FEDERAL TRADE COMMISSION [Billing code 6750-01P]

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final Rules.

SUMMARY:

The Federal Trade Commission is amending the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Commission and with 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, pursuant to Section 7A of the Clayton Act ("the Act"). The filing and waiting period requirements 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. This rulemaking introduces a number of changes that attempt to reconcile, as far as is practical, the current disparate treatment of corporations, partnerships, limited liability companies and other types of non-corporate entities under the rules, particularly in the areas of acquisitions of interests in these entities; formations of the entities; and the application of certain exemptions, including the intraperson exemption. This rulemaking also makes technical corrections in other provisions in the rules.

DATES: These final rules are effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Marian R. Bruno, Assistant Director, Karen E. Berg, Attorney, Malcolm L. Catt, Attorney, B. Michael Verne, Compliance Specialist, or Nancy M. Ovuka, Compliance Specialist, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326-3100.

SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

On April 8, 2004, the Commission published a Notice of Proposed Rulemaking and request for Public Comment. The comment period closed on June 4, 2004.[1] The Proposed Rules recommended changes improving and updating the HSR rules in 16 CFR Parts 801, 802 and 803.

[1] 69 FR 18686 (April 8, 2004).

The proposed rules were intended to apply the Act as consistently as possible to all forms of legal entities, requiring filings for transactions that are likely to present antitrust concerns and exempting transactions that are not. The central thrust of these rules is that meaningful antitrust review should occur at the point at which control of an unincorporated entity changes.

The proposed changes to the coverage rules include a revision to Section 801.1(b) to remove the alternate control test for unincorporated entities; an amendment to Section 801.1(f) to define a "non-corporate interest"; a revision to Section 801.2(d) to clarify the consolidation rule; an amendment to Section 801.2(f) to define when acquiring interests in unincorporated entities may constitute an acquisition; a new subsection to Section 801.10 to define how to value such an acquisition; a new subsection to Section 801.13 to address aggregation of non-corporate interests; and a new Section 801.50, which makes certain formations of unincorporated entities a reportable event. There are also ministerial changes to Sections 801.4, 802.40 and 802.41 to adapt their application to both corporations and unincorporated entities. Additionally, there are minor changes to the Notification and Report Form to require that Item 5(d) be completed in connection with the formation of an unincorporated entity, to reflect the applicability of Items 7 and 8 to unincorporated entities and to change the reporting requirement in Items 1,2 and 7 with regard to the formation of new entities.

Proposed changes to the exemption rules include modifying Section 802.4 to eliminate the dissimilar treatment of asset and voting securities acquisitions that are substantively the same; codifying in Section 802.10 a longstanding informal interpretation that pro-rata reformations (i.e. reincorporation in a new jurisdiction) are exempt transactions; changing Section 802.30 to apply the intraperson exemption to entities that are held other than through holdings of voting securities; and adding a new Section 802.65 to exempt acquisitions of non-corporate interests in entities that are formed in connection with financing transactions.

In addition to amendments concerning unincorporated entities, there were technical corrections to Sections 801.13, 801.15 and 802.2.

The Commission received seven substantive public comments addressing the Proposed Rules. In addition to the substantive comments, the Commission received several non-substantive comments through the www.regulations.gov website. The comments are published on the FTC website at http://www.ftc.gov/os/comments/hsr/index.htm.

The following submitted substantive public comments on the Proposed Rules:

1. Section of Antitrust Law, American Bar Association (Grady, Kevin) (06/03/2004)
2. Bank Of America (Wertz, Phillip) (06/03/2004)
3. Gunderson Dettmer (Caplice, Sean) (06/03/2004)
4. Howery, Simon, Arnold & White LLP on behalf of its client Bertelsmann AG (Grise, Jacqueline) (05/26/2004)
5. Kirkland & Ellis LLP (Sonda, Jim, et al) (06/03/2004)
6. Sony Corporation of America (Kattan, Joseph) (05/27/2004)

7. Business Law Section, Virginia State Bar (Wheaton, James) (06/03/2004)

Introduction

The Act applies to acquisitions of voting securities or assets. Whether a transaction must be reported is determined by applying the statute, supporting regulations, and formal and informal staff interpretations. Neither the Act nor the Hart-Scott-Rodino rules ("HSR rules") specifically addresses whether interests in unincorporated entities are deemed to be voting securities or assets. The Premerger Notification Office, by informal interpretation, has long taken the position that partnership interests, and, by extension, interests in other types of unincorporated entities, are neither assets nor voting securities. Thus, any acquisition of such interests has not been deemed a reportable event unless 100 percent of the interests are acquired, in which case the acquisition is deemed to be that of all of the underlying assets of the partnership or other unincorporated entity.

Informal staff interpretations of the current rules with respect to unincorporated entities lead to several anomalies that do not occur with corporations. These inconsistencies relate primarily to three areas: changes of control, intraperson transfers of assets, and formations.

a) Changes of Control

Section 801.2(a) states "[a]ny person which, as a result of an acquisition, will hold voting securities or assets . . . is an acquiring person." Section 801.1(c)(8) further states ". . . in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls . . .". Despite this language, under current application of the rules, if a minority interest holder or a person that holds no interests at all acquires a controlling, but less than 100 percent interest in an existing unincorporated entity, the transaction is never reportable because the person that will control the unincorporated entity is not deemed to be acquiring the assets of the entity and no reportable acquisition occurs. However, under the rules, the person is immediately deemed to hold those same assets for purposes of determining the size-of-person test, by virtue of having the right to 50 percent or more of the profits and assets upon dissolution of the entity. Further, if the person that now controls the unincorporated entity, were to acquire the remaining interests, it would be required to file notification to acquire the same assets it is deemed to currently hold by virtue of Section 801.1(c)(8), assuming the jurisdictional thresholds are met. The intraperson exemption provided in Section 802.30 prevents this result in the context of a corporation but is not available to unincorporated entities because the exemption requires that the acquiring and acquired person be the same by reason of holdings of voting securities.

Thus, under this current application of the rules, if a person currently holding no interests, or a minority position, in a non-corporate entity acquires 100 percent of the interests, the person is required to file, but if it acquires 99 percent it is not. A person that controls a non-corporate entity and acquires the remainder of the interests must also file. Both situations are anomalous: a filing is required after control is obtained, yet no filing is required to gain control.

Consistent with the treatment of corporate entities, meaningful antitrust review should occur at the time that control of an unincorporated entity changes, and not after control is already acquired. Currently, if a person that controls a partnership or other unincorporated entity is acquiring the remaining interests, that interest holder is deemed both an acquiring and acquired person, and must file notification to acquire the assets that, according to a literal reading of the rules, it already holds.[2] For example, a 90 percent partner acquiring the remaining 10 percent of the interest in a partnership must file. An HSR filing for this type of transaction appears to be of little antitrust significance. The Commission receives a significant number of such filings each year and believes that additional transactions are not reported as currently required due to the counterintuitive nature of the current application of the rules.[3]

(b) Intraperson Transfers

In the context of corporations, any transfer of assets from a corporation to a controlling shareholder, or a transfer of assets from one corporate subsidiary of a parent to another corporate subsidiary of the same parent is exempt.[4] However, because partnerships and other unincorporated entities are not controlled through the holding of voting securities, similar transfers involving such entities are reportable. For example, a reportable transaction results when assets are transferred from a partnership to a partner that holds a 90 percent interest in the partnership, irrespective of the fact that the controlling partner is already deemed to hold those assets. Similarly, if a person controls two different partnerships and transfers assets from one to the other, that person would have a filing requirement despite the fact that it holds the assets under the rules both before and after the transfer. This result conflicts with the definition in Section 801.2 of an acquiring person as "Any person which, as a result of an acquisition will hold voting securities or assets . . ." (emphasis supplied).

