[6750-011]

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

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

PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS

AGENCY: Federal Trade Commission.

ACTION: Promulgation of final rules.

SUMMARY: The purpose of this document is formally to promulgate final rules implementing title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, relating to premerger notification. The document consists of final rules, including a Notification and Report Form, and a statement of basis and purpose. Under the statute, the Federal Trade Commission was directed to promulgate, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, rules implementing a premerger notification program. The effect of the final rules is to implement such a program, by explaining the coverage of the program, certain exemptions from the program, and the means by which persons must comply with their obligations under the program.

EFFECTIVE DATE: August 30,1978.

FOR FURTHER INFORMATION CONTACT:

Malcolm R. Pfunder, Associate Director for Premerger Notification, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580, telephone: 202/523-3894.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Commission and the Assistant Attorney General advance notice and to wait certain designated periods before consummation of such plans. The transactions to which the advance notice requirement is applicable and the length of the waiting periods required are set out in the act, the complete text of which is reprinted below.

The rules are divided into three parts. Part 801 defines a number of the terms used in the act and the rules and explains which acquisitions are subject to reporting and waiting period requirements. Part 802 contains a number of exemptions from the requirements. Part 803 explains the procedures for complying with the act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to part 803 of the rules. The amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions, but instead provides the enforcement agencies with advance notice of, and information about, certain transactions, and with an opportunity to seek a preliminary injunction in Federal district court to prevent consummation of any such transactions which may, if consummated, violate the antitrust laws.

Section 7A of the Clayton Act provides:

"Sec. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if**?**

"(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce:

"(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $10,000,000 or more;

"(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more, or

"(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

"(3) as a result of such acquisition, the acquiring person would hold—

"(A) 15 per centum or more of the voting securities or assets of the acquired person, or

"(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

"(b) (1) The waiting period required under subsection (a) shall—

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the 'Assistant Attorney General') of—

"(i) the completed notification required under subsection (a), or "(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

“(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

“(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the FEDERAL REGISTER a notice that neither intends to take any action within such period with respect to such acquisition.

“(3) As used in this section—

“(A) The term ‘voting securities’ means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or with respect to unincorporated issuers, persons exercising similar functions.

“(B) The amount of percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

“(c) The following classes of transactions are exempt from the requirements of this section—

“(1) acquisitions of goods or realty transferred in the ordinary course of business;

“(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

“(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisitions;

“(4) transfers to or from a Federal agency or a State or political subdivision thereof;

“(5) transactions specifically exempted from the antitrust laws by Federal statute;

“(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

“(7) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

“(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), sections 403 and 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730(a), or section 5 of the Home Owners’ Loan Act of 1933 (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

“(9) acquisition, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

“(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person’s per centum share of outstanding voting securities of the issuer;

“(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

“(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B).

“(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section—

“(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisitions may, if consummated, violate the antitrust laws; and

“(2) may—

“(A) define the terms used in this section;

“(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

“(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

“(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(l) of this section, or from any officer, director, partner, agent, or employee of such person.

“(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion. may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

"(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 or section 1 or 2 of the Sherman Act, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection—

"(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

"(B) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

"(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

"(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e)(2), the United States district court—

"(A) may order compliance;

"(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

"(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate.

upon application of the Federal Trade Commission or the Assistant Attorney General.

"(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or Judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

"(i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of Law.

"(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

"(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section."

STATEMENT OF BASIS AND PURPOSE OF RULES IMPLEMENTING TITLE II OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

On September 30, 1976, President Gerald Ford signed into law the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390. Section 201 of that statute added a new section 7A to the Clayton Act, 15 U.S.C. 18A (referred to in this Statement of Basis and Purpose as "the act"), relating to premerger notification.

The act creates a requirement that "persons" of specified size or larger, which intend to make voting securities or asset acquisitions of specified size or larger, must report their intentions in advance and provide information relevant to the transaction to the Antitrust Division of the Department of Justice and to the Federal Trade Commission. After reporting, those persons must wait a prescribed period of time before consummating the reported transaction. That waiting period may be extended by either enforcement agency by means of a request for additional information or documentary material. The act also contains 11 specific types of exemptions, along with a grant of rulemaking authority to define any terms used in the act, to create additional exemptions, and generally to carry out the purposes of the act.

The act provides for expedited consideration by a Federal district court in the event that either agency seeks a preliminary injunction to prevent consummation of an acquisition. It also contains penalty and enforcement provisions, a requirement that information filed by reporting persons not be made public except under certain circumstances, provisions clarifying the relationship between the act and certain substantive and procedural aspects of other antitrust laws, and the requirement of an annual report to the Congress.

Rulemaking authority under section 7A(d) of the act is conferred upon the Federal Trade Commission, and that provision requires that the Assistant Attorney General in charge of the

Antitrust Division of the Department of Justice (referred to hereafter as the "Assistant Attorney General") concur in the rules. That section also makes applicable the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553, and requires that any rules issued must be consistent with the purposes of the act.

Section 553 of the Administrative Procedure Act requires that an agency that intends to promulgate rules must first publish a "general notice of proposed rulemaking" in the FEDERAL REGISTER. After giving notice, the agency is required to "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, arguments with or without opportunity for oral presentation." Thereafter the agency may adopt and issue final rules; incorporated in those rules must be "a concise general statement of their basis and purpose." The statute also requires that final rules of a substantive nature normally be published or served upon affected persons not less than 30 days before their effective date.

On December 15, 1976, the Federal Trade Commission, with the informal concurrence of the Assistant Attorney General, issued proposed rules and a proposed Notification and Report Form sometimes referred to hereafter as the "form") to implement the act. The proposed rulemaking was published in the FEDERAL REGISTER of December 20, 1976, 41 FR 55488, and is hereafter referred to as the "original" rules and form. The 30-day comment period was extended, by the Commission on January 12, 1977, and expired on February 18, 1977. One hundred thirty-three comments became part of the rulemaking record in connection with the original rules and form. A list of these comments, and of those received during the later comment period, appears at the end of the Statement of Basis and Purpose. Each comment has been assigned a number, and throughout this statement individual comments are referred to by these numbers.

Because of the extensiveness of public comment, it became clear to the Commission that some substantial revisions would have to be made in the original rules. On July 25, 1977, the Commission determined that additional public comment on the rules would be desirable and approved revised proposed rules and a revised proposed Notification and Report Form (hereafter referred to as the "revised" rules and form). The revised rules and form were published in the FEDERAL REGISTER of August 1, 1977, 42 FR 39040, and a 30-day comment period began on that date. In response to numerous requests for additional time for comment, the Commission on August 23, 1977, extended the comment period by 30 days, through September 30, 1977. A total of 116 comments were received on the revised rules and form.

Additional changes in the revised rules and form were made after the close of the comment period, and on February 14, 1978, the Commission gave its interim approval to final versions of the rules and form (referred to hereafter as the "final" rules and form). The Notification and Report Form was then transmitted to the General Accounting Office for review under the Federal Reports Act, 44 U.S.C. 3502. The General Accounting Office submitted its report to the Commission on May 12, 1978. The Commission formally promulgated the final rules and form and issued this Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The final rules and form and this Statement of Basis and Purpose were published in the FEDERAL REGISTER of July 31, 1978, 43 FR 33451, and will become effective on August 30, 1978.

Section 202 of the Antitrust Improvements Act of 1976 specified that section 201, containing new section 7A of the Clayton Act, would become effective 150 days after enactment, except for the rulemaking provisions contained in section 7A(d), which became effective upon enactment. Because final rules could not be promulgated prior to the effective date of the act (February 27, 1977), the Commission on January 27, 1977, with the concurrence of the Assistant Attorney General, promulgated a final rule, designated the Transitional Rule, which was published in the FEDERAL REGISTER of February 2, 1977, 42 FR 6365. The Transitional Rule created an exemption for all transactions consummated prior to the effective date of the final rules and specified the manner in which the final rules will be implemented during the first 30 days following the effective date of the rules.

Under the Transitional Rule, any acquisition which is consummated before the effective date of these rules is exempt from all requirements of the act. Any cash tender offer which is consummated on or within 15 calendar days after the effective date of the rules and any other acquisition which is consummated on or within 30 calendar days after the effective date of the rules is exempt from the waiting period requirement of section 7A(a), subject to two other conditions. First, all persons required by the act and the rules to file notification with respect to the acquisition (or, for an acquisition subject to section 801.30, just the acquiring person) must file on or before the effective date of the rules. Second, if prior to consummation of the acquisition either enforcement agency makes a request for additional information or documentary material under section 7A(e) and section 803.20, then the waiting period normally deriving from such a request takes effect, and its expiration, termination or extension thereafter is governed by the act and the rules.

It should be emphasized that the Transitional Rule does not apply to any transaction that will be consummated more than 30 days (15 in the case of a cash tender offer) after the effective date of the rules; nor does it apply to any acquisition with respect to which the required notifications are not received on or before the effective date of the rules. Transactions of these two types are subject to the full notification and waiting period requirements of the act and the rules.

The Transitional Rule also states that completed notifications received prior to the effective date of the rules will be deemed filed on the effective date of the rules.

For purposes of the Transitional Rule and the rules in parts 801-803, the completion or consummation or, "making" of an acquisition refers to the closing date, or the date on which title is transferred, rather than to the date on which a contract, agreement in principle or letter of intent is signed.

In the course of promulgating the Transitional Rule, the Commission considered comments suggesting that persons that had complied with the Commission's Resolution Requiring Notification and Submission of Special Reports Relating to Corporate Mergers or Acquisitions, dated August 15, 1974, 39 FR 35717 (October 3, 1974) (referred to hereafter as the "Commission's existing premerger notification program,") should be exempt from the requirements of the act and the rules. At that time the Commission, with the concurrence of the Assistant Attorney General, determined not to grant such an exemption. In the statement accompanying the Transitional Rule, the Commission explained:

> The Commission * * * believes that all merger transactions should be placed on the same footing at the inception of the new program and that firms engaging in such transactions will have ample warning of the final effective date of the rules to permit them to schedule consummation of those transactions accordingly. 42 FR at 6365-66.

DETERMINING WHETHER THE ACT APPLIES

The act applies to any acquisition by an acquiring person of the assets or voting securities of an acquired person that meets the criteria of section 7A(a). Thus, the first step in analyzing whether the act applies to a specific acquisition of assets or voting securities is to determine the identify of the "acquiring person" and the "acquired person," and which assets or voting securities will be held "as a result of" the acquisition. One transaction may consist of, or may give rise, to, several distinct "acquisitions" potentially subject to the act. See the examples to 801.2 (c) and (e) and to § 801.4.

To identify the "acquiring person," consult the definitions of "person," "entity," and "ultimate parent entity" in § 801.1(a) and the definition of "hold" in § 801.(c). First determine which entity will have beneficial ownership of the assets or voting securities to be acquired, and identify that entity's ultimate parent entity (as defined in § 801.1(a)(3)). The acquiring person consists of that ultimate parent entity and all entities that it controls directly or indirectly. The definition of "control" in § 801.1(b) will determine whether an entity is an ultimate parent entity and which entities are included within the acquiring person. If the entity that will hold the assets or voting securities to be acquired is controlled by another entity, one must follow the chain of control, locate the ultimate parent entity, and then determine all entities that that entity controls directly or indirectly. This will be the acquiring person.

Next determine the entity whose assets or voting securities are being acquired. See § 801.2(b). This will be the entity that prior to the acquisition has beneficial ownership of any assets, or is the issuer of any voting securities, which are to be acquired. The acquired person consists of the ultimate parent entity that controls the entity whose assets or voting securities are being acquired, along with all other entities that that ultimate parent entity controls directly or indirectly. See also 801.2 (c), (d), and (e).

Having determined the identity of the acquiring and acquired persons, one must determine whether either person is engaged in commerce or in any activity affecting commerce. This is the "commerce text" of section 7A(a)(1); consult §§ 801.1(*d*) and 801.3 for further explanation of how this test is applied.

If the commerce test is satisfied, then the size-of-person test of section 7A(a)(2) must be analyzed. This test focuses upon the annual net sales and total assets of the acquiring and acquired persons. Section 801.11 explains how to determine these figures. It may also be necessary to determine whether the acquiring and acquired persons are "engaged in manufacturing," a term defined in § 801.1(j).

There are three different ways that the size-of-person test of section 7A(a)(2) may be satisfied. If the acquiring person has annual net sales or total assets of $100 million or more and the acquired person is engaged in manufacturing and has annual net sales or total assets of $10 million or more, then section 7A(a)(2)(A) is satisfied. If the acquiring person has annual net sales or total assets of $100 million or more and the acquired person is not engaged in manufacturing but has total assets of $10 million or more (net sales are irrelevant in this case), then section 7A(a)(2)(B) is satisfied. Finally, if the acquiring person has annual net sales or total assets of $10 million or more and the acquired person has annual net sales of $100 million or more, then section 7A(a)(2)(C) is satisfied, without regard to whether either person is engaged in manufacturing. If none of these three tests is satisfied, the act does not apply; if any of them is satisfied, it is then necessary to analyze the size-of-transaction test of section 7A(a)(3).

This test may be satisfied in any of five different ways, since the size-of-transaction test is satisfied whenever, as a result of the acquisition, the acquiring person would hold at least 15 percent, or more than $15 million worth, of either the assets or the voting securities of the acquired person, or more than $15 million worth of both the assets and the voting securities of the acquired person.

In applying this test, one must first determine what will be held as a result of the acquisition. In general, the acquiring person in an assets transaction will hold only those assets which will change hands as a result of the transaction. See § 801.13(b)(1), but, for the moment, ignore the value of the assets; see also § 801.21. There is one significant exception: Whenever the acquiring person has acquired any assets from the same acquired person within 180 days preceding the signing of a contract, agreement in principle, or letter of intent to acquire additional assets, and the earlier-acquired assets have not been transferred to another person, then § 801.13(b)(2) directs both persons to treat the earlier and the present transaction as if they were both occurring at the present time, unless § 801.15 requires otherwise. In other words, the two (or more) asset acquisitions must be aggregated, unless the earlier acquisitions fell within one of the exemptions listed in § 801.15. The effect of aggregation is that the assets acquired in the two (or more) transactions will be "held as a result of" the present transaction, for purposes of determining the dollar value of assets — but not the percentage of assets — being acquired under section 7A(a)(3).

The voting securities of the acquired person to be held by the acquiring person as a result of a transaction are determined by § 801.13(a)(1). In general, any securities which will be held by the acquiring person after the present transaction are held as a result of the present transaction, even if some of those securities were acquired earlier. Certain exceptions are stated in § 801.15 if an earlier acquisition was exempt under the act or rules.

The next step is to determine whether, as a result of the acquisition, the acquiring person will hold an aggregate total amount of assets and voting securities of the acquired person in excess of $15 million. The value of assets is the value at time of acquisition, and not the book value, and is determined by reference to § 801.10 (b) and (c). The value of voting securities to be held as a result of the acquisition is also the current value, determined by reference to section § 801.10 (a) and (c).

If an acquiring person would hold both assets and voting securities of the acquired person as a result of a transaction, the aggregate total amount of voting securities and assets must be determined under § 801.14 and subjected to the $15 million size-of-transaction test of section 7A(a)(3)(B). If the $15 million test is satisfied, the alternative 15-percent test of section 7A(a)(3)(A) may be disregarded, since the size-of-transaction has already been satisfied. If the $15 million test is not satisfied, then the next step is to determine the percentage of the acquired person's assets or voting securities which the acquiring person will hold as a result of the acquisition. This requires a computation, in the form of a fraction, in which the assets or voting securities to be held as a result of the acquisition are divided by the aggregate total amount of assets or voting securities of the acquired person.

In an assets acquisition, the numerator and denominator of this fraction will be dollar values obtained from the books of the acquired person. Section 801.12(d) explains how this computation is made, and § 801.12(c) makes clear that the denominator consists of the total assets of the entire acquired person. If as a result of the acquisition the acquiring person will hold 15 percent or more of the total assets of the acquired person, then section 7A(a)(3)(A) is satisfied.

For an acquisition of voting securities, the numerator and denominator of this fraction will be numbers of votes for directors of the issuer that voting securities presently entitle their holders to cast or, as a result of the acquisition, will entitle their holders to cast. Section 801.12 explains how this computation is made, and § 801.12(a) makes clear that the denominator consists of the total number of votes for directors of the issuer whose voting securities are being acquired. If as a result of the acquisition the acquiring person will hold 15 percent or more of the voting securities of the issuer, then section 7A(a)(3)(A) is satisfied.

SPECIFIC TREATMENT OF PARTICULAR TYPES OF TRANSACTIONS

A series of rules in part 801 specify the manner in which particular types of transactions are treated under the act.

Whenever as a result of an acquisition (the "primary acquisition") an acquiring person will obtain control of an issuer which holds a noncontrolling block of voting securities of another issuer, then the acquisition of the other issuer's voting securities is a secondary acquisition which, by reason of § 801.4, is separately subject to the act and the rules.

Section 801.20 explains that acquisitions meeting the criteria of section 7A(a) and not otherwise exempted under the act or the rules are subject to the reporting and waiting period requirements of the act. This is true even though earlier acquisitions may also have been subject to the act, even though the acquiring person's holdings initially may have met or exceeded a notification threshold (see § 801.1(h)) before the effective date of the rules; and even though the acquiring person's holdings initially may have met or exceeded a notification threshold by reason of increases in market values or events other than acquisitions.

Section 801.30 explains that for certain types of transactions, the waiting period begins when only the acquiring person files notification, rather than when both persons file. In such cases, the acquired person must file within a specified number of days after the acquiring person files. The types of transactions to which this treatment applies are: (1) Acquisitions of voting securities on a national securities exchange or "over the counter" securities markets, (2) certain acquisitions of voting securities by shareholders of the target company in a tender offer, (3) acquisitions of voting securities by means of a tender offer, (4) secondary acquisitions, (5) acquisitions (other than mergers and consolidations) in which voting securities are acquired from someone other than the issuer or a related entity, (6) acquisitions resulting from conversion of convertible voting securities, and (7) acquisitions resulting from the exercise of options and warrants. Additional provisions relating to acquisitions of voting securities by shareholders of the target company in a tender offer are contained in § 801.31. Section 801.32 makes clear that conversion of convertible voting securities (see § 801.1(f)) is a potentially reportable acquisition under the act.

When the persons contributing to the formation of a new corporation receive voting securities of that corporation. § 801.40 must be consulted in order to determine whether these acquisitions are reportable. Section 801.40(b) contains its own size-of-person tests, which interpret those in section 7A(a)(2) in any transaction (except in connection with a merger or consolidation) in which a new corporation is formed. A special rule for determining the total assets of the new corporation is stated in § 801.40(c), and a special rule relating to the commerce test of section 7A(a)(1) is contained in 801.40(d).

In general, § 801.40 applies to the formation of joint ventures organized in the corporate form, but the operation of the rule does not depend upon whether the parties or the enforcement agencies would consider the new corporation to be a "joint venture." Whenever a newly formed corporation issues sufficient voting securities to two or more persons. so that section 7A(a)(3) and § 801.40 (b) and (d) are satisfied, the transaction is reportable, although all such persons acquiring the new corporation's stock may not necessarily have to file notification. The new corporation does not, however, have to report its acquisitions of the assets which its shareholders have contributed as part of the transaction setting up the new corporation.

Finally, § 801.90 states that whenever a reportable transaction is recast in a different form or broken up into a series of transactions, or whenever any other device is employed for the purpose of avoiding the obligation to comply with the act and the rules, the form of the transactions is disregarded, and the obligation to comply with the act and the rules is determined by applying the act and the rules to the substance of the transaction.

EXEMPTIONS

If the commerce, size-of-person and size-of-transaction tests of section 7A(a) are all satisfied, one must next determine whether any exemptions apply. Statutory exemptions are found in section 7A (c)(1) through (c)(11). With respect to section 7A(c)(1), see § 802.1; with respect to section 7A (c)(6) and (c)(8), see § 802.6; as to section 7A(c)(8), see also § 802.8; concerning section 7A(c)(9), see § 802.9; and concerning section 7A(c)(10), see 802.10.

Additional exemptions are found in the remainder of Part 802 of the rules. Each of the separate exemptions in the act and the rules must be separately consulted. More detailed explanations of these rules relating to exemptions appear below.

FILING REQUIREMENTS

If the criteria of section 7A(a) are met and the transaction is not entitled to exemption under the act or the rules, then the acquisition is reportable, and the procedures outlined in part 803 of the rules must be followed. The acquiring and acquired persons must file notification, and a waiting period must elapse. before the transaction may legally be consummated.

The Notification and Report Form is an appendix to part 803 of the rules and must be completed in accordance with § 803.1 and with the instructions appearing in § 803.2 and on the form itself. Whenever a person filing notification is unable to supply a complete response to any item on the form, it must provide a statement of reasons for noncompliance, in accordance with § 803.3. Each Notification and Report Form must be accompanied by an affidavit; consult § 803.5. Each form must also be certified; see § 803.6.

In the special case in which a foreign acquired person refuses to file notification, § 803.4 may permit another person to file on its behalf.

Under section 803.7, reported transactions must be consummated within one year following the expiration of the waiting period in order to avoid the necessity of an additional filing at a later date.

WAITING PERIOD

Sections 7A (a) and (b) state that, when notification is required with respect to an acquisition of assets or voting securities, that transaction may not legally be completed until notification has been accomplished and a 30-day waiting period has thereafter expired (only 15 days is required in the case of a cash tender offer).

Section 803.10(a) explains when the waiting period begins, and section 803.10(b) explains when it expires. Section 7A(b)(2) permits the Commission and the Assistant Attorney General to terminate the waiting period before it expires in certain cases, and section 803.11 explains the procedures governing termination.

REQUESTS FOR ADDITIONAL INFORMATION OR DOCUMENTARY MATERIAL

Section 7A(e) permits the Commission or the Assistant Attorney General, prior to expiration of the waiting period, to require the submission of additional information or additional documentary material relevant to an acquisition, from any person required to file notification, or from any officer, director, partner, agent or employee of any such person. Section 803.20 explains the procedure for such requests and details their impact upon the waiting period. Section 803.21 requires compliance with such requests within a reasonable time.

MISCELLANEOUS PROVISIONS OF THE ACT AND THE RULES

Section 7A(f) provides for expedited treatment by a United States district court of a motion by either enforcement agency for a preliminary injunction to prevent consummation of a transaction reportable under the act.

Sections 7A (g)(1) and (g)(2) provide the enforcement mechanisms for the act. Under section 7A(g)(1), any person (or any officer, director or partner thereof) who fails to comply with any provision of the act (or the rules) may be liable for a civil penalty of up to $10,000 for each day during which such person is in violation of the act. If the notification requirements of the act and the rules are not substantially complied with, section 7A(g)(2) permits either enforcement agency to commence an action in United States district court. Under this section, the court may order compliance and is required to extend the waiting period "until there has been substantial compliance." The act contains one exception: When a person whose stock is sought to be acquired by means of a tender offer (either cash or non-cash) has not complied, the waiting period may not be extended, although civil penalties may be assessed. Section 7A(g)(2)(C) also permits the court to "grant such other equitable relief as the court in its discretion determines necessary or appropriate."

Section 7A(h) states that any information or documentary material filed with the enforcement agencies under the act is exempt from disclosure under the Freedom of Information Act and that no such information or documentary material may be made public except "as may be relevant to any administrative or judicial action or proceeding." Section 7A(h) explicitly preserves to Congress and its committees and subcommittees the ability to obtain information filed with the enforcement agencies under the act.

Section 7A(i) contains two important explanations of the relationship between the act and other activities of the enforcement agencies. Under section 7A(i)(1), any action by either agency or any failure of either agency to take any action under the act has no effect on any proceeding or any other action at any time under any other provision of the Antitrust Improvements Act of 1976 or any other provision of law. Moreover, the ability of the enforcement agencies to make full use of the Antitrust Civil Process Act, the Federal Trade Commission Act, and any other provision of law "to secure at any time from any person documentary material, oral testimony, or other information" is unaffected by the premerger notification requirements of the act.

The Commission, with the concurrence of the Assistant Attorney General, is required by section 7A(j) to submit an annual report to Congress on the operation of the act.

Section 803.30 of the rules provides a mechanism whereby formal and informal interpretations of requirements under the act and the rules may be rendered. Section 803.90 provides for the separability of any provision of the rules or form, in the event that any provision is held invalid or inapplicable to any person or circumstances.

The final versions of the rules and form, and the detailed discussion of each which follows, are of necessity based upon certain factual assumptions. Only actual experience with the operation of the premerger notification program will show which of these assumptions are valid. Such experience may suggest amendments to the rules, and some of those amendments and the reasons articulated for them may differ with portions of this discussion.

PART 801 OF THE RULES

SECTION 801.1(a)(1)—PERSON

The term "person" appears 36 times in the act and is used in connection with virtually every subject with which the statute deals. It is the basic organizational unit to which the requirements of the act apply. Of particular importance are its uses in the tests for determining whether the act applies: The commerce test of section 7A(a)(1), the size-of-person test of section 7A(a)(2) and the size-of-transaction test of section 7A(a)(3). Two related statutory concepts, "acquiring" and "acquired" persons, are separately defined in § 801.2.

The definition states that a person is an ultimate parent entity together with all entities that it controls directly or indirectly. "Entity" is defined in § 801.1(a)(2), and comprehends natural persons, corporations, partnerships, joint ventures, unincorporated associations, trusts, and several other types of units. "Control" is defined in § 801.1(b) and means, in most cases, beneficial ownership of 50 percent or more of the voting stock. Control is effected directly if the voting stock is held without intermediaries; it is effected indirectly if direct control is held by controlled entities, agents, or other means. An "ultimate parent entity" is defined in § 801.1(a)(3). and means an entity that is not controlled by any other entity. A "person" thus can be visualized as a collection of entities headed by an ultimate parent entity and linked together by control relationships. These entities are referred to as being "included within" the person.

Four examples illustrate the rule, Example No. 1 illustrates the most typical case, that of a corporation with subsidiaries. Examples 2, 3, and 4 illustrate less common cases involving foreign governments, natural persons and entities included within two persons. The definition also notes an exception, § 801.12 (a) and (b), in which the term "person" is assigned a different meaning in connection with percentage computations.

BACKGROUND INFORMATION TO § 801.1(a)

Section 7A begins, "[N]o person shall acquire * * *" Although section 7 of the Clayton Act reaches only corporate acquisitions, Congress did not intend the definition of person to be limited to corporations. See 122 Cong. Rec. H10293 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino): 122 Cong. Rec. S15323 (daily ed. Sept. 7, 1976) (comparison of House and Senate versions with final compromise version). The definition of person accordingly embraces the variety of organizations contained in the definition of "entity." But for purposes of the size-of-person test of section 7A(a)(2), "person" could not mean just the particular entity which was acquiring or transferring legal title. If such a limited definition of person were adopted, the ultimate parent entity would be able to evade the requirements of the act by manipulating the entity to be involved in a transaction. For example, a large corporation could evade the size-of-person test of section 7A(a)(2) merely by arranging to have a small subsidiary participate in an acquisition. In order to give effect to the size-of-person test, "person" must mean the overall enterprise.

The rules solve this dilemma by introducing the term "entity" to serve in the first capacity, that of defining the basic organizational units (such as corporations, etc.) to which the act applies. The rules reserve the term "person" for the larger concept, used in the size-of-person test of section 7A(a)(2). See the Statement of Basis and Purpose to § 801.12, which also explains the exception in the definition provided in that rule.

The original rules did not employ the term "entity," and instead expressed the two meanings of "person" by using a more complex definition. The revised rules introduced the present definitional system. The final definition reformulates the language for clarity and to remove potential ambiguities, but does not alter the substance of the definition.

SECTION 801.1(a)(2) ENTITY

The term "entity" does not appear in the act, but in the rules is part of the definition of the term "person," the basic unit to which the act applies. Section 801,1(a) defines a "person" as an ultimate parent entity and all entities that it controls directly or indirectly. "Entities" thus constitute the component parts of persons. The definition of "entity" sets forth a list of organizational units that can be included within a person.

The proviso at the end of the definition excludes the governments of foreign nations, the United States and the several States, as well as their agencies and political subdivisions, from qualifying as entities. Hence, these units are not subject to the act. However, corporations controlled by such units and engaged in commerce are entities, and may be subject to the requirements of the act.

BACKGROUND INFORMATION TO § 801.1(a)(2)

The need to introduce the term "entity" is explained in the statement of basis and purpose to §§ 801.1(a)(1) and 801.12. Revised § 801.1(a)(2) marked the initial appearance of the term, although the original rules had achieved a similar result by means of a more complex definition of "person." See the FEDERAL REGISTER notice accompanying the revised rules, 42 FR at 39042 (August 1, 1977).

The final definition differs only slightly from the revised version. The reference to an entity's domicile was deleted as unnecessary. The reference to joint ventures not yet formed has been conformed to the language of final § 801.40; the reason for its presence in the definition is explained in the statement of basis and purpose to that rule.

Foreign states, foreign governments, and their agencies are excluded from the definition of entity, but foreign governmental corporations engaged in commerce are entities. The definition draws this distinction because the activities of corporations engaged in commerce are invariably commercial activities, over which a U.S. court may have jurisdiction, whereas actions taken directly by States or governments are less likely to be subject to U.S. jurisdiction. Furthermore, the principle of comity, which seeks to assure amicable relations among nations, militates against the United States requiring a foreign state to comply with the reporting and waiting requirements of the act. By contrast, the principle of comity is less compelling with respect to the activities of governmental corporations. The distinction is generally supported by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 160-2-1611, which distinguishes between "commercial activities" of foreign states and agencies, which are not immune from the jurisdiction of the United States, and their noncommercial activities, which retain their immunity. 28 U.S.C. 1605(a)(2).

Similarly, the definition also excludes the States of the United States. The effect of the exclusion is that acquisitions by States are not subject to the act, because the act applies only to acquisitions involving persons. See Section 7A(a). The same is true of asset acquisitions from any of these political units. Stock acquisitions from them are not excluded under this rule, since the issuer of the stock, not the State or government, would be the acquired person. State-owned and U.S.-owned corporations are included within the definition of entity, for reasons similar to those applying to foreign governmental corporations.

SECTION 801.1(a)(3) ULTIMATE PARENT ENTITY

The term "ultimate parent entity" does not appear in the act. The rules employ the term in the course of defining the term "person." An "ultimate parent entity" is an entity that is not controlled by any other entity. The ultimate parent entity included within a person, therefore, is the entity that directly or indirectly controls all other entities within the person and is not itself controlled by any other entity.

An ultimate parent entity must be a unit that fits the definition of "entity" in § 801.1(a)(2). Thus, for example, a corporation engaged in commerce and wholly owned by a foreign government can be an ultimate parent entity, but the controlling government cannot, because it is not an entity. See example No. 2 to § 801.1(a)(1).

The ultimate parent entity included within a person is responsible for a person's compliance with the act and rules, under § 803.2(a). Because the concept of "person" is a creation of the act and rules and, therefore, a person may not have a generally recognized name embracing all its components, the name of the ultimate parent entity is used to identify the person within which it is included. See page 2 of the notification and report form.

BACKGROUND INFORMATION TO § 801.1(a)(3)

The definition is part of the mechanism which constructs the definition of the term "person." The term did not appear in the original rules, and the definition is unchanged in substance from revised § 801.1(a)(3).

SECTION 801.1(B) CONTROL

The term "control" does not appear in the act, but the definition of the term is central to the entire scheme of the rules and indirectly affects the extent of coverage of the act. The language of the act imposes its requirements upon "persons," a term defined in § 801.1(a)(1) to consist of an ultimate parent entity and all entities which it controls directly or indirectly. Only after applying the definitions of control and person, can one determine whether the commerce test of section 7A(a)(1), the size-of-person test of section 7A(a)(2) and the size-of-transaction test of section 7A(a)(3) are satisfied, and thus whether the act applies. The definition of control is also important because the notification and report form, in general, requests revenue data and other information only for entities included within the person.

The definition of control consists of two tests; if either is satisfied, control exists. Subparagraph (b)(1) provides that holding 50 percent or more of the outstanding voting securities of an issuer constitutes control. This test invokes several other definitions and rules, which are necessary to apply the definition correctly. In particular, § 801.1(c) defines the term "hold"; § 801.1(f)(1) defines the term "voting securities"; and § 801.12 governs the calculation of the percentage. The second alternative test in the definition, subparagraph (b)(2), provides that control is also "the contractual power presently to designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions." The example to the definition illustrates the most important use of the term, the linkage of entities into a "person."

Note that since both branches of the definition of control involve properties—the issuance of stock and the existence of directors or individuals exercising similar functions—which cannot be possessed by natural persons, natural persons may exercise control but cannot be controlled. This means that natural persons may be ultimate parent entities within a person, but may not become "included within a person" as controlled entities. See example No. 3 to § 801.1(a)(1) and example No. 2 to § 801.1(a)(3).

The language "in the case of unincorporated entities * * * individuals exercising similar functions" may in appropriate cases find application to organizational units other than corporations which are defined as entities in § 801.1(a)(2).

BACKGROUND INFORMATION TO § 801.1(b)

Although the term "control' does not appear in the act, the concept is implicit within it. It furnishes the link between the term "entity," which in the rules describes the types of units to which the act applies, and the term "person," which is used throughout the act and rules. The need for two terms in the definitional scheme is explained in the statements of basis and purpose to those definitions, § 801.1(a)(1) and (2) and the use of the term "control" arises within that definitional structure.

"Control" was defined at the level of 50 percent stock ownership for two reasons. First, it supplied an objective, easily administrable criterion. Second, except for cases in which the holding is exactly 50 percent, majority ownership will always enable the holder to direct the day-to-day activities of the controlled entity, even though for many large corporations, de facto control may arise from holdings well below 50 percent.

Several comments (e.g., 16, 115; 1050, 1088, 1102) suggested that control should stem only holdings of more than 50 percent, rather than exactly 50 percent, of the outstanding voting securities of an issuer. However, the final rule adheres to the position that a 50-percent holding constitutes control. If the shares of an issuer are evenly divided between two holders, it is more appropriate that the issuer be viewed as part of both "persons," for purposes of the size-of-person test of section 7A(a)(2) and size-of-transaction test of section 7A(a)(3), than as part of neither. In such a situation; each of the 50-percent holders may exercise control. Moreover, after a holder acquires 50 percent of the shares of an issuer, further acquisitions of those shares are exempt under section 7A(c)(3).

This first test of control has been retained without substantial change through the revised and final definitions. In the revised rule the word "ownership" was replaced by "holding," thus incorporating the definition of "hold." In the final rule the exclusion of the holdings of affiliates was deleted as unnecessary because of the final definition of "affiliate."

The second text in the definition can best be understood in the context of its derivation from the earlier drafts. In the original definition the second test attempted to identify actual or working control, however effected. It also contained a proviso excluding from the definition of control any power arising from conditions in financing contracts with certain specified lenders. The original version of the second test attracted approximately 25 comments, for the most part critical.

