

[Billing Code 6750-01P]

FEDERAL TRADE COMMISSION

16 CFR Part 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule amendments.

SUMMARY: The Commission is amending the premerger notification rules ("the rules") that require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission ("the Commission" or "FTC") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice ("the Assistant Attorney General" or "DOJ") 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 may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. These amendments will update and improve the effectiveness of the rules by allowing submission of notification and report forms electronically via the Internet.

DATES: These final rules are effective on **[insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Comments or questions may be directed to Robert L. Jones, Deputy Assistant Director, Premerger Notification Office, Bureau of Competition, Room 302, Federal Trade Commission, Washington, DC 20580.

Telephone: (202) 326-2740. E-mail: HSRHelp@hsr.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 7A of the Clayton Act ("the act"), 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, requires all persons contemplating certain mergers or acquisitions to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General, to require "that the notification * * * be in such form and contain such documentary material and information * * * as is necessary and appropriate" to enable the agencies "to determine whether such acquisitions may, if consummated, violate the antitrust laws." Congress similarly granted rulemaking authority to, inter alia, "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section." 15 U.S.C. 18a(d).

Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Rules ("the rules") and the Notification and Report Form for Certain Mergers and Acquisitions ("the Form"). The rules and Form have been amended or revised on numerous occasions. These rule changes amend Section 803 and the Instructions to the Form to provide the option of filing the Form electronically.

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

The Commission, with the concurrence of the Assistant Attorney General, is adopting and implementing these rule changes to allow the submission of HSR filings electronically via the Internet. Computer technology has reached the level of sophistication necessary, through the growth of the Internet, near universal access to the Internet, and increased speed and sophistication of both computer hardware and software, to allow electronic submission of the Form. Electronic filing will provide several benefits to the companies filing the Form as well as to the reviewing agencies:

- Filing the Form electronically will eliminate expensive and time-consuming duplication of submitted documents. Currently, companies filing HSR notification must submit five paper copies of their filing, consisting of one original and one copy to the FTC, and three copies to DOJ.

- Electronic filing will ease the delivery of completed filings to the agencies and will facilitate circulation of filings within the agencies, reducing the cost and delay associated with traditional delivery methods. Electronic filings may be submitted quickly and easily at any time.

- Electronic filing will enhance the data entry of filing information into the information systems of the agencies. Some filing data will be electronically entered directly into the agency databases rather than by the more time-consuming method of hand data entry by agency staff. Direct data entry will be less prone to data entry error and potentially more accurate.

In addition to the above benefits, electronic filing complies with the mandate of the Government Paperwork Elimination Act, Pub. L. No. 105-277, title XVII (Oct. 21, 1998), which requires that agencies, to the extent practicable, provide electronic filing and signature options.

HSR filings are highly confidential. Every step of the electronic filing process has been designed to ensure the confidentiality and security of submitted information – from requiring a valid electronic signature before submission of the package and encrypting the signed package, to securely transmitting the package over the Internet to a secure FTC server and providing a return e-mail that the Form has been received. Once an electronic Form is received, multiple security measures such as authentication via digital certificates, unique permanent ID tags, and secure storage, will maintain a high level of security.

In order to provide maximum flexibility, filers will now have three options for filing: (1) complete the Form and all attachments in hard copy and deliver them to the designated delivery sites; (2) complete the electronic version of the Form and submit the Form and all attachments electronically; or (3) complete the electronic version of the Form and submit it electronically while providing all documentary attachments in paper copy to the FTC and DOJ as in Option 1 above.

The individual rule modifications necessary to implement electronic filing are described more fully below.

Section 803.1 Notification and Report Form.

Paragraph (a) will be amended to eliminate the outdated reference to photostatic or equivalent reproduction in order to apply more broadly, thus including the electronic filing option. The current version of the Form can be obtained on the Commission's web site, <http://www.ftc.gov>, or <https://www.hsr.gov>.

Section 803.2 Instructions applicable to Notification and Report Form.

In response to Items 4(a) and (b) of the Form, filing persons currently must provide copies of, or direct links to, annual reports, annual audit reports and regularly prepared balance sheets and certain documents, such as 10K's, filed with the Securities and Exchange Commission ("SEC"). These documents may be attached directly to the electronic Form.

Certain formats of electronic files cannot be viewed by the e-filing system. To ensure the submission of compatible files and to avoid problems and delay in processing, a new paragraph, § 803.2(f), has been added, requiring the use of specific file formats when submitting documents or attachments as part of the electronic Form. The filing person is responsible for ensuring that all attachments are of an appropriate file format and is subject to a notice of a deficient filing if an unacceptable format is submitted. See <https://www.hsr.gov> for a current list of acceptable file formats.