(c) Formations

With the exception of certain limited liability company formations, [5] formations of

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[2]16 CFR 801.1(c)(8).

[3]From FY 1997 through FY 2004, the Commission received 259 filings in which the acquiring person and the acquired person were the same.

[4]"An acquisition (other than the formation of a joint venture or other corporation the voting securities of which will be held by two or more persons) in which, by reason of holdings of voting securities, the acquiring and acquired persons are (or as a result of formation of a wholly owned entity will be) the same person, shall be exempt from the requirements of the Act." 16 CFR 802.30.

[5]Formal Interpretation 15 (64 FR 5808 (February 5, 1999)) treats the formation of an LLC as reportable if (1) two or more pre-existing, separately controlled businesses will be contributed to the LLC, and (2) at least one of the members will control the LLC. The formation

unincorporated entities are not reportable events. This leads to a number of transactions where a de facto change of control of assets can occur without notification. For example, A and B form a non-corporate entity to which B will contribute a business in exchange for a 40 percent interest and A will contribute cash in exchange for a 60 percent interest. Although A now holds assets that were previously held by B, current application of the rules does not require notification because A will not hold 100 percent of the interests in the non-corporate entity nor are two pre-existing businesses being combined in an LLC. This would not be reportable in an LLC or partnership formation but would be reportable in the formation of a corporation. While Formal Interpretation 15 was an attempt to address this inconsistency in the context of limited liability company formations, its application still results in non-reportable transactions that could have significant antitrust implications.

Public Comments

The comments received were generally positive. The American Bar Association, Section of Antitrust Law stated:

> "The Section also supports most of the Commission's proposed rule changes. As the first attempt at improved harmonization of the treatment for all entities, the proposed rules are grounded in improved logic with due regard for administrability and the undeniable structural differences between and among entities. The proposed rules are therefore better able to serve the goals of Section 7 enforcement than the current rules and interpretations. Similarly, to the extent that the proposed rules reduce anomalies and logical inconsistencies, they can also be said to promote HSR Act compliance, for illogical rules can promote inadvertent violations." [6]

The suggested changes to the Proposed Rules advanced by the public comments fell into three broad categories: 1) requests for changing the control test for unincorporated entities from an equity test to a governance test; 2) requests for expansion of proposed exemptions or promulgation of additional exemptions; and 3) other requests for clarification. Additionally, a number of the comments contained observations on the proposed rules but did not ask for any specific action. These observations are not addressed in this notice. The Commission agreed with a number of the recommendations and has incorporated them into these final rules. Other recommendations were not adopted for the reasons detailed below.

In addition to requesting specific modifications to the rules, Comments 1 and 2 expressed concern that the estimated number of additional filings these rules would entail (as calculated in the Paperwork Reduction Act section of the proposed rules) may not reflect the actual number

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of all other LLCs is treated like the formation of a partnership, which is not reportable.

[6]Comment of The Section of Antitrust Law, American Bar Association, Kevin E. Grady, Esq., p. 2.

that may ultimately be required. The Commission agrees that it is difficult to project the impact of these changes and will monitor the number and types of transactions that require notification as a result of these amendments. It will consider revisiting these amendments if a significant number of filings for transactions that do not raise antitrust issues are received as a result of the changes.

Four of the new exemptions that were requested by the comments were not adopted by the Commission. A discussion of the requested new exemptions is found at the end of Part 802. The Commission will adopt one new exemption requested by the comments and will expand two others. Comments 4 and 6 requested a new transitional exemption for previously unreportable transactions that become reportable while they are under investigation by one of the agencies. The Commission has adopted this proposal in new Section 802.80. The Commission agrees with the commenters that transactions in this category are unlikely to raise any new antitrust issues and do not warrant the burden of notification under the Act.

In addition, the Commission will broaden the scope of two of the proposed exemptions. Proposed Section 802.65 will be extended to cover existing unincorporated entities, and the prong requiring that the acquiring person not be a competitor of the unincorporated entity will be eliminated. Second, voting securities will be added to the language of Section 802.30(c) so that both contributions of assets and voting securities to the formation of a new unincorporated entity will be exempt with respect to the contributor.

Other amendments to the proposed rules are discussed by section. Unless specifically modified in this document, all of the analysis accompanying the proposed rules in the Notice of Proposed Rulemaking is adopted and incorporated into this Statement of Basis and Purpose for the final rules.

PART 801 - COVERAGE RULES

Section 801.1 Definitions.

The proposed amendment to Section 801.1(b)(2) would remove the alternate test of control for unincorporated entities, which provides for control through having the present contractual power to designate individuals exercising similar functions to those of directors of a corporation. This proposed amendment was intended to ensure that it was clear that an acquisition involving an unincorporated entity is reportable only when control is acquired through an acquisition of non-corporate interests that confer the right to profits or assets upon dissolution of the entity. However, the proposed amendment had the unintended effect of eliminating the test for control of certain trusts, defined in Section 801.1(c)(3) through (5), as having the right to designate 50 percent or more of the trustees of such a trust. The final rule adds back the alternate test of control for these trusts.

Comments 2 and 7 requested that the Commission change its test of control for unincorporated entities from an equity test to a governance test, more in line with the test of control for

corporations. As the Commission noted in its discussion of the proposed amendment to the control rule, this option was considered at length but rejected as too difficult to apply to unincorporated entities because of the inherent differences in legal structure between corporations and unincorporated entities. As comment 7 noted: "By their very nature, unincorporated entities tend to be contractual in nature, and their management arrangements reflect a broad continuum of contractual options."[7]

When the Commission promulgated the control definition for unincorporated entities in 1987, it considered other indicia of control of partnerships, including a governance test that would designate general partners as controlling persons.

> "In formulating the 50% ownership criterion, consideration was given to whether other indicators of control should be included. For example, the Commission might have proposed treating all general partners or the sole general partner of a limited partnership as controlling the partnership. While the Commission did not doubt its authority to attribute control on the basis of this or other criteria, the Commission declined to utilize that authority at this time because it might require many unnecessary filings . . . At present, a rule requiring all general partners to file seems unnecessary and therefore unduly burdensome . . ."[8]

While the Commission agrees that a workable governance test for non-corporate entities would align the treatment of such entities even more closely with corporations, the Commission continues to believe that applying a governance test to partnerships is in practice unworkable and is even more difficult to apply to other types of unincorporated entities, such as LLCs, which seem to have an endless range of different governance structures. Accordingly, the Commission declines to change the control rule at this time, but will continue to consider alternatives that bring the test for unincorporated entities more in line with corporations. It therefore invites continued input from interested parties on this subject.

Comments 1, 2 and 5 raised questions concerning the determination of control where the right to profits or assets upon dissolution is governed by a formula that is based upon variables that cannot be determined at the time of the formation of the entity, or upon an acquisition of interests in an existing entity. If an agreement designates a fixed percentage of profits and/or assets upon dissolution for each person contributing to the formation of the entity or for a person acquiring an interest in an existing entity, the analysis is straightforward. If, however, the profit distribution or distribution of assets upon dissolution is dependent on variables that will be determined in the future, the analysis is more complex.

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[7]Comment from Troutman Sanders LLP, on behalf of the Business Law Section of the Virginia State Bar, James J. Wheaton, Esq., p.4.

[8] 52 FR 20061 (May 29, 1987).

