rules. The affected examples are example 1 to § 801.4, example 4 to § 801.15, example 3 to § 801.30, the example to § 801.40, and example 1 to § 802.41. These amendments elicited no comments.

9. The Premerger Notification and Report Form

The Commission has promulgated eight changes designed to clarify or simplify the Premerger Notification and Report Form. Seven of the changes were proposed in the **Federal Register** in September 1985; six of these appear in substantially the same form as they were proposed, and one has been reworded for the sake of clarity. One additional change, a clarification of an existing requirement, is a product of the staff's recent experience. The Form and its instructions have been revised to reflect these changes, and the revised version appears in this **Federal Register** Notice.

The eight changes to the Form are discussed in paragraphs a–h below. Some of the changes are based on comments received by the Commission in response to its July 1982 **Federal Register** Notice. These comments are referred to as "earlier comments" or "prior comments." Comments received in response to the 1985 rules change proposals are designated by number.

Following paragraph h, sections 1–4 address new issues that were raised in comments received pursuant to the 1985 proposals. These comments did not specifically address the present changes to the Form but instead suggested further changes in the Form or raised other issues about the Form.

Changes in the Report Form

a. General Instructions.

The general instructions to the Form detail the proper procedures for complying with the notification requirements. Some filing parties have misinterpreted one aspect of these instructions: when making a narrative response to an informational item in the Form on attachment pages, parties have sometimes failed to submit one set of those attachment pages with each copy of their Form. The Commission has therefore changed the general instructions to make clear that each filing person must submit two complete copies of the Form to the Commission and three complete copies of the Form to the Department of Justice and that each copy of the Form must have its own set of attachment pages.

This provision does not apply to "documentary attachments," which, as defined in the instructions to the Form, are the documents, usually prepared by the parties for purposes unrelated to the Form, that are submitted pursuant to item 2(d) (formerly 2(f)(i)), item 4, and §§ 803.1(b) and 803.11. The instructions require multiple submissions to each agency of narrative responses to items on the Form, but only a single copy per agency of each "documentary attachment."

This change in the general Form instructions makes clear that when parties choose to make their narrative responses on separate attachment pages, these responses are not "documentary attachments," and multiple copies of these pages must still be supplied to each agency. Some filing parties had incorrectly treated these pages as "documentary attachments" and had submitted only one copy per agency. Such omissions hamper review by the agencies and could cause a filing to be deemed deficient.

b. Description of Transaction

The Commission has consolidated into one question the three items, formerly items 2(a), 2(b), and 2(c), that request a description of the transaction. Item 2(a) had asked for the names and addresses of the parties to the acquisition, a description of the assets or voting securities to be acquired, the consideration to be received from each party, and, if the acquisition involved a tender offer, the terms of the offer. Item 2(b) had called for the scheduled consummation date, and item 2(c) had required a description of the manner in which the transaction was to be carried out, including scheduled major events such as stockholders' meetings, other requests for government approval or tender offer dates. Parties had often repeated information when responding to these items; the Commission has therefore eliminated this redundancy by combining them into one question.

Comment 22 pointed out that the proposed version of item 2(a) and the 1978 version of item 2(d), which has been redesignated as item 2(b) but which is otherwise being retained unchanged, both asked for a description of the assets to be acquired. The Commission has further revised item 2(a) in response to this comment so that it no longer requires a description of the assets or voting securities. Instead, item 2(a) simply asks whether assets or voting securities (or both) are being acquired. The detailed description of assets to be acquired is required by item 2(b) (formerly 2(d)) and the description of the voting securities to be acquired is found in item 2(c) (formerly 2(e)).

c. Description of Voting Securities To Be Acquired

The Commission has changed item 2(c) (which had been 2(e) but which has been redesignated) to allow persons who intend to acquire 100 percent of the acquired person's voting securities to respond by stating that intent and providing the dollar value of the acquisition. Item 2(c) requires responses to eight subsections that elicit information about separate classes of voting securities and the amount of each that will be held by each acquiring person following the transaction. As the 1978 Statement of Basis and Purpose pointed out, the purpose of the detailed breakdown is to enable the agencies to assess the degree of control resulting from the acquisition. 43 FR 33522 (July 31, 1978). The Commission recognizes that detailed responses are likely to be unnecessary when a person is acquiring 100 percent of the voting securities of a company. In that case, the acquiring person will presumably have complete control of the acquired person. The same is true when two companies are merging or consolidating to form a new company. In these instances, therefore, the Commission has eliminated the detailed responses required by item 2(c). Item 2(c) now permits parties simply to state that 100% of the voting securities are being acquired.