Due to technological constraints, the e-filing system has a restriction on the size of file that can be submitted electronically. While this limitation is high enough to make it unlikely to be problematic for most filers, filers should be aware that such a limit exists. See <https://www.hsr.gov> for the current maximum submission size. As technology

improves, the maximum submission size will increase and become less and less problematic. New paragraph, § 803.2(f), requires that all submissions fall under the size limitation as specified at <https://www.hsr.gov>.

Section 803.5 Affidavits required.

Section 803.5 requires an affidavit from the filing person attesting to certain facts about the proposed acquisition. The affidavit is required to be attached to the Form at the time of filing. Paragraphs 803.5(a)(1), (a)(3) and (b) and the Instructions are amended to address attachment of the affidavit when using the electronic filing option.

When filing electronically, the electronic affidavit form must be used and submitted along with the filing. The electronic affidavit form does not specify the wording to be used, but has a blank field for the filer to insert the appropriate language. Thus, as with paper filings, persons filling out the electronic Form are free to produce affidavits specific to the transaction.

Section 803.10 Running of time.

Persons required by the act to file notification must wait 30 days (or 15 days in the case of a cash tender offer or bankruptcy) before consummating the transaction. This rule provides the procedures for determining when this waiting period begins and ends. See § 803.10(a) and (b). Paragraph (c)(1) defines the “date of receipt and means of delivery” concepts used in determining when the waiting period begins. Paragraph (c)(1) has been amended to provide the date of receipt for electronic filings as the date when delivery of

the electronic filing is effected to the Federal Trade Commission server. Paragraph (c)(1)(i) has been updated to the current address of the designated delivery site of the DOJ.

A matter is “effected” to the server when a complete electronic Form has been received by the server maintained by the FTC for the purpose of receiving electronic filings. When receipt of a Form is verified, the system will send an autoreply e-mail to the filing person to notify the person that service has been effected. If a filing is submitted but no autoreply e-mail is received within 24 hours, the filing person should confirm receipt with the FTC by e-mail at “HSRHelp@hsr.gov” or phone at (202) 326-3100. Electronic delivery effected after 5:00 p.m. Eastern Time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next business day.

If the FTC server is unavailable, it will not be possible to submit a notification electronically until the server is available. A filing person assumes the risk of the server being unavailable. It is important to note that confirmation of the date and time of effected service is not notice of the start of the HSR Waiting Period, but analogous to getting a copy of the filing date-stamped on a transmittal letter for a paper filing. Separate notice will be sent subsequently to the parties to a transaction informing them when the waiting period has begun. As with paper filings, if an electronic notification is deemed deficient, the date of receipt shall be the date on which a filing that complies with the rules is received. See § 803.10(c)(2).

If a filing person is submitting the Form electronically but producing hard copies

of attachments to the reviewing agencies, delivery is not effected until the Form is received by the FTC server and all hard copy attachments have been received by both agencies as provided in § 803.10(c)(1).

In order to facilitate the disaster preparedness of the agencies (and not specific to electronic filing), part of Paragraph (c)(1) has been modified to allow for the designation of alternate sites for physical delivery of the Form in the event one or both of the FTC and DOJ offices are unexpectedly closed. Notification of the alternate delivery sites will be made through a press release and, if possible, on the <http://www.ftc.gov> and <https://www.hsr.gov> web sites. The Instructions have been amended to note this.

Appendix to Part 803 - Notification and Report Form and Instructions

A number of changes have been made to the Form and Instructions. These changes are discussed below.

Previous Instructions for the Notification and Report Form required that all dollar amounts be rounded to the nearest thousand dollars. When entering the dollar amounts into the Premerger tracking system, the FTC staff rounds these numbers to one-tenth of a million. To allow direct data entry of electronic Form information and to eliminate the need for rounding when data is entered by hand into the Premerger tracking system, the Instructions have been amended to require that all dollar amounts be expressed in millions of dollars to the nearest one-tenth of a million. For example, the value of an acquisition which is \$76,340,870 would be expressed as \$76.3 on the Form. The Instructions to the Form are amended to reflect this change.

A correction to the instructions, unrelated to the introduction of e-filing, relates to

Item 7 of the Form, which requires dollar revenue information to be provided. In the 2005 rulemaking that implemented the use of 2002 NAICS codes, two NAICS subsectors were inadvertently shifted between subsections of Item 7(c) which requires certain geographic information for overlapping NAICS codes. The earlier 1997 NAICS subsectors 513 (broadcasting) and 517 (telecommunications) were referenced in subsection 7(c)(ii), which requires a list of states in which the person filing notification conducts operations. The 2002 NAICS codes renumbered subsector 513 as 515 (broadcasting) and a drafting oversight moved it and subsector 517 (telecommunications) to subsection 7(c)(iv), which requires the additional information of address, city, county and state of each establishment from which revenues were derived by the person filing notification. This correction now properly references subsectors 515 and 517 in subsection 7(c)(ii).