In order to provide guidance on this issue, the Commission will determine whether a controlling interest has been acquired, either in the formation of a new unincorporated entity or in the acquisition of interests in an existing unincorporated entity when the right to profits and/or the right to assets upon dissolution is not fixed in the following manner: If the right to profits is variable and the right to assets upon dissolution is fixed, the right to 50 percent or more of the assets upon dissolution will be deemed to confer control. Conversely, if the right to assets upon dissolution is variable and the right to profits is fixed, the right to 50 percent or more of the profits will be deemed to confer control. In a situation where both the right to profits and assets upon dissolution are variable, control will be determined by applying the formula for determining rights to assets upon dissolution to the total assets of the unincorporated entity at the time of the acquisition, as if the entity were being dissolved at that time.

Where rights to both profits and assets are variable, for purposes of determining control of a to-be-formed unincorporated entity, a pro forma balance sheet should be prepared in the manner prescribed in Section 801.11(e)(2)(i). For purposes of determining control of an existing unincorporated entity, the last regularly prepared balance sheet in existence at the time of the acquisition should be used. If no such regularly prepared balance sheet exists, a pro forma balance sheet should be prepared in the same manner as prescribed above for a to-be-formed unincorporated entity. If no person has the right to 50 percent or more of the assets of the entity using this method, no person has acquired control of the entity as a result of the proposed acquisition.

The Commission realizes that this is not a perfect solution and may produce some anomalies, but believes that it is the best methodology available at present that will offer a degree of certainty in determining when a potentially reportable acquisition of non-corporate interests will occur. As always, the Commission encourages additional input by interested parties and will give serious consideration to any alternative method that appears to be a better solution.

Proposed new Section 801.1(f)(1)(ii) would define the term “non-corporate interest” as an interest in any unincorporated entity that gives the holder the right to any profits of the entity or the right to any assets of the entity in the event of dissolution of that entity. Comment 5 requested that the proposed definition be clarified to indicate that such interests include only equity interests and not debt interests. The definition in its final form provides this clarification by modifying the definition to include the right to any profits of the entity or, in the event of dissolution of that entity, the right to any of its assets after payment of its debts.

Section 801.2 Acquiring and acquired persons.

The proposed amendments to Section 801.2(d) would codify a longstanding informal staff position that the combination of any two entities into a new holding company is the functional equivalent of a consolidation and should be treated in the same manner, regardless of whether the entities are corporations or non-corporate entities. It also clarifies that even if the two entities are retaining their separate legal identities by becoming subsidiaries of the new holding company, the transaction would be treated in the same manner, i.e., as a consolidation.

The proposed amendments to Section 801.2(d) would treat arrangements such as dual-listing agreements the same as consolidations.[9] Comment 1 requested that this provision be eliminated because it could not distinguish such arrangements from other types of contractual agreements that do not fall under the scope of the Act. The Commission recognizes that all of these arrangements involve foreign entities and to date have occurred fairly rarely. Given these facts and because the Commission concurs that it is difficult to differentiate dual listing arrangements from other types of non-reportable contractual combinations of businesses, it agrees that the provision covering dual listing company agreements should be removed from the final rule defining consolidations. In the future, the Commission may consider reexamining this issue should it find that a significant number of combinations raising substantial antitrust issues use a dual-listing type of arrangement.

Proposed new Section 801.2(f)(1) provides that an acquisition occurs at the time non-corporate interests which confer control of an unincorporated entity are acquired. At this point the person who controls the entity is deemed to hold all of the assets of the entity. Thus the proposed rules would shift reporting from when 100% of the interest in an unincorporated entity is received to the more significant point when control is obtained.[10] This change would be consistent with Section 801.2(a) which defines an acquiring person as "[a]ny person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly . . . is an acquiring person."

Proposed new Section 801.2(f)(2) would clarify that a contribution of assets or voting securities to an existing unincorporated entity is an acquisition by that entity and that such a transaction would not be governed by new Section 801.50, even if all or part of the consideration is interests in the entity. This differs from Formal Interpretation 15 which views the contribution of a business to an existing LLC in exchange for membership interests as a new formation of that LLC. Note that when a person acquires control of an existing non-corporate entity as a result of a contribution made to that non-corporate entity, the acquisition by the non-corporate entity from the contributing person is not separately reportable.

Proposed Section 801.2(f)(3) would also codify a longstanding informal position that acquiring the right to designate 50 percent or more of the board of directors of a not-for-profit corporation is an acquisition of all of the underlying assets of such an entity. This is generally accomplished by becoming a member with the right to designate 50 percent or more of the board of directors.

There were no comments received on these sections. 801.2(f)(3) will be adopted as proposed without change. The final rules incorporate minor edits to sections 801.2(f)(1) and (2) to clarify when a potentially reportable acquisition of non-corporate interests has occurred and who the

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[9]See proposed section 801.2(d)(2)(iii).

[10]See Sec. 801.1(c)(8), which provides that a "person holds all assets and voting securities held by the entities included within it; in addition to its own holdings, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly."

acquiring and acquired persons are.

Section 801.4 Secondary acquisitions.

The proposed amendment to Section 801.4 would clarify that any indirect acquisition of voting securities of an issuer that is not controlled by the acquired entity in the primary acquisition is deemed a secondary acquisition and is separately subject to the reporting requirements of the Act. This is true whether the primary acquisition confers control of a corporation or of an unincorporated entity. There were no comments on this section and the proposed rule will be adopted without change.

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

Proposed Section 801.10(d) would specify the method of valuing a transaction in which non-corporate interests that confer control of an existing unincorporated entity are acquired. Under the current rules, in an acquisition of voting securities of a non-publicly traded corporation, where a person acquires 50 percent or more of the corporation's voting securities, that person is deemed to hold all of the assets of the corporation. However, the value of the transaction is the value of the percentage interest held in the corporation, not the value of 100 percent of the underlying assets. The Commission believes that it is appropriate to similarly value an acquisition of non-corporate interests. Rather than treating such a transaction as a stand-alone acquisition of assets, which would be valued in accordance with Section 801.10(b), the proposed rule establishes the value of the transaction by using the same methodology employed in valuing voting securities of a non-publicly traded corporation. Therefore, the value of any non-corporate interests which are being acquired is the acquisition price if determined or if undetermined, the fair market value of those interests. The value of any non-corporate interests in the same unincorporated entity which are already held prior to the instant acquisition is the fair market value of those interests.

There were no comments on this section and the proposed rule will be adopted without change.

Section 801.11 Annual net sales and total assets.

The final rules will include a technical correction to Section 801.11(b), which states that this section is inapplicable to the determination of the size of a newly formed entity, that adds a reference to unincorporated entities formed under Section 801.50 to make it consistent with the formation of corporations under Section 801.40.

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

The proposed amendment to Section 801.13(b) would correct a drafting oversight that has

existed since the original rulemaking in 1978. [11] Amended Section 801.13(b) would require aggregation if, within the 180 days preceding the execution of a letter of intent or agreement, 1) a still valid letter of intent or agreement, which has not been consummated, was entered into with the same acquired person; or 2) assets were acquired from the same acquired person and are still held by the acquiring person. No aggregation is required if the earlier contemplated or consummated acquisition was subject to the requirements of the Act.

Proposed new Section 801.13(c) would require that any new acquisition of non-corporate interests be aggregated with any previously acquired non-corporate interests in the same unincorporated entity for purposes of determining the value of the transaction in accordance with new Section 801.10(d).

There were no comments on these provisions and the proposed rule will be adopted with minor edits for clarification.