The comments made four principal criticisms. First, several comments (e.g., 9, 11, 78, 115) noted that the definition of control would determine the entities for which revenue and other data must be supplied on the Notification and Report Form. If the definition imputed control of an entity which the reporting person did not in fact control, a reporting person might be unable to supply the required data. Since failure to comply could result in civil penalties of up to $10,000 per day, these comments should require that the definition of control should require the submission of data concerning only those entities with respect to which the reporting person could in fact obtain such data.

A second group of comments (e.g., 9, 11, 78, 88, 95. 120) focused on the subjectivity of the original second test. These comments expressed concern about the potential expansiveness of two phrases in the definition, "dominant minority" and "other means," which they feared might include relationships other than stock ownership. They contended that different observers could reasonably arrive at different conclusions about whether control existed in a given instance. They also urged that, in view of the civil penalties provided for noncompliance with the act, the definition should focus upon objective criteria that would allow both reporting persons and the enforcement agencies to determine their obligations under the act with reasonable certainty.

The third and fourth groups of comments reflected more specialized concerns. A number of comments (e.g., 68, 81, 96, 105, 107, 108, 113) asserted that the second test of control, as applied to mutual funds, would regard an investment adviser that advises several separate mutual funds as controlling the funds. Thus, the several mutual funds would become part of the same "person," and their security holdings would be aggregated for purposes of the 15 percent or $15 million test of section 7A(a)(3). They contended that the legislative history of the act indicated a contrary congressional intent.

Finally, the fourth group of comments (e.g., 15, 83, 88, 98, 115, 120) criticized the proviso relating to financing. They maintained that the exclusion of powers arising from financing contracts should extend to all lenders, rather than to only those listed, since extensions of credit may come from many sources.

The definition was substantially revised in response to these comments. The revised version restricted control to contractual power to designate a majority of the board of directors. When such a contract exists, the controlling entity can direct the actions of the controlled entity and can presumably supply the data required by the Notification and Report Form without difficulty. All parties should be able to determine their obligations under the act with reasonable certainty based on objective criteria.

The limitation of control to these two instances also eliminated the criticism in the comments on the mutual fund issue and on the proviso about creditors; since control could only flow from the two specified relationships, these two problems no longer arose.

However, in addition to the revised definition, the FEDERAL REGISTER notice accompanying the revised rules solicited public comments on another possible modification of the second test of control. It would have defined control to include the power to designate or elect a majority of the directors of an issuer, without limiting the power to contractual instances only. The notice also solicited comments identifying "objective factors of voting control (or contractual power), without relying on a specific percentage of voting securities held." 42 FR at 39043 (August 1, 1977).

Nineteen comments expressed views about the revised definition and the FEDERAL REGISTER proposals. The comments uniformly supported the revised definition and opposed the proposals in the FEDERAL REGISTER notice. Most considered that the revised definition adequately addressed the concerns expressed in the comments to the original rules, while the new proposals would reintroduce the same subjectivity and uncertainty previously mentioned. The comments stressed the need for objective standards because of the civil penalty provisions of the act and viewed the proposals in the FEDERAL REGISTER notice as inadequate. Minority stockholdings, as well as other forms of influence, it was stated, could constitute the "power to designate or elect," but would not be capable of objective ascertainment.

The final rule retains the substance of the revised second test. The Commission believes that in this instance, the advantages of certainty in the application of the act outweigh the disadvantages of limiting the reach of the act. Should experience in administering the act reveal shortcomings in this approach, the definition can be revised.

Accordingly, the final definition makes only one change in the revised version of the second test. It expands the formulation "directors or trustees" to clarify that for unincorporated entities the definition will look to "individuals exercising similar functions" in place of the directors. This language does not apply, however, to banks or trust companies that designate the trustees of trusts they administer. In such cases, the definition of "hold," § 801.1(c), allocates the responsibility for filing notification.

SECTION 801.1(C) HOLD

Section 801.1(c) defines the term "hold," which is central to the structure of the rules. If the commerce test of section 7A(a)(1) and the size-of-person test of section 7A(a)(2) are met, the act applies to an acquisition if "as a result of such acquisition, the acquiring person would hold" 15 percent or $15 million worth of the voting securities or assets of the acquired person. Section 7A(a)(3) (emphasis supplied). The treatment of an acquisition thus depends upon what the acquiring person will hold as a result of the acquisition. See sections 801.13 and 801.15.

Section 801.1(c)(1) states the basic rule that a person "holds" voting securities or assets if that person is the beneficial owner of such securities or assets. The rules do not contain a definition of "beneficial ownership." Instead, the existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership, which include the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, the investment discretion (including the power to dispose of the stock). It should be noted, however, that the concept of "beneficial ownership" for purposes of section 801.1(c) overlaps with, but is not identical to, the definition of beneficial ownership promulgated by the SEC for purposes of section 13(d) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78m. Thus, while a person may be a beneficial owner of securities for purposes of section 13(d) of that statute, it might not be the beneficial owner of those securities for purposes of the premerger notification rules, or vice versa.

Record ownership by itself is of no relevance in determining whether a person "holds" stock or assets under the rules. See the example following section 801.1(c)(1). Beneficial ownership may be effected directly (i.e., where the beneficial owner has legal title), or indirectly "through fiduciaries, agents, controlled entities or other means." This principle is subject to the provisions in subparagraphs (2) through (8) of the rule.

These subparagraphs clarify who the beneficial owner is or is deemed to be in particular situations. The holdings of spouses and minor children are by reason of section 801.1(c)(2) all attributable to one another, so that if any of them makes an acquisition, the holdings of all of them are aggregated for purposes of determining the total assets of the acquiring person and what it will hold as a result of the acquisition. See also section 803.2(a).

With certain exceptions, a trust, including a pension trust, is deemed under section 801.1(c)(3) to hold all assets and voting securities constituting the corpus of the trust; the trust (not the trustee) may thus become a reporting person. See the example in the rule. In the case of a revocable trust, and in the case of an irrevocable trust in which the settlor (i.e., he or she who creates the trust) retains a reversionary interest in the corpus, section 801.1(c)(4) makes the corpus of the trust the "holdings" of the settlor. In these situations the settlor, rather than the trust, would be required to comply with any obligations under the act.

Beneficiaries of all other types of trusts, including pension trusts and common trust funds or collective investment funds, are in section 801.1(c)(5) deemed not to hold any assets or voting securities constituting the corpus of such trusts, since the trusts are the holders." A bank or trust company that administers one or more common trust funds or collective investment funds is under section 801.1(c)(6) deemed the holder of the assets and voting securities constituting the corpus of each such fund, so that those assets and voting securities must all be aggregated with any other assets or voting securities which the bank or trust company may hold for its own account, if either the bank or one of its funds makes an acquisition. See the example following section 801.1(c)(6).

Section 801.1(c)(7) is designed to make clear that assets and voting securities held for the benefit of separate accounts administered by an insurance company are holdings of the company; unlike a trust, the separate account is not itself a holder.

Section 801.1(c)(8) states that in addition to its own holdings an entity (including an ultimate parent entity) holds all assets and voting securities held by entities which it controls directly or indirectly. Moreover, a person holds all assets and voting securities held by the entities included within it (i.e., held by the ultimate parent entity and all entities which it controls). See section 801.1(a).

BACKGROUND INFORMATION TO SECTION 801.1(c)

Original section 801.05(c) defined the term "hold" in terms of the possession of either direct or indirect "ownership" or "control." Revised section 801.1(c) deleted the reference to "control" and defined the term "hold" as "record or beneficial ownership." Possible reporting requirements for persons having mere record ownership sparked a significant number of comments (e.g., 1062, 1070, 1071, 1090, 1108). The final rule reflects the recognition that record ownership by itself is not meaningful for purposes of analyzing the impact of an acquisition on competition. Beneficial ownership is a more reliable indicator of the holder's power to influence the management of the issuer. Record ownership of the shares does not normally indicate which person enjoys the attributes of beneficial ownership, in particular the right to vote or to designate who may vote the shares. Moreover, a variety of persons other than the beneficial owner may be the record owner of voting securities. (In many cases, of course, record owner and the beneficial owner will be the same person.)

Under the final rule it makes no difference who the record owner is. The person or persons that have the benefits and risks of ownership of securities or assets "hold" those securities or assets, and persons that acquire beneficial ownership must report their "acquisition" if the criteria of the act are satisfied.

The holdings of spouses and their minor children are aggregated under § 801.1(c)(2), so that natural persons cannot escape reporting merely by making separate purchases in the names of other natural persons within the immediate family. This limited aggregation rule does not extend to other "related" persons, such as brothers and sisters or parents (unless the beneficial owner is a minor child). The revised rule would have aggregated the holdings of spouses with those of their minor children, but not vice versa, and was thus incomplete. A related rule, § 803.2(a), states that a single Notification and Report Form shall be filed on behalf of a natural person, his or her spouse and minor children, in the event that any of them makes a reportable acquisition.

In general, under § 801.1(c)(5) the beneficiaries of a trust are deemed not to hold any assets or voting securities constituting the corpus of the trust, because the specific assets attributable to a specific beneficiary may be impossible to determine, and because the beneficiary may have no control over an acquisition (or disposition) of assets by the trust. The one exception to this general rule is found in § 801.1(c)(4), when the settlor is also a beneficiary, in that case, the settlor is deemed the holder of the trust's assets.

Since a trust is an "entity" within the meaning of § 801.1 (a)(2), the trust will also be a person, unless the trust is controlled by another entity (other than a bank or trust company). Since a trust does not issue voting securities, under the rules it can be controlled by another entity only if the latter has a contractual power, under the trust indenture, to designate the trustee or, if there is more than one, a majority of the trustees. See §§ 801.1(a)(1) and 801.1(b)(2). For example, if a corporation appoints the trustees of an employee pension plan organized as a trust, then the corporation would control the trust under § 801.1(b)(2), and the trust would not be a separate "person" under the rules. On occasions when a trust is a separate person, the trust (normally through the trustee) must file notification and satisfy waiting period obligations if it makes a reportable acquisition. The holdings of a trust are not aggregated with those of any other entity for any purpose, unless the trust is controlled by or controls another entity. Thus, for example, if a bank is trustee of an individual trust, the bank will normally file notification on behalf of the trust whenever the trust makes a reportable acquisition. If the bank makes an acquisition for its own account, or for the account of another individual trust which it administers, the holdings of the individual trusts are not aggregated, nor are they aggregated with other holdings of the bank.

Special rules are applicable to common trust funds and collective investment funds, as defined in 12 CFR 9.18(a) (referred to hereafter as "collective investment funds"). Under § 801.1(c)(6), a bank or trust company which administers one or more collective investment funds holds the assets and voting securities constituting the corpus of each such fund. Therefore, the collective investment funds do not themselves hold any assets or voting securities, and as a result they will not themselves be subject to the act's requirements. Instead, the bank or trust company which administers such funds must comply with the act, if it applies. In order to determine whether a transaction is reportable, the bank or trust company must aggregate all assets and voting securities held for its own account with all assets and voting securities held by all collective investment funds which it administers. This aggregation does not include assets held in any other kinds of trusts which the bank may administer or for which it may be trustee.

Because of the degree of control which insurance companies typically exercise over their general and separate accounts, all assets and voting securities held for the benefit of any general or any separate account administered by such companies are, under § 801.1(c)(7), deemed holdings of the insurance company. These accounts are treated in a manner similar to that accorded to collective investment funds administered by a bank or trust company. Thus, all holdings of all such accounts are aggregated whenever the insurance company makes any acquisition for the benefit of any of those accounts.

Subparagraph (c)(8) states a conclusion which follows from the concept of control. Since under § 801.1(a) a person is defined as the collection of entities directly or indirectly under the control of an ultimate parent entity, it follows that the assets held by each of the entities included within a person are also held by the person. Similarly, each entity which is included within a person and controls another entity also holds any assets or voting securities held by the controlled entity. Thus, whenever the holdings of an entity must be determined, the holdings of that entity and those of each entity it controls must be aggregated.

At least one comment (1089) suggested that the Commission coordinate reporting requirements for certain types of persons or transactions with those promulgated by the Securities and Exchange Commission under section 13(d) of the Exchange Act. The SEC has adopted rules which define "beneficial ownership" so that a person having either the power to vote or the power to dispose of (i.e., investment discretion with respect to) voting securities would be deemed the beneficial owner of such securities, and would under section 13(d) have to report holdings of 5 percent or more of the stock of any issuer under SEC jurisdiction, and any changes in such holdings. Those rules became final on May 30, 1978. 43 FR 18484 (Apr. 28, 1978). The Commission's rules do not, however, adopt the SEC's position, which equates beneficial ownership with either voting power or investment discretion standing alone. After assessing the compatibility of the SEC's definition of "beneficial ownership" and the use of that concept in these rules, the Commission concluded that the legislative intent underlying each program and the goals of each program were sufficiently distinct to support the different usages of the term "beneficial ownership."

DELETION OF REVISED §§ 802.60 AND 802.61

Section 802.60 of the revised rules exempted "an acquisition by an agent on behalf of and at the specific direction of another person." Under that rule, an agent included a broker or dealer in securities, a trustee, or a fiduciary. The rule also stated that this exemption did not extend to the persons on whose behalf the acquisition was made.

Because the definition of "hold" in § 801.1(c)(1) has been modified to delete record ownership, § 802.60 of the revised rules is superfluous and has been deleted. Whenever any agent makes an acquisition on behalf of another person (whether or not at the specific direction of that other person), the agent does not become a beneficial owner and thus incurs no obligations under the act.

Section 802.61 of the revised rules exempted "an acquisition in escrow by an escrow agent pursuant to a written escrow agreement." That rule did not, however, exempt an acquisition by any person from an escrow agent, unless the assets or voting securities reverted to the original owner pursuant to the escrow agreement. The original rules contained a similar provision (§ 802.15).

Under the definition of "hold" in the final rules, the rule is no longer necessary, because an escrow agent does not become the beneficial owner of assets or voting securities held in escrow. An acquisition in escrow must be reported if beneficial ownership changes hands as a result of the acquisition; the same is true of an acquisition from an escrow agent.

SECTION 801.1(d) AFFILIATE

The term “affiliate” appears in the act only in section 7A(b)(3)(B), which states:

> The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

Thus, the holdings of affiliates of the acquiring person must be included in that person’s holdings for the purpose of determining whether the size-of-transaction test of section 7A(a)(3), as well as the additional notification thresholds defined in § 801.1(h), are met with respect to a particular acquisition. Section 801.1(d) defines an “affiliate” of a person as an entity controlled directly or indirectly by the ultimate parent entity of that person.

The practical effect of the definition of “affiliate” is that only holdings of entities included within the acquiring person, and no holdings of entities not included within the acquiring person, are counted in determining what that person holds, and thus whether the act applies to an acquisition.

BACKGROUND INFORMATION TO § 801.1(d)

The final definition of “affiliate” differs from the original and revised definitions, both of which designated as affiliates certain persons or entities not included within the acquiring person and thus required aggregation of their holding with those of the acquiring person.

Original § 801.05(d) defined one person as an affiliate of another person if either person held 5 percent or more of the other person’s outstanding voting securities or if one person was an officer, director, or partner of the other person. The definition was intended to identify entities that although not closely enough linked to be included within the acquiring person may nevertheless have a substantial similarity of interest with the acquiring person.

That definition attracted considerable critical comment. Several comments (e.g., 6, 15, 63, 88) argued that a 5 percent holding is too small a percentage to create any competitively significant link between a person and its “affiliate.” Some of the comments suggested that a higher level of stock ownership, such as 20 or 25 percent, should be required for the “affiliate” relationship. Other comments (e.g., 49, 73, 78, 112) noted that since an acquiring person might not in fact control its affiliates, it would in many cases be impossible for a person to compel disclosure of its affiliate’s stockholdings. Since the affiliate’s stockholdings could determine whether the size-of-transaction test was satisfied, an acquiring person might not be able to find out whether a reporting requirement existed, or to comply fully with it, if it did.

A number of comments, (e.g., 6, 63, 83, 88, 113) also criticized the concept that an officer, director, or partner could be an affiliate. They argued that since many companies have hundreds of officers, directors, and partners, it would be extremely burdensome to require a reporting person to find out what all of them held. Several comments (e.g., 7, 96, 105) argued that it would be unreasonable to aggregate the holdings of mutual funds, investment companies, or other institutions that are clients of the same investment adviser, either through the definition of “affiliate” or through other definitions. See the Statement of Basis and Purpose to § 801.1(b). Finally, several comments (e.g., 49, 73, 78) suggested that the confidentiality surrounding some acquisitions likely would be breached if an acquiring person had to contact its noncontrolled “affiliates” before the acquisition in order to determine the affiliates’ holdings in the company to be acquired.

In response to these comments. revised § 801.1(d) considerably altered the definition of "affiliate." In order to decrease the reporting burden on acquiring persons and to obtain information only on more meaningful affiliations, the percentage of stock ownership constituting affiliation was increased from 5 to 25 percent. Furthermore, affiliation arising from one's status as an officer, director, or partner of another person was deleted. Information on these relationships, while potentially relevant, was deemed less essential and less useful than information on stockownership. Thus, the concept of "affiliation" was restricted in the revised rules to the holding of a stock interest of at least 25 but less than 50 percent (which is defined as "control" and would result in inclusion within the person). In addition, the revised rule specified that holdings of voting securities of only the ultimate parent entity of the reporting person or the affiliated person were to be counted in determining affiliation.

The comments on the revised definition, although fewer than those on the original rules, continued to object to defining "affiliate" to include noncontrolled entities. The comments (e.g., 1090, 1110) reiterated the contention that a person may be neither aware of nor able to compel disclosure of the holdings of a noncontrolled affiliate. Comment 1110 suggested that the definition of affiliate be tied more closely to the definition of "control," and that a corporation be considered an affiliate of a person only if 50 percent of its voting securities are owned by such person.

The final rules, in contrast to both of the earlier drafts, define "affiliate" as an entity controlled by the ultimate parent entity of a person. The concept of affiliation arising from a less-than-control relationship has been entirely deleted. The final rules thus incorporate a suggestion made by several comments (e.g., 78, 83, 112; 1110) that affiliation be defined no more broadly than the concept of control.

The final rules make this change because of what appeared to be potential administrative problems involved in any definition of affiliation that included less-than-control relationships. Although the Commission believes the act unmistakably affords it the power to define the term to include relationships short of control, the Commission considered it difficult to require disclosures of holdings of noncontrolled entities. Furthermore, in many cases, aggregation of these holdings also would have resulted in the imposition of a reporting requirement on a person whose holdings were less significant than those of its affiliate. For example, assume that A, a large corporation, acquires a 14-percent stock interest, valued at less than $15 million, in company X. This acquisition is not reportable under the act and rules. Assume that A also holds 25-percent of company F. Under the revised rules, F would have been an affiliate of A and A an affiliate of F. If F then purchases 1-percent of X, and the criteria of section 7A(a)(1) and (a)(2) are met, this acquisition would have been reportable under the revised rules, since for purposes of section 7A(a)(3), F would have aggregated its holdings of X stock with A's holdings of X stock. Therefore, F, the 1-percent shareholder of X, would have been required to report on its business activities, but A, the 14-percent shareholder of X, would not have been required to report, and no information would have been received by the agencies on its activities. Thus a great deal of relevant information would not have been obtained.

Defining the term "affiliate" by reference to the concept of control solves both of these problems. Since the only entities whose holdings are defined as relevant to determining the size of the transaction are those controlled by the reporting person, there should be no difficulty in obtaining information from such entities. In addition, the reporting person is always certain to be the most relevant person from a competitive standpoint.

The Commission does not consider it likely that many significant acquisitions will escape a reporting obligation because of the final definition of "affiliate." The 15-percent-or-$15 million threshold of section 7A(a)(3) is low enough that most major acquisitions will be reported well before the acquisition of control, even though the holdings of 25-percent-to-49-percent subsidiaries are excluded. Item 6 of the form was inserted, in part, so that once a reporting obligation exists, significant holdings in other companies by the reporting person, and significant holdings in the reporting person by others, can be identified. The form will reveal such holdings without affecting the basic concept of what transactions are reportable. See the Statement of Basis and Purpose of item 6.

The final definition of "affiliate" is supported by the legislative history of the act. A similar definition of "affiliate" was contained in the House-passed bill. See the final text of H.R. 14580 at 122 Congressional Record H8137 (daily ed. August 2, 1976). Although the definition was deleted from the final version of the act, the Commission believes that this deletion was intended to permit the agencies to define the term by rule rather than to preclude any particular definition. Note that since the term "person," which is closely connected with the term "affiliate," was not defined, a statutory definition of "affiliate" would thus have been impracticable. Furthermore, Senator Philip Hart, explaining the deletion on the Senate floor, clearly suggested that Congress intended the Commission to have maximum discretion in defining the term. See 122 Congressional Record S15417 (daily ed. September 8, 1976).

SECTION 801.1(E) UNITED STATES PERSON, UNITED STATES ISSUER, FOREIGN PERSON, FOREIGN ISSUER

Section 801.1(e) defines four terms relevant to determining the applicability of several exemptions relating to foreign commerce or foreign parties. These exemptions turn partly on whether certain persons or issuers are U.S. persons or issuers, or foreign persons or issuers. Subparagraph (e)(1)(i) defines a "U.S. person" as a person (other than a natural person) the ultimate parent entity of which is incorporated in the United States, is organized under the laws of the United States, or has its principal offices in the United States. Subparagraph (e)(1)(ii) similarly defines a "U.S. issuer" as an issuer which fulfills any of the above three criteria. A natural person is defined as a "U.S. person" if he or she is a citizen or resident of the United States.

Note that a person or issuer which fulfills any of the stated criteria is defined as a U.S. person or U.S. issuer. Thus, for example, a corporation incorporated abroad which has its principal offices in the United States is a U.S. person (or issuer). A natural person who resides in the United States but is not a U.S. citizen is nevertheless a "U.S. person." The term "United States" is defined in § 8-1.1(k) to include the several States, the territories, possessions, and commonwealths of the United States, and the District of Columbia.

Conversely, a person other than a natural person is defined in subparagraph (e)(2)(i) as a "foreign person" if its ultimate parent entity is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States. A foreign issuer is defined in subparagraph (e)(2)(ii) as an issuer which meets none of the three criteria for a "U.S. issuer." A natural person is defined as a "foreign person" if he or she is neither a citizen nor a resident of the United States.

The terms defined in § 801.1(e) do not appear in the act, which contains no special provision for transactions having foreign aspects. The terms appear in §§ 802.50 and 802.51, which exempt certain acquisitions by foreign persons and certain acquisitions of voting securities of foreign issuers or foreign assets. The terms “foreign person” and “foreign issuer” are also used in § 803.4, which provides that under certain circumstances another party to a transaction may file notification on behalf of a foreign acquired person that refuses to file. The term “U.S. issuer” is also used in item 9 of the Notification and Report Form, which requires the reporting person to list certain prior acquisitions of the voting securities of U.S. issuers.

For purposes of the definition, a person’s “principal offices” refers to that single location which the person regards as the headquarters office of the ultimate parent entity. This location may or may not coincide with the location of its principal operations.

In determining whether a person other than a natural person is a U.S. person (or a U.S. issuer), one will ordinarily have to consider only two countries—the place of its principal offices and the place of its incorporation or organization. The definition uses the concept “organized under the laws of the United States” as well as “incorporated in the United States” to encompass partnerships, associations, trusts, and other unincorporated units.

BACKGROUND INFORMATION TO § 801.1(e)

The primary purposes of this definition is to clarify the scope of the foreign commerce exemptions of §§ 802.50 and 802.51 and the special filing provision of § 803.4. The definitions establish objective criteria that can be easily applied by reporting persons and by the agencies. These definitions include as “U.S.” persons or issuers those with significant ties to the United States; i.e., incorporation (or organization) or principal offices in the United States.

These definitions appear for the first time in the final rules. The original rules did not designate persons or issuers as “United States” or “foreign”; instead, the foreign commerce exemption embodied in original § 802.35 was premised on the absence of “substantial involvement” in United States commerce, as evidenced by United States sales or assets. Although the revised rules did not use the terms “U.S. person,” “U.S. issuer,” “foreign person,” and “foreign issuer,” they implicitly adopted similar criteria by referring to the domicile of persons and issuers. Revised §§ 802.50 and 802.51 would have exempted certain acquisitions by persons domiciled outside the United States. Those rules, however, did not define “domicile.”

The comment of the Department of State (1072) pointed out that the failure to define the concept of “domicile” in the revised rules could have led to confusion. The comment gave the example of a corporation organized under the laws of Delaware but having its principal place of business in a foreign country. It inquired whether such a corporation would be considered domiciled in the United States for the purposes of §§ 802.50 and 802.51. The comment expressed no preference between a place-of-business test or a place-of-incorporation test, and specifically noted that the Commission might choose to deny the foreign commerce exemptions if either the principal place of business or the place of incorporation were in the United States. The final definition adopts this suggestion.

For natural persons, a similar alternative test was inserted to clarify an ambiguity in the revised rules. Since the term “U.S. person” includes U.S. citizens, wherever domiciled, it includes some persons not "domiciled" in the United States. Similarly, anyone, of whatever citizenship, who resides in the United States is also considered a "U.S. person."

SECTION 801.1(f)(1) VOTING SECURITIES

The Act applies to acquisitions of "voting securities." "Voting securities" is defined in section 7A(b)(3)(A), and § 801.1(f)(1) basically restates the statutory definition. "Voting securities" are securities that at present or upon conversion entitle the owner or holder to vote for directors of any issuer or for individuals exercising similar functions in a non-corporate entity.

BACKGROUND INFORMATION OF § 801.1(f)(1)

No definition of "voting securities" appeared in the original rules. The revised definition incorporated the statutory definition. The final definition expands the statutory definition in only one respect. The phrase "or of any entity included within the same person as the issuer" was inserted so that if an entity issues securities which, upon conversion, will enable the holder to vote for directors of a different entity within the same person as the issuer, the issue is still one of "voting securities." Without the added phrase, such securities would not be "voting securities" within the meaning of section 7A(b)(3)(A) or § 801.1(f)(1). The added phrase assures that such securities are treated on an equal footing with all other convertibles when converted. See § 803.30(a)(6).

DELETED DEFINITION OF "SECURITY"

Section 801.1(e) of the original and revised rules defined the term "security." The definition listed the various interests in businesses deemed to be securities, as well as "in general, any interest or instrument commonly known as a 'security,'" or the right to purchase any such security.

The definition was deleted from the rules for two reasons. First, the statute uses only the term "voting securities," which is defined both in section 7A(b)(3)(A) and in § 801.1(f)(1). "Voting securities" is a unitary concept and as such its components need not be defined separately. See § 801.1(f)(1).

Moreover, the term "security" has a commonly understood meaning which poses no difficulty in the vast majority of transactions. Inherent in the deleted definition was a recognition of this commonly understood meaning. Thus, the deletion should effect no substantive change.

SECTION 801.1 (f)(2) CONVERTIBLE VOTING SECURITY

Section § 801.1(f)(2) defines the term "convertible voting security" as a voting security that does not, at present, entitle its owner or holder to vote for directors of any entity. The definition was added to the final rules to emphasize the existence of a distinct scheme for the treatment of convertible voting securities ("convertibles"). See §§ 801.12(b), 801.15(a)(2), 801.32, and 802.31.

The distinction between convertibles and other voting securities is important for two related reasons. First, under the final rules the reporting and waiting period requirements of the act do not apply to convertibles until they are exchanged for voting securities presently entitled to vote. The acquisition of convertibles, unlike the acquisition of other voting securities, is always exempt (§ 802.31), but a "conversion" is a potentially reportable acquisition (§ 802.32). The second reason is a corollary of the first. For purposes of the 15 percent-or-$15 million size-of-transaction test of section 7A(a)(3), convertibles are disregarded entirely in computing the value or percentage of voting securities to be held or acquired. Section 801.12(b) provides that, for purposes of the 15 percent test of section 7A(a)(3)(A), it is irrelevant whether the acquiring person or others own convertible voting securities of the acquired person; these convertibles appear in neither the numerator nor the denominator of that percentage. Similarly, under § 801.15(a)(2), the value of convertible voting securities is ignored for purposes of the $15 million test of section 7A(a)(3)(B). The only time, in fact, that convertibles are "counted" is as assets on a person's last regularly prepared balance sheet, for purposes of the size-of-person test of section 7A(a)(2). See § 801.11 (c)(2).

BACKGROUND INFORMATION TO 801.1(f)(2)

Section 7A(b)(3)(A) of the Act provides:

> The term "voting securities" means any securities which at present or *upon conversion* entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions. (Emphasis supplied.)

The only reference to convertible securities in the legislative history of the act was made by Chairman Rodino from the House floor. He stated:

> The House bill covered acquisitions of assets and "voting securities"-any debt or equity instrument entitling the holder to elect directors of a corporation. Nonvoting securities were completely exempt from the House-passed bill. However, nonvoting securities that can be converted into voting securities were covered "upon conversion," and compliance with the bill's notification and waiting requirements would thus have been required prior to conversion. In contrast, the Senate bill covered *** nonvoting but convertible securities ***. The compromise bill completely exempts acquisitions of non-voting, nonconvertible debt or equity securities. Further, the compromise bill covers nonvoting but convertible securities upon acquisition, not conversion.
>
> 122 Cong. Rec. H10294 (daily ed. Sept. 16, 1978).

Neither section 7A(b)(3)(A) nor any other section of the act states when notification with respect to convertible securities is to take place. The legislative history provides very little guidance. The Commission, however, interprets the departure from the House passed bill (to which the final rules largely return) as an effort by Congress to provide rulemaking flexibility in lieu of mandating that acquisitions of convertibles must be covered.

Section 7A(c)(2), the subsection of the act that exempts acquisitions of nonvoting securities, reinforces this position. Since it does not specifically exempt convertibles as nonvoting securities, it implicitly leaves the Commission free to determine whether to cover acquisitions of convertibles.

Moreover, the language of the act permits coverage at either the time of acquisition or the time of conversion: Either event is an "acquisition" potentially required by the act to be preceded by reporting and a waiting period. Indeed, nothing in the act prohibits coverage at both junctures. However, the Commission determined in the final rules that reporting at the time of conversion is most appropriate, and that reporting before conversion obviates the necessity of also reporting before acquisition.

From an antitrust standpoint, reporting at conversion is more useful. It is true that before conversion, convertible voting securities may confer upon their holder the power to influence, either directly or indirectly, the management of the issuer. But the conversion price attached to convertibles may make conversion economically unattractive. And the measurement of the potential voting power conferred by convertibles is highly speculative, since conversions by other holders may dilute the potential voting power of the person holding the convertibles. So although a substantial holding of convertible voting securities may give the holder some power to influence management, this power is far less significant than the ability actually to vote the securities. At conversion a more accurate picture of voting power in the hands of the owner or holder of those securities can be calculated.

In addition, convertible voting securities commonly change hands several times before conversion. By interposing the notification and waiting period requirements of the act only before conversion, the Commission minimizes the intrusion of the act into the capital markets.

Accordingly, § 802.31 of the final rules exempts all acquisitions of convertible voting securities, and § 801.32 explicitly designates conversions as acquisitions potentially subject to the act. The exclusion of convertibles from the 15 percent-or-$15 million size-of-transaction test of section 7A(a)(3), mentioned above, is consistent with the decision to disregard convertibles prior to conversion, except for purposes of section 7A(a)(2).

The revised rules had introduced the opposite approach to convertibles. Convertible voting securities were not differentiated from other voting securities, and their acquisition was reportable if the criteria of section 7A(a) were met. Percentages were calculated by means of a formula reflecting "partial dilution" — that is, only convertibles held or acquired by the acquiring person were regarded as already converted. For example, when determining the percentage of voting securities of an issuer held, the holder was obliged under revised § 801.12(b)(1)(i) to include within its holdings only those convertibles which were "convertible upon the occurrence of an event certain to occur within 5 years or convertible at the option of the holder." The denominator of that fractional computation was to reflect the number of votes presently entitled to be cast plus "the votes represented by conversion of voting securities of the issuer which are included in the numerator by reason of (the foregoing formula)." This procedure assessed the maximum voting power that the acquiring person could achieve within a reasonable period of time by means of conversions by disregarding the impact of convertibles of the issuer held by all others. In addition, revised § 802.31 exempted the subsequent conversion of convertibles.

The comments to the revised rules did not object to covering convertibles at time of acquisition, but did object to the formula for computing the percentage of voting securities that convertible voting securities represented. Several (e.g., 1026, 1070, 1090, 1102, 1108, 1115) perceived unfairness in not requiring full dilution in the percentage computations. One comment (1070) maintained that the language of the act maintained such treatment, for elaboration of that argument, see the Statement of Basis and Purpose to § 801.12(b). By ignoring all convertibles until exchanged for voting securities presently entitled to vote, the final rules eliminate this dispute and employ the most useful means of estimating voting power for purposes of in antitrust evaluation.

SECTION 801.1(F)(3) CONVERSION

The reporting and waiting period requirements of the act apply to acquisitions of "voting securities." The definitions of voting securities, section 7A(b)(3)(A) and section 801.1(f).l(f)(1), provide generally that a voting security is one that at present or upon conversion entitles the owner or holder to vote for directors of an issuer.

Section 801.1(f)(3) defines "conversion" as the exchange, without the payment of additional consideration, of voting securities not presently entitled to vote for voting securities entitling the owner or holder to vote for directors of any issuer. Transfer costs, fees, and payments made to complete fractional shares are not considered "additional consideration" in this context. The definition emphasizes that "conversion" represents an exchange of "voting securities," as defined in section 801.1(f)(1), for "voting securities" and that an exchange, as opposed to automatic maturation of inchoate rights, must take place to effect conversion. For example, if preferred shares become entitled to vote because dividends have been omitted, that occurrence is not a conversion and the act does not apply.

As a practical matter, although the definition of conversion means that convertible bonds and the like are voting securities, and that therefore reporting could be required prior to their acquisition, section 802.31 of the rules exempts all acquisitions of convertible voting securities from the requirements of the act. Thus, convertibles, like options and warrants, can be acquired without complying with the act, but compliance may be required prior to conversion or exercise.

Background Information to Section 801.1(f)(3)

The original rules did not address convertibles or the concept of "conversion." Revised section 801.1(f)(2), defined "conversion" but employed circular language. It stated essentially that conversion was the *conversion*, without the payment of additional consideration, of securities not presently entitled to vote into voting securities entitling the owner or holder to vote.

The requirement that the conversion be effected without additional consideration was essential in the revised rules to distinguish convertible securities, which are "voting securities," from options and warrants, which are not. Under those rules, convertibles would have been reportable at acquisition and exempt at conversion, while options and a warrants would have been exempt at acquisition but potentially reportable when exercised. See the Statement of Basis and Purpose to section 801.1 § (f)(2).

As stated above, the final rules treat convertibles in exactly the same way as options and warrants. The definition of "conversion" is present only to complete the scheme of the act, which uses the term in section 7A(b)(3)(A).