However, to enable the Commission to monitor compliance with the act with regard to previous acquisitions between the parties, parties must still give full responses to item 2(c) if, prior to the acquisition, the acquiring person held 15 percent or more than $15 million of the acquired person's voting securities. Since holdings of this magnitude normally require a filing, disclosure of this information in item 2(c) will permit the agencies to inquire whether the prior acquisition was exempt from the act. For the sake of clarity, the wording of item 2(c) has been altered from the form in which it was proposed.

d. Index to Ancillary Documents

The Commission has deleted item 2(f)(ii), which had asked for an index of ancillary documents related to the acquisition agreement, such as those relating to personnel matters (*e.g.*, union contracts and employment agreements), third-party financing agreements, leases, subleases and documents related to the transfer of realty. The 1978 Statement of Basis and Purpose stated that the index "will permit the agencies to identify particular documents in a second request." 43 FR 33523 (July 31, 1978). In the Commission's experience, however, this index has not been particularly helpful. Second requests do not usually focus on issues related to third-party agreements, subleases, union contracts or other documents listed in the index. If this type of information is needed, the agencies can ask for it descriptively in the second request even without an index of the documents. Since the index can be lengthy and time-consuming to prepare, the Commission has dropped this item from the Form.

e. Shareholders and Holdings of Persons Filing Notification

The Commission has changed the instructions to item 6 to specifically permit parties to identify where responses to this item can be found in a "documentary attachment" to the Form. The Commission does not object to parties responding to these items by referencing "documentary attachments" submitted with a filing as long as they indicate the relevant pages in the attachments and as long as the information provided in the attachments is complete, up-to-date, and accurate. If the information contained in the attachments is not complete, up-to-date, and accurate, the filing will not be deemed substantially compliant and the waiting period will not begin until the correct materials are filed with both agencies.

As revised, item 6(a) asks for a list of the filing person's subsidiaries, except for subsidiaries with total assets of less than $10 million. Item 6(b) asks for a list of shareholders of each entity included within the person filing notification. Holders of 5 percent or more of the voting securities of any entity included within the person must be listed unless the entity has total assets of less than $10 million. Item 6(c) requires parties to list their minority holdings. Parties may omit holdings of less than 5 percent and holdings of issuers with total assets of less than $10 million.

One prior comment stated that the Commission should permit parties to respond to these items by referencing a "documentary attachment" to the Form rather than including a response on the Form itself. The Commission is of the view that a response that references a "documentary attachment" is adequate so long as the specific pages of each attachment are indicated for each item.

f. List of Subsidiaries

The Commission has changed item 6(a) so that parties may omit subsidiaries with total assets of less than $10 million. Item 6(a) requires persons filing notification to provide the name and headquarters mailing address of each entity included within the person filing notification. The 1978 instructions gave parties the option of not listing entities with total assets of less than $1 million. Prior comments questioned whether a list of subsidiaries was helpful to the agencies' antitrust review and especially whether the names of relatively small subsidiaries were necessary.

To conduct their review, the agencies must be able to determine the names and addresses of all significant entities included within the parties to the acquisition. In many instances, the names of these subsidiaries can give the agencies a better understanding of the acquisition and can enable them to seek information from public sources, most of which is only available by company (subsidiary) name. The need for subsidiaries' names is particularly compelling when the subsidiaries are foreign entities, since the SIC code information contained in item 5 is limited to U.S. operations. See § 803.2. Without the name of the foreign subsidiary, information about the person's foreign operations is not readily obtainable. However, the Commission has recognized that some subsidiaries may be so small that even their names are unlikely to produce information relevant to the agencies' antitrust review. The Commission has therefore raised the $1 million cut-off provided in original item 6(a) to $10 million. This change was based in part on the fact that items 6(b) and 6(c) have always been subject to a $10 million cut-off and that these cut-off levels do not appear to have adversely affected the agencies' ability to conduct their antitrust review.

g. Geographic Information in Overlapping SIC Codes

The Commission has changed the level of specificity with which parties must provide certain geographic information. When an overlap occurred in certain SIC codes, the Commission had previously required that each party provide the address, arranged by the state, county, and city or town, of its establishments that derived revenue in the overlapping code. Now, for some of these codes, parties may provide only the state or states in which they derive revenue.