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

As explained in the Notice of Proposed Rulemaking, the proposed amendment to Section 801.15 would correct a drafting oversight in the rulemaking promulgated in March, 2002.[12] To correct this earlier drafting error, the proposed amendment to Section 801.15 would move reference to Sections 802.50 and 802.51 from paragraph (b) to new paragraph (d), which requires that sales in or into the U.S. be aggregated under both foreign exemptions to determine if the $50 million limitation is exceeded. There were no comments on this section and the proposed rule will be adopted without change.

Section 801.21 Securities and cash not considered assets when acquired.

The final rules add a technical correction to Section 801.21 to include a reference to its use in Section 802.4. The change also corrects a potentially misleading statutory reference in the rule.

Section 801.50 Formation of unincorporated entities.

Proposed Section 801.50 would govern the reportability of formations of new unincorporated entities. Because the formation of an entity presents the same potential antitrust concerns regardless of whether its legal form is that of a corporation or a non-corporate entity, the Commission believes that all such formations should be treated as similarly as possible under the rules. Thus, proposed new Section 801.50 would mirror Section 801.40, which governs the

[11]The Notice of Proposed Rulemaking explains the problem with the current provision. 69 FR 18691 (April 8, 2004).

[12]67 FR 11898 (March 18, 2002).

formation of corporations, with two exceptions as discussed in the NPRM. Most importantly, like any potentially reportable acquisition of an existing unincorporated entity, acquisitions of non-corporate interests which confer control must be reported.

The final rules reorganize Section 801.50 for clarity and add language that was inadvertently omitted in the proposed rule. The added language clarifies that a newly formed entity is not an acquiring person with respect to any contribution to its formation and comports with similar language in Section 801.40 governing corporate formations. There is also a new example added to illustrate the interplay among sections 801.50, 802.4 and 802.30(c). There were no comments on this section.

PART 802 - EXEMPTION RULES

Section 802.2 Certain acquisitions of real property assets.

In 2001, the FTC amended the HSR Form and Instructions to require reporting of revenue data by NAICS[13] rather than by SIC[14] code. [15] At the same time, the two HSR Rules that had referenced SIC codes were amended so as to replace those references with "the applicable NAICS sector." Accordingly, the parenthetical in the agricultural property exemption was amended to read:

"(activities within NAICS sector 11)."

The agencies have since discovered that timberland, which was in SIC major group 08 and thus not originally referenced in the parenthetical at issue, is in NAICS sector 11, which is captioned "Agriculture, Forestry, Fishing and Hunting." Within sector 11 are "timber tract operations", "forest nurseries and gathering of forest products", and "logging." Thus, the change to NAICS sector 11 could be read as expanding the exemption beyond the agricultural property originally intended.

To rectify this ambiguity and clarify that timberland acquisitions are not exempted by Section 802.2(g), the proposed amendment to this rule would make two changes. First, the parenthetical at issue would be revised to make it clear that only real property and assets that primarily generate revenues from "certain" activities within NAICS sector 11, i.e., activities named in the text of the rule (the production of crops, fruits, vegetables, livestock, poultry, milk and eggs), are exempted. Second, the amendment would add a new subsection under the exceptions to the rule providing that timberland and other real property that generates revenues from activities within

[13]North American Industry Classification System.

[14]Standard Industrial Classification System

[15]66 FR 23561 (May 9, 2001) (interim rules); 66 FR 35541 (July 6, 2001) (finalizing interim rules).

NAICS subsector 113 (Forestry and logging) and NAICS industry group 1153 (Support activities for forestry and logging) do not qualify for the agricultural property exemption. There were no comments on this section and the proposed rule will be adopted without change.

Section 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

Proposed Section 802.4 exempts an acquisition of voting securities if the acquired issuer or issuers do not, in the aggregate, hold non-exempt assets exceeding the $50 million notification threshold. The proposed rule would expand the current rule in two ways: first, consistent with the other proposed amendments to the rules, the proposed amendments to this exemption would apply to both acquisitions of voting securities and to acquisitions of non-corporate interests. Second, the proposed exemption would be broadened to include acquisitions of voting securities or of non-corporate interests that confer control of an unincorporated entity if the assets of the issuer or unincorporated entity are exempt under any section of Part 802 of the rules or Section 7A(c) of the Act, or are specified under Section 801.21 of the rules. There were no comments on this section and the proposed rule will be adopted without change.

Section 802.10 Stock dividends and splits; reorganizations.

Proposed new Section 802.10(b) would expand the existing exemption to codify a longstanding informal staff position that exempts the reincorporation or formation of an upstream holding company by an existing corporation, as long as two conditions are met: (1) no new assets will be introduced as a result of the conversion, and (2) the percentage of interests that will be held by an acquiring person in the new entity will be, pro-rata, the same or less than the percentage of holdings in the original entity. The reorganization will be exempt for a person that controlled the original entity regardless of its holdings in the new entity as long as the first condition is met. There were no comments on this section and the proposed rule will be adopted without change.

Section 802.30 Intraperson transactions.

Section 802.30 in its present form exempts acquisitions in which, by reason of holdings of voting securities, the acquiring and acquired person are the same person. Current Section 802.30 produces another inconsistent application of an exemption dependent on whether a corporation or an unincorporated entity is involved in the transaction. Because of the qualifying phrase “by reason of holdings of voting securities”, entities that do not issue voting securities are excluded from the exemption. For example, if a corporate subsidiary transfers assets to its controlling shareholder, no filing is required. If an unincorporated subsidiary made the same transfer to a person who controlled it, the exemption would not apply. Similarly, if a parent controlled two corporations and transferred assets from one to the other, no filing is required. If a parent controlled two partnerships and made the same transfer between them, the exemption is inapplicable and a filing would be required. These scenarios seem at odds with the HSR rules’ definition of “control” and “hold” because the parent holds the assets of the controlled entities both before and after each transaction.

Proposed Section 802.30(a) would eliminate the requirement that control be achieved through the holding of voting securities, and instead applies the appropriate control test in Section 801.1(b)(1) to any type of entity. This proposed section also adds the provision that the exemption would apply if "at least one of the acquired persons" is the same person. This insures that the proposed exemption would be available in an acquisition where there are two acquired ultimate parent entities as in proposed Example 1.

The proposed amendment to Section 802.30(b) would restate the existing exemption for formation of wholly-owned subsidiaries, but would change the language slightly to exempt the formation of any type of wholly-owned entity.

Proposed new Section 802.30(c) would provide that assets that will be contributed to a new entity upon its formation would not be subject to the requirements of the Act with respect to the person contributing the assets to the formation. This is intended to eliminate a filing requirement where the assets contributed to the formation by other persons would not on their own be subject to the Act, such as when the controlling person contributes assets and the non-controlling person contributes only cash. This proposed exemption would be applicable to the formations of both unincorporated entities and corporations.

Comment 1 requested that voting securities be added to the language in 802.30(c) so that a contribution of either voting securities or assets to the formation of a new entity would be exempt with respect to the person contributing them. The Commission will incorporate the requested language in the final version of this section. The final rule also incorporates minor edits for clarity.

Section 802.40 Exempt formation of corporations or unincorporated entities.

Section 802.40 is intended to exempt the formation of not-for-profit corporations, but its requirement that the acquisition be of voting securities of the not-for-profit is inapposite because the vast majority of not-for-profit corporations do not issue voting securities. The proposed amendment to Section 802.40 would correct this by removing the reference to voting securities, thereby extending the exemption to the formation of any not-for-profit entity within the meaning of the cited sections of the Internal Revenue Code. There were no comments on this section and the proposed rule will be adopted without change.

Section 802.41 Corporations or unincorporated entities at the time of formation.