The final definition's emphasis on the *exchange* process addresses an issue raised by two comments (1070, 1090). Some issues of preferred stock entitle the owner or holder to vote for directors after the issuer has failed to pay dividends for a specified period of time. At acquisition, such preferred stock does not entitle its holder to vote; thus, the acquisition is not an acquisition of voting securities and is not reportable. Since the accrual of voting rights to such preferred stock is an automatic process and does not represent an exchange, this event is not a conversion, and again, is not reportable. Therefore, since preferred stock which entitles its owner or holder to vote upon default is not converted within the meaning of the rules when such voting rights accrue, is a "voting security" only when presently entitled to vote-that is, only when the issuer is already in default. Acquisitions of this kind of preferred stock accordingly are subject to the reporting and waiting requirements of the act only if made during a period when voting rights have attached. On the other hand, the acquisition of voting preferred stock is treated like any other acquisition of voting securities and is potentially reportable. If voting preferred may be converted into (exchanged for) voting common stock, this conversion is also subject to the requirements of the act if the criteria of section 7A(a) are met. (Note, however, that if the exchange does not increase the holder's percentage of the voting securities of the issuer. it may be exempt. See section 7A(c)10).)

The definition requires that *voting securities* be exchanged for voting, securities to make clear that the acquisition of voting securities for cash or equivalent securities is not a conversion, and that cash and such securities therefore are not voting securities subject to the act.

SECTION 801.1(g)(1) TENDER OFFER

Section 801.1(g)(1) defines the term "tender offer," which appears in several places in the act and rules. The definition is important chiefly because the act and rules treat tender offers differently from other acquisitions in one important respect. A request for additional information and documentary material under section 7A(e) and section 803.20 normally extends the waiting period when directed to either party to an acquisition; however, for tender offers the waiting period is extended only when the request is directed to acquiring persons. In addition, other special treatment, summarized in the Statement of Basis and Purpose to section 801.1(g)(2), applies to cash tender offers.

The definition of "tender offer" incorporates the meaning of the term in section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n. Neither the Exchange Act nor the rules and regulations issued under that act by the SEC define the term "tender offer," and the meaning of the term is instead found in case law and administrative precedent.

BACKGROUND INFORMATION TO SECTION 801.1(g)(1)

In its regulatory programs, the SEC has considered, but explicitly declined, defining the term "tender offer." In August 1976, the SEC issued proposed rules and schedules to implement sections 14(d) and 14(e) of the Exchange Act relating to tender offers. Exchange Act Release No. 3412676 (August 2. 1976). 41 FR at 33004 (Aug. 6, 1976). The SEC stated that the dynamic nature of tender offers cautioned it to remain flexible in determining which types of transactions fall within the term. It specifically noted that its position did not limit the term to "so-called conventional tender offers whereby an offer is published by a person requesting that all or a portion of a class of a company's securities be deposited during a fixed period of time so that (the offeror) may purchase such securities * * * subject to specified conditions." Id. The release mentioned other types of bids and solicitations, which, depending on the circumstances, it might characterize as tender offers.

The definition in original section 801.05(f) was modeled after the SEC's description of a conventional tender offer. The SEC criticized this definition in its comment on the original rules (125). noting that there did not appear to be any reason to limit the tender offer provisions of the premerger notification rules to conventional tender offers. Accordingly, the SEC comment suggested adoption of the definition which appeared in the revised rules. In its comment on the revised rules (1058), the SEC supported the revised definition, which was retained without change in the final rules.

Section 801.1(g)(1), by referring to section 14 of the Exchange Act, invokes section 14(e) of that act, which, as interpreted by the SEC, embraces all tender offers without regard to the limitations contained in section 14(d). Exchange Act Release No. 34-12676 (Aug. 2, 1976), 42 FR at 33005 (Aug. 6, 1976). The Commission specifically adopts this broader meaning of the term "tender offer."

SECTION 801.1(g)(2) CASH TENDER OFFER

Section 801.1(g)(2) defines the term "cash tender offer." The act provides that for cash tender offers, the initial waiting period is 15 rather than 30 days (section 7A(b)(1)(B)), and may be extended only for 10, rather than 20, days after the response to a request for additional information or documentary material is received (section 7A(e)(2)). These statutory provisions are explicated in section 803.10(b), and references to the term also occur in other rules, e.g., section 801.30(b). The definition states that a cash tender offer is a tender offer in which cash is the only consideration offered to the holders of the voting securities sought to be acquired.

BACKGROUND INFORMATION TO SECTION 801.1(g)(2)

This definition merely states the plain meaning of the act. It appeared in the original rules as section 801.05(g) and in the revised rules as section 810.1(h), and attracted no comments.

SECTION 801.1(g)(3) NONCASH TENDER OFFER

Section 801.1(g)(3) defines the term "noncash tender offer." This term appears for the first time in section 802.23 of the final rules, an exemption rule which modifies the length of the waiting period when a cash tender offer is amended into a noncash tender offer, or vice versa. The definition provides that a noncash tender offer is any tender offer that is not a cash tender offer-that is, one in which any consideration other than or in addition to cash is offered to the holder of the voting securities to be acquired.

BACKGROUND INFORMATION TO ? 801.1(g)(3)

This definition is the logical converse of the definition of cash tender offer.

SECTION 801.1(h) NOTIFICATION THRESHOLD

Section 801.1(h) defines the term "notification threshold." The term does not appear in the act. In the rules the term identifies the levels of stock ownership that may not be attained or surpassed by a person without first filing notification and observing a waiting period. The most important application of the term is in § 802.21. the exemption rule governing stock purchase above the 15-percent or $15 million level prescribed in the act.

To understand the term one must begin with the language of section 7A(a)(3), the size-of-transaction test. Notification and a waiting period are required if section 7A(a)(1) and (2) are satisfied, and if:

(3) *as a result of such acquisition, the acquiring person would hold* [15-percent or $15 million of the stock or assets of the acquired person]. (Emphasis supplied.)

The rules interpret this language to include every acquisition after which the acquiring person would hold more than 15-percent or $15 million of the stock of the acquired person, rather than only those acquisitions which initially raise the acquiring person's holdings to the 15-percent or $15 million level. See § 801.13(a). Therefore, every stock acquisition above the 15-percent or $15 million level becomes a potentially reportable transaction — reportable if section 7(a)(1) and (a)(2) also are satisfied, and if no exemption applies. Section 802.21 exempts all acquisitions above the 15-percent or $15 million level except those attaining specified "notification thresholds," provided that certain timing and other conditions are satisfied. These levels of ownership, before which an additional notification and waiting period will be required, are defined in this rule as 15 percent of the stock of the acquired company, if valued at more than $15 million; 25 percent of the stock; and 50 percent of the stock. (The 15-percent or $15 million level contained in the act is inserted as the first notification threshold to facilitate the operation of § 802.21.) Section 801.12 governs the calculation of all percentages. For further explanation of the role of notification thresholds, see the Statement of Basis and Purpose to § 802.21.

Notification thresholds and the exemption conferred by § 802.21 apply only to acquisitions of voting securities. Any acquisition of assets that satisfies the three tests of section 7A(a) and is not exempted by the act and rules is reportable. In particular, any acquisition as a result of which the acquiring Person would hold 15 percent or $15 million of the acquired person's assets in reportable, even though the reporting Person may have previously filed notification with respect to an acquisition of assets from the same person. However, note that under § 801.13(b) assets cease to be assets of the acquired person after 180 days.

The other occurrences of the term are relatively minor and relate to the same purposes. For example, § 802.23(a) is a provision similar to § 802-21 in connection with tender offers. Section 803.7 uses the term in explaining the impact of that rule upon § 802.21. Several rules relating to the application of section 7A(a)(3) also refer to § 801.1(h)(1) in order to assure consistency between the rules and the act. See, e.g., §§ 801.14, 801.21.

BACKGROUND INFORMATION TO § 801.1(h)

Under § 801.13(a) every acquisition as a result of which the acquiring person would hold more than 15 percent or $15 million of the voting securities of the acquired person becomes a reportable acquisition if the tests of section 7A(a)(1) and (2) are satisfied. The Commission has determined, however, that to interpose the notification and waiting period requirements before every acquisition above the 15-percent or $15 million level would entail a burden on reporting persons and the enforcement agencies not justified by the additional information it would provide. See the Statement of Basis and Purpose to § 802.21. The definition of "notification threshold" identifies the points at which reporting subsequent to the 15-percent or $15 million level will be required.

The number of notification thresholds - four - was chosen because it serves the enforcement interests of the agencies without excessively taxing their administrative resources or burdening reporting persons. The particular percentage levels were selected as notification thresholds because they are appropriate levels for the agencies to review the significance of holdings of voting securities. Subparagraph (h)(1), the criterion of section 7A(a)(3), was selected by Congress as the first appropriate level. The second and third notification thresholds are appropriate because the act applies to the acquisition of the stock of companies ranging from quite large to quite small, and from widely to closely held corporations. Thus, working control or significant influence may arise at different points with respect to different companies. The 15-percent (when applicable) and 25-percent thresholds give the enforcement agencies adequate opportunities to assess the ability of a significant minority shareholder to influence or direct management.

The second threshold, which did not appear in the revised rules, was inserted because for larger companies, stock valued at $15 million may represent substantially less than 15 percent of the total number of outstanding shares. A holding that posed no antitrust concern at such a low percentage level may pose concern well before reaching the 25 percent threshold.

The final 50 percent threshold is appropriate because that level represents veto power, if not actual control, and because section 7A(c)(3) exempts acquisitions prior to which the acquiring person already held at least 50 percent of the shares.

The term "notification threshold" first appeared in the revised rules as § 802.21(a), but has been transferred to § 801.1, in which other terms are defined. The dollar amount in subparagraph (h)(1) has been corrected to an amount exceeding $15 million, to conform with section 7A(a)(3)(B). The reference in the revised rules to § 802.64 were necessary to accommodate institutional investors that first filed notification not at 15 percent or $15 million, but at the higher limits in that rule. However, § 802.21 has been reworded so that different notification thresholds for institutional investors are no longer required. Note that institutional investors, like other persons, are subject to the 25 percent and 50 percent thresholds.

SECTION 801.1(I)(1) SOLELY FOR THE PURPOSE OF INVESTMENT

The phrase "solely for the purpose of investment" occurs in two statutory exemptions, section 7(A)(c)(9) and (11), and in two exemption rules, §§ 802.9 and 802.64. The definition provides that so long as a person does not intend to participate in the formulation of the basic business decisions of an issuer, that person holds or acquires the issuer's voting securities "solely for the purpose of investment."

BACKGROUND INFORMATION TO § 801.1(i)(1)

The purpose of this definition is to limit the availability of the exemptions contained in section 7A(c)(9) and (11) of the act and §§ 802.9 and 802.64 of the rules to situations in which the acquiring person or the holder has no intention of participating in the management of the issuer. For further information, see the Statements of Basis and Purpose to § 802.9 and 802.64. Although the definition has been reworded to conform with the language of the act, its substance is unchanged from revised § 801.1(i). Original § 802.85(c) had excluded control holdings from the concept, but the original rules did not otherwise define the term.

In the FEDERAL REGISTER notice accompanying the revised rules. 42 FR at 39047 (Aug.1, 1977), comments were invited on the suggestion that this definition be further limited by requiring that stock purchased for investment purposes not be voted. The comments (e.g., 1020, 1050, 1051, 1058, 1067, 1070, 1090, 1101, 1103, 1110, 1111) were unanimously negative, arguing that voting for directors, without more, was not inconsistent with investment purpose. The Commission has decided not to incorporate this limitation into the final definition. Therefore, merely voting the stock will not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer. The facts and circumstances of each case will be evaluated whenever any of these actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act's requirements. In appropriate circumstances the Commission may investigate to determine whether an enforcement action under section 7A(g) is warranted.

Comment 1059 suggested that section 7A(c)(9) refers only to acquisitions, but not holdings, for investment purposes, and therefore this rule should not refer to holdings. But section 7A(c)(9) does refer to holdings: it provides that an acquisition "solely for the purpose of investment" is exempt only if, as a result of the acquisition, the amount of stock "acquired or *held*" does not exceed 10 percent of the issuer's outstanding shares (emphasis supplied). Furthermore, the reference to "holding" in the rule is necessary because of the possibility of multiple acquisitions below either the 10 percent limitation of section 7A(c)(9) or the 15 percent and $25 million level of § 802.64(b)(5). In such situations, the question arises whether previously acquired stock is "held" — and thus must be aggregated with a subsequent acquisition. Such questions are answered by § 801.15, and it is therefore necessary to have a concept of holding as well as acquiring "solely for the purpose of investment."

If a person makes an exempt acquisition "solely for the purpose of investment" and later decides to participate in the management of the issuer, this change in intent does not require filing with respect to the exempt purchase, because the act applies only at the time of an acquisition. However, the change would require the person to file notification prior to any further acquisitions, whether or not exceeding the 10 percent limitation in section 7A(c)(9), if the criteria of section 7A(a) are met and the acquisition is not otherwise exempt.

SECTION 801.1(i)(2) INVESTMENT ASSETS

This definition defines "investment assets" to mean cash on hand or deposited in financial institutions, money market instruments (generally, commercial paper), and Government bonds. The term is used in connection with the foreign commerce exemptions (§§ 802.50, 802.51), in connection with filing on behalf of foreign persons refusing to file notification (§ 803.4), and in determining the total assets of a natural person (§ 801.11(d)).

BACKGROUND INFORMATION TO § 801.1(i)(2)

The use of the term "investment assets" is explained in the Statement of Basis and Purpose to each of the rules in which it appears. In general, these types of assets are believed to lack competitive significance.

This definition appears for the first time in the final rules. It replaces the term "assets held solely for investment purposes" which was used in §§ 802.50 and 802.51 of the revised rules, and an equivalent provision in original § 802.35.

SECTION 801.1(j) ENGAGED IN MANUFACTURING

Section 801.1(j) defines the phrase "engaged in manufacturing." The definition is relevant only to the size-of-person test of section 7A(a)(2). The size-of-person test can be satisfied in three ways, and two of the three—section 7A(a)(2) (A) and (B)—use the phrase "engaged in manufacturing."

Under the definition, a person is "engaged in manufacturing" if it produces and derives more than $1 million in aggregate annual sales or revenues from products within industries 2000-3999, as coded in the 1972 edition of the Standard Industrial Classification Manual, published by the Executive Office of the President, Office of Management and Budget. Since the definition applies to "persons," all the activities of the person, as defined in § 801.1(a)(1), must be considered. The definition specifies that the person must produce and derive the revenues from manufactured products, so that merely reselling manufactured products does not satisfy the definition.

BACKGROUND INFORMATION TO § 801.1(j)

The size-of-person test of section 7A(a)(2) has three branches. If the acquiring person has annual net sales or total assets of $100 million or more, then section 7A(a)(2)(A) provides that, if the acquired person is engaged in manufacturing, the test is satisfied if the acquired person has annual net sales or total assets of $10 million or more. If the acquired person is not engaged in manufacturing, then section 7A(a)(2)(B) provides that the test will be satisfied only if the acquired person has total assets of $10 million or more. For the third branch, it is irrelevant whether either the acquiring or the acquired person is engaged in manufacturing. Section 801.11 explains how to determine the annual net sales and total assets of a person.

Note that the definition is narrower than the standard for completing item 5 of the Form. That item requires a listing of all revenues derived from manufacturing activities regardless of whether those revenues exceed $1 million.

The definition refers to selected 4-digit (SIC code) industries because those classifications are commonly accepted as a basis for distinguishing manufacturing activities from non-manufacturing activities. The original definition, § 801.05(h), did not provide for a threshold dollar amount of annual sales or revenues below which persons would not be deemed to be "engaged in manufacturing." The $1 million threshold amount was inserted in the revised rules in response to several comments (e.g., 15, 63, 115, 120) in order to distinguish de minimis from significant manufacturing operations. The final rules retain the revised definition.

SECTION 801(k) UNITED STATES

Section 801.1(k) defines the term "United States" to include each of the States, along with the territories, possessions and commonwealths of the United States, and the District of Columbia.

One of the two important applications of the term "United States" in the rules is to the foreign commerce exemptions, §§ 802.50 through 802.52, and the related definitions, in § 801.1(e). References in § 801.1(e) to the location of a person's or an issuer's principal offices or the residence of a natural person, and references in §§ 802.50 and 802.51 to the location of assets and to "sales in or into the United States" are all affected by this definition of the term "United States."

The other important application of the term "United States" appears in § 803.2(c)(1), which provides that responses to items 5, 7, 8, 9 and the Appendix to the Notification and Report Form shall be supplied only with respect to operations conducted within the United States. In addition, the term appears in § 801.1(a)(2), which states that "the United States, any of the States thereof, or any political subdivision or agency of either ***" are not themselves included in the term "entity."

BACKGROUND INFORMATION TO § 801.1(k)

Original § 801.05(i) made no references to "possessions," and neither the original nor the revised definition referred to the several States. The reference to the several States in § 801.1(k) was inserted into the final rules so that an entity "incorporated in the United States" or "organized under the laws of any of the United States" (see § 801.1(e)) would include entities organized or incorporated under the laws of the several States.

Comment 1104 asserted that the Bureau of the Census collects data only from the continental United States and thus suggested that reference to the commonwealths, territories and possessions of the United States should be deleted from the rules. This suggestion was not adopted, for two reasons. First, Census data is collected from Puerto Rico, the Northern Mariana Islands, Guam, and the Virgin Islands, and statutory authority permits collection of data by the Bureau of the Census from "such other possessions and areas over which the United States exercises jurisdiction, control, or sovereignty." 13 U.S.C. 191(a) (1976). Second, for purposes of the foreign commerce exemptions, it would be inappropriate to regard these territories and possessions as being outside the United States.

Moreover, while the term "State" in section 7A(c)(4) is not defined in the rules, it is intended that transfers to or from any of the governments of the commonwealths, territories or possessions of the United States, or any political subdivisions thereof, are exempt under that subsection, which exempts "transfers to or from *** a State or political subdivision thereof."

SECTION 801.1(l) COMMERCE

Section 801.1(l) defines the term "commerce" to have the same meaning as in section 1 of the Clayton Act, 15 U.S.C. 12, or 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

Section 7A(a)(1) contains the "commerce test" of the act. An acquisition which satisfies the size-of-person and size-of-transaction tests of section 7A (a)(2) and (a)(3) is subject to the act only if

> the acquiring person, or the person whose voting securities or "assets are being acquired, is engaged in commerce or in any activity affecting commerce* * *

Section 801.3 interprets this test for all acquisitions except those in connection with the formation of joint venture or other corporations, to which § 801.40(d) applies. The term "commerce" does not appear elsewhere in the act or rules.

BACKGROUND INFORMATION TO § 801.1(l)

"Commerce" was not defined in the original rules. The final rules define the term in the same way as the revised rules did, except that the word "and" appearing between the statutory citations was changed to "or." The change makes clear that "commerce" includes definitions and interpretations of that term under either statute.

One comment (1059) implied that some confusion resulted from having "two definitions" of the term "commerce" in the rules and suggested that, since section 7A is part of the Clayton Act, that statute's definition should be adopted. The Commission has declined to — adopt this suggestion. Congress intended that either the Clayton Act or the Federal Trade Commission Act, as well as the Sherman Act, could be used to challenged mergers or acquisitions. See section 7A(f). It is thus appropriate that a transaction which satisfies the commerce test of the act under either definition of the term "commerce" should be reportable.

Another comment (1086) suggested that the term "commerce" should be limited by a \$1 million threshold similar to the provision of § 801.1(j). The comment stated no reason for this suggestion, and it was not adopted. While dollar thresholds appear in section 7A (a)(2) and (a)(3), none appears in section 7A(a)(1); had Congress believed a threshold to be desirable, it could have added one. Moreover, a threshold would probably be unworkable: it is not clear, for example, how one might determine whether a person was engaged in an activity affecting 1 million dollars' worth of commerce.

SECTION 801.1(m) THE ACT

This paragraph explains that references to "the act," which appear throughout the rules, mean section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and codified at 15 U.S.C. 18A. References to subsections of the act appearing in the rules are denoted "section 7A(a)(1)," "section 7A(d)(2)(B)," "section 7A(h)," etc., meaning, respectively, subsections (a)(1), (d)(2)(B), (h), etc., of the act.

Because of required FEDERAL REGISTER terminology, 1 CFR 21.10, 21.11, the word "section" is used in the rules to refer to sections of the rules (not to sections or subsections of the act, as the revised rules did). This usage departs from the language of the act itself, which used the term "section" to mean section 7A.

SECTION 801.2 ACQUIRING AND ACQUIRED PERSONS

Section 801.2 identifies the acquiring and acquired persons to a transaction for purposes of the act and rules. To apply the size-of-person test of section 7A(a)(2) and the size-of-transaction test of section 7A(a)(3), one must first identify the acquiring and acquired persons.

SECTION 801.2(a)—ACQUIRING PERSONS

Section 801.2(a) defines an "acquiring" person as any person that will hold voting securities or assets as a result of an acquisition. "Person" is defined in § 801.1(a)(1). "Hold" is defined in

§ 801.1(c), and; in general, means beneficial ownership. The rule also mentions several ways in which a person may acquire beneficial ownership, but these are supplied principally for emphasis since each is embodied in the definition of "hold."

An acquiring person may hold assets or voting securities either directly, or indirectly through controlled entities or other means. Thus, if agents, brokers, or other entities (whether or not controlled) are acquiring on behalf of a person, they will not "hold" within the meaning of § 801.1(c)(1) and need not file notification with respect to acquisitions made in that capacity. Only the beneficial owner will hold the voting securities and becomes the acquiring person.

The example illustrates the unique case of a corporation with two 50 percent shareholders. When such a corporation makes an acquisition, under the rules there are two acquiring persons.

BACKGROUND INFORMATION TO § 801.2(a)

No counterpart to any paragraph of § 801.2 appeared in the original rules.

Since the act repeatedly refers to acquiring and acquired persons, the revised rules added § 801.2 to explain the terms. The final rule makes several changes to revised § 801.2(a). For example, the revised rule identified an acquiring person as one which "*is acquiring* voting securities or assets." The size-of-transaction test of section 7A(a)(3), however, is couched in terms of the amount of voting securities or assets that "as a result of such acquisition, the acquiring person would *hold*" (emphasis supplied). Thus, the statute focuses on holding as a result of an acquisition rather than on the act of acquiring. This focus is reflected in the language of final § 801.2(a), which describes an acquiring person as one "which, as a result of an acquisition, will hold voting securities or assets* * *."

The revised rule also identified persons as acquiring persons even if holding through "brokers or other entities acting on behalf of and at the specific direction of such person." The reference to brokers was deleted altogether because brokers, whether or not acting at the specific direction of a principal, typically do not acquire beneficial ownership of voting securities. Therefore, under the final rules the principal, and not the broker, would become the holder, and hence the acquiring person. Since this result is embodied in the definition of "hold," the quoted phrase was deleted as superfluous.

The revised rule had restricted acquiring persons to those acquiring assets other than cash. The final rule omits this exclusion from § 801.2 (a) and (b) because new § 801.21(a) makes clear that cash is not considered an asset when acquired.

No comments addressed any portion of revised § 801.2.

SECTION 801.2(b)—ACQUIRED PERSONS

Section 801.2(b), read together with § 801.12 (a) and (b), defines "acquired" person. For all but one purpose, the acquired person is the person within which the entity whose voting securities or assets are being acquired is included. The most important consequence of this definition arises in connection with acquisitions of voting securities from third-party holders. If voting securities are acquired from a holder not included within the same person as the issuer, then the acquired person is *not* the seller of the securities, but instead is the person within which the issuer is included. The latter person, rather than the transferor of the shares, must file notification. Example 1 to the paragraph illustrates this point. Since the term "hold" generally means beneficial ownership, see § 801.1(c), agents and other intermediaries are to be disregarded in determining whether a transferor is a third-party holder.

The general rule stated in § 801.2(b) is subject to one exception: Whenever the percentage of voting securities to be held or acquired is calculated, the issuer of those voting securities will be deemed the acquired person. Thus, if a person will acquire shares of a subsidiary of a corporation, the percentage test of section 7A(a)(3)(A) will be applied to the subsidiary, not to the entire "person" within which the subsidiary is included. See the Statement of Basis and Purpose to § 801.12 (a) and (b).

Example 2 to paragraph (b) illustrates the special case of the acquisition of a corporation with two 50 percent shareholders. Under the rule there will be two acquired persons in this situation.

BACKGROUND INFORMATION TO § 801.2(b)

Antitrust analysis requires that the acquired person be the person within which the issuer of voting securities is included, rather than the person transferring the shares, when the two are different. The relationship established by the acquisition, which will be the source of any competitive consequences, will be between the acquiring person and the issuer. Accordingly, the rule places the reporting obligation upon the person within which the issuer is included, and places no obligation upon the third-party transferor.

Revised § 801.30(a) had specifically made this point. The original rules did not address the subject.

The exclusion of cash as an asset when acquired, which appeared in the revised rule, has been deleted from the final rule because § 801.21(a) precludes considering cash as an asset for purposes of the 15-percent or $15-million test of section 7A(a)(3) throughout the rules.

SECTION 801.2(c)—ACQUIRED AND ACQUIRING PERSONS

Section 801.2(c) makes clear that a person may be both an acquiring and an acquired person in the same transaction. The example to paragraph (c) illustrates such a situation. When it arises, the parties to the acquisition must complete portions of the Notification and Report Form separately as acquiring and acquired persons. See § 803.2. A person need not complete two entire forms on such occasions; all that is necessary is to identify clearly the separate responses to the appropriate items.

Paragraphs (c) and (e) of the rule overlap. See the Statement of Basis and Purpose to § 801.2(e), below. Since under paragraph (e) the acquisitions are analyzed separately whenever voting securities are to be acquired from an acquiring person, one or both of the two acquisitions may not be reportable. For example, if an acquiring person is to acquire assets valued in excess of $15 million, the acquisition is reportable. However, if the acquiring person is to pay for the assets with cash plus its own stock valued at less than $15 million (and less than 15 percent of the total shares outstanding), the acquisitions would be analyzed separately. The person transferring the assets would then be an acquiring person, but the criteria of section 7A(a)(3) would not be satisfied as to its acquisition of the stock, and it would not be reportable. See also § 801.21(a).

BACKGROUND INFORMATION TO § 801.2(c)

Section 801.2(c) provides that persons may be both acquiring and acquired persons in the same transaction, because, as the example illustrates, each person may fit both descriptions. If so, the Notification and Report Form must be completed by each person in each capacity in order for the agencies to accurately evaluate the impact of the transaction upon competition. For the reasons why the form must be completed differently for acquiring and acquired persons, see the Statement of Basis and Purpose to § 803.2. A person also may be both an acquiring and an acquired person in a transaction described by § 801.2(e). However, under that paragraph, whenever more than one separately reportable acquisition results, separate Notification and Report Forms must be filed.

SECTION 801.2(d)—MERGERS AND CONSOLIDATIONS

This paragraph of the rule provides that mergers, consolidations, and other acquisitions combining all or part of the business of two or more parties are acquisitions within the meaning of the act. Each party to the acquisition is both an acquiring and acquired person, and if the acquisition is subject to the act, each will be required to file notification in both capacities in accordance with § 803.2(b).

BACKGROUND INFORMATION TO § 801.2(d)

The legislative history of the act permits no doubt that Congress intended the act to apply to mergers and other forms of business consolidations. For example, title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 is entitled "Premerger Notification." See also, e.g., the remarks of Chairman Rodino, 122 Cong. Rec. H10293-94 (daily ed. Sept. 16, 1976). However, the language of the act employs only the term "acquisition." Paragraph (d) of this rule simply makes clear that mergers and other business consolidations are "acquisitions" within the meaning of the act.

This paragraph of § 801.2 specifies that both parties to a merger or consolidation are, for purposes of the act and rules, both acquiring and acquired persons. In the typical merger in which all the activities of both persons are combined, designating each party as an acquiring person would provide sufficient information for the agencies, since under § 803.2 an acquiring person completes the Notification and Report Form with respect to all its activities. But since the act contemplates an acquiring and an acquired person for each transaction, the rule instead designates each party as both are acquiring and an acquired person. The dual designation does not involve multiple submissions of data, because for this type of transaction the reports filed by each person as an acquiring and an acquired person will be identical, and only one need be submitted. See § 803.2(b)(1)(iv).

The dual designation also proves useful for those mergers and consolidations in which less than all of the issuers included within one of the persons are to be merged or consolidated. Under § 803.2(b) that person, when reporting as an acquired person, will complete the Notification and Report Form with reference only to the entities to be involved in the merger or consolidation.

One comment (112) suggested that the rule provide objective criteria for designating the acquiring and acquired parties to a merger. For example, it suggested that unless the parties agreed otherwise, the person with the greater total assets could be designated the acquiring person. The

Commission rejected this suggestion because this procedure would not assure submission of all necessary information.

SECTION 801.2(e)—ACQUISITIONS OF VOTING SECURITIES FROM AN ACQUIRING PERSON

Section 801.2(e) states that whenever voting securities will be acquired from an acquiring person in connection with an acquisition, that acquisition is to be separately analyzed under the act and rules. To some extent paragraph (e) overlaps paragraph (c) of this rule. If, for example, a seller of assets (an acquired person) receives the voting securities of the acquiring person as consideration, both paragraphs (c) and (e) are applicable. Under paragraph (c), each person is both an acquiring and an acquired person, and, if the criteria of section 7A(a) are satisfied, each acquisition is reportable. See the discussion and example in the Statement of Basis and Purpose to § 801.2(c).

The focus of paragraph (e) is somewhat different. If a shareholder of an acquired person will acquire voting securities from the acquiring person (or any issuer included within that person) in connection with an acquisition, only paragraph (e) would apply, because the shareholder is not an acquired person within the meaning of the rule. For example, in a non-cash tender offer, the acquired person is the issuer whose shares are to be acquired. Under paragraph (e), if any shareholder of the acquired person will be acquiring voting securities from the acquiring person, that acquisition is to be tested separately under the act and rules. If the shareholder would hold 15 percent or $15 million of the voting securities of the issuer, and the criteria of section 7A(a)(1) and (a)(2) are also satisfied, the acquisition by the shareholder would be reportable. See also § 801.31. The example to paragraph (e) illustrates the analogous situation in connection with a merger.

When an acquisition is separately reportable, separate Notification and Report Forms must be submitted with respect to it.

BACKGROUND INFORMATION TO § 801.2(e)

This paragraph was added to the final rule to clarify that acquisitions of the type described, like other acquisitions, are subject to the act. The Statement of Basis and Purpose to § 801.31 explains the rationale for coverage, and for separate coverage, of such acquisitions.

SECTION 801.3 ACTIVITIES IN OR AFFECTING COMMERCE

Section 7A(a)(1) is the first of the three tests that must be satisfied before the act applies to an acquisition. If either the acquiring or the acquired person is engaged in commerce or in any activity affecting commerce, the test is satisfied. This rule interprets the test by providing that if the activities of any entity included within the acquiring or acquired persons are in or affect commerce, then that person is so engaged, and the commerce test of section 7A(a)(1) is met. The term "commerce" is defined in § 801.1(l).

BACKGROUND INFORMATION TO § 801.3

The final rule is unchanged from the revised rule and is substantially the same as § 801.15 of the original rules.

Some comments (e.g., 87, 112, 1102) suggested that the commerce test should be less inclusive when foreign transactions are involved. These comments have not been adopted, because restricted coverage of foreign transactions is accomplished by specific exemption rules, §§ 802.50-802.53. Similarly rejected was the suggestion in comment 1115 that the rule specifically refer to United States commerce. Since the term “commerce” is defined in § 801.1(1), there is no need to modify its use in this rule. Furthermore, such a limitation would potentially cause confusion. The definition adopts the meaning of the term contained in the two statutes most relevant to merger enforcement, the FTC Act and the Clayton Act. Those acts apply to both the domestic and foreign commerce of the United States.

Finally, comment 1086 suggested that a minimum dollar test be imposed in determining whether activities are in or affect commerce. Again, the Commission declined to so limit the act’s jurisdictional coverage. Section 7A(a)(1) sets no such limits. Rather than exclude transactions on jurisdictional grounds, the rules exempt certain transactions that, because of their size, are of lesser competitive concern. See § 802.20.

SECTION 801.4 SECONDARY ACQUISITIONS

Whenever as a result of an acquisition (a primary acquisition) a person will obtain control of an issuer, as a result of the same acquisition the acquiring person will also hold any voting securities held by that issuer. See § 801.1(c)(8). If the issuer to be acquired holds voting securities of other issuers that it does not control, the rule terms acquisitions of those voting securities “secondary acquisitions” and provides that they are separately subject to the act and rules.

Making the primary and secondary acquisitions separately subject to the act and rules has three effects. First, the three tests of whether the act applies, Section 7A(a)(l)-(3), are applied separately to each acquisition. Thus, for example, if the issuer of the stock to be acquired in the secondary acquisition does not meet the size-of-person test of section 7A(a)(2), the secondary acquisition would not be subject to the requirements of the act even though the primary acquisition might be. Second, as set forth in paragraph (b) of the rule, the exemptions contained in the act and rules are also applied separately. Subparagraph (b)(1) specifies that even if the primary acquisition is exempt, the secondary acquisition may be reportable. Conversely, subparagraph (b)(2) makes clear that if the primary acquisition is reportable, the secondary acquisition nevertheless may be exempt. Third, since the secondary acquisition, if reportable, is separate from the primary acquisition, separate Notification and Report Forms must be submitted with respect to it. Three examples illustrate the rule.

Note that secondary acquisitions include, in addition to the noncontrolling holdings of the issuer to be acquired in the primary acquisition, any noncontrolling holdings of entities controlled by such an issuer. See § 801.1(c)(8). The rule does not apply to acquisitions of voting securities of entities controlled by the issuer acquired in the primary acquisition. All such voting securities are acquired as part of the primary acquisition. See §§ 801.1(a)(1), (b), and (c)(8). Nor does the rule apply if the acquiring person will not control or already controls the issuer to be acquired in the primary acquisition; secondary acquisitions occur only when, as a result of the primary acquisition, the acquiring person obtains control. Finally, note that the acquiring person must aggregate all its preexisting holdings, if any, with the voting securities to be acquired in a secondary acquisition, in determining whether the act or an exemption applies.

In the case of a merger or consolidation, each party will make secondary acquisitions of any noncontrolling stock holdings held by the other party prior to the merger or consolidation. Since § 801.2(d) designates each party to the acquisition as both an acquiring and acquired person, in its capacity as acquiring person each party will make secondary acquisitions of the non-controlling stock holdings of the issuer to be acquired.

The waiting period with respect to secondary acquisitions begins upon receipt of notification from only the acquiring person. See § 801.30 and the Statement of Basis and Purpose to that rule.

BACKGROUND INFORMATION TO § 801.4

An acquisition may violate the antitrust laws even though it is effected as a secondary acquisition. The rule merely clarifies that such acquisitions are within the ambit of the act and insures that the agencies review the competitive consequences of such acquisitions prior to consummation.