Item 7(a) of the Form requires the filing person to identify 4-digit industry SIC codes in which it has knowledge or belief that it and any other person which is a party to the acquisition also derives revenue (usually referred to as "the overlapping code" or "a four-digit overlap"). Item 7(c) requires the filing person to identify the geographic areas in which it derives revenue in overlapping codes. For most overlapping codes the filing person lists the states in which it derives revenue. In the 1978 version of Item 7(c)(iv), parties were required to provide more detailed geographic information for overlaps in all SIC major groups 52–62 and 64–89.

In most of these major groups, the agencies must determine the precise geographic areas in which the parties operate. For instance, acquisitions involving food stores, gasoline service stations, hospitals, apparel and accessory stores, and banks require a detailed breakdown of geographic information, since the relevant geographic market is often a local area rather than an entire state or region. However, some of the SIC major groups identified in 1978 as requiring the more detailed breakdown have proved in fact not to require such detailed breakdowns in the initial Hart-Scott-Rodino filing. For instance, acquisitions involving securities brokers, insurance agents, investment offices and certain other businesses falling within these codes can be adequately reviewed without the initial filing providing such detailed information. Acquisitions involving overlaps in these codes either do not involve local markets or, if they do involve local markets, can still be adequately reviewed if the parties specify in their initial filings only the states in which they derive revenue. Therefore, the Commission has changed item 7(c) to require only state-by-state information for overlaps occurring in SIC major groups 62, 64–67, 72, 73, 76, 79, and 81–89. The SIC major groups that still require the parties to give the address, arranged by state, county, and city or town, of establishments where they derive revenue are listed in Attachment A.

h. Prior Acquisitions

The Commission has changed item 9 of the Form to require the acquiring person to provide information about acquisitions made within five years of filing rather than the ten years that had been required.

If both the acquiring person and the acquired issuer or the acquired assets had attributable to them $1 million or more in revenue in the same 4-digit SIC code, the acquiring person must list in item 9 its past acquisitions of other persons that also derived revenue in that 4-digit SIC code. Only acquisitions of more than 50 percent of the voting securities or assets of entities that had annual net sales or total assets greater than $10 million in the year prior to the acquisition need be listed. In the original version of item 9 parties were required to list all such acquisitions that had taken place in the past ten years. The Commission has changed item 9 so that it now applies only to acquisitions in the past five years.

The purpose of item 9 is to assist the agencies in identifying prior acquisitions by the acquiring person that may suggest a pattern of acquisitions in a particular industry by that person. See 43 FR 33534 (July 31, 1978). Several earlier comments suggested modifications of item 9. One such comment suggested raising to $10 million the present $1 million cut-off for the overlap in the acquisition that is the subject of the notification. This suggestion was rejected because the agencies sometimes find overlaps of less than $10 million in a given 4-digit SIC code to be of competitive significance. This is particularly true when the parties compete in a small geographic area or when one of the parties has an extremely large share of a market.

Another prior comment suggested that the ten-year period be reduced to five years. The Commission has adopted this suggestion. It believes that this change can be made without harming the agencies' ability to conduct a thorough antitrust review since an account of the acquiring person's acquisitions over the past five years will give adequate notice of possible trends toward concentration. This change should significantly reduce the burden of this item because it will cut in half the number of years that parties will have to search for information about prior acquisitions and because it should be easier for companies to identify more recent acquisitions.

Other Comments

In addition to the comments discussed in paragraphs (a) through (h) above, comment 16 specifically endorsed the changes as proposed, and no comment objected to them. Several other comments suggested additional changes in the Form, requested clarification of existing items, or otherwise made observations about the Form's reporting requirements. The Commission takes this opportunity to respond to the issues raised in these comments.

1. Comments about SIC code revenue required by the Form. Several comments made observations about the existing Report Form's SIC code requirements. Comment 2 said it is difficult for companies to classify information in the correct code since some companies have internal bookkeeping inconsistencies and their SIC code classifications vary from year to year. The comment stated that this problem is especially acute when the classifications are highly detailed. Although compiling SIC-based information may occasionally be difficult, the Commission has found it the most workable way to determine whether and to what extent companies produce competing products.

Similarly, comment 2 stated that it is difficult to provide the detailed breakdown required for 7-digit codes ending in "00." If a 7-digit code ends in "00," the instructions require a further breakdown by codes listed in Appendix B of the *Numerical List of Manufactured Products*. Again, notwithstanding this possible difficulty, the Commission needs this detailed information for its antitrust review.