The section of the Instructions relating to the affidavit has been amended to include the required elements specified in Section 803.5. The Commission has often received deficient affidavits. Including this information in the Instructions should assist filers in properly preparing the affidavit.

Administrative Procedure Act

These amendments to the HSR rules and Form fall within the category of rules covering agency procedure and practice that are exempt from the notice-and-comment requirements of the Administrative Procedure Act (“APA”). See 5 U.S.C. 553(b)(A). Because the amendments are not substantive in nature, they are also not subject to the delayed effective date provisions of the APA. See 5 U.S.C. 553(d) (substantive rules may

take effect no sooner than 30 days after publication). Accordingly, the Commission has determined to make these amendments effective on **[insert date of publication in FEDERAL REGISTER]**.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. The Regulatory Flexibility Act requirements apply, however, only to rules or amendments that are subject to the notice-and-comment requirements of the APA. See 5 U.S.C. 603, 604. Because these amendments are exempt from those APA requirements, as noted earlier, they are also exempt from the Regulatory Flexibility Act requirements. In any event, because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, amendments to the act in 2001 were intended to reduce the burden of the premerger notification program by exempting all transactions valued at less than \$50 million. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, to the extent, if any, that the Regulatory Flexibility Act applies, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The rules and the Form contain information collection requirements, as defined by the Paperwork Reduction Act, 44 U.S.C. 3501-3518, that have been reviewed and approved by OMB under OMB Control No. 3084-0005. Providing an electronic filing option was contemplated by the FTC's Supporting Statement and OMB's May 13, 2004 approval of the extension of the clearance for the rules and the Form.

List of Subjects

16 CFR Part 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR part 803 as set forth below:

PART 803—TRANSMITTAL RULES

1. The authority citation for part 803 continues to read as follows:

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

2. Amend § 803.1 by revising paragraph (a) to read as follows:

§ 803.1 Notification and Report Form.

(a) The notification required by the act shall be the Notification and Report Form

set forth in appendix to this part (803), as amended from time to time. All acquiring and acquired persons required to file notification by the act and these rules shall do so by completing and filing the Notification and Report Form, in accordance with the instructions thereon and these rules. The current version of the Form can be obtained at <http://www.ftc.gov> or <https://www.hsr.gov>.

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3. Amend § 803.2 by adding paragraph (f) to read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

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(f) Filings made electronically, including documents or other attachments submitted as part of such filings, must comply with all format and size requirements set forth at <https://www.hsr.gov>. The use of any format or size not specified as acceptable, or any other failure to comply with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

4. Amend § 803.5 by revising the text of paragraph (a)(1) before subparagraph (i), paragraph (a)(3), and paragraph (b) to read as follows:

§ 803.5 Affidavits required.

(a)(1) Section 801.30 acquisitions. For acquisitions to which § 801.30 applies, the notification required by the act from each acquiring person shall contain an affidavit, attached to the front of the notification, or attached as part of the electronic submission,

attesting that the issuer whose voting securities are to be acquired has received notice in writing by certified or registered mail, by wire or by hand delivery, at its principal executive offices, of: * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section. For electronic filing, an electronic copy of the written notice must be attached as part of the electronic submission.

* * *

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

* * * * *

5. Amend § 803.10 by revising paragraph (c)(1) to read as follows:

§ 803.10 Running of time.

* * *

(c)(1) Date of receipt and means of delivery. For purposes of this section, these procedures shall apply.

(i) For paper copy filings, the date of receipt shall be the date on which delivery is

effected to the designated offices (Premerger Notification Office, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington DC 20580, and Director of Operations, Antitrust Division, Department of Justice, 950 Pennsylvania Avenue, N.W., Room #3335, Washington DC 20530) during normal business hours. Delivery should be effected directly to the designated offices, either by hand or by certified or registered mail. In the event one or both of the delivery sites are unavailable, the FTC and DOJ may designate alternate sites for delivery of the filing. Notification of the alternate delivery sites will normally be made through a press release and, if possible, on the <http://www.ftc.gov> and <https://www.hsr.gov> web sites.

(ii) For electronic filings, the date of receipt shall be the date on which delivery of the electronic filing package is effected to the server maintained by the FTC for the purpose of receiving electronic filings.

(iii) For electronic filings with paper copy submission of all attachments, the date of receipt shall be either the date on which delivery of the electronic filing package is effected to the Federal Trade Commission's server or the date on which delivery of the attachments is effected to the designated offices as provided in paragraph (c)(1)(i) of this section, whichever is later.

(iv) Delivery effected after 5:00 p.m. Eastern Time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If delivery of all required filings to all offices required to receive such filings is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected.

Example: * * *

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6. Amend the Appendix to part 803 to replace the Notification and Report Form and the Instructions applicable to Notification and Report Form with the following:

[INSERT FORM HERE]

[INSERT INSTRUCTIONS HERE]

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By direction of the Commission.

Donald S. Clark
Secretary