The rule appeared in the revised rules. The final version has been rewritten for clarity but reflects no substantive change. The terminology of the revised rule, "indirect acquisitions," has been changed to secondary acquisitions in order to avoid confusion arising from the use of the former term elsewhere in the rules. "Indirect acquisition" refers to an acquisition made through a controlled entity, an agent, or another means resulting in acquisition of beneficial ownership. See § 801.1(c).

Only one comment (1090) was received on the rule. It recommended that § 801.30 should be expanded to include acquisitions described by this rule, and that secondary acquisitions resulting from mergers should be specifically covered by the rule. The first proposal was adopted. No change was necessary to adopt the second suggestion, since § 801.2(d) provides that mergers and consolidations are acquisitions within the meaning of the act. Therefore, since primary acquisitions include mergers, secondary acquisitions resulting from mergers fall within the rule.

SECTION 801.10 VALUE OF VOTING SECURITIES AND ASSETS TO BE ACQUIRED

Section 801.10 governs the valuation of voting securities and assets to be acquired. The third criterion for coverage under the act, the size-of-transaction of test section 7A(a)(3), provides in general that as a result of the acquisition, the acquiring person must hold either 15 percent or $15 million of the stock or assets of the acquired person. Section 801.10 explains how to determine whether the $15 million test is satisfied. (Section 801.12 explains how to determine whether the 15-percent test is satisfied.) The rule does not apply to the valuation of total assets for the section 7A(a)(2) size-of-person test, which is governed by § 801.11.

Paragraph (a) of the rule treats the valuation of voting securities; paragraph (b) treats the valuation of assets. Both paragraphs employ the term "market price," "acquisition price," and "fair market value," and these terms are explained in paragraph (c).

Section 801.13 also pertains to valuation. It provides valuation rules for voting securities and assets of the acquired person that are already held by the acquiring person prior to the acquisition at issue; for that reason, § 801.10 begins, "[e]xcept as provided in § 801.13* * *." Section 801.13 also utilizes, by reference, the terms defined in paragraph (c) of this rule.

BACKGROUND INFORMATION TO § 801.10

The words "to be acquired," which were not in the revised rule, were inserted into the title and first sentence of the rule to distinguish the rule even more clearly from § 801.11, relating to total assets as suggested by comment 89. With the new title, subparagraph (b)(1) of the revised rule, which was a reminder to consult § 801.11 to determine the total assets of a person, was deleted as unnecessary.

SECTION 801.10(a)—VOTING SECURITIES

Paragraph (a) prescribes the method of valuing voting securities to be acquired. In brief, the value is the higher of the market price or acquisition price. If neither market nor acquisition price can be ascertained, the fair market value is used. The procedures for determining "market price," "acquisition price," and "fair market value" are set forth in paragraph (c). The rule utilizes market quotations only from a "national securities exchange" or "interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission." "National securities exchange" means any securities exchange registered with the SEC under section 6 of the Securities Exchange Act of 1934, 15 U.S.C. 78f, and thus includes the regional stock exchanges. The only interdealer quotation system currently registered with the SEC is the National Association of Securities Dealers Automated Quotation (NASDAQ) service.

BACKGROUND INFORMATION TO § 801.10(a)

Section 801.10(a) defines the $15 million test of section 7A(a)(3)(B) to mean the greater of the acquisition and market prices. If the acquisition price exceeds the market price, designating the acquisition price as the value is appropriate because the value of the acquisition to the parties is greater. Market value reflects present supply and demand for a stock. A major acquisition, such as a tender offer, may change that equilibrium more quickly than the market can reflect it, thus making market value a less appropriate test of the value of the transaction to the parties. On the other hand, if the market price exceeds the acquisition price, the market price must be employed as the value for purposes of the act. The rule invokes the procedure for determining fair market value only as a last resort, when neither market nor acquisition price is available.

The predecessor of the rule, original § 801.20, had provided that the value was the market price, or, if none, the higher of the acquisition price and fair market value. A number of comments (e.g., 15, 48, 63, 71, 120) complained that no board of directors would ever assign a fair market value different from the acquisition price, and that the required determination of fair market value would prove expensive and troublesome. The comments recommended that the acquisition price be determinative, and the fair market value reserved for occasions when the securities have no ascertainable dollar value. The revised rule reflects this recommendation, and no comments on this aspect of the revised rule were received.

SECTION 801.10(b)—ASSETS

Paragraph (b) prescribes the method of valuing assets to be acquired. The rule provides that the value is the fair market value of the assets, or, if the acquisition price is determined and is greater than the fair market value, the acquisition price. The procedures for determining fair market value, which are set forth in paragraph (c), therefore must be applied in connection with every acquisition of assets. If the reporting person has designated the acquisition price as the value of the assets, the agencies will treat this designation as a representation by the filing person that the fair market value has been determined to be equal to or less than the acquisition price. Again, the term "acquisition price" is defined in paragraph (c).

BACKGROUND INFORMATION TO § 801.10(b)

The valuation of assets is analogous to that of voting securities, except that for assets no market price generally exists, and the fair market value substitutes for it. If the parties assign an acquisition price greater than the fair market value, then the acquisition price becomes the value of the assets because that is the value to the parties. If the fair market value is greater, it, rather than the acquisition price, becomes the value.

Original § 801.20(b) specified that the value would be the highest of the fair market value, book value, and acquisition price. The comments on paragraph (a) of the original rule were for the most part equally directed to paragraph (b)—that is, the required determination of fair market value was said to be unnecessary and troublesome when the acquisition price had been determined. However, the revised rule retained the requirement for assets, deleting only the reference to book value as irrelevant and unlikely to exceed the greater of the other two values. See comment 77. Although several comments (1059, 1102, 1108) continued to call for the elimination of fair market value, the final rule retains it. In many cases, the acquisition price of assets may not be known at the time of filing. Note that the revised and final rules modify the procedure for determining fair market value, making it significantly more flexible. See the Statement of Basis and Purpose to § 801.10(c)(3).

SECTION 801.10(c)

Paragraph (c) defines the terms "market price," "acquisition price" and "fair market value" used in this rule and § 801.13.

SECTION 801.10(c)(1)—MARKET PRICE

Subparagraph (c)(1) provides instructions for determining the market price separately for transactions subject to § 801.30 and for other transactions. Section 801.30, in general, applies to acquisitions on stock exchanges and other transactions not involving agreement between the acquiring and acquired persons. See the Statement of Basis and Purpose to that rule.

For transactions subject to § 801.30, clause (i) provides that the market price is the lowest closing quotation or bid price within the 45 calendar days preceding either the receipt of the notice by the acquired person required by § 803.5(a), or, if the act does not apply to the transaction, the consummation of the acquisition. For other transactions, clause (ii) provides that the market price is the lowest closing quotation or bid price within the 45 or fewer calendar days preceding the consummation of the acquisition, but not extending back prior to the day before execution of any contract, agreement in principle or letter of intent to merge or acquire. Clause (iii) specifies that if the security was not traded within the time period set forth, the last preceding trade or bid should be used, notwithstanding the time limitations of clause (ii). Clause (iii) also provides that if quotations are available in more than one market, the person filing notification may select any such quotation. A

Both clauses (i) and (ii) give the parties the benefit of a decline in market price by providing that the value is the lowest price within time periods not only prior to filing notification but also prior to consummating the acquisition. For example, assume that, in an acquisition in which the 15-percent test of section 7A(a)(3)(A) is not satisfied, the parties have filed notification because the market price exceeded $15 million, even though the acquisition price is less than $15 million. If the market price falls during the waiting period, the rule would assign a new value and the $15 million test would no longer be satisfied. Therefore, the act would no longer apply, and the parties would be free to consummate the acquisition, even though notification had already been filed. (Note that a change in market price can have no effect upon whether the 15-percent test of section 7A(d)(3)(A) is satisfied, because the percentage of stock or assets does not depend on market price. See § 801.12. In addition, if the 15-percent test had been satisfied, the decline in market price may make the acquisition exempt under § 802.20.)

Finally, the rule also allows parties to determine with assurance that the act does not apply. If on a given day the market price results in a value of less than $15 million for an acquisition, that price may or may not be the lowest price for the following 45-day period. But so long as the acquisition is consummated within 45 days following that date, under the rule the value of the acquisition can be no greater, and thus will be less than $15 million, and the parties need not file notification or observe a waiting period.

BACKGROUND INFORMATION TO § 801.10(c)(1)

The previous versions of the rule, original § 801.20 and revised § 801.10, would have directed selection of a market price within a specified number of days before filing notification. Two comments (1026, 1108) noted that this procedure did not permit a firm determination that an acquisition was not reportable—since no notification was contemplated, the time period for selecting the market price could not be identified, and consequently the parties were presumably imperiled by the risk that a rise in market prices would render the acquisition reportable shortly before the planned consummation date. In order to cure this problem, the final rule makes two changes. First, it provides for selecting the market price within a time period prior to either receipt of the notice preceding notification under § 803.5(a), or the date of consummation. Second, it provides that the market price is the lowest price within the 45-day period preceding consummation, so that a market price indicating that the transaction need not be reported assures the parties of their ability to consummate for that length of time.

Since the rule specifies the lowest price within the 45-day period, the parties need not agree to perform the valuation as of any particular date. Antagonistic parties therefore cannot select dates that lead to inconsistent conclusions about whether the acquisition is reportable. And the lowest price gives the parties the benefit of a decline in the market price, as discussed above.

The time period was lengthened to 45 days in order to provide adequate time for planning while still reflecting a reasonably current value. Comment 1115 noted that the few days afforded by the revised rule may have been insufficient. However, the 45-day period may not extend back to any days prior to the day before execution of a contract, agreement in principle, or letter of intent to acquire, since the parties presumably entered into their agreement on the basis of market prices prevailing at that time.

The subparagraph distinguishes between transactions subject to § 801.30 and those that are not, because, for the former there typically will be no objective reference point for the time period until the acquisition is consummated or the notice preceding notification is received by the acquiring person. By contrast, for consensual (non-§ 801.30) transactions, the date of execution of the contract, agreement in principle or letter of intent marks the reference date.

The SEC's comment (1058) suggested the inclusion, in clauses (i) and (ii), of bid prices on interdealer quotation systems, and the treatment in clause (iii) of situations in which the stock has not been traded.

SECTION 801.10(c)(2)—ACQUISITION PRICE

Subparagraph (c)(2), "acquisition price," specifies that the acquisition price includes the value of all consideration for the voting securities or assets to be acquired. This means, for example, that cash, voting securities, nonvoting securities, tangible and intangible assets and assumption of liabilities, if consideration for an acquisition, must all be valued in computing the acquisition price.

BACKGROUND INFORMATION TO § 801.10(c)(2)

Determination of the acquisition price is part of the procedure for implementing the $15 million test of section 7A(a)(3)(B). Section 801.10(c)(2) states that the acquisition price is the value of all the consideration for the acquisition.

The original rules contained no counterpart to subparagraph (c)(2). Instead, original § 801.20(c) provided that if securities were to be furnished as consideration for an acquisition, they were to be valued according to this rule. That provision was deleted from the revised rule as superfluous, since the recipient of securities furnished as consideration must use this rule to value them. The final rule provides instructions for determining the value of voting securities to be acquired by any person, and the revised and final rules effect no change by the deletion. Comment 1090 requested reinstatement of such language and the suggestion accordingly was rejected as unnecessary. The final provision is identical to the revised provision except for minor editorial revisions.

Comment 115 suggested that the value of installment contracts be discounted to reflect the present worth of the payments. This suggestion was rejected. The value of an installment contract is the value of the total payments of principal to be made under the contract, but excluding interest.

SECTION 801.10(c)(3)—FAIR MARKET VALUE

Subparagraph (c)(3) provides that the fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if the ultimate parent entity is unincorporated, by officials exercising similar functions. The board or officials may delegate the actual process of making that determination, but in any case remain responsible for it. The determination can be performed at any time, but must reflect the fair market value as of any day within 60 calendar days prior to either filing notification or consummating the acquisition. If the 60-day period expires before filing or closing, the parties would no longer be entitled to rely on the value previously determined, and if in doubt about whether to close without filing notification, the acquiring person would be obliged to make a new determination. Item 2(d)(i) on the form, however, which requests the approximate value of assets to be acquired, would not alone require a determination if the parties were otherwise certain that the act applied. The example illustrates these points.

BACKGROUND INFORMATION TO § 801.10(c)(3)

The rule provides that the acquiring person makes the determination, so that the parties to the acquisition can resolve with certainty whether the act applies. If the acquiring and acquired person each made determinations, or if the rule required the two sides to agree on a fair market value, the rule could lead to inconsistent conclusions about whether filing notification and observing the waiting period was required.

The rule provides that the determination of fair market value must reflect the value as of any day within 60 days prior to either filing notification or consummating the acquisition for the same reasons discussed in connection with market price—in brief, to permit the parties to determine with certainty whether or not they must comply with the act prior to an acquisition. The 60-day limitation is intended to allow enough time for a determination but still assure that the fair market value assigned is reasonably current.

The final rule on fair market value exhibits significant changes from both the original and revised rules.

Original § 801.20 did not have a separate paragraph instructing how to determine the fair market value, but had equivalent language within paragraphs (a) and (b) pertaining to securities and assets, respectively. The original rule arguably did not permit the board of directors to delegate the determination, and was criticized by numerous comments (e.g., 38, 48, 58, 74, 77, 98, 112, 115, 120). Imposing the responsibility upon the board of directors, the comments stated, would require a costly and time-consuming independent appraisal, and the value determined by management ought to suffice. Although the original rule did not seek to preclude such an appraisal, the revised rule explicitly permitted the board to delegate the determination. The final rule substitutes the word “function” for “responsibility” to make clear that the board of directors cannot disavow the determination if compliance with the act and rules is drawn into question. One comment on the revised rule (1061) suggested that the board of directors of the ultimate parent entity should be allowed to delegate the determination to subsidiary, and the final rule clarifies that this is permitted by replacing the word “person” in the revised rule by “entity.”

Two comments (29, 104) suggested that an accurate determination of fair market value may be impossible until after the acquisition closes, and that the rule should permit an estimate. This suggestion was not explicitly adopted because it seemed unnecessary to state that in some circumstances the determination of fair market value may require a good faith estimate. Note that the instructions to the notification and report form explicitly permit estimates and provide that the sources of the estimates must be indicated.

Two other comments (92, 115) suggested that acquisitions of patents and other forms of intangible property could not be readily assigned a fair market value, and that the rule should specifically permit valuing such assets at zero. This proposal was rejected, for the same reason that the rule insists upon comparison of the acquisition price to the fair market value: That the acquisition price alone may be difficult to determine at the time of filing notification. In such cases there may be no alternative but to determine the fair market value of the intangible property.

The final rule modifies the last sentence of the revised rule, as noted earlier, to reflect determinations of fair market value which establish that notification is not required, and to expand the 15-day period to 60 days.

SECTION 801.11 ANNUAL NET SALES AND TOTAL ASSETS

Section 801.11 explains how to compute the annual net sales and total assets of a person. The terms "annual net sales" and "total assets" occur primarily in the size-of-person test of section 7A(a)(2). In general, either the acquiring or the acquired person must have annual net sales or total assets of at least $100 million, while the other must have annual net sales or total assets of at least $10 million before the act applies; but see section 7A(a)(2)(B) (for acquired persons not "engaged in manufacturing," a term defined in § 801.1(j), only total assets satisfy the test).

Section 801.12(d)(2) of the rules also provide that the total assets of a person serve as the denominator in determining the percentage of assets to be held or acquired; thus the rule also contributes to determining whether the third test for application of the act, the size-of-transaction test of section 7A(a)(3), is satisfied. In addition, the terms "annual net sales" and "total assets" appear elsewhere in the rules, most notably in § 801.40, which contains its own size-of-person test applicable to the formation of a joint venture or other corporation, and § 802.20, which exempts certain small acquisitions.

Since the chief purpose of the rule is to determine whether the act applies, persons need not use the rule to compute precise figures for annual net sales or total assets if they are certain that the act either does or does not apply. None of the items on the notification and report form requires a statement of the annual net sales or total assets of either party, and item 3(a), which requests the percentage of assets to be held or acquired, may be answered by estimating the total assets figure for the denominator of the percentage. See the statement of basis and purpose to item 3(a). Section 801.11 prescribes a method by which persons that are unsure whether the size-of-person test of section 7A(a)(2) or the percentage-of-assets test of section 7A(a)(3) is satisfied can resolve definitively whether the act applies.

Except for § 801.40, the rule does not explicitly refer to other rules, but an understanding of the definition of "person," § 801.1(a)(1), is essential to applying the rule correctly. The rule presupposes identification of the "person" the annual net sales and total assets of which are to be determined.

The rule consists of four paragraphs. Paragraph (a) expresses the general principle that all sales and assets of the person are included, whether foreign or domestic. Paragraph (d) constitutes a limited exception to this principle for natural persons. Paragraph (b) sets forth the general rule that the annual nets sales and total assets shall be as stated on the person's financial statements, with two provisos that may modify the figures on such statements. Paragraph (c) specifies exactly which statements are to be consulted.

SECTION 801.11(a)

Paragraph (a) states that the annual net sales and total assets of a person include all net sales and all assets, whether foreign or domestic, except as provided in paragraph (d), which excludes certain assets of natural persons.

By including both foreign and domestic sales and assets, paragraph (a) makes clear that foreign assets, operations or subsidiaries may not be disregarded for purposes of the size-of-person test of section 7A(a)(2) or the percentage-of-assets test of section 7A(a)(3)(A) even though foreign operations may affect the applicability of certain exemptions under §§ 802.50-802.52.

The term "net sales" has its common meaning, that is, sales less (or exclusive of) returns, discounts, excise taxes, and the like. See § 801.11(b) and its Statement of Basis and Purpose. The costs of production or materials may not be deducted. Persons that do not have "sales" should use net receipts, revenues, or other comparable figures.

Of course, the sales and assets of a "person" include the sales and assets of all of its component entities. See § 801.1(a)(1).

BACKGROUND INFORMATION TO § 801.11(a)

Original § 801.25 corresponds to this rule, and paragraph (c) of the original rule corresponds most nearly to paragraph (a) of the final rule. The comments to original paragraph (c) addressed matters that appear in other paragraphs of the final rule.

Revised § 801.11 set the rule into its current format, and the final version of paragraph (a) retains the revised version with only two changes. It inserts the word "net" before "sales," to clarify that deductions normally made from gross sales under the person's accounting procedures, e.g., returns, discounts, etc., are permitted. The term "sales" does not, however, mean net income after costs of goods sold, as one comment (1088) suggested. Congress manifestly intended the act to reach acquisitions by large firms, and while sales are a useful measurement of size for this purpose, profitability is not.

The final rule also inserts the word "held," to incorporate all of the concepts of ownership that the definition of that term imports. See § 801.1(c).

SECTION 801.11(b)

Paragraph (b) provides that the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c), with a number of exceptions and provisos.

First, the paragraph states that the total assets of a joint venture or other corporation at the time of its formation are not determined under this rule, but shall be determined in accordance with § 801.40(c).

Second, subparagraph (b)(1) requires that the annual net sales and total assets of the person reflect the annual net sales and total assets of every entity included within the person. If the financial statements of the ultimate parent entity do not reflect consolidation of the net sales and total assets of all the entities included within the person, the annual net sales and total assets must be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such unconsolidated entity. The term "nonduplicative" makes clear that the consolidation may not consist simply of adding the sales and assets of unconsolidated entities, since, for example, the parent corporation's interest in an unconsolidated entity have been carried as an asset on the parent corporation's books; therefore, to add the assets of the unconsolidated entity without subtracting the asset already reflected would be to count the same assets twice. The example following subparagraph (b)(2) illustrates this point.

Next, subparagraph (b)(2) requires that the financial statements (and any restatements necessary to comply with the previous subparagraph) must, insofar as possible, be prepared in accordance with the accounting principles normally used by the person. The financial statements must be of a date not more than 15-months prior to filing notification or consummating the acquisition.

Note that neither the financial statements required by this rule, nor the restatements directed by paragraph (b), must necessarily be submitted as such in response to the Notification and Report Form. Item 4 of the form explains in detail which documents must be submitted.

BACKGROUND INFORMATION TO § 801.11(b)

Paragraph (b) creates the framework for determining the annual net sales and total assets of a person. Since annual net sales and total assets are accounting concepts, the rule logically employs financial statements to derive figures for these terms. The rule requires modifying the figures shown on the statements only to the extent necessary to conform to the pattern of the act and rules.

The total assets of a joint venture or other corporation at the time of its formation are determined under § 801.40 instead of this rule.

Since the annual net sales and total assets must reflect the entire person, the financial statements must reflect consolidation of the sales and assets of each entity included within the person. Comment 89 asserts that under the original rules, consolidation of the total assets of controlled entities may unfairly inflate a person's size for purposes of the section 7A(a)(2) size-of-person test, because it attributed to the person all of the assets of an entity that could be "controlled" with only a minority interest. The revised and final rules in most cases will not cause the same result, since the definition of control insures that the person holds at least 50 percent of the controlled entity's stock. On occasions when control arises from contractual power to designate a majority of the board of directors, consolidation is justified for the same reasons underlying the existence of control in such situations—basically, the similarity of interest for purposes of antitrust analysis. See the Statement of Basis and Purpose to § 801.1(b).

Likewise, subparagraph (b)(1) requires that the recomputation of annual net sales and total assets result in nonduplicative figures so that the recomputation does not unfairly inflate a person's size. Two comments (15, 29) suggested that the rule define "nonduplicative," but the revised and final rule retain the term without additional explanation, as adequately descriptive of the result sought. The term was extended to net sales as well as total assets in response to comment 29.

Paragraph (b) of original § 801.25 would have required a different restatement of the financial statements: if a material change in net sales or total assets had occurred after the date of the statement, which could reasonably have been expected to increase the annual net sales or total assets to the levels of section 7A(a)(2), the rule required either preparation of a new statement or compliance with the act as though the test of section 7A(a)(2) had been satisfied. Revised subparagraph (b)(2) preserved a similar provision and encompassed dispositions as well as acquisitions since the last statement. However, no consistent, easily administrable way could be found to require restatement of annual net sales when a business had been acquired or disposed of after the beginning of the fiscal year. The final rule abandons the approach as not worth the added complexity.

Subparagraph (b)(2) requires the financial statements and any restatements to be prepared insofar as possible in accordance with the accounting principles normally used by the reporting person, so that novel procedures are not adopted in order to circumvent the act. Original § 801.25(a) would have required certified financial statements prepared in accordance with Regulation S-X of the Securities and Exchange Commission. A number of comments (e.g., 15, 59, 63, 78, 83, 93, 120) criticized this provision as unnecessary and burdensome to privately held companies and foreign firms, which are not subject to regulations by the SEC and thus may not have certified financial statements prepared in accordance with Regulation S-X. Therefore, the revised rule called only for financial statements prepared in accordance with generally accepted accounting principles. Comment 1090, however, noted that generally accepted accounting principles would still be incompatible with several other provisions in the rule: for example, generally accepted accounting principles may not permit consolidation of some majority-owned entities and would not permit restatement of annual net sales for businesses acquired during the fiscal year. Accordingly, the comment suggested deleting the words "generally accepted," and the final rule adopts the suggestion. For similar reasons, the final rule requires use of the accounting principles normally used only insofar as possible.

The 15-month limitation insures that the statements reflect annual net sales during the most recent fiscal year. The original rule would have permitted statements prepared only within 1 year, rather than 15 months, of the date of filing notification. A number of comments (e.g., 29, 63, 78, 83, 88, 93, 115, 120) attacked the limitation as inadequate to allow preparation of the statement after the close of the fiscal year, and the revised and final rules provide for 15 months.

The final rule modifies the 15-month restriction so that statements within 15 months of consummating the acquisition, as well as filing notification, qualify. In that way, parties to an acquisition can resolve whether they satisfy the size-of-person test of section 7A(a)(2) even if not required to file notification. The change also allows persons to secure the benefit of a decrease in annual net sales or total assets. If during the waiting period a new regularly prepared financial statement appears and reveals that the act no longer applies, the parties need not comply with the act.

SECTION 801.11(c)

The two subparagraphs of paragraph (c) specify exactly which figures on the financial statements are the annual net sales and total assets of the person. Since paragraph (c) is subject to the provisions of paragraph (b), the annual statement must consolidate the net sales and total assets of all entities included within the person, use the accounting principles normally used by the person, and be prepared as of a date within 15 months of the date of filing or consummation.

Subparagraph (c)(1) provides that the annual net sales of a person shall be as stated on the last regularly prepared annual statement of income and expense of the person. See the Statement of Basis and Purpose to paragraph (b) of this rule, above.

Subparagraph (c)(2) specifies that the total assets of the person shall be as stated on the last regularly prepared balance sheet of the person. "Assets" means assets disregarding liabilities but less depreciation if the accounting principles normally used by the person so provide. "Regularly prepared," as used in both subparagraphs, means that the statement was prepared both at the time a statement would normally be prepared and in the normal fashion that such a statement would be prepared. Internal balance sheets prepared for management and not audited or disseminated to the public may satisfy this standard.

If no statements of income and expense or balance sheets are regularly prepared, statements must be prepared if necessary to determine whether the act applies.

An example illustrates the paragraph.

BACKGROUND INFORMATION TO § 801.11(c)

Paragraph (c) had no equivalent in the original or revised rules. Each of the earlier versions provided that the annual net sales and total assets of a person should be as stated on the financial statements of the person. The earlier rules would also have required restatement of the annual net sales and total assets to reflect certain changes occurring since the beginning of the fiscal year; see the Statement of Basis and Purpose to paragraph (b). The final rule abandoned that approach and instead inserted paragraph (c).

SECTION 801.11(d)

Paragraph (d) relates to the determination of total assets for natural persons. The total assets for a "person" of which the ultimate parent entity is a natural person are, under paragraph (b) of this rule, as stated on a balance sheet which consolidates all the entities which the natural person controls, directly or indirectly. See also § 801.1(a)(1), (b). However, paragraph (d) permits a natural person to omit from such a balance sheet all assets except "investment assets" (a term defined in § 801.1(i)(2) to mean, in substance, cash and equivalents, and Government bonds), voting securities and other income-producing property. Thus, a natural person compiling such a balance sheet could omit the value of assets such as a personal residence, automobile and other personal (non-income-producing) property.

The phrasing of the rule makes clear that all voting securities are regarded as income-producing property. Similarly, "income-producing property" means any property held for investment or for the production of income, whether or not actually, producing income.

The "annual net sales" of a natural person will be the annual net sales of all entities (including partnerships) he or she controls, plus any annual net sales from proprietorships. Of course, a natural person may not have compiled a balance sheet, regularly prepared or otherwise, reflecting all such entities. As discussed above in connection with paragraph (a), the annual net sales and total assets of a "person" need be determined according to the rule only if the person is in doubt about whether compliance with the act is necessary.

Since paragraph (a) of the rule includes all assets "held," and because the definition of "hold" provides that the holdings of spouses and minor children are treated as though held in common (see § 801.1(c)(2)), a natural person's balance sheet, to comply with the rule, must reflect all investment assets, voting securities and other income-providing property held by the spouse or minor children of a natural person, or by the parents if the person is a minor child.

BACKGROUND INFORMATION TO § 801.11(d)

The assets excluded by this paragraph are generally irrelevant to any antitrust concerns that may arise from an acquisition, and thus their exclusion for purposes of determining whether the act applies is appropriate.

In general, the rules treat natural persons, corporations, and other entities alike. This rule adheres to that principle by aggregating all entities, however unrelated in their business activities, that are under the common control of the ultimate parent entity (whether a corporation or natural person) and by consolidating the annual net sales and total assets of all such entities.

Original § 801.25(d) would have excluded all assets of a natural person other than partnership assets. Comment 63 criticized the provision, noting that Congress must have intended the act to cover acquisitions by natural persons, but that excluding all assets of natural persons effectively exempted such acquisitions, since section 7A(a)(2) would never be satisfied.

Revised § 801.1l(d) was quite similar to the final rule. Comment 1090 criticized the inclusion of all income-producing assets, arguing that only those related to control of a trade or business were relevant to antitrust considerations. However, that criterion seemed difficult for the agencies to administer and the parties to apply. Furthermore, it could result in artificial understatement of the size of natural persons by comparison with corporate persons or others, for which the criterion would not apply. Accordingly, the final rule retains as the test "income-producing" property. The final rule also clarifies the test by specifically including in the total assets all investment assets and voting securities.

SECTION 801.12 CALCULATING PERCENTAGE OF VOTING SECURITIES OR ASSETS

Section 801.12 prescribes the method of calculating the percentage of voting securities or assets to be held or acquired. Whenever the act or rules refer to a percentage, the percentage must be determined by applying this rule.

In general terms, the rule provides that the percentage of voting securities is the percentage of the total votes for directors of the issuer which the acquiring person will be entitled to cast after the acquisition. The percentage of assets is the ratio of the book value of the assets to be held as a result of the acquisition to the total assets of the person (not the entity) from which acquired. However, these general statements are subject to certain modifications and exceptions contained in the rule.

In many instances calculation of the precise percentage of assets or voting securities to be held or acquired may be unnecessary. For example, any acquisition as a result of which the acquiring person will hold assets of the acquired person valued (under §§ 801.13 and 801.10) at more than $15 million will satisfy the size-of-transaction test without regard to the percentage held or acquired. Conversely, § 802.20 will exempt any acquisition of assets for which the corresponding figure is less than $10 million, without regard to the percentage of assets to be held or acquired. For voting securities, the situation is similar, except that the exemptions under §§ 802.20 and 802.21 may require calculation of percentages.

SECTION 801.12 (a), (b)—VOTING SECURITIES

Paragraph (a) provides that whenever the act and rules refer to the percentage of voting securities of the acquired person, the issuer whose voting securities are being acquired shall be deemed the acquired person for that purpose. Therefore, the percentage of voting securities is calculated with reference only to the voting securities of the issuer to be held or acquired, in the manner prescribed by paragraph (b). Since the term "person" normally refers to all entities under common control, see § 801.1(a)(1), the use of the issuer rather than the person as the denominator of the percentage calculation represents a departure from the usage of the term "person" elsewhere in the rules. For this reason, the definition of "person" begins, "Except as provided in paragraphs (a) and (b) of § 801.12 * * *." The example following § 801.12(a) illustrates this point.

Paragraph (b) prescribes a formula for computing an exact percentage. The numerator is the number of votes for directors that voting securities presently entitle the holder to cast, or, as a result of the acquisition, will entitle the acquiring person to cast. This instruction requires application of the definition of "hold" contained in § 801.1(c), and § 801.13, which tells which voting securities are to be held "as a result of" an acquisition, before the correct number of votes can be ascertained. Votes that the holder may cast because of proxies obtained from other persons are not included in the numerator.

The denominator of the computation is the total number of votes for directors that all outstanding shares are entitled to cast. If the acquisition will increase the number of outstanding shares, clause (b)(1)(ii) specifies that the larger number should be used in the denominator. Otherwise, subparagraph (b)(2) directs that treasury shares and authorized but unissued shares should not be included for purposes of determining the number of votes presently entitled to be cast. Finally, for purposes of determining the number of outstanding voting securities of an issuer, subparagraph (b)(3) permits a person to rely on the most recent information set forth in filings with the SEC, if any, unless the person knows or has reason to believe that that information is inaccurate.

Two examples following § 801.12(b) illustrate application of the percentage formula.

BACKGROUND INFORMATION ON VOTING SECURITIES

Applying the percentage test to the issuer whose voting securities are being acquired sparked considerable controversy in the comments. The controversy ultimately arises, however, from the fact that the act itself uses the term "person" in at least two different senses. The act phrases each of the three tests that must be satisfied before the act applies to an acquisition — the commerce test of section 7A(a)(1), the size-of-person test of section 7A(a)(2), and the size-of-transaction test of section 7A(a)(3) — in terms of "person." For purposes of the size-of-person test of section 7A(a)(2), the relevant "person" must be the entire corporate structure, rather than just the company or subsidiary which is making the acquisition. If the size-of-person test depended upon the size of the particular corporation making an acquisition, rather than the overall corporate structure, the act would become easily susceptible of evasion. Accordingly, § 801.1(a)(1) defines "person," in general, as the entire corporate structure, and § 801.11 applies the size-of-person test to that "person." Likewise § 801.3 appropriately applies the commerce test of section 7A(a)(1) to the same, overall "person."

However, the 15-percent test of section 7A(a)(3)(A) poses a problem. As the FEDERAL REGISTER notice accompanying the revised rules explained:

> For example, suppose the transaction involves the purchase by a large corporation of a subsidiary of another large corporation. The definition of "person" as the entire corporate structure would dictate that the selling corporation's entire corporate structure be considered the "acquired person" for purposes of the $100 million or $10 million size criteria. But if the selling corporation and its subsidiary each issue their own stock, then a specific number of the subsidiary's shares cannot conveniently be expressed as a percentage of either the shares of the parent, or the combined shares of the parent and its subsidiary corporations. The problem is not as acute when the acquisition is of assets rather than voting securities, since assets could be valued without reference to the corporate forms.
>
> (42 FR at 39042 (Aug. 1, 1977).)

The revised rules addressed this problem by introducing the term "entity" to mean the component parts of a "person." See § 801.1(a)(2). For purposes of the size-of-transaction test of section 7A(a)(3), the revised rules designated as the "acquired person" the entity (rather than the person) whose voting securities or assets were being acquired. The original rules had accomplished the same result, without using the term "entity," by means of a more complex definition of "person." That scheme, in essence, defined the term "person" differently for the different tests for coverage.

The comments criticized original § 801.30(a) and revised § 801.12(a), the predecessors of the final rule. In general, the comments argued that different definitions of the single term "person" were impermissible. Some of the comments (e.g., 63, 89; 1042, 1050, 1091) complained that the scheme "expanded" the coverage of the act. Others (e.g., 120; 1042, 1050, 1059, 1091) disagreed that the different contexts required different meanings for the term "person." They noted that Congress used the term "issuer" in section 7A(c)(3), (c)(9) and (c)(10) and therefore inferred that Congress, by failing to sue the term "issuer" in section 7A(a)(3), did not intend the agencies to substitute the word "issuer" for "person" in that context. Still others (82; 1042) noted that the rule could be circumvented by first collapsing a subsidiary into the parent corporation, and that therefore the rule made coverage under the act turn upon the form of corporate organization.

The Commission did not agree with these comments. Unless Congress intended the 15-percent test of section 7A(a)(3)(A) to reach acquisitions not meeting the $15 million test of section 7A(a)(3)(B), the former provision would not appear in the act. Section 7A(d) of the act assigns the Commission the power to define the terms of the act and to prescribe rules to implement the act. The use of the term "issuer" elsewhere in the act does not preclude its use in any definition or rule. The argument in the comments thus reduces to insisting that the term "person" ought to carry the same meaning in all instances. But since "person" must mean a collection of entities for purposes of the section 7A(a)(2) size-of-person test, demands for consistency were not constructive to the extent that they failed to suggest a way to apply the 15-percent test of section 7A(a)(3)(A) when shares of one corporation of a multicorporate person are to be acquired.