The same comment also stated that SIC code information on interplant transfers as is required by § 803.2 is difficult to assemble, and that providing such information can result in some double counting. Here as well, despite the possible difficulty of gathering the information, the Commission believes that interplant transfers are relevant to antitrust review since internally consumed products must sometimes be considered in the market along with products sold externally. Furthermore, the Commission has not found the double counting problem insurmountable. Although the inclusion of interplant transfers means that the sum of SIC code revenues may slightly exceed the sales listed on the company's most recent income statement, the agencies can take this possibility into account in performing their antitrust review.

Comment 2 also observed that it is difficult to compile SIC code revenue, especially the more detailed 7-digit information, for recently acquired entities. This problem is more likely to occur if the recent acquisition was not reportable, since in a reported acquisition the acquired entity would already have compiled its SIC code information to fulfill its filing requirements. Again, even if the information has not been previously compiled and may be difficult to compile, it must be compiled in connection with the filing since the agencies' antitrust review depends on it.

Comment 22 objected to item 5(b)(ii)'s requirement that current 7-digit information be provided for products added since the base year. The comment pointed out that this item required companies to annually update 7-digit information for products they have recently added. The comment suggested that the information be supplied only for the year following the addition.

The Commission needs SIC code information on all aspects of a person's business, including recently commenced operations. This information must be as detailed as practicable. In this particular item, the Commission already permits parties the option of providing the information based on 7-digit SIC codes "or in the manner ordinarily used by the person filing notification." It would not be workable, however, to permit parties to provide the information only for the year following its addition. If this were permitted, the parties to an acquisition would be providing dollar revenues for dissimilar years for added products, since any number of different intervening years would appear in addition to the base year and the most recent year. This would make it difficult for the Commission to compare the parties' revenues. Moreover, if parties only provided revenues for new products for the year after the product was introduced, the Commission would often be unable to determine the present level of that person's presence in the market. The new product may have generated very little revenue when it was introduced, but may have since gained a significant presence in the market.

2. *Suggested reduction in reporting requirements.* Most of the observations about difficulties in complying with filing requirements centered around the need to provide SIC code information. Comment 22, however, also suggested two changes in the Form unrelated to SIC code data: Deletion of the requirement that persons submit an affidavit with the Form and deletion of the requirement that filing persons certify the Form.

The Commission believes that these two requirements impose at most a minimal burden on the parties to an acquisition. The Commission needs to know that the acquisition that is the subject of the filing is actually planned and not hypothetical; this is the goal of the affidavit requirement. The Commission also needs to be certain that the information contained in the Form is accurate. The current certification requirement gives the Commission added assurance that a specific individual has taken responsibility for the accuracy of the information contained in the Form. The Commission believes that the small burden imposed by these requirements is outweighed by the importance of the requirements. If interested persons believe the burden imposed by these requirements is more substantial, the Commission would appreciate submissions describing the extent of the burden.

3. *Requests for clarification of Report Form instructions.* Comment 2 requested clarification of the instructions for two items on the Form: Item 5(b)(ii) and item 8. The Commission believes that the instructions are adequate and therefore does not propose to change them at this time.

Item 5(b)(ii) requests information about products that have been added or deleted subsequent to 1982. The instruction to this item permits parties to identify added or deleted products either by 7-digit code or "in the manner ordinarily used by the person filing notification." The instruction does not expressly define the term "products added or deleted." Most filing persons have correctly read the instructions to require only additions or deletions of products that comprise a 7-digit product code. In other words, for purposes of this item, parties should define the term "product" to mean all items that are classified in a single 7-digit code. For example, assume all widgets are classified in a single 7-digit code. If a person has always made blue and yellow widgets, and one year it begins production of red widgets, it need not list red widgets in item 5(b)(ii). Similarly, if the person stops making blue widgets, it need not list them as a deleted product. In both instances the addition and deletion took place within a existing or ongoing 7-digit code in which the person derived revenue in 1982.