Section 802.41 states that in a formation of a joint venture or other corporation under Section 801.40, only the acquiring persons need file notification; the new corporation being formed is not required to file as an acquired person. The proposed amendment to Section 802.41 would extend the same treatment to new unincorporated entities being formed under proposed new Section 801.50. There were no comments on this section and the proposed rule will be adopted without change.

Section 802.65 Exempt acquisition of non-corporate interests in financing transactions.

Proposed new Section 802.65 would exempt certain acquisitions in financing transactions involving the formation of unincorporated entities. In some financing transactions, a new unincorporated entity is formed into which one party contributes assets and another contributes only cash. Initially, the cash investor will have a preferred return in order to recover its investment. As a result, that person may have the right to 50 percent or more of the profits of the entity for some period of time following the formation. This type of transaction is analogous to a creditor acquiring secured debt in the entity, an event that is not subject to the Act. Rather than taking back secured debt, however, the investor acquires an equity interest in the entity only long enough to obtain its return on investment. For these reasons, the Commission believes that such a financing arrangement is unlikely to raise antitrust concerns.

As proposed in the NPRM, the new exemption would be applicable when four conditions are met: a) the acquiring person is contributing only cash to the formation of the entity; b) the formation transaction is in the ordinary course of the acquiring person's business; c) the terms of the formation agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return; and d) the acquiring person will not be a competitor of the new entity.

Various comments requested changes to proposed Section 802.65. Comments 2 and 3 recommended removing proposed paragraph (d) because the term "competitor" is not defined in the rules and may unreasonably narrow the scope of the exemption in certain situations. The Commission agrees that this may be ambiguous and that if the other three conditions of the exemption are satisfied, the need for this fourth condition is diminished. Therefore, Section 802.65 in its final form will not contain requirement (d).

Comments 2 and 3 also recommended that the exemption be expanded to cover financing transactions that involve acquisitions of interests in existing unincorporated entities. The Commission agrees that if an interest is acquired in an existing unincorporated entity in a bona fide financing transaction that satisfies the other requirements of this exemption, there is no reason for the exemption not to be available. Therefore, the final rule will incorporate this recommendation.

Comments 1, 3 and 7 requested that paragraph (b), which requires that the financing transaction be in the ordinary course of the acquiring person's business, be eliminated. The stated concern was that this provision might prevent an entity that was not a financial institution, such as a bank, from using the exemption in an otherwise bona fide financing transaction. A second concern was that a recently formed entity that had not yet engaged in previous financing transactions would not satisfy this test. The intent of this test was not to require that the transaction be in the ordinary course of business of the acquiring person, rather that the transaction be for the purpose of providing financing. Therefore, paragraph (b) will remain in the final rule but will be reworded to clarify its application.

Comments 1, 2, 3 and 7 recommended eliminating paragraph (c), which requires that the acquiring person cede control of the unincorporated entity once it has recovered its investment. The criticism of this provision was that it narrowed the exemption to a specific type of financing structure and would exclude transactions where the equity return to the investor was fixed for the life of the financing vehicle. These final rule amendments will have the result that, in a transaction where one party ("A") contributes cash and takes back a 50 percent or greater equity interest in an unincorporated entity, and another party ("B") contributes non-exempt assets, the person acquiring the controlling interest must file notification if the statutory thresholds are exceeded. This result departs from the methodology of Formal Interpretation 15, which makes the formation of a new LLC reportable only when it combines two previously separately controlled businesses.[16] Formal Interpretation 15 has proven unsatisfactory in capturing a number of LLC transactions that the Commission believes should be reported, such as the type of transaction described above. In this transaction, A now holds assets that were previously held by B. If A directly acquires the assets from B, the acquisition is reportable. The Commission sees no reason why a change in beneficial ownership of the same assets should be non-reportable because it is effected through acquiring for cash a controlling interest in an unincorporated entity. A new Formal Interpretation 18 will be issued that revokes Formal Interpretation 15.

New Section 802.65 was intended to be a narrow exception to the general notion that acquisition of a controlling interest in an unincorporated entity should be reportable, limited to instances where a cash acquisition is an ordinary course of business mechanism of providing financing, and the acquiring person's acquisition of a controlling interest is only temporary. The Commission did not intend to exempt cash acquisitions of controlling interests in unincorporated entities generally. The Commission believes that the exemption is workable, especially with the two amendments described above, although clearly not as broad as some commenters desire. Therefore, paragraph (c) will remain in the final rule. As with this rulemaking generally, the Commission will revisit this exemption if experience with the rules warrants.

Section 802.80 Transitional rule for transactions investigated by the agencies.

The final rules add a new transitional exemption for transactions that are or have been under active investigation by the FTC or the DOJ and would otherwise be subject to notification when these rules become final. Comments 4 and 6 requested an exemption with regard to formation of unincorporated entities, designed to exempt transactions from filing requirements if the parties have or are currently providing documents regarding the same transaction to one of the agencies under a subpoena or CID that is the functional equivalent of a second request. The Commission agrees that subjecting the parties to additional filing and waiting period requirements, as well as filing fees, would serve no useful

[16] 64 FR 5808 (February 5, 1999). The requirement that two businesses must be combined to make an LLC formation reportable was included in Formal Interpretation 15 to eliminate a filing requirement for financing transactions of the type now exempted by new Section 802.65.

purpose and would be unduly burdensome and unfair. Therefore, the exemption will be included in the final rules, as new Section 802.80. The Commission notes that a transaction involving an acquisition of control of an existing unincorporated entity that meets the same criteria should also be exempt from reporting. It has therefore added a reference to Section 801.2 to the language suggested by the commenters, which requested the exemption only for new formations of unincorporated entities under Section 801.50. It should be noted, however, that if the transaction materially changes during or after the pendency of the investigation, it may be subject to notification under these new rules.

Additional exemptions requested by the commenters.

Commenters requested three types of new additional exemptions. Comments 2 and 3 requested a new exemption for investments in passive investment vehicles, including mutual funds, investment companies, hedge funds, and structured finance and securitization vehicles. The Commission believes that the recommended new exemption for investments in passive investment vehicles goes beyond the scope of the proposed exemption for financing transactions that will be adopted in these rules. While some acquisitions of interests in these types of entities may have no antitrust implications, the Commission is concerned that such a broad exemption, particularly without a definition of precisely which types of entities are included, could lead to problematic acquisitions going unreported to the agencies. Although certain of these transactions will fall under new Section 802.65 and other existing exemptions, the Commission is concerned that broadening the scope of exemptions to the extent requested by the commenters could result in potentially anticompetitive combinations.

Comment 7 asked for a new exemption for acquisitions of non-voting interests in unincorporated entities. Similarly, Comment 1 requested a new exemption for acquisitions of economic rights in an unincorporated entity that is structured to separate economic rights from control rights. The requested new exemptions for acquisitions of non-voting interests and economic rights are in direct conflict with the control test for unincorporated entities, which remains an equity test as indicated above in the discussion of Section 801.1(b).

Comment 2 requested an exemption for transactions entered into pursuant to the Community Reinvestment Act.[17] The Community Reinvestment Act requires federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account an institution's record of meeting the credit needs of its entire community, including low-and moderate- income neighborhoods, in evaluating bank expansionary proposals. As part of this review, the relevant agency evaluates an institution's record of helping to meet the credit needs through qualified investments that benefit the relevant assessment areas. These investments can take many forms, including project financing, in which an unincorporated entity is created and funded for the purpose of building or renovating real property, such as low income housing; and equity investments in socially conscious private

[17] 12 U.S.C. §2901 et seq.

equity funds that invest in businesses that hire predominantly low income workers. The project financing entities generally are each limited to one project and are highly unlikely to be of sufficient size to satisfy the statutory size-of-transaction test and would, at any rate, most likely be exempted by expanded Section 802.4. Even the private equity investments, effected through the bank's merchant banking arm, would rarely reach reportable size and the few that might reach reportable size would generally be exempted by the financing exemption in new Section 802.65, as extended in these Final Rules to existing unincorporated entities. Given the availability of other exemptions and the rarity of such transactions meeting the required size-of-transaction test, the Commission concludes that it is unnecessary to promulgate the requested exemption at this time.