Of the other comments, one (1091) dismissed the problem as one for the agencies to solve. Two comments (1059, 1070) conceded that application of the percentage test on any basis other than the issuer was inconvenient.

Comment 1042, however, suggested that the agencies should treat the shares of a subsidiary as assets of the parent corporation and calculate a percentage on that basis. This proposal was rejected. First, it is inconsistent with the statutory scheme — restated in § 801.21(b) — which deals separately with assets and voting securities. In addition, the proposal proves unworkable for third-party transactions since even though the seller is not the relevant person for purposes of an antitrust analysis, the proposal would calculate the percentage with reference to that person.

As the FEDERAL REGISTER notice accompanying the revised rules noted, 42 FR at 39042 (August 1, 1977), the agencies also considered another set of definitions. It would have defined the acquiring person to be the entire corporate structure, while defining the acquired person to be the entity whose voting securities (or assets) were being acquired, and all entities it controlled. Although this would have cured the inconsistency discussed above, it would have introduced another inconsistency — differing definitions for acquiring and acquired persons. It also would have permitted large corporations to evade the size-of-person test of section 7A(a)(2) by conducting transactions through small subsidiaries. As indicated in the FEDERAL REGISTER notice, this alternative was rejected.

Accordingly, the Commission retained the substance of the revised rule. The final version of paragraph (a) reflects only editorial differences from the revised rule.

The final version of paragraph (b) simplifies the revised rule, because the percentage formula no longer need accommodate convertible voting securities. The final rules makes convertible securities reportable, if at all, upon conversion, whereas the revised rules would have made the acquisition of convertible voting securities a potentially reportable event. This change in approach is discussed in the Statement of Basis and Purpose to § 801.1(f)(2). Under the revised rules, conversions would not have prompted additional reports to the agencies. Therefore, the formula in paragraph (b) had to assess the voting power potentially represented by convertibles whenever acquired (or held). On the other hand, since under the final rules conversions must be preceded by filing notification and waiting, the agencies will be able to assess the competitive impact of the conversion. Therefore, the voting formula in paragraph (b) can disregard the voting power potentially represented by unconverted convertibles.

A number of comments (e.g., 1026, 1070, 1090, 1102, 1115) criticized revised § 801.12(b) because it computed its percentages assuming conversion of only the convertibles held by the acquiring person, rather than all outstanding convertibles. Most of these comments no longer apply to the final rule, because the final rule does not assume conversion of any voting securities. However, one comment (1070) argued that section 7A(b)(3)(A), the definition of voting securities contained in the act, requires that the rule compute percentages assuming full dilution, that is, conversion of all outstanding convertible voting securities.

The Commission does not agree. Section 7A(b)(3)(A) provides:

> The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

Comment 1070 argued that this language compelled that all convertible securities be considered voting securities for all purposes, and therefore be treated as converted for purposes of percentage calculations. However, this interpretation ignores the function of the definition. Subsection (b)(3)(A) of the act simply empowers the Commission to bring convertible voting securities within its ambit, a matter which, but for the words "or upon conversion," might not be free from doubt. The Commission does not interpret the language of the definition to require that the agencies treat convertible voting securities in any particular fashion, as the Statement of Basis and Purpose to § 801.1(f)(2) explains in detail.

Paragraph (b) expresses the percentage formula in terms of the number of votes to be cast, rather than the number of shares, in order to accommodate (to the extent possible) multiple classes of voting securities or other voting arrangements differing from a single class of voting stock that elects the entire board of directors.

The formula includes only votes that voting securities entitle the holder to cast, and therefore excludes votes cast by proxies. Example 2 to paragraph (b) makes this point.

Subparagraph (b)(2) excludes authorized but unissued voting securities and treasury shares from the percentage formula simply to confirm that such shares are not "outstanding."

The final rule adds new subparagraph (b)(3) in response to comment 1089. Persons applying the percentage test can rely upon the total number of outstanding voting securities shown in the most recent filing with the SEC, if any, unless they know or have reason to believe that information to be inaccurate. This language is patterned after SEC rule 13d-l(d), 17 CFR 240.13d-101(d), 43 FR 18484 at 18496 (April 28, 1978).

SECTION 801.12 (c), (d)—ASSETS

Section 801.12(c) provides that whenever the act and rules refer to the percentage of assets of the acquired person, the "acquired person" is the person whose assets are being acquired. This treatment differs from that accorded voting securities in paragraph (a), which specifies that the issuer whose voting securities are to be acquired is the "acquired person." Instead, when the percentage test is applied to assets, the denominator of the percentage fraction will be calculated with reference to entire "person."

Paragraph (d), which specifies the exact ratio which composes the percentage, confirms this treatment. Subparagraph (d)(2) provides that the denominator for the percentage ratio is the total assets, determined in accordance with § 801.11, of the acquired person. The numerator of the fraction is the book value of the assets to be acquired as shown on the books of the acquired person. The assets to be acquired do not include any previously acquired assets identified by § 801.13(b)(2); only the assets subject to the current acquisition, identified in § 801.13(b)(1), need be considered for the percentage-of-assets test of section 7A(a)(3)(A).

BACKGROUND INFORMATION ON ASSETS

The final rule made two important changes in the application of the percentage test of section 7A(a)(3)(A) to assets.

The first change is the shift from “entity” to “person” in paragraph (c). Under both original section 801.30(b) and revised section 801.12(c), the entity from which the assets were to be acquired would have been the “acquired person” for purposes of the percentage test. The earlier versions, in effect, took the same position that the final rules take as to voting securities. The comments criticized the earlier versions; in general, the comments discussed above in connection with voting securities were equally directed to the assets provisions of the rules. Their arguments generally urged that the “acquired person” for purposes of the percentage test should be the entire person from which the assets are acquired, rather than the specific entity from which acquired, because the section 7A(a)(2) size-of-person test and the section 7A(a)(3) size-of-transaction test ought both to employ a consistent meaning of “acquired person.”

The final rule adopts the position proposed by the comments as to assets, even though it rejects the comments as to voting securities. The chief reason for the difference is that no practical problem prevents the rules from employing the larger “person” in applying the percentage test to assets, as it does for voting securities. The book value of assets, no matter from which entity within the person acquired, can be compared to the total assets of the person. By contrast, the impossibility of expressing the shares of a subsidiary as any percentage of the voting securities of the parent corporation prevented the rules from comparing voting securities to any entity or combination of entities other than the issuer.

Thus, the final rule achieves as much consistency between the terms governing each of the three tests of Section 7A(a) as is possible.

The second important change effected by the final rule is in the numerator of the percentage fraction. Revised § 801.12(d)(1) would have valued the assets to be acquired at the value assigned by § 801.10(b) for purposes of the $15 million test. The final rule substitutes the book value of the assets on the books of the acquired person. Several comments (e.g., 1040, 1090) noted that the numerator revalued the assets to be acquired, in order to reflect current values, but that the denominator reflected total assets at book value, which is typically lower than current value. The comments maintained that the resulting percentage would be exaggerated, and indeed, could exceed 100 percent. To cure this anomaly, subparagraph (d)(1) of the final rule provides that the book value of the assets on the books of the acquired person is to be the numerator. Although book value may understate the actual value of the assets, the resulting ratio is likely to be reasonably accurate.

Comment 1115 questioned whether intangible assets such as patents and goodwill are to be valued and included in the percentage-of-assets calculation. Since the final rule makes no distinction between types of assets, these assets, like any others, are to be included at book value in the percentage calculation.

For purposes of the percentage-of-assets test of section 7A(a)(3)(A), the numerator does not include any assets of the acquired person previously acquired by the acquiring person. Section 801.13(b)(2) includes the value of such assets under certain circumstances for purposes of the $15 million test of section 7A(a)(3)(B). The Statement of Basis and Purpose to § 801.13(b)(2) explains why such assets are excluded from the percentage-of-assets test.

SECTION 801.13 VOTING SECURITIES OR ASSETS TO BE HELD AS A RESULT OF ACQUISITION

Section 801.13 interprets the statutory phrase, "as a result of." Notification and a waiting period are required if section 7A(a)(1) and (2) are satisfied, and if "as a result of such acquisition, the acquiring person would hold (15 percent or $15 million of the stock or assets of the acquired person.)" Section 7A(a)(3) (emphasis added). This rule identifies which voting securities and assets will be considered to be held "as a result of" in acquisition. The rule also provides instructions for valuing the voting securities and assets identified by the rule.

Several other provisions of the rules are indispensable in applying § 801.13. Chief among these is § 801.15, which excepts from this rule certain acquisitions of assets and voting securities which were exempt from the requirements of the act at the time of their acquisition (or would have been had the act and rules been in effect). Although this rule would provide that some such assets and voting securities are held as a result of an acquisition, § 801.15 constitutes an exception to this rule and may provide that some of them are not so held.

In addition, the definition of "hold," 801.1(c), is important, since voting securities or assets must first be "held" before they may be held as a result of an acquisition. And the valuation provisions of the rule invoke the valuation procedures set forth in § 801.10(c).

Paragraph (a) of the rule treats voting securities, and paragraph (b) of the rule addresses assets.

SECTION 801.13(a) VOTING SECURITIES

The first sentence of § 801.13(a)(1) states the entire substance of the rule regarding voting securities: All voting securities of the issuer that will be held by the acquiring person after the acquisition are voting securities held as a result of the acquisition. Section 801.15, though, constitutes an exception to this rule for certain voting securities exempt when acquired, as described above. See that rule and its Statement of Basis and Purpose.

The rule has two important consequences. First, the number of transactions or the length of time between acquisitions becomes irrelevant in determining whether the act applies. The acquiring person after the acquisition either will or will not hold, cumulatively, 15 percent or $15 million of the issuer's outstanding voting securities.

Second, the rule means that every acquisition after which the acquiring person will hold more than 15 percent or $15 million of the voting securities of the acquired is one in which the 15 percent or $15 million test of section 7A(a)(3) is satisfied. Therefore, every acquisition after which the acquiring person would hold 15 percent or $15 million of the acquired person's voting securities — rather than only those which initially raise the acquiring person's holdings to that level — becomes a reportable acquisition if the two other tests of section 7A (a)(1) and (2) are satisfied. Therefore, large holdings of voting securities that antedate the effective date of the act and rules must be reported before being increased. Note, however, that § 802.21 exempts acquisitions above the 15 percent or $15 million level for 5 years after an initial notification except for those meeting or exceeding specified notification thresholds.

This rule also prescribes the value to be assigned to voting securities held as a result of an acquisition. Subparagraph (a)(1) provides that the value of the voting securities is the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10, and the value of the voting securities held prior to the acquisition, determined in accordance with subparagraph (a)(2).

Subparagraph (a)(2) of the rule provides that, for securities traded on a national securities exchange or quoted on an inter-dealer quotation system, the value is the market price calculated in accordance with § 801.10(c)(1); for other securities, the value is the fair market value determined in accordance with § 801.10(c)(3). The practical effect of the subparagraph is to require revaluation of the previously held securities to reflect current value. Of course, revaluation may affect whether the act applies. A pre-existing holding acquired for less than $15 million may become worth more than $15 million, thus rendering any further purchases reportable.

The examples illustrate the rule, and cross-reference §§ 801.20 and 801.15.

BACKGROUND INFORMATION TO § 801.13(a)

Acquisitions raising the holdings of the acquiring person to meet or exceed the 15 percent or $15 million level of section 7A(a)(3) self-evidently meet the standard of that subsection of the act. The only aspect of the rule addressed by the comments was the construction of "as a result of" that permits the agencies to require notification and a waiting period in connection with acquisitions subsequent to the one reaching the 15 percent or $15 million level of section 7A(a)(3). Original § 801.50 first contained this interpretation, which several comments (e.g., 11, 73, 84; 1059) challenged. The comments characterized it as an attempt to achieve retroactive coverage of partial acquisitions or to accumulate "dossiers" on major companies by means of repetitive reports. (The original rules would have required reporting and waiting at every 5 percent interval above the 15 percent or $15 million level; § 802.21 of the revised and final rules lessens the burden of repetitive reports considerably.) Other comments simply noted that the construction "could have gone the other way" (63) or implicitly supported the interpretation (78, 96). However, to adopt the opposite position would be to assert that large securities holdings (short of control) may be increased without limit if only the 15 percent or $15 million level could be surpassed before the act and rules take effect. But the Commission believes that it is unreasonable to construe the act in a manner which would leave the enforcement agencies powerless to detect and investigate such holdings. The act manifests an intention that the agencies should be informed of large securities holdings whenever an acquisition takes place, and the rule is faithful to that intention.

The revised rule cast the rule into its present form, and the final rule retains the revised rule save for editorial changes and the reference to new § 801.15.

SECTION 801.13(b)—ASSETS

Section 801.13(b)(1) provides that all assets to be acquired in an acquisition will be assets held as a result of the acquisition. It also provides that the value of such assets shall be determined in accordance with § 801.10.

Subparagraph (b)(2) provides that, under certain circumstances, assets previously acquired by the same acquiring person will be considered assets to be held as a result of the acquisition, for purposes of the $15 million test of section 7A(a)(3)(B) only. Previously acquired assets will be assets held as a result of a subsequent acquisition if:

The subsequent acquisition is also of assets of the same acquired person;

The assets were acquired within 180 days of the execution of the contract, agreement in principle, or letter of intent to make the subsequent acquisition;

The acquiring person still holds the assets previously acquired; and Section 801.15 does not dictate otherwise.

If the criteria are met, the acquiring and acquired persons must treat the earlier acquired assets as though they had not been previously acquired but were to be acquired as part of the subsequent acquisition. This treatment applies only for purposes of the $15 million test of section 7A(a)(3)(B) and not for purposes of the 15-percent test of section 7A(a)(3)(A). The value of the previously acquired assets in such cases shall be the value determined in accordance with § 801.10 as of the time of their acquisition.

Since subparagraph (b)(2) does not apply for purposes of the 15-percent test of section 7A(a)(3)(A), only the assets to be acquired in an acquisition need be considered in computing the percentage figure. See also 801.12(d)(1).

Subparagraph (b)(2) also has no effect upon the size-of-person test of section 7A(a)(2). The total assets of all persons remain under § 801.11(c)(2), as stated on the last regularly prepared balance sheet of the person, regardless of subsequent acquisitions or dispositions not reflected on the balance sheet.

The example at the end of the rule illustrates the operation of subparagraph (b)(2).

BACKGROUND INFORMATION TO § 801.13(b)

Section 801.13(b)(1) merely states the obvious in declaring that assets to be acquired in an acquisition will be held as a result of that acquisition.

The criteria for application of subparagraph (b)(2) can be more easily understood with reference to its basic purpose. Subparagraph (b)(2), by including assets acquired within the preceding 180 days, prevents persons from evading the $15 million test of section 7A(a)(3)(B) by dividing an acquisition into two or more smaller acquisitions, each valued at less than $15 million. Subparagraph (b)(2) would still allow such a scheme to succeed, so long as the agreement to make each of the smaller acquisitions was executed at least 180 days after the consummation of the previous one. Note, however, that if the parties agreed to execute a series of formal contracts more than 180 days apart, the transactions might be viewed as one, depending upon when beneficial ownership passes.

Each aspect of subparagraph (b)(2) relates to this purpose. The 180-day period, for example, is sufficiently long to discourage the type of evasion described. In addition, after a period of time assets cease to be attributable to the person from which acquired and become assets of the acquiring person. The length of the period did not attract any comment.

The subparagraph's application is limited to the $15 million test of section 7A(a)(3)(B) for two reasons. First, attempting to incorporate the previously acquired assets into the percentage test would pose practical problems. Section 801.12(d) provides that the denominator of the percentage is the total assets of the acquired person, but the denominator could shift during the 180 days, reflecting the first sale of assets. Therefore, the percentages computed for each asset acquisition would not be comparable to one another and could not be added together. And if the denominator is held constant at the total assets level of the acquired person at the time of the first acquisition, then a substantial disparity from the actual percentage could arise. Second, acquisitions of assets which satisfy the 15-percent test of section 7A(a)(3)(A), but which do not satisfy the $15-million test of section 7A(a)(3)(B), will frequently be exempt in any event, because § 802.20 exempts such acquisitions valued at $10 million or less. Although two comments (63, 83) questioned the omission of the percentage test from original § 801.35, the predecessor of final § 801.13(b)(2), the final rule refrains from introducing such complexity and problematical calculation in order to secure reports for asset acquisitions valued at more than $10 million but not exceeding $15 million.

Similarly, the value of the earlier acquired assets is not used to adjust the total assets of either the acquiring or the acquired person for purposes of the size-of-person test of section 7A(a)(2). If the figures shown on the balance sheets were adjusted in order to reflect earlier acquisitions or dispositions of assets, the adjustment would affect whether compliance with the act was required only when it changed the total assets of one party to exceed or fall short of either the $10 million or $100 million figure in section 7A(a)(2). Although revised § 801.13(b)(2) had attempted to make such adjustments, the final rule jettisons the scheme as more complex than the result warrants.

The final rule also reflects, in another context, the limited purpose of the provision. The original and revised rules declared assets of the acquired person to be assets held as a result of any acquisition by the acquiring person within the following 180 days — that is, for purposes of subsequent acquisitions of either voting securities or assets. The final rule includes the previously acquiring assets only when the subsequent acquisition is also of assets. See clause (i). The change confines subparagraph (b)(2) more closely to its principal purpose of preventing evasion, but also embodies another principle. A prior acquisition of stock, because of the influence the shareholder may exert upon management, may contribute to the subsequent sale of assets. Therefore, aggregating the dollar amounts of the two acquisitions (which the phrase, "aggregate total amount of voting securities and assets" in section 7A(a)(3) and § 801.14 will do) is appropriate. However, once assets are sold, they confer no continuing ability to participate in the affairs of the acquired person, and so prior acquisitions of assets need not be considered for purposes of subsequent acquisitions of stock. Accordingly, the final version of subparagraph (b)(2) does not label previously acquired assets to be assets held as a result of a subsequent acquisition of stock (and therefore § 801.14 does not compel aggregation of the stock and asset values for purposes of the $15 million test in such cases).

The final rule makes several other changes in the revised rule. The reference to new § 801.15 is added, since that rule constitutes an exception and provides that certain assets are not held as a result of an acquisition, even though § 801.13 might declare otherwise. See comment 15. The reference to § 801.1(h)(1) was inserted to assure consistency between rules and statute. Section 801.1(h)(1) is the first "notification threshold" and simply restates the test of section 7A(a)(3) for use in § 802.21, and elsewhere; for more information, see §§ 801.1(h) and 802.21. The final rule measures the 180-day period back from the date of execution of the contract, agreement in principle or letter of intent, rather than the date of filing of notification as was provided in the revised rule. This change was made in order to clarify that the aggregation of the previous and current asset acquisitions may determine whether notification is required, rather than presuppose notification and measure the 180-day period from the date of its filing, as did the revised rule. And the final rule requires that the earlier acquired assets must still be held by the acquiring person at the time of the execution of the agreement, since disposing of the assets would seemingly eliminate any cumulative anticompetitive effect flowing from the earlier asset acquisition.

SECTION 801.14 AGGREGATE TOTAL AMOUNT OF VOTING SECURITIES AND ASSETS

Section 801.14 explains the phrase "aggregate total amount of voting securities and assets" which appears in the size-of-transaction test of section 7A(a)(3)(B). That test is satisfied if, as a result of an acquisition, the acquiring person will hold an aggregate total amount of voting securities and assets in excess of $15 million. The rule provides that the "aggregate total amount" is the sum of the values of the voting securities and assets to be held as a result of an acquisition, as determined under the rules.

To apply the rule, add the values of the voting securities and assets to be held as a result of an acquisition. Paragraph (a) of the rule specifies that the value of voting securities to be held as a result of an acquisition is to be determined in accordance with § 801.13(a), and paragraph (b) provides that the value of assets to be held as a result of an acquisition is to be determined in accordance with § 801.13(b). Two examples illustrate the rule.

BACKGROUND INFORMATION TO § 801.14

This rule interprets section 7A(a)(3)(B) and states the plain meaning of that provision. Original § 801.40 attracted little comment, and revised § 801.15 attracted no comment. The final rule is unchanged in substance and reflects only clarifying editorial changes and the renumbering of other rules. The examples have been revised.

SECTION 801.15 AGGREGATION OF VOTING SECURITIES AND ASSETS THE ACQUISITION OF WHICH WAS EXEMPT

Section 801.15 interprets the size-of-transaction test of section 7A(a)(3). That test will be satisfied whenever as a result of an acquisition, the acquiring person will hold 15 percent or $15 million of the assets or voting securities of the acquired person. This rule explains whether assets and voting securities acquired in transactions exempt under the act or rules will be deemed held as a result of an acquisition.

This rule applies only when the acquiring person is simultaneously acquiring both exempt and nonexempt assets or voting securities of the same acquired person, or is acquiring nonexempt assets or voting securities after previously acquiring exempt assets or voting securities of the same acquired person. Because its application is narrowly limited to situations combining exempt and nonexempt acquisitions, the rule should apply to relatively few transactions.

In general, § 801.13 specifies which assets and voting securities are deemed held as a result of an acquisition. This rule constitutes an exception to § 801.13, declaring that notwithstanding

§ 801.13 certain assets and voting securities acquired in exempt transactions will not be held as a result of an acquisition. For this reason, reference to § 801.15 appears at the beginning of § 801.13.

Since § 801.15 determines which assets and voting securities count toward satisfying the size-of-transaction test of section 7A(a)(3), it necessarily will affect the application of the rules determine the value of the voting securities or assets to be held or acquired (§ 801.10), the percentage of assets or voting securities to be held or acquired (§ 801.12), and the aggregate total amount of voting securities and assets to be acquired (§ 801.14). The rule is not relevant to the size-of-person test of section 7A(a)(2), or to the rule implementing that test, § 801.11.

The rule applies both to current and to past exempt acquisitions. For current acquisitions, the rule permits the acquiring person, in deciding whether the size-of-transaction test of section 7A(a)(3) is satisfied, to disregard assets or voting securities that are exempt under the listed provisions of the act and rules. Thus, if the acquiring person is acquiring a mixture of exempt and nonexempt assets and voting securities in a single acquisition, only the nonexempt assets and voting securities need be considered in determining whether the test of section 7A(a)(3) is satisfied. Example No. 1 to the rule illustrates this point. Of course, if only exempt assets or voting securities are being acquired, the acquisition is exempt and need not be reported regardless of whether the particular exemption is listed in the rule.

The rule also entitles the acquiring person to disregard certain past exempt acquisitions, although applying the rule becomes more complicated in such situations. First, if the current acquisition is exempt under any provision of the act or rules, whether or not listed in this rule, this rule does not apply. Second, the acquiring person must verify that under § 801.13 the assets or voting securities previously acquired would be deemed held as a result of the current transaction. As a practical matter, this will fail to be true in only three instances: when the acquiring person has disposed of the assets or voting securities in the interim; when the earlier acquisition was of assets, and the subsequent acquisition is to be of voting securities (§ 801.13(b)(2)); and when both the earlier and current acquisitions are of assets of the acquired person, but the earlier acquisition took place more than 180 days prior to the execution of the contract, agreement in principle or letter of intent with respect to the current acquisition of assets. In the last-mentioned case the assets are no longer deemed those of the acquired person, and thus they cannot be relevant for purposes of section 7A(a)(3). See § 801.13(b)(2).

If under § 801.13 the acquiring person would hold the earlier-acquired assets or voting securities as a result of the current acquisition, and if the earlier acquisition was exempt under one of the listed provisions of the act or rules, this rule allows the acquiring person to disregard those assets or voting securities for purposes of the size-of-transaction test of section 7A(a)(3). Example No. 2 to the rule illustrates this point.

Additionally, if the earlier acquisition occurred before the act and rules went into effect, the rule still permits the assets or voting securities acquired earlier to be disregarded if, had the act and rules been in effect, the acquisition would have been exempt under a listed provision Example No. 3 to the rule illustrates this case.

In each of the last two instances, if the earlier acquisition was exempt (or would have been exempt, had the act and rules been in effect) under a provision of the act or rules not mentioned in this rule, the acquiring person cannot disregard the earlier acquisition for purposes of applying the size-of-transaction test to the current acquisition. For example, voting securities exempt when acquired under section 7A(c)(10) will be deemed held as a result of any subsequent acquisitions of voting securities or assets of the same issuer.

Section 801.15(b) is applied similarly, but represents a slightly different approach. Earlier acquisitions which when acquired were exempt under one of the listed provisions will not be held as a result of a subsequent transaction "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 as a result of the acquisition * * *." This means, in the case of section 7A(c)(9), that if the 10-percent limitation contained in that exemption will not be exceeded by the aggregate of the prior exempt acquisitions and the current acquisition, the voting securities previously acquired and to be acquired under the exemption will not be held as a result of the acquisition. If the aggregate of the prior and current acquisitions would exceed the 10-percent figure, all of the holdings are considered "held." Likewise, the limitation contained in section 7A(c)(9) that the acquisition be solely for investment purposes must apply to the current acquisition; if it does not, both the voting securities previously acquired under section 7A(c)(9), and the voting securities to be acquired (which would not be exempt under section 7A(c)(9)) will be held as a result of the acquisition. Example No. 4 to the rule illustrates § 801.15(b).

The principal consequence of finding that voting securities exempt when acquired under section 7A(c)(9) are not held is that the acquiring person may acquire voting securities of other issuers included within the same acquired person, or assets of the same acquired person, without having the section 7A(c)(9) securities count toward the aggregate total amount of voting securities and assets of the acquired person that, if exceeding $15 million, would make the subsequent acquisition reportable.

The exemption rules listed in paragraph (b) contain parallel limitations that must continue to apply ("qualitative limitations"), or not be exceeded ("numerical limitations"), if acquisitions under those sections are to be not held under the rule. In § 802.50(a)(2), there is the qualitative limitation that the assets must be located outside the United States, and the numerical limitation that the sales in or into the United States attributable to the assets in the acquired person's most recent fiscal year must not meet or exceed $10 million. In § 802.50(b), there is the qualitative limitation that the issuer be foreign, and two numerical limitations are expressed in subparagraphs (b)(1) and (b)(2) of that rule. In § 802.51(b), there is the qualitative limitation that the issuer be foreign, and the numerical limitations in subparagraphs (b)(1) and (b)(2). In § 802.64, there are the qualitative limitations of subparagraphs (b)(l)-(3), and the numerical limitations of subparagraphs (b)(4) and (b)(5).

Section 801.15(c) is similar to paragraph (b) of the rule. Voting securities that were exempt then acquired under section 7A(c)(11)(A) will not be held unless additional voting securities of the same issuer have been or are being acquired.

BACKGROUND INFORMATION TO § 801.15

This rule had no counterpart in the original or revised rules, although a number of comments (for example, 1059, 1070, 1089, 1099, 1100) suggested similar concepts.

Under this rule, assets and voting securities acquired under certain exemption provisions of the act and rules may be disregarded for purposes of the size-of-transaction test of section 7A(a)(3). Each of the provisions was selected, in general, because the rationale for the exemption indicates that counting the acquisition toward making subsequent acquisitions reportable would not serve enforcement interests. By contrast, the exemptions provisions of the act and rules omitted from § 801.15 were omitted either because the opposite conclusion was reached, or because whether the assets or voting securities are held makes no difference in such situations. The listed provisions will be treated first, followed by the omitted provisions. For convenience, each will be discussed in the content of a prior acquisition exempt under the exemption provision in question, followed by a subsequent acquisition, although the rule makes clear that it is equally applicable to acquisitions occurring prior to the effective date of the act and rules that would have been exempt and to simultaneous acquisitions.

EXEMPTION PROVISIONS LISTED IN § 801.15

Certain acquisitions of goods or realty transferred in the ordinary course of business are exempt under section 7A(c)(1) and § 802.1, which interprets the statutory exemption. Since section 7A(c)(1) is listed in § 801.15, such acquisitions are not counted toward making later acquisitions reportable. Because of the nature of goods and realty, and because of the limitations inherent in the concept "ordinary course of business," it is unlikely that these acquisitions will be relevant to subsequent acquisitions.

If acquisitions were exempt from reporting under section 7A (c)(5) or (c)(6), then the underlying transaction is exempt from the antitrust laws. If that is true, no enforcement purpose can be served by counting the acquisition toward making later acquisitions reportable, and accordingly § 801.15 lists those exemptions.

In section 7A (c)(7) and (c)(8), Congress has determined that certain transactions which require agency approval need not be subject to the full requirements of the act, even though they are not exempt from the antitrust laws generally. Thus acquisitions exempt from reporting under sections 7A (c)(7) or (c)(8) or under § 802.8 are not relevant for purposes of subsequent acquisitions.

Acquisitions of voting securities solely for the purpose of investment are exempt under section 7A(c)(9) if the acquiring person's holdings as a result of these acquisitions do not exceed 10 percent of the outstanding voting securities of the issuer. Section 801.15(b) provides that, as long as the investment purpose limitation continues to be satisfied and the 10 percent limitation has not been or will not be exceeded, these acquisitions are not counted for purposes of other or subsequent transactions, since the rationale for the section 7A(c)(9) exemption continues to apply. They are counted, however, in determining whether a person holds 10 percent or more of the outstanding shares of the issuer.

Similarly, acquisitions of assets by certain types of acquiring persons in the ordinary course of business, exempt under section 7A(c)(11)(B), are not held by the acquiring person for purposes of subsequent transactions. The aggregation provisions of § 801.13(b)(2) are not applied to such assets because the opportunities for evasion of the act seem minimal. However, voting securities acquired by the same types of persons pursuant to a plan of reorganization under the bankruptcy laws or pursuant to a plan of dissolution, while exempt under section 7A(c)(11)(A), are held (under § 801.15(c)) when additional voting securities of the same issuer have been or are being acquired in a transaction which is not itself exempt. The means of acquisition does not affect the ability of the acquiring person to influence or control the issuer after the acquisition.

Convertible voting securities are never deemed held for purposes of section 7A(a)(3) or the notification thresholds of § 801.1(h). See the Statement of Basis and Purpose to § 801.1(f)(2).

The several exemptions relating to foreign commerce are handled in two different ways. For purposes of making later acquisitions reportable, acquisitions exempt under certain of those provisions never result in the acquiring person's holding the assets or voting securities acquired; acquisitions exempt under others may under certain circumstances. In the former category are acquisitions by United States persons of assets located abroad that generate no sales in or into the United States (§ 802.50(a)(1)); acquisitions by foreign persons of assets located abroad, regardless of whether sales in or into the United States are generated by such assets (§ 802.51(a)); acquisitions by or from a foreign government-controlled entity of assets located in the same country as the foreign government, or of voting securities issued by an entity organized under the laws of the same country (§ 802.52); and certain foreign banking transactions subject to the approval of the Federal Reserve System (§ 802.53). The considerations of jurisdiction and comity which underlie the exemptions themselves also suggest that assets and voting securities acquired pursuant to these exemptions should not be counted for purposes of later acquisitions.

On the other hand, certain of the foreign commerce exemptions depend for their applicability upon the fact that the impact of an acquisition upon United States foreign commerce is limited. Accordingly, assets or voting securities acquired pursuant to these exemptions also are not counted for purposes of subsequent acquisitions, so long as the limitations stated in the exemption rules will not be exceeded. Sections 802.50(a)(2), 802.50(b) and 802.51(b) fall into this category, and under § 801.15(b) acquisitions exempt under these sections are only counted toward testing the limitations contained in those sections. Example 4 to the rule illustrates § 801.15(b) with respect to § 802.50(a)(2). Similar procedures apply to §§ 802.50(b) and 802.51(b), both of which relate to acquisitions of voting securities of foreign issuers. The foreign issuer's holdings of U.S. assets and the annual net sales and total assets of any U.S. issuer whose stock is held by the foreign issuer must be examined in order to determine whether the acquiring person holds the voting securities it acquired in a previous exempt transaction, and thus whether a subsequent acquisition is exempt.

Assets and voting securities acquired by creditors and insurers in the ordinary course of business under the exemption in § 802.63 are not counted for purposes of subsequent acquisitions of assets or voting securities of the same acquired persons. An acquisition exempt under § 802.63 is not likely to become a predicate for the acquiring person's attempting to gain control of the acquired person. On the other hand, a creditor or insurer may make unrelated investments in the acquired person with which it would be inappropriate to aggregate assets or voting securities acquired under the exemption.

Acquisitions by institutional investors that satisfy the various limitations of § 802.64 do not result in the acquiring person's holding the voting securities of the issuer. So long as those limitations continue to apply or are not exceeded, the rationale for the exemption continues to apply. If the limitations are exceeded or do not apply, then all voting securities of the acquired person of which the acquiring person is beneficial owner or is deemed the holder (see § 801.1(c)) are held by the acquiring person for purposes of additional acquisitions.

Finally, acquisitions subject to an order of the Commission or any Federal court, and thereby exempt under § 802.70, do not result in the acquiring person holding those assets or voting securities for purposes of additional acquisitions, since presumably the supervision of the Commission or court ensures that all competitive considerations have been or will be carefully weighed.

EXEMPTION PROVISIONS NOT LISTED IN § 801.15

Under § 801.15, previous acquisitions exempt under sections 7A (c)(2), (c)(3), (c)(4), and (c)(10) are held for purposes of the size-of-transaction tests of section 7A(a)(3) and the notification thresholds of § 801.1(h), since these statutory exemptions are not listed in § 801.15. Acquisitions of non-voting securities or other obligations exempt under section 7A(c)(2) are irrelevant for purposes of making later acquisitions reportable, because the act applies only to acquisitions of voting securities. Thus it makes no difference that technically they are "held," because they do not affect either the dollar or percentage computations applicable to voting securities (§§ 801.10, 801.12, 801.13, 801.14), and because these securities or other obligations are deemed not to be assets of the acquired person (§ 801.21). While voting securities acquired under a section 7A(c)(3) exemption are deemed held for purposes of later acquisitions of the same person's securities the later acquisitions are themselves exempt if prior to that transaction the acquiring person holds at least 50 percent of the outstanding voting securities of the acquired person. So long as the later acquisitions are exempt, it is not significant whether the voting securities acquired under the section 7A(c)(3) exemption are held. Furthermore, if some voting securities are disposed of, so that acquisitions subsequent to the one exempt under section 7A(c)(3) are not exempt under section 7A(c)(3), the voting securities acquired under the section 7A(c)(3) exemption must be deemed held so that the later acquisition becomes reportable.

Acquisitions exempt under section 7A(c)(4) because they involve transfers to or from a Federal agency or from a State or political subdivision are deemed held for purposes of later acquisitions. If the later acquisition involves the transfer of assets of, or voting securities issued by, a Government agency, it will also be exempt. On the other hand, if a Government agency were to make an exempt transfer of voting securities of a non-governmental issuer, and if the acquiring person were later to purchase additional voting securities of the same issue, all the holdings of that issuer's voting securities by the acquiring person must be aggregated by the acquiring person to determine its holdings. This aggregation is appropriate because the fact that voting securities were acquired from a governmental entity does not affect the possible use of such securities by the acquiring person to influence or control the issuer.