Comment 2 requested a similar change in the instruction to item 8, which asks for information about any vendor-vendee relationship between the parties to the acquisition. To complete this item, each vendee must list the "products" it purchased from other parties to the acquisition. Only aggregate purchases of "products" of more than $1 million must be listed. To determine whether the $1 million figure applies, most parties have correctly read the existing instructions as defining the term "product" to mean a 7-digit SIC code. Thus, in our example above, if $750,000 worth of red widgets and $750,000 worth of blue widgets were purchased in the most recent year, the person should list widgets in item 8. If, however, blue and red widgets were properly classified in separate 7-digit codes, then in our example widgets would not be listed in item 8 since the $1 million level would not be met for any given "product."

4. *Comments regarding joint venture filings.* Two comments (7, 16) expressed the concern that the Notification and Report Form did not provide the Commission with enough information to determine whether all the parties to the formation of a joint venture or other corporation had fulfilled their filing requirements. These comments arose in the context of the proposal to change rule 803.10(a), which codifies the Commission's policy of starting joint venture waiting periods after all parties to the venture with a reporting obligation have filed. The comments asserted that the Commission would not be able to determine which parties to the acquisition were required to file and therefore the agencies would not know when to start the applicable waiting period. The Commission believes that the Form already requires enough information to allow the agencies to determine which joint venturers are required to file.

The Form requires certain information about the parties to a joint venture. For instance, item 1(c) requires each party to "[g]ive the names of *all* ultimate parent entities of acquiring ... persons which are parties to the acquisition *whether or not they are required to file notification.*" (emphasis supplied) In the joint venture context, this item requires the name of each person that will acquire any voting securities of the venture, even if the parties do not believe that some of those persons will ultimately have a reporting obligation. Similarly the subparts of item 2(c) (formerly 2(e)) require detailed information about the amount and dollar value of the voting securities to be acquired by each person. Each joint venturer that files must supply this information for each person acquiring securities of a joint venture corporation.

Item 5(d) requires detailed information about all contributions to the joint venture or other corporation. Item 5(d)(ii)(A) requires a list of contributions from each person forming the venture and item 5(d)(ii)(D) requires a full description of the consideration to be received by each person forming the joint venture. Neither item is limited to persons required to file. Therefore each person that files for a joint venture must disclose this information for itself and every other person forming the venture.

These items, when read together, give the Commission considerable information about each venturer. The Commission will know the names of each contributor, the amount and value of the securities each venturer will receive and the contributions made by each venturer. Once the first venturer files, the Commission can readily determine from that filing which other venturers will meet the act's size-of-transaction test. Furthermore, the names of the other venturers will likely permit the Commission to determine from public sources which of the other venturers appear to meet the commerce and size-of-person tests.

Comments 7 and 16 suggested that parties be specifically required to state which other parties to the joint venture are required to file. The Commission agrees that this would not be particularly burdensome and that it would provide further confirmation of the Commission's independent evaluation of who must file. Nevertheless, the Commission has not adopted the suggestion at this time since it has not in the past had difficulty determining which venturers must file. If in the future the Commission experiences difficulty determining which joint venturers must file (particularly if filing persons resist the Commission's attempts to determine this information informally), the Commission will propose a change suitable to remedy the problem.

Attachment A

SIC major groups in which parties are required to provide the address, arranged by state, county, and city or town, of each establishment from which they derive dollar revenues.

Division G. Retail Trade

Major Group 52. Building materials, hardware, garden supply, and mobile home dealers.
Major Group 53. General merchandise stores.
Major Group 54. Food stores.
Major Group 55. Automotive dealers and gasoline service stations.
Major Group 56. Apparel and accessory stores.
Major Group 57. Furniture, home furnishings, and equipment stores.
Major Group 58. Eating and drinking places.
Major Group 59. Miscellaneous retail.

Division H. Finance, Insurance and Real Estate

Major Group 60. Banking.
Major Group 61. Credit Agencies other than banks.

Division I. Services

Major Group 70. Hotels, rooming houses, camps, and other lodging places.
Major Group 75. Automotive repair, services, and garages.
Major Group 78. Motion pictures.
Major Group 80. Health services.

List of Subjects

16 CFR Parts 801 and 802

Antitrust.

16 CFR Part 803

Antitrust, Reporting and recordkeeping requirements.

Accordingly, 16 CFR Parts 801, 802 and 803 are amended as follows:

A. The authority for Parts 801, 802 and 803 continues to read as follows:

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

PART 801—COVERAGE RULES

B. Example 1 to § 801.4(b) is revised to read as set forth below.

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

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.

* * * * *

C. Section 801.11(a) is revised and a new § 801.11(e) is added to read as set forth below.

§ 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.

* * * * *

(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