Although the Commission declines to adopt these four exemptions, it will continue to monitor the volume of transactions which result from these rule changes and will consider reassessing these issues should the numbers and types of filings received warrant it.

PART 803 - TRANSMITTAL RULES

Section 803.2 Instructions applicable to Notification and Report Form.

The final rules add a new paragraph to Section 803.2 instructing an acquired person in an acquisition of non-corporate interests to limit its response to Items 5 through 8 of the Notification and Report Form to the unincorporated entity whose non-corporate interests are being acquired. This addition is consistent with the manner in which acquisitions of voting securities and assets are currently treated.

Section 803.10 Running of time.

The final rules add to Section 803.10(a) a reference to unincorporated entities. This paragraph establishes that the waiting period in the formation of a new corporation commences when filings required from all acquiring persons in the formation are received. The added language extends the same treatment to the formation of an unincorporated entity.

Appendix: Premerger Notification and Report Form.

Section 7A(d)(1)[18] authorizes the Commission to determine the nature of the notification to be required under the Act and to designate for inclusion such "documentary material and information relevant to a proposed acquisition as is necessary and appropriate" to ascertain the potential anticompetitive impact of a proposed acquisition. Consequently, in light of this rulemaking, certain items to the Premerger Notification and Report Form and its Instructions ("the Form and Instructions") require minor modification and, in two cases, new subsections.

[18] 15 U.S.C. § 18a(d)(1)

The Commission proposed changes to three of the items on the Form and Instructions (Items 5(d), 7 and 8). There were no comments on these items and the proposed amendments will be adopted without change. Additionally, the Commission is amending several other items on the Form and Instructions to clarify how an acquisition of non-corporate interests should be reported. All of these changes are described below.

Item 1(c) Description of the Person Filing Notification

Current Item 1(c) requires persons to indicate in the appropriate box whether the filing person is a corporation, partnership or some other type of entity, such as an individual. New Item 1(c) would replace the reference to partnership with unincorporated entity.

Item 1(f) Name and Address of Entity Being Acquired

Current Item 1(f) requires, in part, the name and address of the entity whose assets or voting securities are being acquired, if different from the person filing. New Item 1(f) would be amended to include instances where non-corporate interests are being acquired, as well.

Item 2(b) Identification of the Type of Transaction

Item 2(b) lists various types of acquisitions and requires the reporting person to identify those that accurately describe the transaction. Amended 2(b) would add non-corporate interests to the list of possible transaction types.

Item 2(d) Value of Transaction

Current Item 2(d) requires the reporting persons to state in several subsections (i) the value of the voting securities to be held, (ii) the percentage of voting securities, (iii) the value of assets to be held and (iv) the aggregate total value of the transaction. Amended Item 2(d)(iv) would require parties to disclose the value of the non-corporate interests to be held as a result of the transaction. Former 2(d)(iv), the aggregate total value, would become new subsection, Item 2(d)(v), and would include a reference to non-corporate interests in the Instructions.

Item 3(b)(iii) Assets held by Unincorporated Entities

Item 3(b)(iii), a new subsection to Item 3 of the Form, would require persons acquiring non-corporate interests to identify the assets held by the unincorporated entity(ies) being acquired. The instructions to Item 3(b)(iii) would read: “This Item is to be completed only to the extent

that the transaction is an acquisition of non-corporate interests. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction. For examples of general classes of assets refer to Item 3(b)(i)."

Item 5(d) Corporations and unincorporated entities at the time of formation

Current Item 5(d) requires that certain additional information be provided when the Notification and Report Form is being submitted in connection with the formation of a new corporation. The proposed amendment to the Item 5(d) instructions would require that the same information be provided in connection with the formation of a new unincorporated entity pursuant to new Section 801.50. Item 5(d) on the Notification and Report Form would be amended to include reference to unincorporated entities as well as corporations. Item 5(d) and the Instructions are being amended as proposed.

Item 7 NAICS code overlaps

The instructions to Item 7 currently require the reporting of any NAICS codes in which the person filing notification and any other person that is a party to the transaction both derived revenues in the most recent year. This language implies that in the formation of a new entity, overlaps among the acquiring persons contributing to the formation must be reported. The Commission believes that is overly burdensome and provides little helpful information because the only relevant overlap is between the person filing notification as an acquiring person and the newly-formed entity. The proposed new language would also clarify that this information should be provided in connection with the formation of new corporations and new unincorporated entities. These instructions are being amended as proposed.

Item 8 Previous acquisitions

The instructions to Item 8 are being amended as proposed to include reference to newly formed unincorporated entities as well as corporations.

Note for Items 5 through 8 and the Appendix

This note in the Instructions, which precedes more detailed information concerning Items 5-8, advises the acquired person to limit its responses pursuant to § 803.2 of the rules to the assets or voting securities being sold. The amended note also would include a reference to the sale of non-corporate interests.

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 Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of a transaction necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the 2000 amendments to the Act were intended to reduce the burden of the premerger notification program by exempting all transactions valued at $50 million or less. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, 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 the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, as amended, 44 U.S.C. 3501 et seq. ("PRA"), the Commission submitted the proposed rule changes to the Office of Management and Budget ("OMB") for review. The OMB has approved the rules' information collection requirements.[19] The Commission did not receive any comments that necessitated modifying its original burden estimates for the rules' information collection requirements.

Only two of the comments, Comments 1 and 2, addressed the burden estimate. Comment 1 noted that it is difficult, if not impossible, to quantify the impact of the proposed rules on filing obligations, but that the Commission's effort generated a reasonably sensible prediction. It expressed a belief, however, that because the burden estimate is based on unverifiable assumptions, the Commission should revisit the rules after two years to evaluate the volume and the antitrust significance of the filings received, as well as any additional burden on businesses.

Comment 2 disagreed with the methodology used by the Commission in calculating the burden, and thereby concluded that the resulting estimate was too low. Specifically, the comment stated that acquisitions of control in non-corporate entities should represent about half of all reportable acquisitions, and that existing and proposed exemptions will not winnow out as many of these acquisitions as the Commission has projected. This comment also calls for monitoring the volume and burden of reportable transactions to see if it becomes necessary to revise the new rules.

The Commission agrees with Comment 1 that it is difficult to estimate accurately the number of filings that it is likely to receive involving acquisitions of previously unreportable interests. The Commission believes that the methodology it chose was based on reasonable assumptions and extrapolations from available data. Furthermore, it employed fairly conservative estimates of acquisitions that would be exempted from filing, either by proposed extensions of existing corporate exemptions or by newly-proposed exemptions for non-corporate

[19]The assigned OMB control number is 3084-0005.

entities. Moreover, as previously discussed, the final rules expand the scope of the proposed exemptions, which should result in even fewer reportable non-corporate filings overall. Thus, the Commission declines to revise its estimate as suggested by Comment 2 because it believes its methodology and estimate are reasonable and does not believe another approach would yield a more accurate figure. The Commission will, however, as stated earlier, monitor the volume and types of transactions that result from these rules changes and will consider revisiting these amendments if it finds that these changes result in filings being required for a significant number of transactions that do not raise antitrust issues.