Voting securities acquired in a transaction exempt under section 7A(c)(10) and § 802.10 must be counted for purposes of all later acquisitions. While the acquisition of voting securities by means of stock dividends or stock splits is exempt, these securities are not qualitatively different from any other voting securities of the acquired person, and thus the acquiring person is deemed to hold them for purposes of subsequent acquisitions. In addition, a contrary conclusion would mean that a stock dividend or stock split actually would reduce the acquiring person's percentage holdings as measured under the rules.

With respect to exemption provisions in the rules, under § 801.15 certain exempt acquisitions of assets or voting securities will result in the acquiring person's holding such assets or voting securities for purposes of later acquisitions. The exemptions in this category are §§ 802.20, 802.21, 802.23, 802.30, 802.40, 802.41, 802.51 (c) and (d), 802.60 and 802.71.

Acquisitions which are exempted by 802.20 are those which, while technically within the requirements of the act, generally seem too small to merit detailed pretransaction antitrust scrutiny. These acquisitions, like those which are too small to satisfy the reporting criteria of the act, may become more significant if similar acquisitions follow. Likewise, those acquisitions of voting securities exempt under § 802.21 because notification previously has been filed may not increase the holdings of the acquiring person significantly enough to warrant an additional filing. But the holdings which result from these exempt acquisitions must be aggregated with all voting securities of the acquired person held by the acquiring person in order to give an accurate picture of the latter's ability to influence or control the issuer.

Voting securities acquired under the procedures outlined in § 802.23 are indistinguishable from the issuer's voting securities acquired in any other manner. The same is true of voting securities acquired by means of an intraperson transaction exempt under § 802.30. Thus the holdings resulting from each of these exemptions are counted for purposes of determining whether later acquisitions are reportable.

Acquisitions of voting securities in the process of forming a joint venture or other corporation may be reportable under § 801.40. When the transaction forming the joint venture or other corporation is complete, the shareholders of the joint venture or other corporation obviously continue to hold the shares of that corporation. That is true whether or not the acquisitions are exempt under § 802.40 because the corporation being formed is a nonprofit entity within the meaning of the sections of the Internal Revenue Code cited in § 802.40. Similarly, while the new corporation by reason of § 802.41 never has to report its acquisitions of assets in the transaction forming that corporation, the assets are held by the new corporation after formation and must be counted for purposes of any subsequent acquisitions by or from the corporation.

An acquisition by a foreign person of less than $10 million of assets located in the United States (other than investment assets) is exempt under § 802.51(c), but those assets are held by the acquiring person as a result of the acquisition. Thus, an additional asset acquisition by the acquiring person, if falling within the aggregation provisions of § 801.13(b)(2), will be exempt only if the aggregate value of the U.S. assets (other than investment assets) acquired in both the earlier and the later acquisitions is less than $10 million.

Section 802.51(d) exempts transactions in which both the acquiring and the acquired persons are foreign, if the combined annual sales of the two persons in or into the United States are less than $110 million and if the two persons' combined total assets located in the United States (other than investment assets) are less than $110 million. Both assets and voting securities acquired under this exemption are held for purposes of future acquisitions (subject, in the case of the assets, to the aggregation provisions of § 801.13(b)(2)), since the cumulative impact of the transactions on foreign commerce determines the availability of the exemption.

Securities underwriters which are exempt under § 802.60 from reporting certain acquisitions of voting securities nevertheless hold those voting securities as a result of their acquisition and continue to hold such securities for purposes of any subsequent acquisitions.

Finally, when an acquisition is the result of a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust, the transaction is exempt under § 802.71

because the recipient typically does not cause the transaction to occur and is thus unlikely to use the transaction to further an anticompetitive purpose. After the transaction is complete, however, the recipient's ability to use the voting securities or assets acquired under this exemption is indistinguishable from that of other acquiring persons, and thus that person is deemed to hold what was acquired under the exemption.

DELETION OF REVISED § 801.20

Revised § 801.20 stated that any particular acquisition, even if part of a sequence of transactions that will eventually exceed the threshold levels of section 7A(a)(3), was not subject to the requirements of the act unless as a result of the particular acquisition the acquiring person's holdings would meet or exceed a threshold level of section 7A(a)(3). Original § 801.45 was a similar provision.

The final rules omit revised § 801.20 as unnecessary. The proposed rule merely restated a conclusion that followed from § 801.13 — that any particular transaction was subject to the requirements of the act only if, as a result of that transaction, the holdings of the acquiring person satisfied the size-of-transaction test of section 7A(a)(3).

SECTION 801.20 ACQUISITIONS SUBSEQUENT TO EXCEEDING THRESHOLD

When a person has previously made an acquisition of assets or voting securities, this rule clarifies the acquiring person's obligation to file notification and comply with the waiting period requirements with respect to a later acquisition of the assets or voting securities of the same acquired person. The rule states that such notification and compliance is required:

(a) Even though the earlier acquisition or acquisitions may have been reportable;

(b) Even though the prior acquisitions may have resulted in the acquiring person's meeting or exceeding a notification threshold (as defined in § 801.1(h)) prior to the effective date of the act or the rules; and

(c) Even though a notification threshold may previously have been met or exceeded by reason of increases in market values or events other than acquisitions.

The basic principle underlying the act and incorporated in the rules is that every acquisition as a result of which the acquiring person's holdings meet or exceed the statutory notification threshold of section 7A(a)(3) and § 801.1(h)(1) gives rise to an obligation to file notification and comply with the waiting period requirements. See the Statement of Basis and Purpose to § 801.13. Section 802.21 substantially modifies this basic principle for acquisitions of voting securities when notification has previously been filed with respect to a transaction involving the same parties, and for that reason § 802.21 is specifically mentioned in the beginning portion of this rule.

This basic principle is also subject to the commerce test of section 7A(a)(1) and the size-of-person test of section 7A(a)(2), to each of the exemptions contained in section 7A(c)(1) through section 7A(c)(11), and to each of the exemptions in part 802 of the rules. In other words, if the statutory criteria are not met, or if the later acquisition is exempt under either the act or the rules, § 801.20 does not create a reporting obligation.

When a notification threshold is met or exceeded by reason of an event other than an acquisition, no filing or waiting period obligations arise at that time. Thus, for example, if a person acquired voting securities worth less than $15 million, and the market price of those securities thereafter rose above $15 million, that increase in market price would not by itself create a reporting obligation, because the price increase is not an acquisition within the meaning of section 7A(a). Similarly, if a person acquired less than 15 percent of the shares of an issuer, and thereafter the issuer purchased enough of its own stock so that the originally purchased shares constituted more than 15 percent of the shares then outstanding, no notification would be required, because the increase in percentage holdings did not result from an acquisition by the person whose holdings met or exceeded a notification threshold. However, in either of these situations, if the acquiring person thereafter purchased any additional shares, notification would be required with respect to that subsequent transaction. See example No. 2 to this rule.

This rule merely clarifies the operation of other rules (notably § 801.13) and does not change the results obtained by application of those rules.

BACKGROUND INFORMATION TO § 801.20

Original § 801.50 and revised § 801.21 were similar to the final rule. A number of comments relating to the original version are discussed in the Statement of Basis and Purpose to § 801.13, and there were no comments on the revised rule.

SECTION 801.21 SECURITIES AND CASH NOT CONSIDERED ASSETS WHEN ACQUIRED

Section 801.21 clarifies that neither cash nor securities of an issuer unrelated to the person from which acquired are to be considered ‘‘assets" of that person for purposes of the 15 percent or $15 million test of section 7A(a)(3). The rule thus excludes a possible literal interpretation of the term "assets" which could have made an acquisition of cash or securities reportable as an acquisition of the "assets" of the person from which acquired.

The heading of the rule states that it applies to the size-of-transaction test of section 7A(a)(3), the notification threshold that restates that test (§ 801.1(h)(1)), and the rules implementing the test (§§ 801.12(d)(1) and 801.13(b)). Paragraph (a) directs that cash is not to be considered an asset of the person from which it is received. Paragraph (b) provides that securities, whether voting or nonvoting, are not to be viewed as assets of third-party holders. Three examples illustrate the rule.

Note that even though the cash and securities are not assets for purposes of section 7A(a)(3) when acquired, after acquisition they must be reflected on the acquiring person's next regularly prepared balance sheet as assets for purposes of the size-of-person test of section 7A(a)(2).

This rule also affects § 801.2, which identifies acquiring and acquired persons for purposes of the act and rules. Section 801.21(a) makes clear that if cash is the only consideration for the voting securities of an issuer, the acquired person will not thereby acquire any "assets of the acquiring person and therefore will not become both an acquiring and acquired person within the meaning of § 801.2(c). The acquiring person, likewise, will not be transferring any of its "assets" by paying cash, and thus does not also become an acquired person. The same result follows whenever an acquisition is of securities issued by an entity not included within the person from which acquired. The person transferring the securities does not transfer "assets" and become an acquired person; instead, under § 801.2(b) the acquired person is the person within which the issuer is included. See example No. 1 to § 801.2(b).

BACKGROUND INFORMATION TO § 801.21

This rule appears for the first time in the final rules. It was added in order to avoid situations in which a literal reading of the term "assets" could result in the imposition of meaningless reporting and waiting period requirements upon transferors of cash or securities of unrelated issuers. Cash generally lacks competitive significance, and so treating it as an asset would not further the purposes of the act. Nor would filings by third-party holders of voting securities advance the purposes of the act, since only the relationship between the acquiring person and the issuer is likely to have competitive consequences. In such cases § 801.2(b) appropriately rests the obligation to comply with the act upon the person within which the issuer whose voting securities are to be acquired is included.

SECTION 801.30 TENDER OFFERS AND ACQUISITIONS OF VOTING SECURITIES FROM THIRD PARTIES

Section 801.30 applies to certain enumerated types of transactions that may be initiated by the acquiring person without the agreement of the acquired person. For these acquisitions, the waiting period begins upon receipt of only the acquiring person's Notification and Report Form, rather than both the acquiring and acquired persons' forms. The rule ensures that a hostile or indifferent issuer cannot prevent the beginning of the waiting period by failing to file notification.

Paragraph (a) specifies the seven types of acquisitions to which the rule applies. These are acquisitions on a national securities exchange or through an inter-dealer quotation system registered with the SEC; certain acquisitions by offerees of noncash tender offers described in § 801.31; tender offers, which are defined in § 801.1(g)(1); secondary acquisitions, which are described in § 801.4; all acquisitions (other than mergers and consolidations) in which voting securities will be acquired from holders other than the issuer or an entity included within the same person as the issuer; conversions, which are defined in § 801.1(f)(3); and the exercise of options or warrants that were issued by the acquired person and that are subject to a currently effective registration statement filed with the SEC. For these acquisitions, subparagraph (b)(1) specifies that the waiting period begins when notification is received from the acquiring person. Subparagraph (b)(2) requires the acquired person in such acquisitions to file notification no later than 5 p.m. eastern time on the fifteenth (or, in the case of a cash tender offer, the tenth) day thereafter. If the fifteenth (or, in the case of a cash tender offer, the tenth) day falls on a weekend or Federal holiday, the acquired person must file notification by 10 a.m. eastern time on the next business day.

This rule does not affect the length of the waiting period. Section 803.10 governs the length of the period, and also explains when receipt of a notification is effective.

Three examples illustrate the rule.

Except with respect to tender offers, the original rules made no special provision for acquisitions of blocks of stock from third parties unrelated to the issuer or through securities exchanges or other open-market transactions.

That approach tracked the statutory language describing the required waiting periods. The act provides for a 30-day waiting period that commences when notification is filed by both the acquiring and acquired persons. The only exception relates to tender offers. Section 7A(a) states in part:

> [N]o person shall acquire * * * any voting securities * * * of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification * * * and the waiting period * * * has expired * * *.

Section 7A(b)(1) likewise states in part:

> The waiting period required under [§ 7A](a) shall—
>
> Begin on the date of receipt * * * of * * * the completed notification required under [§ 7A1](a) * * * from both persons, or, in the case of a tender offer, the acquiring person * * *.

This result was inadequate, however, because absent special provision, third-party and open-market acquisitions (other than tender offers) would have been subject to the same rules as two-party acquisitions. As noted in several comments (e.g., 9, 10, 19, 49, 63, 74, 78, 93, 96, 115), unless the beginning of the waiting period is conditioned solely upon filing by the acquiring person, an apathetic or hostile issuer could frustrate the transaction merely by neglecting to file notification. The waiting period thus might never begin to run. The Commission believes that notwithstanding the language of section 7A(a) and (b)(1), these types of acquisitions are more closely analogous to tender offers than to two-party consensual acquisitions.

As Chairman Rodino stated on the House floor, lengthy delays in the waiting period for tender offers

> will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a state with an antitakeover statute, or negotiating costly life-time employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful.
>
> (122 Cong. Rec. H10294 (daily ed. Sept. 16, 1976))

Although the Williams Act does not apply, these same basic concerns — including delay, avoidance, and detrimental impact on the capital market — all exist with respect to third-party acquisitions other than tender offers. See generally, 122 Cong. Rec. 15417 (daily ed. Sept. 8, 1976); id. at H10293-94 (daily ed. Sept. 16, 1976).

The final rule extends to analogous types of transactions the treatment accorded tender offers. In each type of acquisition listed in paragraph (a), treatment under the standard two-party rules could delay or preclude the acquisition. Therefore, in each case the waiting period begins when notification is filed by the acquiring person. The difficulties in applying the normal two-party rules are particularly pronounced in the case of those acquisitions that are part of other acquisitions, such as acquisitions of an acquiring person's stock by offerees in a tender offer (§ 801.31) and secondary acquisitions (§ 801.4). In these instances, even if the acquired person chooses to file notification, it may well be hard-pressed to do so quickly. Often the acquired person is unaware of the acquisition until the acquiring person is ready to file notification. In these situations — unlike negotiated acquisitions — the acquired person usually will not have begun to prepare its form or have undertaken a preliminary analysis of the legality of the acquisition. As comment 1090 suggested, delay by acquired persons in these related acquisitions could easily impede the main acquisitions, often with severely detrimental effects.

In subparagraph (a)(5), mergers and consolidations are excluded from the treatment afforded by the rule because even though acquisitions are made from third-party holders, such transactions are typically consensual. Therefore, the rationale for the rule, the danger that an issuer will seek to frustrate the transaction, does not apply.

In subparagraph (a)(7), the two limitations placed upon the types of options that qualify for treatment under the rule seek to prevent improper use of the rule by means of characterizing consensual acquisitions as the exercise of spurious "options." Note that although these limitations exclude "put" and "call" options from subparagraph (a)(7), acquisitions of stock resulting from the exercise of such options typically would qualify under other subparagraphs of paragraph (a).

Revised § 801.30 was substantially similar to the final rule. Although in stating the coverage of the rule it mentioned only tender offers and transactions described in § 801.3O(a)(5) of the final rule, its coverage would have been similar to that of the final rule because the types of transactions identified in the final version of paragraph (a) overlap to a considerable extent. For example, acquisitions made on a securities exchange are usually acquisitions from third parties. The final version of paragraph (a) was expanded merely to clarify the scope of the rule.

Paragraph (a) of the revised rule, which identified the acquired person, was deleted from the final rule. Since § 801.2(b) identifies the acquired person, repetition of the point is unnecessary. The effect, however, remains the same: The acquired person is that collection of entities within which the issuer of the voting securities to be acquired is included. The seller of the securities—if it is not also the acquired person—has no obligation to file notification. See also § 801.21(b).

The statutory authority for compelling the acquired person in a tender offer to file notification lies in the last sentence of section 7A(a). Comment 1075 complained that for the acquired person to file notification within the time limits prescribed by subparagraph (b)(2) could be burdensome, because the acquired person would be preoccupied with evaluating the fairness of the tender offer or with other aspects of the acquisition. However, the act mandates that the agencies review the acquisition during the waiting period. Much of the information necessary for a review of the acquisition is in the hands of the issuer. The length of time afforded the acquired person by the rule is the maximum that will still permit the agencies to perform their duties.

SECTION 801.31 ACQUISITIONS OF VOTING SECURITIES BY OFFEREES IN TENDER OFFERS

This rule applies only to those noncash tender offers in which the stockholders of the issuer whose shares are sought to be acquired will receive voting securities from the offeror as full or partial consideration for their shares. Section 801.2(e) provides that such acquisitions are separately subject to the requirements of the act and rules if the criteria of section 7A(a) are satisfied. Section 801.31 details the procedures to be followed regarding the notification and waiting period for such acquisitions, and provides for an optional escrow arrangement to facilitate the underlying tender offers. The term "noncash tender offer" is defined in § 801.1(g)(3).

When an acquisition is separately reportable, separate Notification and Report Forms must be submitted with respect to it. Paragraph (a) of the rule provides that the waiting period — that is, the separate waiting period with respect of the acquisition by the offeree, distinct from the waiting period with respect to the tender offer — begins when the offeree files notification. See §§ 801.30 and 803.10(a)(1). Paragraph (b) requires the person within which the issuer of the shares to be acquired by the offeree is included to file notification within 15 days thereafter. Note that the shares to be acquired by the offeree need not necessarily be those of the tender offeror. Paragraph (c) provides that a request for additional information will extend the waiting period in accordance with § 803.20(c). Finally, paragraph (d) creates a special escrow mechanism that can be used if the tender offeror would otherwise be unable to acquire the shares tendered by the offeree, because the waiting period with respect to the offeree's acquisition of the voting securities furnished by the offeror has not expired. The rule permits the voting securities destined for the offeree to be placed into escrow for the benefit of the offeree, so that the tender offeror may accept the tendered shares and complete the tender offer as soon as the waiting period with respect to the tender offer expires, even if the waiting period with respect to the acquisition by the offeree has not expired. The escrow agreement may be structured in any way determined by the parties, and may provide for the transfer of alternative consideration to the offeree in the event that either agency secures an injunction against the offeree's acquisition of shares from the offeror. The only limitation on the escrow agreement provided by the rule is that the shares placed in escrow cannot be voted by anyone during the pendency of the escrow.

An example illustrates the rule.

BACKGROUND INFORMATION TO § 801.31

This rule, which had no counterpart in either the original or revised rules, was added in order to clarify that acquisitions of voting securities by offerees of tender offers may be separately reportable, to detail the procedural aspects of such acquisitions, and to eliminate, by means of the escrow provision of paragraph (d), the risk that tender offers could be delayed or frustrated by complications arising in connection with such acquisitions.

As with any other acquisition, an acquisition described by this rule is subject to the requirements of the act whenever the criteria of the act are satisfied and no exemption applies. It is separately subject to the act because the potential antitrust problems posed by the acquisition differ from those posed by the underlying tender offer. The antitrust analysis of the tender offer will focus upon the relationship of the tender offeror and issuer whose shares are sought to be acquired. The analysis of the offeree's acquisition. by contrast, will typically focus upon the relationship between the offeree—the acquiring person—and the issuer of the shares that the offeree will acquire from the tender offeror. Since different parties are involved, separate application of the act is necessary.

Acquisitions described by the rule are specifically mentioned in § 801.30(a)(2) as qualifying for that section's special treatment. As with other acquisitions failing under that rule, the waiting period commences when notification is filed by the acquiring person, in this case the offeree of the tender offer. The acquired person, the issuer of the securities to be acquired by the offeree, must file notification within 15 days thereafter. Section 801.30 treatment for these acquisitions facilitates completion of the tender offer. It will be particularly important if the voting securities furnished by the offeror are not issued by the offeror, in which case the issuer may regard its filing requirement with indifference or hostility. For further explanation of the rationale for § 801.30 treatment, see the Statement of Basis and Purpose to that rule.

The escrow arrangement permitted by paragraph (d) of the rule is designed to permit noncash tender offers to be consummated before the expiration of any waiting periods imposed on the acquisitions of voting securities being offered as consideration. Without this provision, consummation of the tender offer could be delayed, and conflict with the Williams Act could result.

The escrow provision prohibits any person from voting any shares placed in escrow during the pendency of the escrow. Because voting presents the risk of anticompetitive activity, the Commission determined that this indicium of beneficial ownership should not pass to the offeree prior to the expiration of the waiting period.

SECTION 801.32 CONVERSION AND ACQUISITION

Section 801.32 declares that a conversion is an acquisition within the meaning of the act. Therefore, if the criteria of section 7A(a) are satisfied, the acquisition of voting securities by means of a conversion must be preceded by notification and observance of the waiting period. Note that conversions are among the transactions for which the waiting period commences upon receipt of the acquiring person's Notification and Report Form. See § 801.30(a)(6).

The term "conversion" is defined in 801.1(f)(3).

An example illustrates the rule.

BACKGROUND INFORMATION TO § 801.32

A conversion of convertible voting securities into securities presently able to vote for directors involves an exchange in which the holder acquires voting securities and surrenders convertibles as consideration for that acquisition. See § 801.1(f)(3). The fact that one type of voting securities is exchanged for another does not alter the fact that the exchange involves an acquisition of voting securities.

Therefore, the purpose of this rule is merely to clarify the Commission's interpretation of the act; the rule does not create any obligation which would not exist in its absence.

Several of the final rules implement the treatment of convertible voting securities. This rule insures that persons acquiring voting securities by means of conversions first file notification and observe a waiting period, if the criteria of section 7A(a) are met. Section 802.31 exempts acquisitions of convertible voting securities. For a complete explanation of the manner in which the rules treat convertible voting securities, see the statement of Basis and Purpose to § 801.1(f)(2); see also §§ 801.1(f)(3) and 802.31.

SECTION 801.40 FORMATION OF JOINT VENTURE OR OTHER CORPORATIONS

Section 801.40 announces the criteria by which to identify those joint ventures or other corporations the formation of which, because of the acquisition of voting securities of the new entity by its parents, will trigger the requirements of the act. The rule specifies which such transactions must be reported. It also enables acquiring persons reporting such acquisitions to complete properly item 5(d) of the form, which relates exclusively to such transactions.

The phrase "joint venture or other corporation" means that the formation of any corporation, whether or not denominated a joint venture by the parties, is potentially subject to the reporting and waiting period requirements of the act. (This rule applies to the formation of all corporations except those formed in connection with mergers and consolidations, which are treated under § 801.2(d).) Since the formation of a new corporation all of the voting securities of which will be held by one person will be an intraperson transaction exempt from the requirements of the act under § 802.30, as a practical matter only the formation of corporations the voting securities of which will be held by two or more persons is potentially subject to the act. And since the rule applies only to the formation of corporations, the formation of entities other than corporations is by virtue of this rule, not brought within the coverage of the act and need not be preceded by compliance with the act's requirements.

As with any other acquisition, the requirements of the act need be observed only if the criteria of section 7A(a) are met. Paragraph (a) identifies the acquiring and acquired persons in such a transaction. Paragraphs (b), (c), and (d) of the rule explain the application of the criteria of section 7A(a) to such acquisitions, and an example illustrates their application.

Paragraph (a) of the rule provides that the persons contributing to the formation of a joint venture or other corporation are acquiring persons. Since they will acquire and hold voting securities of the new entity, the rule parallels § 801.2(a). Even though the new entity may also acquire assets or voting securities from the contributors, notwithstanding § 801.2(c) the contributors are deemed acquiring persons only, and the new entity is an acquired person only. Under § 802.41, however, the joint venture or other corporation need not file notification in connection with its own formation.

The criteria of paragraph (b) constitute the size-of-person test of section 7A(a)(2) in connection with the formation of a new corporation. An acquiring person is subject to the requirements of the act if it has annual net sales or total assets of $100 million or more, if at least one other contributor has annual net sales or total assets of $10 million or more, and if the joint venture or other corporation will have $10 million or more in total assets. If, on the other hand, the new corporation will be of $100 million size, its formation is reportable if two or more of its shareholders are of $10 million size or larger. In the latter case, each contributor of $10 million size is required to file notification and wait. For acquiring persons, § 801.11 governs calculation of annual net sales and total assets; for the new corporation, § 801.40(c) determines the total assets for purposes of this rule.

Paragraph (b) also makes clear that the act applies only if the size-of-transaction test of section 7A(a)(3) is satisfied. In the context of the formation of a joint venture or other corporation, the test will be satisfied as to a particular acquiring person if, as a result of the transaction forming the corporation, the acquiring person would hold 15 percent or $15 million of the new corporation's stock.

Under § 801.40(c), the total assets of a joint venture or other corporation at the time of its formation will be deemed to include (1) all assets that, as of the time of formation, the parents have agreed to transfer or for which agreements have been obtained for the new entity to acquire at any time, and (2) all credit or other obligations that, as of the time of formation, the parents have agreed to extend or guarantee at any time. Paragraph (c) supplants § 801.11, the rule that normally governs the calculation of total assets, only at the time of its formation, for purposes of paragraph (b) of this rule. If the joint venture or other corporation after its formation acquires or is acquired by another entity, its total assets and annual net sales at that time would be determined under § 801.11.

Paragraph (d) interprets the commerce test of section 7A(a)(1) for transactions forming a joint venture or other corporation. It provides that the test is satisfied either if the activities of any acquiring person are in or affect commerce, or if the person filing notification should reasonably believe that the new entity will be engaged in activities in or affecting commerce.

Two additional rules complete the treatment of the formation of joint venture or other corporations: Section 802.40 exempts acquisitions of voting securities in connection with the formation of certain tax-exempt, non-profit corporations, and § 802.41 exempts the new corporation from filing notification in connection with its own formation.

BACKGROUND INFORMATION TO § 801.40

The earlier versions of the rules, which were drafted in terms of joint ventures rather than joint venture or other corporations, generated a substantial number of comments during both the first and second comment periods. Many comments insisted that Congress had not intended the act to apply to joint ventures and therefore that including them within the ambit of the rules was improper. (See, e.g., 16, 47, 57, 59, 62, 83, 84; 1018, 1019, 1025, 1030, 1046, 1060, 1068, 1069, 1070, 1075, 1086, 1087, 1088, 1096, 1097.) These arguments were based on inferences drawn from legislative history and other sources outside title II of the Antitrust Improvements Act, as well as from the specific language of section 7A. Specifically, the comments noted that title II omitted mention of joint ventures (16, 83, 84), and contrasted the explicit references to joint ventures in title I of the Antitrust Improvements Act, the Antitrust Civil Process Act amendments, 15 U.S.C. 1311 (57, 67). One comment (92) also suggested that, since Congress had eliminated from an earlier draft a clause giving the Commission the power to expand the scope of the act's coverage, coverage should not be "expanded" by rule to embrace joint ventures. Comment 47 argued that since, in contrast to a merger, there is no problem "unscrambling" the assets of a joint venture if after its formation it is found to be anticompetitive, preconsummation review is less imperative. Finally, one comment (59) objected to coverage because the Commission's existing premerger notification program does not reach joint ventures.

The Commission finds, however, that nothing in the act's legislative history indicates that Congress did not intend for the act to reach acquisitions of voting securities in connection with the formation of new corporations. To the contrary, the language of the act indicates that, except for the qualifications of section 7A(a) and the exemptions in section 7A(c), Congress intended that the act reach all acquisitions of voting securities—regardless of the types of transactions in which they occur. The comments that objected to joint venture coverage were focused on the formation of the new entity rather than on the acquisition of its voting securities. Since under the act the former is irrelevant and coverage of the latter is beyond doubt, these comments were rejected.

The formation of new corporations in connection with mergers or consolidations is excluded from the rule, since the character and likely competitive consequences of such transactions are dissimilar to those treated under this rule.

"JOINT VENTURE OR OTHER CORPORATION"

It became apparent after the first comment period that there is no commonly understood and generally accepted definition of "joint venture." The comments suggested that thousands of common business arrangements in different industries could be construed as joint ventures. These business arrangements range from coproduction ventures in the motion picture industry (e.g., 67, 78, 116) to joint bidding, exploration and drilling in the oil and gas industry (e.g., 3, 5, 8, 16, 24, 34, 46, 72) to real estate development and shopping center construction projects (e.g., 10, 60, 81, 83). It was clear from the comments that there was no consensus whether any, some, or all of these arrangements were "joint ventures" and thus whether their formation would have been a reportable event under those rules. The comments insisted that these common joint arrangements are unlikely to violate the antitrust laws, and that because of the frequency with which they are used, the reporting and waiting period requirements would impose substantial hardships on the venturers.

The Commission thus sought more information about joint ventures. The FEDERAL REGISTER notice accompanying the revised rules invited comments detailing the types and forms of organizations of joint ventures that would have been reportable under the revised rules (42 FR at 39044 (Aug. 1, 1977).

This invitation attracted 52 comments. These comments revealed that in the industries in which joint business arrangements are most commonly formed to effect day-to-day operations— the oil, gas, and other extractive industries (e.g., 1018, 1019, 1022, 1024, 1025, 1033, 1034, 1046, 1056, 1060, 1069, 1075, 1081, 1084, 1087, 1088, 1096, 1097, 1107); the construction industry (e.g., 1015, 1047, 1077, 1092, 1112, 1113, 1114); the real estate investment and development and shopping center development industries (e.g., 1064, 1065, 1070, 1079, 1085); the motion picture industry (e.g., 1066); and financing transactions (e.g., 1071, 1089) very few of those arrangements typically are incorporated. They also suggested that although the venturers are sometimes competitors, the ventures usually do not engage in marketing and are primarily risk-sharing devices. As a general rule, in these day-to-day joint ventures the participants provide a pro rata share of the expenses and take in kind from the output of the venture. They frequently are formed for a single, specific purpose (e.g., bidding on a lease or project, making a movie, or completing a specific project) and often are dissolved when that purpose has been accomplished or abandoned. The comments also expressed concern that the coverage of "joint ventures" under the revised rules was ambiguous.

The approach to joint ventures adopted in the final rules meets these concerns. Section 801.40 applies to "joint venture or other corporations." When a new corporation is formed, it typically issues its stock to those contributing capital. The language of the rule makes clear that the formation of any corporation, regardless of what the parties call it, potentially gives rise to a reportable acquisition of voting securities by every shareholder. This approach obviates the need to decide whether an entity should be termed a joint venture, because the concept of "corporation" is unambiguous. Moreover, it emphasizes that it is not the *formation* of the corporation upon which the act (and similarly, the rules) focuses, but rather the acquisition of a corporation's voting securities.

There is evidence that Congress intended coverage of acquisitions by or of noncorporate entities. Section 7A(b)(3)(A) states:

> The term "voting securities" means any securities which * * * entitle the owner or holder thereof to vote for the election of directors of the issuer or, *with respect to unincorporated issuers*, persons exercising similar functions. (Emphasis supplied.)

However, the Commission has instructed its staff to monitor the formation of joint business arrangements of all types and forms and to determine, after a year of operation, whether the rules provide appropriate coverage. The fact that persons contributing to the formation of a noncorporate joint venture are not required to report and wait prior to the transaction should not, of course, be construed as a Commission statement that such transactions are free from antitrust concerns. See section 7A(i).

SIZE-OF-PERSON AND SIZE-OF-TRANSACTION TESTS

The rule adapts acquisitions in connection with the formation of joint ventures, which always involve at least three parties, to the basic two-party framework of the act by separately pairing each parent with the joint venture or other corporation, and then testing the pair against a modified version of the size-of-person test of section 7A(a)(2), and the size-of-transaction test of section 7A(a)(3). Thus with respect first to the size-of-person test, if the joint venture or other corporation is of $10 million size (determined under paragraph (c) of the rule), a parent of $100 million size may be required to report. If the new entity will have $100 million or more in total assets, an acquiring person with annual net sales or total assets of $10 million may be required to report. This aspect of § 801.40(b) is drawn directly from section 7A(a)(2).

In each of these cases, however, paragraph (b) of the rule imposes an additional requirement not present in section 7A(a)(2)—the participation of another person of $10 million size forming the corporation. See § 801.40 (b)(1)(iii), (b)(2)(iii). Thus, a parent of $100 million size contributing to the formation of a corporation of $10 million size need only report and wait if a second contributor is of $10 million size. This additional contributor may not itself be required to report. If neither it nor the joint venture or other corporation are of $100 million size, when paired they will not satisfy the test of § 801.40(b) (because they would not satisfy the test of section § 7A(a)(2)).

Likewise, each pair, composed of an acquiring person and the acquired person (new entity), must satisfy the size-of-transaction test of section 7A(a)(3) before the acquiring person need report. If the particular acquiring person as a result of the acquisition forming the new corporation will not hold either 15 percent or $15 million of the voting securities of the new corporation, it need not report.

This approach to coverage in final § 801.40(b) differs in two respects from that taken in the original rules. First, the size criteria were stated as exemptions in original § 802.30, rather than as coverage criteria in original § 801.55. Second, the original rules addressed only the situation in which parents of $100 million and $10 million sizes were involved as acquiring persons, regardless of the size of the new entity. The revised rules transferred the size criteria to § 801.40 and expanded them to include two parents of $10 million size contributing to the formation of a $100 million joint venture. As comment 95 observed, the latter situation reflects section 7A(a)(2)(C), which is applicable to all other types of acquisitions.

Comment 16 suggested that a joint venture should be exempt from the notification and waiting period requirements unless all of the acquiring persons have net sales on total assets of $100 million or more. This suggestion was rejected. Clearly section 7A(a)(2) authorizes the Commission to go further than that. If the acquired person (the new entity) has net sales or total assets of $100 million or more, an acquiring person may be of $10 million size and, if the size-of-transaction tests are met, it will be subject to the act. Another comment (63) suggested that if the formation transaction is reportable, all the contributors should be required to report. This comment was also rejected, since, as discussed above, paragraph (b) is closely modeled after those combinations of acquiring and acquired persons that satisfy the size-of-person test of section 7A(a)(2).

Comment 57 suggested that, since section 7A(a)(1) is stated in the present tense, coverage of joint ventures at formation is improper. First, it argued, securities cannot be acquired from a person not yet in existence, and second, the act should not apply unless the acquired person satisfies the size-of-person test at the time of acquisition. The Commission is unpersuaded by these arguments. Section 7A(d)(1) grants the Commission the power to define the terms of the act, and the rules define "person" to include a joint venture or other corporation not yet formed. Section 801.1(a)(2) defines "entity" to include "any joint venture or other corporation which has not been formed but the acquisition of the voting securities in which, if already formed, would require notification under the act and these rules * * *." And under § 801.1(a)(1) a "person" is composed of entities. Thus, since a joint venture not yet formed may be a "entity," it also may be a "person." Somewhat similarly, § 801.40(c) adapts the size-of-person test to the formation of a joint venture or other corporation, notwithstanding the fact that the corporation, by one view, does not have total assets at the time of formation. The Commission believes this treatment is reasonable and permissible for the reasons previously stated.

TOTAL ASSETS OF JOINT VENTURE OR OTHER CORPORATION

Paragraph (c) of the rule provides that the assets of the new entity will include (1) all assets that the parents have agreed to transfer or for which agreements have been obtained for the new entity to acquire at any time, and (2) all credit or other obligations that the parents have agreed to extend or guarantee at any time. The paragraph focuses upon the agreement at the time of formation; however, the new entity's assets are not limited to those contributed at formation. Thus, if the contributors agree to form a joint venture or other corporation and agree to contribute assets each year for a specified number of years, the total assets of the new entity for the size-of-person and percentage-of-assets tests will be the total of all contributions over the several years. See the example to the rule. This approach to total assets is followed because, at least at formation, the timing of the contribution of assets to a new entity is totally within the control of the contributors.

The Commission considers it reasonable to rely on agreements entered into by those contributors for purposes of calculating the entity's size.

The emphasis of the original rule was different. Original § 801.55(d) provided that assets of a joint venture included all assets intended to be contributed to the venture within 1 year of formation. Numerous comments (e.g., 25, 26, 74, 84, 92) objected that reliance on the parents' intentions made the act's coverage turn on a purely subjective determination and therefore was unworkable. Comment 95 suggested—and the Commission agreed—that the assets of the joint venture need not be restricted to those contributed during the first year; instead, it urged that all assets that the contributors intended to commit during the life of the new entity should be tallied. The revised rule thus looked to those assets and loans that the venturers (or any other persons) has agreed to contribute or guarantee at any time. It was adopted in the final rule with only minor revisions for clarity and conformity with other language of the rule.

COMMERCE TEST

Paragraph (d) provides that the commerce test of section 7A(a)(1) is satisfied, for purposes of this rule, if the activities of any acquiring person are in or affect commerce, or if the filing person should reasonably believe that the activities of the joint venture or other corporation will be in or affecting commerce. Section 7A(a)(1) states that the act applies if "the acquiring person, *or* the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce * * *. [Emphasis supplied.] Since the word "or" is disjunctive, the test is satisfied if only the acquiring person is engaged in commerce or an activity affecting commerce, within the meaning of that term in § 801.1(*1*).

Moreover, it is appropriate to find the commerce test satisfied, if the joint venture or other corporation to be created will engage in commerce. Under the definition of "entity," the joint venture or other corporation qualifies as a "person," as discussed above. And since the joint venture or other corporation merely by its formation may exert an effect on commerce it is appropriate to consider its future activities in or affecting commerce for purposes of the commerce test at the time of its formation.

Original § 801.55(c) would have provided that a joint venture would be deemed engaged in commerce or an activity affecting commerce of the persons contributing to its formation intended that it be so engaged within 1 year of formation. Revised § 801.40(d) eliminated the 1-year limitation, and instead focused upon whether the agreement among the contributors, rather than the contributors themselves, contemplated that the activities of the joint venture would be in or affecting commerce. The formulation in the final rule, the reasonable belief of the person filing notification, both establishes an objective standard and unambiguously calls for its application by the particular person filing notification.

SECTION 801.90 TRANSACTIONS OR DEVICES FOR AVOIDANCE

Section 801.90 prohibits transactions or devices entered into or employed for the purpose of avoiding the obligation to comply with the notification and waiting period requirements of the act. It provides that whenever the parties to an acquisition appear to have structured their transaction in order to avoid the requirements of the act, the Commission will apply the act and the rules to the substance rather than to the form of the transaction.

The rule serves as a warning that the enforcement agencies may seek civil penalties or equitable relief under section 7A(g) whenever it appears that the act's reporting and waiting period requirements apply and have not been observed.

For purposes of determining whether transactions or devices for avoidance have been employed, of obvious relevance will be the existence of reasons other than avoidance for the manner in which a particular transaction is consummated. Each situation, therefore, will be considered on its own merits.

Two examples illustrate the rule.

BACKGROUND INFORMATION TO ? 801.90

Because of the broad variety of transactions subject to the act and the unavoidable complexity of the act and rules, persons may be able to structure acquisitions to avoid the act and rules in ways not specifically contemplated by the act and rules. Even if a complex rule or set of rules could be constructed to prohibit such maneuvers, a general prohibition is preferable. Any transaction or sequence of transactions that appear to have been devised in order to avoid reporting obligations will be disregarded, and the substance of the underlying transaction will determine whether the act applies.

This rule appears for the first time in the final rules.

PART 802 OF THE RULES

SECTION 802.1 ACQUISITION OF GOODS OR REALTY IN THE ORDINARY COURSE OF BUSINESS

Section 802.1 interprets and expands the exemption contained in section 7A(c)(1) which exempts "acquisition of goods or realty transferred in the ordinary course of business."

Paragraph (a) of the rule extends the section 7A(c)(1) exemption to acquisitions of voting securities, when the issuer's assets consist solely of realty and other assets incidental to the ownership of realty. In such cases, acquisitions of the voting securities of the realty corporation will be viewed as acquisition of the realty. This treatment does not mean that every acquisition of either real estate or the stock of real estate corporations is automatically entitled to exemption under section 7A(c)(1). The rule means only that if an acquisition of realty would be exempt under section 7A(c)(1), the exemption will not be lost simply because the realty purchase is accomplished by making a stock acquisition, so long as the issuer meets the limitations set forth in the rule.

Paragraph (b) of the rule provides that an acquisition shall not be exempt under section 7A(c)(1) if, as a result of the acquisition, the acquiring person will hold all or substantially all of the assets of an entity (or of an operating division of an entity). None of the goods or realty to be acquired may be considered "transferred in the ordinary course of business" if such a situation will arise. The only exceptions are entities described in paragraph (a) of the rule. All of the assets of such an entity—i.e., the realty and related assets—may be acquired in the ordinary course of business, and such an acquisition may be exempt under section 7A(c)(1). Likewise, all of the voting securities of such a corporation may be so acquired, since under paragraph (a) such an acquisition will be treated as an acquisition of realty.

BACKGROUND INFORMATION TO § 802.1

This rule appears for the first time in the final rules.

Paragraph (a) appears because the Commission determined that the applicability of this exemption should not depend upon the form of the acquisition. At least from an antitrust standpoint, whether real estate is acquired directly or by acquiring voting securities would seem to make no difference. Comments 83 and 1070 recommended a provision resembling paragraph (a).

Paragraph (b) excludes from the concept of ordinary course of business acquisitions of all or substantially all of the assets of an entity. A person which transfers all or substantially all of its assets normally does not do so in the ordinary course of business. Furthermore, the Commission has determined that Congress did not intend to exempt such acquisitions under section 7A(c)(1). See, e.g., 122 Congressional Record S15417 (daily edition, September 8, 1976) (remarks of Senator Hart).

SECTION 802.6 FEDERAL AGENCY APPROVAL

Section 7A(c)(6) exempts from the requirements of the act and rules—

> * * * transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

And section 7A(c)(8) exempts—

> * * * transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), section 403 or 408(e) of the National Housing Act (12 U.S.C. 1726 and 1730a), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction.

Section 802.6 identifies, for purposes of sections 7A (c)(6) and (c)(8), what is included in the term "information and documentary material." It provides that a person availing itself of these exemptions must file one copy of all documents, application forms, and all other written submissions of any type whatsoever filed with another agency in connection with the acquisition. Alternatively, the filing person may submit one copy of an index describing all such "information and documentary material," provided that the index is accompanied by a certification that any information or documents indexed but not provided will be supplied within 10 calendar days of a request by the Commission, Assistant Attorney General, or a delegated official of either. The Federal Trade Commission has delegated its power to make such requests to the Director Deputy Directors and Associate Director for Premerger Notification of the Bureau of Competition, without power of redelegation. All materials ("information and documentary material" or indices thereof) must be submitted to the offices of the agencies designated in § 803.10(c).

Section 802.53, which invokes the procedure set forth in this section regarding the index, is thus likewise subject to the same provisions regarding submission of the index, requests for the underlying documents, and delegation of the power to make such requests by the Federal Trade Commission.

BACKGROUND INFORMATION TO § 1802.6

Under original § 802.75, a person that elected to file an index of information and documentary material in lieu of copies of all such filings was required merely to certify that copies of such materials would be provided to the agencies upon request. The final rule adds the requirement that the filing person be prepared to submit the materials with 10 days.

One comment (15) questioned whether the "contemporaneous filing" requirement to the act and rule applied to transactions for which agency approval had been sought, but not formally conferred, prior to the effective date of the rules. The comment suggested that the rule be amended to make clear that the "contemporaneous filing" provision does not apply to documents submitted to agencies before the effective date of the rules.

An amendment of this sort does not appear necessary. The Commission interprets the requirement of "contemporaneous" submissions to mean that material filed with another agency prior to the effective date of the rules need not be submitted to the Commission and Assistant Attorney General. The Commission construes the exemption to apply in such cases, even though the prior submission of the documents prevents contemporaneous filing and, consequently, no documents are filed.

For the same reason, if the initial submissions commencing proceedings that may lead to such agency approval were made before the effective date of the rules, the filing of supplemental submissions is not required, regardless of when such submissions are made. Such supplemental submissions would not be useful in the review process. However, new original filings with other agencies occurring after the effective date of the rules must of course be contemporaneously filed with the Federal Trade Commission and Assistant Attorney General in order to gain exemption under section 7A(c)(6).

SECTION 802.8 CERTAIN SUPERVISORY ACQUISITIONS

Section 7A(c)(8) of the act specifically exempts a limited class of acquisitions subject by statute to the approval of the Federal Home Loan Bank Board ("FHLBB") or the Federal Savings and Loan Insurance Corporation ("FSLIC") from the requirements of the act, provided that copies of the information and documentary material filed with the FHLBB or FSLIC are also contemporaneously filed with the Commission and the Assistant Attorney General at least 30 days prior to consummation of the transaction. This rule completely exempts certain emergency acquisitions of failing savings and loan associations (known as supervisory acquisitions) from any filing requirement if the agency whose approval is required finds that approval of the transaction is necessary to prevent the probable failure of one of the institutions involved.

This specialized exemption has relevance only to a limited class of transactions—acquisitions and mergers of savings and loan associations which by statute require the approval of the FHLBB. There are several types of such transactions. The FHLBB has the statutory power under section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, to approve or disapprove a merger, consolidation, or purchase of the assets of a Federal savings and loan association. In its capacity as operating head of the FSLIC, it also has the power under section 403 of the National Housing Act, 12 U.S.C. 1726, to approve or disapprove mergers of savings and loan associations insured by the FSLIC. In the same capacity, the FHLBB exercises a similar power, under section 408(e) of the National Housing Act, 12 U.S.C. 1730a(e), to approve or disapprove the acquisition of control by a savings and loan holding company of a savings and loan association.

BACKGROUND INFORMATION TO § 802.8

This exemption was suggested by the FHLBB in its comment (1) on the original rules. The exemption for supervisory acquisitions—those in which the FHLBB or the FSLIC approves (and often arranges) acquisition of a failing savings and loan association in order to save it from imminent failure—is based on the need for extremely speedy action in such cases. The 30-day waiting period provided in section 7A(c)(8) might be too long, because the savings and loan association might fail before the period expires, resulting in the payment of savings account insurance claims by the FSLIC and the depletion of the corporation's insurance reserves. This failure could have an adverse effect on other financial institutions and on the confidence of savers in such institutions.

Further, the exemption from the waiting period requirement reflects a judgment that, as the FHLBB suggested, supervisory acquisitions are not likely to violate the antitrust laws since the disappearing association is always a failing institution.

An exemption for supervisory mergers and acquisitions is also consistent with other existing law and practice in the area of regulation of financial institutions. For example, in bank mergers subject to section 18(c) of the Federal Deposit Insurance Company Act, 12 U.S.C. 1828(c) (exempt from reporting under this Act by reason of 7A(c)(7)), the Attorney General ordinarily has thirty days to review the competitive impact of a proposed transaction, but this period may be dispensed with if immediate action is necessary to prevent the probable failure of one of the institutions, 12 U.S.C. 1828(c)(4).

For these reasons the Commission accepted the suggestion of the FHLBB and exempted supervisory transactions under the relevant statutory provisions from reporting and observing any waiting period at all.

SECTION 802.9 ACQUISITIONS SOLELY FOR THE PURPOSE OF INVESTMENT

This rule interprets the exemption contained in section 7A(c)(9) of the act. The rule provides that if an acquisition is made solely for the purpose of investment, as defined in § 801.1(i)(1), the acquiring person need not observe the reporting and waiting period requirements of the act, regardless of the dollar value of voting securities held or acquired, so long as its holdings as a result of the acquisition will not exceed 10 percent of the issuer's voting securities. The act limits the exemption to acquisitions of voting securities.

If as a result of in acquisition the acquiring person's holdings would exceed 10 percent of the voting securities of the issuer, investment intent is no longer relevant, and the section 7A(c)(9) exemption can no longer apply.

Section 801.12 governs the calculation of percentages for this provision, as for all other provisions of the Act and rules.

BACKGROUND INFORMATION TO § 802.9

The rule merely interprets the exemption conferred by section 7A(c)(9).

The FEDERAL REGISTER notice accompanying the revised rules stated:

> Because of the difficulty in establishing criteria for determining when voting securities are held "solely for the purpose of investment," the Commission also invites comment on the desirability of exempting from the reporting requirements all acquisitions of voting securities which do not result in the acquiring person holding more than IO percent of the outstanding voting securities of the issuer regardless of the acquiring person's intent.
>
> 42 FR at 39047 (Aug. 1, 1977).

A number of comments (e.g., 1053, 1059, 1070, 1077, 1110, 1111) endorsed the suggestion that investment intent should be disregarded and that all acquisitions below the 10 percent level should be exempt. The Commission declined to follow this course for two reasons. First, the language of section 7A(c)(9) clearly makes the acquiring person's intentions a relevant consideration. Second, such an exemption would, when large corporations are involved, eliminate the $15 million reporting threshold of section 7A(a)(3)(B), contrary to congressional intent.

Original § 802.85 would have required an acquiring person to file a short statement at the time of purchase in order to qualify for the section 7A(c)(9) exemption. The statement was to contain the names of the acquiring person and the issuer, the percentage of the latter's voting securities held before and after the acquisition, and a declaration that the voting securities would be held solely for the purpose of investment. A number of comments (e.g., 63, 89, 105, 112, 115, 120) questioned the Commission's legal authority to require such a statement. The revised rules did not contain any similar filing requirement, and none has been included in the final rules. The principal result of requiring such statements would have been to disclose holdings of less than 10 percent of the shares of an issuer, and in general holdings of 5 percent or more will be disclosed in any event by the filing of a schedule 13D with the SEC. The Commission believes that it has the authority to insert such a requirement at a later date, should it appear necessary to monitor compliance with section 7A(c)(9) more closely.

For further information, see the definition of "solely for investment purpose," § 801.1(i)(1), and its Statement of Basis and Purpose.

SECTION 802.10 STOCK DIVIDENDS AND SPLITS

Section 7A(c)(10) exempts

> Acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer * * *

This exemption was designed to apply to two common types of stock acquisitions: Those resulting from stock splits and pro rata stock dividends. Section 802.10 makes this explicit.

BACKGROUND INFORMATION TO ? 802.10

Neither of the two types of acquisitions exempted by the rule increases the holder's ability to influence management decisions vis-a-vis other shareholders, even though, under certain circumstances, these acquisitions may increase the market value of that person's stock holdings.

Original § 802.90 exempted only the two types of acquisitions exempted by the final rule. In response to comment 63, revised § 802.10 also exempted acquisitions of voting securities "pursuant to an issue of new shares offered proportionately to all shareholders." The revised rule generated no comments. However, this provision was deleted from the final rule because it appeared to exceed the criterion of section 7A(c)(10). The fact that a new issue of voting securities is offered proportionately to all shareholders does not insure that the offer will be accepted (or accepted proportionally) by all shareholders. Thus, acquisitions which result from such an offering may increase the acquiring person's share of the outstanding voting securities of the issuer. Accordingly, the Commission determined to eliminate that portion of the revised exemption.

SECTION 802.20 MINIMUM DOLLAR VALUE

This rule exempts certain acquisitions as a result of which the acquiring person would hold 15 percent or more of the voting securities or 15 percent or more of the assets of the acquired person, but the aggregate total amount of voting securities and assets so held will be $15 million or less (i.e., the 15-percent test of section 7A(a)(3)(A) will be satisfied, but the $15 million test of Section 7A(a)(3)(B) will not). The rule exempts acquisitions as a result of which the acquiring person would not hold either (a) assets of the acquired person valued at more than $10 million, or (b) voting securities conferring control of an issuer which, together with all entities that it controls, has annual net sales or total assets of $10 million or more.

BACKGROUND INFORMATION TO § 802.20

The purpose of this rule is to eliminate reporting and waiting period requirements with respect to certain relatively small acquisitions that are clearly reportable under the act. For example, if a $100 million person were to make an acquisition of assets from a $10 million person, the transfer of as little as 15 percent of the assets of that person, worth as little as $1.5 million, would be subject to a reporting requirement. Further, because percentage holdings of voting securities are calculated with reference only to the issuer (see ? 801.12(a)), potentially some even smaller acquisitions of voting securities may, by reason of section 7A(a)(3)(A), be reportable. For example, if the same $100 million person were to acquire 15 percent of the voting securities of an entity included within the $10 million acquired person, that transaction would be reportable but for this rule, regardless of the size of the entity.

It is clear from the language of the act that Congress did not intend to limit the coverage of the act to large acquisitions; instead, the act expressly applies to transactions between large parties, including some relatively small acquisitions.

Nevertheless, the Commission believes that certain relatively small transactions (frequently involving only a portion of the stock or assets of the acquired person) that might be reportable under the act are sufficiently unlikely to have a significant anticompetitive impact that imposition of the act's requirements would not represent an appropriate use of public resources. These transactions are exempted by § 802.20. As with any other exemption rule, of course, either agency may challenge an acquisition under a substantive antitrust law, notwithstanding exemption from section 7A. See section 7A(i).

Original § 802.40 and the revised and final versions of § 802.20 all exempt asset acquisitions as a result of which the acquiring person will not hold assets of the acquired person valued at more than $10 million.

The original version also would have exempted acquisitions as a result of which the acquiring person would not hold voting securities of the acquired person valued at more than $10 million, so long as the transaction did not confer control of any issuer. Several comments (e.g., 45, 81, 120) pointed out that, as long as that provision placed no limitation on the size of the issuer, reporting requirements might still extend to transactions which conferred control of issuers of de minimis size. In response, the revised rule exempted all acquisitions of voting securities valued at less than $10 million which did not confer control of an issuer with annual net sales or total assets of $10 million or more. Acquisitions of voting securities valued at more than $10 million were not exempt under the revised rule, regardless of whether such acquisitions conferred control of an issuer.

In the final rule, the exemption does not depend on the value of the voting securities, although the rule does not apply (as neither of the earlier versions applied) to an acquisition as a result of which the acquiring person will hold voting securities of the acquired person valued at more than $15 million. (If such voting securities are valued at more than $15 million, section 7A(a)(3)(B) is satisfied, and § 802.20 is inapplicable.) If such voting securities are valued at $15 million or less, the final rule exempts the acquisition unless it will confer control of an issuer which (together with any entities which that issuer controls) has annual net sales or total assets of $10 million or more.

In addition, while the revised version of § 802.20 did not apply to the formation of joint ventures (see comment 1059), the final version treats acquisitions in connection with the formation of joint venture or other corporations in the same way that it does all other acquisitions. In light of the changes in § 801.40 which result in similar treatment for joint venture and other corporations, the distinction in revised § 802.20 no longer seemed appropriate. Under the final rule, a person which, in a transaction forming any corporation, acquires sufficient voting securities of the newly formed corporation to require reporting under the act may take advantage of the exemption in § 802.20 if it applies. Thus if three or more (but fewer than seven) persons, each having $100 million or more in assets or sales, form a joint venture corporation and acquire equal amounts of its stock, and if the assets of that corporation, as measured by § 801.40(c), are $10 million or more, this rule would apply. Section 801.40 would require each acquiring person to report its acquisition of voting securities of the newly formed corporation, because each person would hold more than 15 percent of the shares of an entity with total assets of $10 million or more. (If there were seven or more persons acquiring equal shares no one person would hold as much as 15 percent.) However, under § 802.20, if none of the acquiring persons would be acquiring voting securities valued in excess of $15 million and since none of the acquiring persons would obtain control of an issuer of $10 million size, each person's acquisition would be exempt under § 802.20. If any one person were acquiring voting securities valued in excess of $15 million, or if any one (or two, if there were only two) of the acquiring persons were obtaining control of this issuer, each such person's acquisition would not be exempt under § 802.20, although the acquisitions of the other persons might be. See the Statement of Basis and Purpose to § 801.40.

One comment on the original rule (95) pointed out that the rule would permit acquisition of 25 percent of the stock of a $40 million company or 15 percent of a $66 million company. That is not technically correct, since the amount of stock that may be purchased without reporting is determined by the value of the stock acquired, not by the size of the company, although the value of the stock may be related to the value of the company's assets. (If it is assumed that the aggregate value of a company's outstanding shares is equal to its total assets, then the final rule could permit acquisition of as much as 37.5 percent of a $40 million company, or 22.7 percent of a $66 million company, or 49.9 percent of a $30 million company; any greater percentage would in each case result in a holding of stock valued in excess of $15 million, and the exemption would not apply.) That comment questioned the wisdom of exempting such transactions without a detailed study of their frequency and effect. The Commission did not believe it appropriate to impose reporting obligations and to expend scarce law enforcement resources on relatively small stock acquisitions, since the benefit to the public is less likely to be as significant in these situations. While the thrust of this comment may have been that the exemption had been extended to inappropriately large transactions, it did not suggest an alternative means of distinguishing relatively small acquisitions from those that may have a more substantial impact upon a significant amount of commerce. After the effective date of these rules, the Commission staff will continue to monitor mergers and acquisitions brought to their attention by members of the public, reports in the trade press and other sources. If it appears from this experience that the balance between administrative cost and the benefits of enforcement should be shifted because the exemptions in § 802.20 are unduly broad, the Commission will consider narrowing them.

Comment 1042 suggested that § 802.20 should exempt all transaction involving less than $15 million worth of stock or assets, in order to eliminate the "anomaly" of reaching very small transactions. The Commission believes that, if Congress had intended such a result, the act could easily have been worded so as to achieve it. The fact that the act contains an alternative percentage test in section 7A(a)(3)(A) and dollar test in section 7A(a)(3)(B) indicates a clear congressional intention to reach at least some acquisitions that satisfy only the percentage test. Adoption of this suggestion thus seems inappropriate.

Comment 1061 suggested that if a person containing an institutional investor holds a noncontrolling stock interest in another person, the former should be permitted to purchase up to $10 million of the assets of the latter without reporting. The rationale underlying the comment apparently was that a small acquisition of assets does not gain additional significance by reason of the acquiring person's holding of the seller's voting securities for investment. Section 801.15(b) of the final rules adopts a similar procedure, but extends it to all acquisitions of voting securities exempt under section 7A(c)(9) or § 802.64, so long as the limitations of those respective exemptions are not exceeded.

Finally, comment 1075 suggested increasing the $10 million coverage threshold in the rule for capital-intensive industries, on the theory that small acquisitions in such industries are less likely to have an impact on competition than in less capital-intensive industries. The comment did not, however, propose a means of implementing this suggestion, and the Commission regards it as unworkable. It is also unclear whether the premise underlying the suggestion is necessarily correct, and the comment offered no factual support for it. The difficulty of generalizing about the impact of mergers and acquisitions upon competition suggests the inadvisability of eliminating reporting requirements as a result of similar generalizations about whether an industry is "capital-intensive."

SECTION 802.21 ACQUISITIONS OF VOTING SECURITIES NOT MEETING OR EXCEEDING GREATER NOTIFICATION THRESHOLD

In general, if a person has previously complied with the act, § 802.21 exempts for a period of 5 years additional acquisitions of the voting securities of the same acquired person, so long as the acquiring person's holdings do not meet or exceed, the next higher "notification threshold." The rule also replaces § 802.22 of the revised rules and permits the acquiring person, if its holdings decrease below the level for which it originally filed notification, to meet or exceed that level again within 5 years without filing notification. The rule does not exempt any acquisitions of assets.

Under the act, every acquisition after which the acquiring person would hold more than 15 percent or $15 million of the stock of the acquired person is potentially reportable. Section 801.13 interprets the phrase "as a result of" in section 7A(a)(3), the size-of-transaction test for application of the act. Under § 801.13, every acquisition after which the acquiring person would hold more than 15 percent or $15 million of the stock of the acquired person satisfies this criterion, rather than only acquisitions that first raise the acquiring person's holdings to the 15 percent or $15 million level. See the statement of basis and purpose to that rule.

Section 802.21, in substance, exempts all acquisitions above the 15 percent or $15 million level except those meeting or exceeding notification thresholds or those occurring more than 5 years after the earlier notification.

The rule conditions the exemption upon three requirements, set forth in paragraphs (a), (b), and (c). First, the acquiring person (in the acquisition for which the exemption is being considered) must have filed notification with respect to an earlier acquisition of the same issuer's stock, and all other persons required by the rules to file with respect to the earlier acquisition must also have done so. Second, the waiting period with respect to the earlier acquisition must have expired or been terminated, and the expiration or termination must have occurred within 5 years of the acquisition being considered for exemption. Finally, the acquisition must not increase the holdings of the acquiring person to meet or exceed a notification threshold greater than the greatest threshold surpassed in the earlier acquisition.

The term "notification threshold" is defined § 801.1(h). In brief, the four thresholds are (1) the 15 percent or $15 million level of section 7A(a)(3); (2) 15 percent of the outstanding voting securities of the issuer, if valued at more than $15 million; (3) 25 percent of the outstanding voting securities of the issuer; and (4) 50 percent of the outstanding voting securities of the issuer. See also the statement of basis and purpose to § 801.1(h)(1). Thus, as the example to § 802.21 illustrate, after complying with the act for an acquisition of 15 percent of the stock of an issuer, the acquiring person can increase its holdings to any amount below 25 percent of the stock within 5 years of the end of the earlier waiting period without again filing notification and waiting; after acquiring 25 percent, up to 50 percent within 5 years, and so on. Once a person holds 50 percent or more of the outstanding voting securities of an issuer, further acquisitions are exempt under section 7A(c)(3).

Note that under § 803.7, the earlier notification entitles the reporting person to meet or exceed only those notification thresholds with respect to which the earlier notification was filed, and that were actually achieved within a period of 1 year. After 1 year the notification expires, and though the person may use this rule to raise its holdings to just under the next greatest threshold, it may not meet or exceed a higher threshold without again filing notification. See the example to § 803.7.

Example No. 5 to the rule illustrates the other feature of the rule: That if for some reason the acquiring person reduces its holdings below a threshold for which it filed notification and waited, it can (within 5 years of the expiration of the waiting period) cross the same notification threshold again without filing and waiting. Of course, after recrossing the threshold, it may acquire additional shares so long as it does not meet or exceed the next threshold.

Since acquisitions of assets are not exempted by the rule, any acquisition of assets that satisfies the three tests of section 7A(a) and is not exempted by the act or rules, is reportable. In particular, any acquisition as a result of which the acquiring person would hold 15 percent or $15 million of the assets of the acquired person is reportable, even though the reporting person may have previously filed notification with respect to an acquisition of assets from the same person. Note, however, that under § 801.13(b) assets cease to be assets of the acquired person, and become assets of the acquiring person, after 180 days.

BACKGROUND INFORMATION TO ? 802.21

The language of the act indicates that Congress contemplated agency review of stock acquisitions not only at the 15 percent or $15 million level, but also at additional, higher levels of ownership. Further review is desirable because holdings that may be innocuous at low levels may pose antitrust concerns at higher levels. Section 801.13 construes the phrase “as a result of” to fulfill this congressional purpose; see the statement of basis and purpose to that rule.

However, this principle would not justify notification and a waiting period prior to every acquisition above the 15 percent or $15 million level. The delay and expense of repeated filings would be extremely burdensome to reporting persons and would present too substantial an administrative burden for the enforcement agencies. Nor would such notifications serve any enforcement purpose. Percentage holdings varying by a few percentage points will in most cases have equivalent antitrust significance, and periodic review at the levels of the notification thresholds, or within the timing constraints of ? 802.21, should be sufficient. The rule insures that the agencies learn of appreciable increases in holdings by imposing the reporting requirements at the prescribed notification thresholds, and insures that the agencies learn of changed circumstances by imposing the reporting requirement in any event after 5 years. Of course, in a particular case an acquisition exempted by the rule may prove to have antitrust significance, and the fact that the acquisition was exempt under this (or any other) rule does not preclude either agency from challenging the acquisition. See section 7A(i).

The reasons why these precise ownership levels were selected as notification thresholds are detailed in the statement of basis and purpose to **?** 801.1(h). The 5-year limitation is discussed in connection with paragraph (b) of this rule.

The final version of the rule reflects important modifications both from revised § § 802.21 and 802.22 and from related provisions in the original rules.

The definition of "notification thresholds," which appeared in the revised rules as § 802.21(a), has been transferred to § 801.1(h) because the term proves useful in other rules as well.

Paragraph (a) of the rule is unchanged from revised § 802.21(b)(1). The Commission rejected suggestions in the comments (e.g., 74, 77, 120) that submissions under the existing FTC premerger notification program should satisfy the requirement of a prior report, or that the requirement should be eliminated. The existing program's report form is not as comprehensive or detailed as the notification and report form, and the breadth of the exemption conferred by the rule warrants the more penetrating initial inquiry.

Paragraph (b), however, significantly alters revised § 802.21(b)(2). The final rule inserts the requirement that the waiting period for the earlier acquisition must have expired or been terminated in order to insure that the agencies have completed their review of the competitive consequences of the acquisition. In addition, by measuring the time period from the date of expiration or termination of the waiting period, rather than the date of filing notification, the time period for exemption is a full 5 years.

Paragraph (b) of the final rule also lengthens the 180-day period contained in the revised rule into a 5-year period during which subsequent acquisitions may qualify for the exemption. Numerous comments had protested the 180-day restriction, urging variously 1 year (1053, 1090, 1091, 1101), 2 years (1044, 1077, 1090), 5 years (1059) or its deletion altogether (1086). The comments argued that changed business activities of the parties would not change the Government's enforcement intentions often enough to justify the burden of compliance with the act at such brief intervals. The comment of the Securities and Exchange Commission (1058) had also expressed concern that 180 days from the date of filing might not be long enough to avoid conflict with proposed SEC rule 14d-6, which would require tender offerors to pay the tender offer price for all purchases within 40 days after the close of the offer. The final rule sets the time period at 5 years because, in addition to the reasons expressed by the comments, the Bureau of the Census undertakes its comprehensive economic censuses every 5 years, so that by the time the exemption ceases to be available the agencies will have new census data to compares with the data submitted.

Final § 802.21(c) replaces revised 802.22, which exempted acquisitions recrossing notification thresholds, by rewording revised § 802.21(b)(3). Instead of prohibiting attainment of any notification threshold, as did the revised rule, the final version of paragraph (c) prohibits only reaching or exceeding a greater notification threshold than the highest one attained in connection with the earlier notification. Thus, any number of acquisitions raising or lowering holdings across a notification threshold earlier attained are fully exempt, and § 802.22 has been deleted. The comments on § 802.22, which almost exclusively recommended lengthening the time period for the exemption (1059, 1077, 1086, 1090, 1091), have been acknowledged by combining the rule with the 5-year period adopted for § 802.21.

The final version of § 802.21(c) also accommodates the insertion of § 803.7 into the final rules. Its phrasing, "the greatest notification threshold met or exceeded in the earlier acquisition" means the greatest threshold met or exceeded within the 1-year period before the notification expires under § 803.7. See the example to that rule.

Original ? 802.45 would have adopted a different exemption scheme for acquisitions subsequent to compliance with the act. It would have allowed incremental increases of 5 percent of an issuer's voting securities, without time limit, above the holdings reflected by the original notification, provided that the incremental acquisition would not confer control of the issuer. ("Control" in the original rules was defined to mean control in fact, regardless of the percentage held.) Several comments on the revised rule (1044, 1059, 1077, 1090) recommended adoption of both schemes: Permitting acquisitions up to thresholds within a time period, as the final rule does, and incremental acquisitions of a de minimis percentage above the last notification filed, without time limit. Comment 1059, for example, argued that the two exemptions served different needs, but that both were desirable. The final rules do not provide for a de minimis exemption without time limit, partly because of the lengthening of the time period for the exemption to 5 years. De minimis incremental acquisitions that cross a notification threshold are thought to warrant examination for the reasons underlying the notification thresholds, while those occurring more than 5 years after the waiting period from the previous filing do not merit exemption because the businesses of the acquiring and acquired persons, the market or the product may have changed.

The original rules also contained a provision, § 802.50, allowing a "short report" in place of the notification and report form for acquisitions between the same parties within 1 year of filing notification with respect to the earlier acquisition. The final rules omit this procedure since § 802.21 embodies a more comprehensive exemption.

Finally, the rules adopt no exemption for multiple acquisitions of assets by the same acquiring person from the same acquired person. Since one group of assets does not necessarily bear any relation to another, the competitive significance of each acquisition of assets is unique and must be evaluated on its own merits. Comment 63 supported this view. In any event, the problem is much less acute since, while voting securities potentially remain voting securities of the acquired person indefinitely, acquired assets become assets of the acquiring person after 180 days. See § 801.13(b)(2).

SECTION 802.23 AMENDED OR RENEWED TENDER OFFERS

Section 802.23 modifies the notification and waiting period requirements of the act under certain circumstances when a tender offeror amends or renews a tender offer with respect to which it previously filed notification.

Except in three situations, the rule fully exempts amended or renewed tender offers from any notification or waiting period requirement under the act. The rule does not affect reporting and waiting period obligations with respect to the original offer. If none of the three exceptions applies, the acquiring person is free to amend or renew its tender offer, and to consummate the acquisition, for up to one year after the expiration of the waiting period, in accordance with the provisions of section 803.7.

The rule applies only when the amended or renewed tender offer seeks to acquire voting securities of the same issuer as did the original tender offer. An amended tender offer is one that alters only the terms of the offer; a renewed tender offer is one that reopens the time period for offerees to tender their stock. An offer may be both amended and renewed.

In order for the rule to apply, the tender offeror must have filed notification with respect to the original offer. The rule applies whether or not the acquired person has filed notification, since under section 801.30(b)(2) the acquired person need not file until fifteen (or, in the case of cash tender offers, 10) days after filing by the acquiring person.

Paragraphs (a), (b), and (c) describe the three instances in which the rule grants only a partial exemption. First, under paragraph (a), if the number of voting securities the offeror seeks to acquire pursuant to an amended offer will meet or exceed a greater notification threshold than earlier reported, the offeror must complete and file a new Notification and Report Form, and a new waiting period will commence. The acquired person, however, is required to file only once. If the acquired person already filed notification in response to the offeror's first filing, its obligation is discharged (unless it receives a request for additional information under section 7A(e) and section 803.20). If the acquired person has not yet filed notification by the time of the second notification by the offeror, the acquired person must nevertheless file no later than the time it becomes due in response to the first notification. The term "notification threshold" is defined in section 801.1(h). See also section 802.21.