List of Subjects in 16 CFR Parts 801, 802 and 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801, 802 and 803 as set forth below:

PART 801--COVERAGE RULES

1. The authority citation for part 801 continues to read as follows:

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

2. Amend § 801.1 by revising paragraphs (b)(1)(ii) and (b)(2), redesignating paragraph (f)(1) as (f)(1)(i) and adding paragraph (f)(1)(ii) to read as follows:

§ 801.1 Definitions.

* * * * *

(b) * * *

(1) Either. (i) * * *

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

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

* * * * *

(f)(1)(i) Voting securities. * * *

(ii) Non-corporate interest. The term "non-corporate interest" means an interest in any unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets after payment of its debts. These unincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and business trusts; but these unincorporated entities do not include trusts described in paragraphs (c)(3) through (5) of this section and any interest in such a trust is not a non-corporate interest as defined by this rule.

* * * * *

3. Amend § 801.2 by revising the main text of paragraph (d)(2)(iii), adding new Example 5 to the existing examples 1-4 in paragraph (d)(2)(iii), and by adding a new paragraph (f) to read as follows:

§ 801.2 Acquiring and acquired persons.

* * * * *

(d) * * *

(2) * * *

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

Examples to paragraph (d)(2)(iii): * * *

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

* * * * *

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

person is the pre-acquisition ultimate parent entity of the entity.

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

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

Examples to paragraph (f)(2): 1. A, B and C each hold 33 1/3percent of the interests in Partnership X. D contributes assets valued in excess of $50 million (as adjusted) to X and as a result D receives 40 percent of the interests in X and A, B and C are each reduced to 20 percent. Partnership X is deemed to be acquiring the assets from D, in a transaction which may be reportable. This is not treated as a formation of a new partnership. Because no person will control Partnership X, no additional filing is required by any of the four partners.

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

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

Example to paragraph (f)(3): A becomes the sole corporate member of not-for-profit corporation B and accordingly has the right to designate all of the directors of B. A is deemed to be acquiring all of the assets of B as a result.

4. Amend § 801.4 by revising paragraph (a) to read as follows:

§ 801.4 Secondary acquisitions.

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

* * * * *

5. Amend § 801.10 by revising the heading and by adding paragraph (d) to read as follows:

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

* * * * *

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

6. Amend § 801.11 by revising the introductory language in paragraph (b) to read as follows:

§ 801.11 Annual net sales and total assets.

*** * * * ***

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

*** * * * ***

7. Amend § 801.13 by revising the heading, by revising paragraph (b)(2), by removing the Example following paragraph (b)(2) and adding four Examples in its place, and adding paragraph (c) and two examples to read as follows:

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

* * * * *

(b) Assets. * * *

(2) If the acquiring person signs a letter of intent or agreement in principle to acquire assets from an acquired person, and within the previous 180 days the acquiring person has

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

(ii) The previous acquisition (whether consummated or still contemplated) was not subject to the requirements of the Act; then for purposes of the size-of-transaction test of Section 7A(a)(2), both the acquiring and the acquired persons shall treat the assets that were the subject of the earlier letter of intent or agreement in principal as though they are being acquired as part of the

present acquisition. The value of any assets which are subject to this paragraph is determined in accordance with § 801.10(b).

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

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

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

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

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

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

Examples to paragraph (c)(2): 1. A currently has the right to 30 percent of the profits in LLC. B has the right to the remaining 70 percent. A acquires an additional 30 percent interest in LLC from B for $90 million in cash. As a result of the acquisition, A is deemed to now have a 60 percent interest in LLC. The current acquisition is valued at $90 million, the acquisition price. The value of the 30 percent interest that A already holds is the fair market value of that interest. The value for size-of-transaction purposes is the sum of the two.

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

8. Amend § 801.15 by revising paragraphs (b) and (c), adding paragraph (d), designating the Examples as Examples to the entire section, and adding Example 9 to read as follows:

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

* * * * *

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

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

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

Examples to this section: * * *

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

9. Amend § 801.21 by revising the introductory language to read as follows:

§ 801.21 Securities and cash not considered assets when acquired.

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

* * * * *

10. Add new § 801.50 to read as follows:

§ 801.50 Formation of unincorporated entities.

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

(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity. Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1), the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a consolidation), a person is subject to the requirements of the Act if:

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

(ii) The newly-formed entity has total assets of $10 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity; or

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

(ii) The newly-formed entity has total assets of $100 million (as adjusted) or more; and

(iii) The acquiring person acquires control of the newly-formed entity.

(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with § 801.40(d).

(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with § 801.10(d).

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.

Example: A and B form a new partnership (LP) in which each will acquire a 50 percent interest. A contributes a plant valued at $250 million and $100 million in cash. B contributes $350 million in cash. Because each is acquiring non-corporate interests, valued in excess of $50 million (as adjusted) which confer control of LP both A and B are acquiring persons in the formation. Each must now determine if the exemption in Section 802.4 is applicable to their acquisitions of non-corporate interests in LP. For A, LP's exempt assets consist of all of the cash contributed by A and B (pursuant to Section 801.21) and A's contribution of the plant (pursuant to Section 802.30(c)). Because all of the assets of LP are exempt with regard to A, A's acquisition of non-corporate interests in LP is exempt under Section 802.4. For B, LP's exempt assets include only the cash contributions by A and B. The plant contributed by A, valued at $250 million is not exempt under Section 802.30(c) with regard to B. Because LP has non-exempt assets in excess of $50 million (as adjusted) with regard to B, B's acquisition of non-corporate interests in LP is not exempt under Section 802.4. B must now value its acquisition of non-corporate interests pursuant to Section 801.10(d) and because the value of the non-corporate interests is the same as B's contribution to the formation ($350 million), the value exceeds $200 million (as adjusted) and B must file notification prior to acquiring non-corporate interests in LP. See additional examples following Section 802.30(c) and Section 802.4.

PART 802--EXEMPTION RULES

11. The authority citation for part 802 continues to read as follows:

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

12. Amend § 802.2 by revising the introductory language in paragraph (g), by revising (g)(1)(ii), and by adding paragraph (g)(1)(iii) to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

(g) Agricultural property. An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the Act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (certain activities within NAICS sector 11).

(1) * * *

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition; or

(iii) Timberland or other real property that generates revenues from activities within NAICS subsector 113 (Forestry and logging) or NAICS industry group 1153 (Support activities for forestry and logging).

* * * * *

13. Amend § 802.4 by revising the heading; by revising paragraph (a) and adding an example thereunder; and by revising paragraphs (b) and (c) to read as follows:

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to Section 7A(c) of the Act, this part 802, or pursuant to § 801.21 of this chapter, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted). The value of voting or non-voting securities of any other issuer or interests in any non-corporate entity not included within the acquired issuer does not count toward the $50 million (as adjusted) limitation for non-exempt assets.

Example to paragraph (a): A and B form a new corporation as an acquisition vehicle to acquire all of the voting securities of C. Each contributes $250 million in cash. Because all of the cash is considered to be exempt assets pursuant to § 801.21, the new corporation does not have non-exempt assets valued in excess of $50 million (as adjusted), and the acquisition of its voting securities by A and B is exempt under § 802.4. Note that the result is the same if the acquisition vehicle is formed as an unincorporated entity. Also see the examples to § 802.30(c) for additional applications of § 802.4.

(b) For purposes of paragraph (a) of this section, the assets of all issuers and unincorporated entities that are being acquired from the same acquired person are included in determining if the limitation for non-exempt assets is exceeded.

(c) In connection with paragraph (a) of this section and §801.15 (b), the value of the assets of an issuer whose voting securities or an unincorporated entity whose non-corporate interests are being acquired pursuant to this section shall be the fair market value, determined in accordance with §801.10(c).

* * * * *

14. Revise § 802.10 to read as follows:

§ 802.10 Stock dividends and splits; reorganizations.

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

(b) An acquisition of non-corporate interests or voting securities as a result of the conversion of a corporation or unincorporated entity into a new entity is exempt from the requirements of the Act if:

(1) No new assets will be contributed to the new entity as a result of the conversion; and

(2) Either:

(i) As a result of the transaction the acquiring person does not increase its per centum holdings in the new entity relative to its per centum holdings in the original entity; or

(ii) The acquiring person controlled the original entity.

Examples to paragraph (b): 1. Partners A and B hold 60 percent and 40 percent respectively of the partnership interests in C. C is converted to a corporation in which A and B hold 60 percent and 40 percent respectively of the voting securities. No new assets are contributed. The conversion to a corporation is exempt from notification for both A and B.

2. Shareholder A holds 55% and B holds 45% of the voting securities of corporation C. C is converted to a limited liability company in which A holds 60% and B holds 40% of the membership interests. No new assets are contributed. The conversion to a limited liability company is exempt from notification because A controlled the corporation. If however, B holds 55% and A holds 45% in the new limited liability company, the conversion is not exempt for B and may require notification because control changes.

3. Shareholders A , B and C each hold one third of the voting securities of corporation X. Pursuant to a reorganization agreement, A and B each contribute new assets to X and C contributes cash. X is then being reincorporated in a new state. Each of A , B and C receive one third of the voting securities of newly reincorporated C. The reincorporation is not exempt from notification and may be reportable for A, B and C because of the contribution of new assets.

15. Revise § 802.30 to read as follows:

§ 802.30 Intraperson transactions.

(a) An acquisition (other than the formation of a corporation or unincorporated entity under § 801.40 or § 801.50 of this chapter) in which the acquiring and at least one of the acquired persons are, the same person by reason of § 801.1(b)(1) of this chapter, or in the case of a not-for-profit corporation which has no outstanding voting securities, by reason of § 801.1(b)(2) of this chapter, is exempt from the requirements of the Act.

Examples to paragraph (a): 1. A and B each have the right to 50% of the profits of partnership

X. A also holds 100% of the voting securities of corporation Y. A pays B in excess of $50 million in cash (as adjusted) and transfers certain assets of X to Y. Because A is the acquiring person through its control of Y, pursuant to § 801.1(b)(1)(i), and one of the acquired persons through its control of X pursuant to § 801.1(b)(1)(ii) , the acquisition of assets is exempt under § 802.30(a).

2. A and B each have the right to 50% of the profits of partnership X. A contributes assets to X valued in excess of $50 million (as adjusted). B contributes cash to X. Because B is an acquiring person but not an acquired person, its acquisition of the assets contributed to X by A is not exempt under § 802.30(a). However, A is both an acquiring and acquired person, and its acquisition of the assets it is contributing to X is exempt under § 802.30(a).

(b) The formation of any wholly owned entity is exempt from the requirements of the Act.

(c) For purposes of applying Sec. 802.4(a) to an acquisition that may be reportable under Sec. 801.40 or Sec. 801.50, assets or voting securities contributed by the acquiring person to a new entity upon its formation are assets or voting securities whose acquisition by that acquiring person is exempt from the requirements of the Act.

Examples to paragraph (c): 1. A and B form a new partnership to which A contributes a manufacturing plant valued at $102 million and acquires a 51% interest in the partnership. B contributes $98 million in cash and acquires a 49% interest. B is not acquiring non-corporate interests which confer control of the partnership and therefore is not making a reportable acquisition. A is acquiring non-corporate interests which confer control of the partnership, however, the manufacturing plant it is contributing to the formation is exempt under § 802.30(c) and the cash contributed by B is excluded under § 801.21, therefore, the acquisition of non-corporate interests by A is exempt under § 802.4.

2. A and B form a new corporation to which A contributes a plant valued at $120 million and acquires 60% of the voting securities of the new corporation. B contributes a plant valued at $80 million and acquires 40% of the voting securities of the new corporation. While the assets contributed to the formation are exempted by § 802.30(c) for each of A and B, the new corporation holds more than $50 million (as adjusted) in non-exempt assets (the plant contributed by the other person) with respect to both acquisitions. A is now acquiring voting securities of an issuer which holds $80 million in non-exempt assets (the plant contributed by B), and B is acquiring voting securities of an issuer which holds $120 million in non-exempt assets (the plant contributed by A). Therefore neither acquisition of voting securities is exempt under § 802.4. Note that in contrast to the formation of the partnership in Example 1, B is not required to acquire a controlling interest in the corporation in order to have a reportable transaction.

3. A and B form a 50/50 partnership. A contributes a plant valued at $100 million and B contributes a plant valued at $40 million and $60 million in cash. Because with respect to A, the new partnership has non-exempt assets of $40 million (the plant contributed by B), A's acquisition of non-corporate interests is exempt under § 802.4. With respect to B, the new partnership holds in excess of $50 million (as adjusted) in non-exempt assets (the plant

contributed by A), therefore B's acquisition of non-corporate interests would not be exempt under § 802.4.

16. Revise § 802.40 to read as follows:

§ 802.40 Exempt formation of corporations or unincorporated entities.

The formation of an entity is exempt from the requirements of the Act if the entity will be not-for-profit within the meaning of sections 501(c)(1)-(4), (6)-(15), (17)-(20) or (d) of the Internal Revenue Code.

17. Amend § 802.41 by revising the heading and the introductory text preceding to read as follows:

§ 802.41 Corporations or unincorporated entities at time of formation.

Whenever any person(s) contributing to the formation of an entity are subject to the requirements of the Act by reason of § 801.40 or § 801.50 of this chapter, the new entity need not file the notification required by the Act and § 803.1 of this chapter.

* * * * *

18. Add new § 802.65 to read as follows:

§ 802.65 Exempt acquisition of non-corporate interests in financing transactions.

An acquisition of non-corporate interests that confers control of a new or existing unincorporated entity is exempt from the notification requirements of the Act if:

(a) The acquiring person is contributing only cash to the unincorporated entity;

(b) For the purpose of providing financing; and

(c) The terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return.

19. Add new § 802.80 to read as follows:

§ 802.80 Transitional rule for transactions investigated by the agencies.

Section 801.2 and Section 801.50 shall not apply to any transaction that has been the subject of investigation by either the Federal Trade Commission or the Antitrust Division of the Department of Justice in which, prior to the effective date of that section, the reviewing agency obtained documentary material and information under compulsory process from all parties that

would be required to submit a Notification and Report Form for Certain Mergers and Acquisitions under Section 801.50 but for this transitional rule.

PART 803 - TRANSMITTAL RULES

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

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

21. Amend § 803.2(b)(1) by redesignating existing paragraph (iv) as paragraph (v), and by adding new paragraph (iv), to read as follows:

§ 803.2 Instructions applicable to the Notification and Report Form.

* * * * *

(b) * * *

(1) * * *

(iv) By acquired persons, in the case of an acquisition of non-corporate interests, with respect to the unincorporated entity whose non-corporate interests are being acquired, and all entities controlled by such unincorporated entity; and

* * * * *

22. Amend § 803.10 by revising paragraph (a) to read as follows:

§ 803.10 Running of time.

(a) * * *

(2) In the case of the formation of a corporation covered by Sec. 801.40 or an unincorporated entity covered by Sec. 801.50, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

* * * * *

23. Revise the Appendix to part 803 to read as follows:

[insert .pdf file]

By direction of the Commission.

Donald S. Clark
Secretary