Second, under paragraph (b), if a non-cash tender offer is amended to become a cash tender offer, the offeror must file a copy of the amended offer with the enforcement agencies, in the manner prescibed in section 803.10(c). The waiting period will expire 15 days after that filing, or 30 days after the original filing, whichever is earlier. Since the expiration date is determined by section 803.10(b), it is subject to extension by requests to the acquiring person for additional information or documentary material under section 7A(e) and section 803.20 or by court order under section 7A(g)(2) and to early termination under section 7A(b)(2) and section 803.11. When a non-cash tender offer is amended to become a cash tender offer, the acquired person's obligations are not affected. It must file no later than the time determined by the tender offeror's first notification, and remains subject to a second request, although the waiting period is not thereby extended.

Third, if a cash tender offer is amended to become a non-cash tender offer, the offeror again must file a copy of the amended offer with the enforcement agencies in the manner specified by section 803.10(c). The waiting period will expire 15 days after that filing, or 30 days after the original filing, whichever is later. Again, the obligation of the acquired person to file notification is unaffected and is determined by the date of the original notification, and both parties remain subject to second requests.

In each of the latter two instances, the rule may be applicable even though the waiting period begun by the original offer has expired or been terminated.

If a waiting period is to be extended by a request for additional information or documentary material under section 7A(e) and section 803.20, the length of the extension is determined by the character of the tender offer at the time the response is received—that is, ten days if a cash tender offer, 20 days if a non-cash tender offer.

BACKGROUND INFORMATION TO § 802.23

The purpose of this rule is to minimize the reporting and waiting period obligations for amended or renewed tender offers, while still ensuring that the agencies receive sufficient information and advance notice to fulfill the purposes of the act.

If a tender offer is amended or renewed under circumstances other than those described in the three paragraphs of the rule, the amendment or the renewal is unlikely to have competitive consequences appreciably different from those of the original offer, as to which notification has already been filed. The agencies' decision whether to challenge the acquisition will probably not be affected by the amendment or renewal. Accordingly, the rule exempts such amendments and renewals altogether.

Amended and renewed offers described in paragraph (a), however, present different concerns. Since a higher notification threshold will be met or exceeded, a new notification and a new waiting period are required just as they would be for sequential acquisitions under § 802.21. In such cases, the increased holdings warrant fresh scrutiny by the agencies. The acquiring person's Notification and Report Form is necessary to inform the agencies of the amended acquisition. However, the rule exempts the acquired person from filing again since its Form will contain adequately current information. If the amendment is made before the acquired person has filed notification in response to the original tender offer, it must still file that notification.

If a non-cash tender offer is amended to become a cash tender offer, the acquiring person would be subject to a waiting period no longer than 15 days (before any extension), simply by filing a new notification. Paragraph (b) of the rule further relaxes the waiting period, by permitting it to expire at the end of the original 30 day period if that is earlier. The earlier expiration date is practicable because the agencies, upon receipt of notification for the original non-cash tender offer, would have had 30 days to decide whether to challenge the acquisition, and because the change in the nature of the consideration should not unduly complicate the agencies' review of the acquisition. The copy of the tender offer is needed to inform the agencies of the amendment, while the acquired person's re-filing would be redundant and is eliminated.

When a cash tender offer is amended to become a non-cash tender offer, the waiting period expires 15 days from the filing of the amended tender offer, or 30 days from the original filing, whichever is later. Again, since the agencies' review of the acquisition should be completed within 30 days from the original filing, the rule affords the agencies adequate time. Again, the copy of the tender offer is needed to inform the agencies of the amendment, but the acquired person is not required to file again.

Note that for non-cash tender offers, § 801.31 facilitates the agencies' review by ensuring that any significant holdings resulting from acquisitions of voting securities by offerees of the tender offer will be separately reportable.

By minimizing the notification and waiting period requirements, the rule minimizes multiple reporting in the event that a tender offeror changes the terms of its offer in response to competing offers by other prospective purchasers.

The rule first appeared as revised § 802.23, which had several limitations not present in the final rule.

First, revised § 802.23(a) would have required the amended or renewed tender offer to be consummated within 180 days of the filing of the earlier notification. This period has been lengthened to the 1-year period of § 803.7. The change should resolve the concern of the SEC expressed in comment 1058. The SEC had feared that the 180-day period might not be long enough for the tender offeror to comply with state laws delaying tender offerors, and with proposed SEC rule 14d-6, which would integrate with the tender offer certain purchases of securities within 40 days after its termination. Comments 1086 and 1090 also criticized the 180-day limit.

Second, revised § 802.23(b) would not have exempted the amended offer if it offered as consideration voting securities that had not been offered as consideration in the original offer. This restriction was deleted because § 801.31 assures that the agencies will learn of any significant holding resulting from acquisition of voting securities by offerees of the tender offer. Comment 1090 noted this point in substance.

SECTION 802.30 INTRA-PERSON TRANSACTIONS

This rule provides generally that whenever the acquiring and acquired persons are (or, when a wholly owned subsidiary is being formed, will be) the same person, the acquisition is exempt from the reporting and waiting period requirements of the act. Acquiring persons are defined by § 801.2(a), and for this purpose acquired persons are identified by § 801.2(b). Acquisitions of both assets and voting securities are exempt under the rule. Note that for voting securities, the acquired person is the person within which the issuer whose voting securities are to be acquired is included, and is not the person from which the voting securities are to be acquired (unless they are the same). See example No. 1 to § 801.2(b).

Thus, example No. 1 to this rule illustrates that any transaction between entities included within the same person (save for an exception noted below) is exempt. Example No. 2 illustrates that the formation of a new wholly owned subsidiary is exempt. And example No. 4 illustrates that a corporation's repurchase of its own stock is exempt. Redemptions and retirements of shares are likewise exempt. In each of these cases the acquiring and acquired persons are the same.

The rule contains two exceptions. First, the formation of a new corporation will not be exempt under the rule if the voting securities of the new corporation will be held by more than one person. Example No. 5 to the rule illustrates this exception. Second, the acquiring and acquired persons must be included within the same person because of holdings of voting securities. The definition of control, § 801.1(b), determines whether an entity is included within a person. If an entity is included within the person under the other test of control, i.e., because a contract permits the person to name a majority of the board of directors of that entity, acquisition of the shares of that entity is not exempt under this rule. Example No. 3 illustrates this point.

BACKGROUND INFORMATION TO § 802.30

Section 7A(c)(3) exempts:

> acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition * * *.

This exemption expresses a Congressional determination that such acquisitions are unlikely to raise Questions under the antitrust laws that were not raised by acquisition of the 50- percent interest. The rule extends the exemption to other situations to which the same rationale applies: transfers of assets between subsidiaries of the same parent, formations of new wholly owned subsidiaries, repurchases of stock by a corporation, and the like.

The two exceptions to the rule deny the exemption because this rationale does not apply. The contracts underlying contractual control may be less permanent than controlling ownership interests. In addition, termination of a contractual control relationship will generally not give rise to a reporting requirement, whereas transfer of a controlling block of stock will. Comment 1061 questioned withholding the exemption for such situations, but the final rule adheres to the position. The formation of a joint venture or other corporation having two or more shareholders is also excluded, because the combination of two different persons is an event posing precisely the kinds of antitrust concerns that the act directs the agencies to review.

The final version of the rule rephrases the previous versions, revised § 802.32 and original § 802.25. The revised rule used somewhat cumbersome language to exempt the formation of a subsidiary, which is achieved explicitly in the final rule. The final rule states that the acquiring and acquired persons are or will be the same person because the new corporation may not yet exist.

Since the reworded final rule exempts repurchases and redemptions, the final rules omit revised section 802.30 as superfluous.

Revised section 802.32 had excluded the formation of all joint ventures, but in response to comment 1070 the final rule makes clear that Joint ventures involving the participation of only one person are exempt under the rule. A joint venture between subsidiaries of the same corporation would be exempt.

Comment 25 suggested that purchases of a corporation's shares should be exempt not only if made by the corporation for its own account, but also if made for the account of an employee's stock or pension plan. Under final section 801.2(a), the acquiring person is the person that as a result of the acquisition will hold the voting securities, and section 801.1(c) defines "hold" to mean beneficial ownership. Therefore, when the corporation acquires shares "for the account of" an employees' stock or pension plan, the acquisition would be exempt under this rule if the corporation becomes the beneficial owner, but would not be exempt under this rule if, for example, a pension trust became the beneficial owner. See section 801.1(c)(3). The latter acquisition may, however, be exempt under section 7A(c)(9) or under section 802.64. Likewise, the definition of "hold" answers the inquiry in comment 1058, because when other persons act on behalf of a corporation to repurchase its own stock, the corporation becomes the beneficial owner and the acquisitions are exempt under this rule.

SECTION 802.31 ACQUISITION OF CONVERTIBLE VOTING SECURITIES

Section 802.31 exempts the acquisition of convertible voting securities from the requirements of the act. The term "convertible voting security" is defined in section 801.1(f)(2). Note that section 801.32 specifies that the conversion of convertible voting securities is a potentially reportable acquisition.

BACKGROUND INFORMATION TO SECTION 802.31

Revised section 802.31 exempted from the requirements of the act the conversion of convertible voting securities into voting securities presently entitled to vote. Under the revised rules, the reporting requirements would have attached when the convertibles were acquired. Under the final rules, however, the acquisition of voting securities that results from the conversion of convertibles is the event requiring the holder to report. The acquisition of convertible voting securities is exempt. For a full explanation of the rationale for the exemption, see the Statement of Basis and Purpose to section 801.1(f)(2); see also sections 801.1(f)(3) and 801.32.

SECTION 802.40 EXEMPT FORMATION OF JOINT VENTURE OR OTHER CORPORATIONS

Section 802.40 exempts from the requirements of the act the acquisition of voting securities in connection with the formation of a joint venture or other corporation if the newly-formed 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.

BACKGROUND INFORMATION TO SECTION 802.40

Section 802.40 exempts the formation of any corporation, whether or not termed a joint venture, that will be not for profit within the meaning of any of the cited sections of the Internal Revenue Code ("Code"). The types of organizations thereby exempted include: Corporations created by act of Congress and acting as instrumentalities of the United States, section 501(c)(1) of the Code; holding companies for otherwise tax-exempt organizations, section 501 (c)(2); religious, charitable, scientific, literary, or educational organizations that are not substantially dedicated to lobbying efforts, section 501(c)(3); civic leagues or employee associations, section 501(c)(4); business leagues. chambers of commerce, real estate boards, boards of trade, or professional football leagues, section 501(c)(6); recreation clubs, section 501(c)(7); fraternal lodges that provide insurance benefits to members or their dependents, section 501(c)(8); employee beneficiary associations, section 501(c)(9); domestic fraternal lodges that devote their net earnings to religious, charitable, scientific, literary, educational and fraternal purposes, section 501(c)(10); certain local teachers' retirement fund associations, section 501(c)(11); local benevolent life associations or other cooperative companies, if at least 85 percent of their income consists of amounts collected from members to meet losses and expenses, section 501(c)(12); cemeteries and burial societies operated solely for the benefit of their members, section 501(c)(13); certain credit unions, section 501(c)(14); small mutual insurance (other than marine or life) companies or associations, section 501(c)(15); certain trusts forming part of a plan providing for the payment of supplemental unemployment compensation benefits, section 501(c)(17); certain pension trusts funded solely by employee contributions, section 501(c)(18); certain organizations of war veterans, section 501(c)(19); certain organizations formed as part of a qualified group legal services plan or plans, section 501(c)(20); and certain religious and apostolic organizations, section 501(d).

All these types of organizations are operated solely for the benefit of society of some segment thereof, or for the benefit of a specific membership. They either are not usually engaged in commerce within the meaning of the act and rules or are specifically prohibited from permitting any of their net earnings to inure to the benefit of any private shareholder or other individual. In light of these characteristics, it was considered unlikely that the formation of a joint venture or other corporation of one of these varieties would violate the antitrust laws, and this exemption was thus provided.

The formation of some species of organizations exempt from income taxes remains nonetheless subject to the requirements of the act and rules. Section 501(c)(b) of the Code exempts "[l]abor, agricultural, or horticultural organizations." and section 501(c)(16) provides that farmers' cooperatives organized to finance crop operations of their members are tax-exempt even if they have capital stock that is owned by the associations or their members, pay dividends and accumulate and maintain a reserve. Organizations tax-exempt under these two sections of the Code unlike organizations tax-exempt under the other cited sections of the Code—often engage in activities that are in or significantly affect commerce. The tax-exempt status of these organizations does not insure that a combination of certain persons forming such Joint venture or other corporations" will be free from antitrust concerns. In fact, the identity of the persons contributing to the formation of such organizations is essential to determining whether the activities of the organizations so formed may be exempt from the antitrust laws under section 6 of the Clayton Act or under the Capper-Volstead Act, 7 U.S.C. section 291. Since agricultural or horticultural organizations and farmers' cooperatives may exist in the corporate form and may be organized to produce and market goods or services, the fact that they are tax-exempt is not sufficient justification to exempt their formation from the requirements of the act and rules.

Revised § 802.40 exempted the formation of tax-exempt, nonprofit joint ventures from the requirements of the act. The FEDERAL REGISTER notice accompanying the revised rules invited comments identifying and discussing other types of joint ventures or other corporations that are unlikely to violate the antitrust laws and should thus be exempted from the requirements of the act. It stated:

> [T]he Commission would like to know in greater detail the reasons that formation of specific types of joint ventures might be unlikely to violate the antitrust laws, as many of the comments have alleged. Given the fact that some judgment concerning the possible anticompetitive impact of a joint venture must be made by the enforcement agencies at the time of its formation, the Commission specifically invites comments concerning appropriate tests that would prospectively distinguish ventures which might raise possible anticompetitive consequences from those that are unlikely to do so.
>
> The Commission has difficulty with the suggestions, made in a significant number of comments received in response to the originally proposed rules, that narrow exemptions relating to specific types of joint ventures in particular industries would be appropriate. The Commission invites specific suggestions concerning principles of general application to broad classes of joint ventures, regardless of the specific industry or particular purpose of the venture, which may serve to distinguish those ventures raising little likelihood of antitrust problems. The Commission is not inclined to grant exemptions absent clear indication that they are warranted under the Act. Comments which do not

> attempt to relate suggested exemptions to the underlying purposes of the act are not likely to be helpful to the Commission.
>
> (42 FR at 39044 (Aug. 1, 1977).)

Despite this instruction, numerous comments persisted in urging industry-specific exemptions. See the Statement of Basis and Purpose to § 801.40. The Commission does not believe that the formation of a particular type of joint venture is less likely to be anticompetitive simply because it is commonly used in a particular industry. Nothing revealed in the comments eliminates this concern. Other comments suggested that "method of operation" exemptions be introduced into the rules. These exemptions would have extended to the formation of joint ventures that would not market products or services outside the venture, (e.g., 1027, 1059, 1068); to joint ventures organized to perform a single contract or organized for a limited time period (e.g., 1059, 1092, 1112, 1113); or to joint ventures with public policy goals (1050).

These limiting conditions, however, do not necessarily render the formation of such ventures unlikely to violate the antitrust laws. Ventures that will not market manufactured products (or real estate or services) other than to their parents may in fact raise numerous anticompetitive problems, including market foreclosure and increased entry barriers. Such effects are even more likely if the venturers maintain a customer-supplier relationship prior to formation of the venture.

A great many problems surround the suggested "single purpose, limited duration" exemption. First, the distinction between a single project or single contract and some larger undertaking is necessarily artificial. A single contract, for example, could call for undertaking a project continuing over many years, or the production of a large number of units could be designated a single project. The "limited duration" criterion also is inherently vague and would introduce an unacceptable level of subjectivity into the rule. It is not always clear whether a new entity will be permanent or temporary, and what constitutes a limited period of time. Any period of time chosen to delineate such a "limited duration" would necessarily be arbitrary. Moreover, the duration of a new entity might be limited at formation but extended thereafter: no reporting requirement would have attached at formation under this proposal, and none would have attached at extension. This would have created a large and improper loophole in the reporting scheme.

Finally, public policy motivation, evidenced perhaps by absence of profit as opposed to tax-exempt status), is not a satisfactory safeguard. The mere absence of profit, particularly in a situation in which a joint venture or other new corporation has a vertical relationship with its parents, simply may mean that the parents have elected to take their profits at a different level of operations. Moreover, these kinds of exemptions are unavailable in connection with acquisitions involving already existing corporations. Accordingly, the proposals in these comments were rejected.

SECTION 802.41 JOINT VENTURE OR OTHER CORPORATIONS AT TIME OF FORMATION

Section 802.41 exempts newly formed joint venture or other corporations from filing notification in connection with their own formation. The exemption reaches only the transactions involving formation and does not extend to subsequent acquisitions by or from the newly formed corporation.

BACKGROUND INFORMATION TO § 802.41

Since it is the combination of the persons that form the new entity (and not the new entity standing alone) that presents antitrust issues when a new corporation is formed, the Notification and Report Forms submitted by the parents of the new corporation will provide the information necessary to evaluate the competitive impact of the combination. Any data relevant to the intended activities of the new entity would appear on the parents' forms. The new entity would have no history and its report would provide no additional detail with respect to the consequences of its own formation.

Original § 801.55(b) and revised § 802.41 also provided that a newly formed joint venture (the acquired person in the formation transaction) need not file notification with respect to its formation. Final § 802.41 retains this exemption. The examples to the rule were revised and enlarged in the final version to make clear the distinction between formation transactions and subsequent transactions, as to which the new entity (or the person within which it is included) would be required to file notification. Whenever a joint venture or other corporation acquires assets or voting securities of another person or sells its own assets or stock—other than in connection with its formation—and the criteria of section 7A(a) are satisfied, it must comply with the reporting and waiting requirements of the act like any other acquiring or acquired person.

No comments were received on this rule.

SECTION 802.50 ACQUISITIONS OF FOREIGN ASSETS OR OF VOTING SECURITIES OF A FOREIGN ISSUER BY UNITED STATES PERSONS

This rule exempts certain acquisitions by United States persons of assets located outside the United States or of voting securities of a foreign issuer. It does not apply to acquisitions by foreign persons, which are treated in § 802.51. The terms "United States person," "United States issuer," "foreign person" and "foreign issuer" are defined in § 801.l(e).

Paragraph (a) of the rule governs asset acquisitions. It exempts the acquisition of assets located outside the United States to which no sales in or into the United States are attributable. It also exempts the acquisition of assets located outside the United States to which less than $10 million of sales in or into the United States were attributable during the acquired person's most recent fiscal year. The exemption of a foreign assets acquisition by a United States person thus turns entirely upon the United States sales, if any, attributable to the assets to be held. It is of no consequence in this context whether the acquired person is a United States person or a foreign person.

The term "as a result of" the acquisition is used in the sense described in § 801.13(b). In order to determine whether this exemption is applicable, therefore, the acquiring person must aggregate all assets of the acquired person it is acquiring in the present transaction and has acquired in the previous 180 calendar days. If all such assets together had $10 million or more in sales attributable to them in the most recent fiscal year, the exemption is not applicable, as indicated in example No. 2 to the paragraph.

Paragraph (b) of the rule concerns voting securities. It exempts acquisitions by United States persons of the voting securities of a foreign issuer unless that issuer (together with all entities it controls) holds assets located in the United States (other than investment assets and securities of another person) having an aggregate book value of $10 million or more, or made aggregate sales in or into the United States of $10 million or more in its most recent fiscal year. The term "investment assets" is defined in § 801.1(i)(2). The value of these types of United States assets held by a foreign issuer does not count toward the $10 million threshold above which the exemption does not apply.

BACKGROUND INFORMATION TO § 802.50

This rule, like its companion rule, § 802.51, is intended to exempt several classes of transactions having only a limited nexus with United States commerce. The commerce criterion of section 7A(a)(1) requires only that either the acquiring or the acquired person be engaged in commerce or in any activity affecting commerce. The act thus permits coverage of a great many transactions that have some or even predominant foreign aspects. This rule, like the other "foreign commerce" exemptions, is designed to exempt some of these acquisitions**?**those with only a minimal impact on United States commerce. The Commission also recognizes that considerations of comity may be significant in the area of international business transactions. With respect to some acquisitions whose principal impact is foreign, it is appropriate for the agency in its discretion to exercise a self-imposed limitation and decline to subject them to the act's requirements. The exemption from the notification and waiting period obligations does not, of course, imply an exemption from the substantive antitrust laws.

The rule fixes the threshold of impact on United States commerce at $10 million largely because section 7A(a)(2) of the act uses that figure as the minimum size for a person in a reportable transaction. In each instance when foreign assets or voting securities are being acquired by a United States person, the nexus with United States commerce will be as great as that statutory threshold.

The final rule is largely similar to revised § 802.50 but incorporates some changes. The final rules partially restructure the foreign commerce exemptions so that all acquisitions by foreign persons are treated in § 802.51, which in the revised rules had treated only acquisitions by foreign persons from other foreign persons. Final § 802.50 applies only to acquisitions by United States persons. The final rules thus differentiate between acquisitions by foreign persons and acquisitions by United States persons; the former must have a more substantial link to United States commerce before they are reportable. For further information, see the Statement of Basis and Purpose to § 802.51.

The final rule's reference to "investment assets" as one of the types of assets that may be excluded in counting a foreign issuer's holdings in the United States pursuant to subparagraph (b)(1) represents a clarification and limitation of the exclusion in the revised rule. That rule would have excluded "assets held solely for investment purposes" from this computation. The purpose of the exception remains unchanged: To exclude assets that do not reflect a substantial business presence in the United States and generally have little competitive significance. However, the Commission does not believe that the term "assets held solely for investment purposes" has any well-understood or administrable meaning. Therefore, as implied in the FEDERAL REGISTER notice accompanying the revised rules, the reference to "assets held solely for investment purposes" has been deleted. See 42 FR at 39047 (Aug. 1, 1977). Instead, final § 802.50(b)(l) instructs the acquiring person to exclude "investment assets," which are defined in § 80l.l(i)(2), as well as voting or nonvoting securities of another person. In addition, final § 802.50 refers to "United States" persons and "foreign" issuers. The revised rule had referred to issuers "domiciled outside the United States." As a result of the definitions inserted in final section 801.1(e) and the deletion of the concept of domicile, this reference was altered. See the Statement of Basis and Purpose to section 801.1(e).

The original rules did not distinguish between acquisitions by foreign persons and those by United States persons. Original section 802.35, the only foreign commerce exemption in those rules, would have exempted acquisitions by any person of voting securities of an issuer not substantially involved in United States commerce or of assets to which no substantial involvement in United States commerce was attributable. The revised rules refined this exemption to provide separate exemptions, with differing criteria, depending on the identity of the acquiring and acquired persons. This is essentially the pattern followed in the final rule.

Several comments (e.g., 1059, 1063) expressed disagreement with the differing treatment accorded to foreign persons and United States persons. They argued that the special provisions for foreign persons might prejudice American firms abroad, since a foreign firm might prefer to deal with another foreign firm in order to avoid a reporting requirement. This differing treatment, according to comment 1063, is also inconsistent with the asserted principle that the antitrust laws should be enforced without regard to nationality. These comments suggested that a uniform but higher threshold of impact on United States commerce should be applicable to all foreign transactions. Comment 1063, for example, suggested a $50 million or even a $100 million test instead of the $10 million test in revised section 802.50.

These comments were rejected because it is not clear that transactions below these higher thresholds are unlikely to violate the antitrust laws, and because the considerations of comity that also underlie this exemption were lessened when a transaction has at least a $10 million nexus with United States commerce. The differing treatment for acquisitions by United States persons is also justified, since such acquisitions may be more likely to violate the antitrust laws.

Comment 1099 asserted that section 802.50(a)(1) was superfluous, because assets to which no United States sales were attributable would also qualify as assets to which less than $10 million of United States sales were attributable, and thus would be exempt under § 802.50(a)(2). However, the structure of final § 801.15 clarifies the difference in treatment. Under § 801.15(a)(2), assets to which no United States sales are attributable may be disregarded in determining whether subsequent acquisitions of assets from the same acquired person meet the $15 million test of section 7A(a)(3)(B): Such assets are not considered held by the acquiring person for that purpose. On the other hand, since § 802.50(a)(2) is listed in § 801.15(b) rather than § 801.15(a)(2), assets acquired in transactions exempt under § 802.50(a)(2) *are held* for purposes of the $15 million test of section 7A(a)(3)(B), once the $10 million United States sales threshold is met. Thus, assets to which some United States sales were attributable must be aggregated with any additional assets that the acquiring person within 180 days agrees to acquire, for purposes of the $15 million test of section 7A(a)(3)(B), and hence for determining whether the act applies. See § 801.13(b)(2) and § 801.15, and the Statement of Basis and Purpose to those rules.

SECTION 802.51 ACQUISITIONS BY FOREIGN PERSONS

This rule exempts certain acquisitions by foreign persons, a term defined in § 801.1(e). Paragraphs (a) through (d) of the rule describe the circumstances in which the exemption applies.

Paragraphs (a) and (c) relate to asset acquisitions. Paragraph (a) exempts all acquisitions by foreign persons of assets located outside the United States. In contrast with the exemption in

§ 802.50(a), which treats acquisitions of foreign assets by United States persons, this exemption does not depend upon the United States sales, if any, attributable to the foreign assets. Paragraph (c) exempts assets. Paragraph (c) exempts acquisitions by foreign persons of less than $10 million of assets (excluding investment assets) in the United States. The term "investment assets" is defined in § 801.(i)(2).

Paragraph (b) relates to voting securities acquisitions. It exempts acquisitions by foreign persons of voting securities of foreign issuers, except in two circumstances. If the acquisition of the foreign issuer will give the acquiring foreign person control either of an issuer that holds assets (other than investment assets) located in the United States with an aggregate book value of $10 million or more, or of a United States issuer with annual net sales or total assets of $10 million or more, the acquisition is not exempt under paragraph (b). Example 2 illustrates this paragraph.

Paragraph (d) applies to both voting securities and asset acquisitions. It exempts all transactions in which both the acquiring and the acquired persons are foreign persons, unless either their aggregate annual sales in or into the United States, or their aggregate total assets located in the United States, total $110 million or more. Note that paragraphs (a) through (d) are to be read in the alternative, and that an acquisition is exempt if any one (or more) of these paragraphs is satisfied. For example, if a foreign person acquires $20 million of assets located in the United States from another foreign person, the transaction is not exempt under paragraph (c), but it may still be exempt under paragraph (d), depending on the United States sales and assets of the acquiring and acquired persons.

BACKGROUND INFORMATION TO § 802.51

Like § 802.50, this rule exempts certain acquisitions by foreign persons because of their minimal relationship to United States commerce. See the Statement of Basis and Purpose to 802.50.

As explained in the Statement of Basis and Purpose to § 802.50, this treatment represents a change from the revised rules, which distinguished from all other foreign-commerce transactions those acquisitions involving *only* foreign persons. All other transactions with foreign aspects could be exempted only under the more limited exemption of revised § 802.50.

This change was made in the final rules because the Commission believes that an anticompetitive impact upon United States commerce is less likely to occur when a foreign person is acquiring foreign assets or voting securities, regardless of who the acquired person is. Since the anticompetitive impact, if any, results from the transfer of the stock or assets to the acquiring person, the identity of the acquiring person is of greater antitrust significance than the identity of the acquired person. In addition, considerations of comity are more significant whenever a foreign person is the acquiring person. Therefore, the final rules distinguish acquisitions by foreign persons, which benefit from the broader exemption of this rule, from acquisitions by United States persons, which may be exempt under § 802.50.

Paragraph (a) of the rule states that the acquisition by a foreign person of foreign assets is never reportable. Acquisitions by foreign persons of foreign assets generally have a less substantial connection with United States commerce, regardless of any United States sales attributable to the assets, and are therefore less likely to violate the antitrust laws. Paragraph (c) provides that the acquisition by a foreign person of less than $10 million of United States assets is not reportable.

This threshold was adopted in part to parallel the size-of-person tests in section 7A(a)(2) and the exemption in § 802.20(a).

Paragraph (b) sets out criteria for acquisitions of voting securities of foreign issuers roughly parallel to the exemption of voting securities acquisitions below a minimum dollar amount in § 802.20.

Paragraph (d) is substantially identical to revised § 802.51(a)(1) and thus retains an aggregate sales or assets test for acquisitions involving only foreign persons. The $110 million threshold was adopted to approximate the criteria of section 7A(a)(2), which provide various combinations of total assets or annual net sales requirements, each totaling $110 million. It appears appropriate and consistent with congressional intent not to exempt a transaction involving two foreign persons with a United States presence similar in size to the general criteria of the act for all persons. Note that unlike the section 7A(a)(2) test, the test of § 802.51(d) can be met, e.g., by a foreign acquiring person with United States sales of $60 million and a foreign acquired person with such sales of $50 million.

Like final § 802.50, final § 802.51 uses the term "investment assets" for the first time and deletes the concept of "domicile" found in the revised rules. For the reasons for these changes, see the Statement of Basis and Purpose to § 802.50.

Comment 1035 criticized the revised rule for allegedly placing an inappropriate barrier in the path of a foreign company contemplating a U.S. acquisition. The final rules reject this comment and retain a reporting and waiting period requirement in most cases when a foreign person acquires the stock of a U.S. issuer or assets located in the United States. The transfer of such voting securities or assets, even to a foreign person, is considered to be of potential competitive significance. When the transaction is otherwise reportable, there is no doubt of U.S. jurisdiction and the potential antitrust concerns outweigh any considerations of comity.

Comment 1099 argued that a greater nexus to U.S. commerce should be required before acquisitions involving only foreign persons are subject to the act. The comment cited considerations of comity and the greater interest a foreign country may have in the transaction, and suggested that the reporting and waiting period obligations might be reduced in situations when only, foreign persons are involved. Comment 1100 also cited comity as a reason not to impose a waiting period on "non-U.S. transactions" or on companies domiciled in countries with a greater interest in the transaction. Although final § 802.51 provides several exemptions for acquisitions involving only foreign persons, the Commission did not choose to broaden these exemptions further. The reason is that the Commission believes acquisitions not exempt under § 802.51 potentially have important anticompetitive impact upon U.S. commerce. The considerations of comity cited in the comments have been taken into account in framing the exemption. Therefore, the suggestion in comment 1099 that the reporting and waiting period obligations be reduced for reportable transactions involving foreign persons was rejected.

Comment 1100 noted that since the $110 million threshold of § 802.51(d) involves aggregating the U.S. sales or assets of both persons in the transaction, an acquisition by a foreign person with no U.S. contacts of a foreign person with $110 million in U.S. sales may be reportable. The comment suggested that a minimum of $10 million in U.S. sales or assets by both foreign persons be required, since it viewed as extremely unlikely the chances that a violation of U.S. law could result if the acquiring person had no U.S. contacts. This suggestion was rejected. The Commission does not view it as unlikely that an antitrust violation can arise when a foreign person with no sales or assets in the United States makes an acquisition of a person with substantial U.S. assets or sales.

Similarly, comment 1116 argued that all transactions involving only foreign persons are unlikely to violate the antitrust laws and urged their exemption. This suggestion was rejected. In the limited circumstances in which such transactions are reportable, there will always be a significant impact on U.S. commerce in terms of assets, sales, or both.

For a discussion of the comments on the differing treatment accorded to foreign firms and U.S. firms, see the Statement of Basis and Purposes to § 802.50.

§ 802.52 ACQUISITIONS BY OR FROM FOREIGN GOVERNMENTAL CORPORATIONS

This rule exempts certain acquisitions of assets or voting securities in which a foreign governmental corporation is a participant. The acquisitions exempted by the rule are those of assets located within a foreign state, or of voting securities of an issuer organized under the laws of a foreign state, if the ultimate parent entity of either the acquiring person or the acquired person is controlled by the foreign state, the government of that state or an agency thereof.

Since foreign states, foreign governments, and agencies thereof (other than corporations engaged in commerce) are not "entities" as defined in § 801.1(a)(2), they therefore cannot be "persons," nor can they be included within "persons," under § 801.1(a)(1). The act does not apply to acquisitions by or from foreign governments because the act applies only to acquisitions of assets or voting securities by or from persons. See section 7A(a). The act does apply to acquisitions of voting securities of noncontrolled (third-party) issuers from foreign governments, since the foreign state then would not be the acquired person; but for the same reason, in such cases this rule would not apply. This rule thus concerns only acquisitions by corporations engaged in commerce that are ultimately controlled by foreign governments, or acquisitions of the voting securities or assets of such corporations.

An example illustrates the rule.

BACKGROUND INFORMATION TO § 802.52

The transactions exempted by this rule are considered to be so directly involved with the acts of foreign states within their own borders as to merit exemption. Since the interests of a sovereign are generally paramount within its own borders, to require a State-controlled corporation to file notification with respect to these transactions might violate principles of international comity. In addition, acquisitions or dispositions by corporations controlled by a foreign government of assets located within the foreign country are in many cases considered acts of State and may be substantively immune from U.S. antitrust law.

This exemption appeared in substantially similar form in revised § 802.52; it did not appear in the original rules. However, the final rule changes three provisions of the revised rule. First, the revised rule would have required the acquiring or acquired person to be a corporation more than half of whose voting securities are held by a foreign state before the exemption applied; the final rule requires the ultimate parent entity of either person to be controlled by a foreign state. The change makes clear that the exemption is equally applicable if the involvement of the governmental corporation is effected through subsidiaries. The change also substitutes control for the "more than half" formulation and refers to persons rather than corporations (as suggested by comment 1072), for consistency with the rest of the rules. Second, the revised rule would have exempted only acquisitions "solely" of assets located within the foreign state or voting securities of a foreign issuer. The final rule deletes the word "solely," so that the exemption applies even if assets or voting securities located outside the foreign state in question, e.g., in the United States, are also being acquired in a transaction. In such a situation only the nonexempt portion of the transaction is reportable. See § 803.2(c)(2). Last, the final rule substitutes the concept of "organized under the laws" of a foreign state for the undefined and potentially ambiguous term "domicile" used in the revised rule. See the Statement of Basis and Purpose to § 801.1(e).

Comments 1063 and 1072 recommended that § 802.52(b) should exempt acquisitions of voting securities when the issuer's principal place of business, rather than its place of incorporation, is the foreign state involved. The suggestion was rejected because comity considerations, as well as the potential act of State defense, are strongest in the case of an issuer incorporated in the relevant foreign state.

Comment 1063 argued that if foreign governmental corporations must file notification with the agencies for nonexempt acquisitions, American firms may become handicapped in competing for business transactions involving foreign governmental corporations. Citing comity and the desirability of American firms participating in such transactions, the comment urged that foreign governmental corporations be exempted from filing notification even when the acquisition was not exempt. This recommendation was rejected. Sections 802.50 and 802.51 exempt acquisitions in which the United States lacks a substantial interest in or nexus to the acquisition. This rule exempts acquisitions that might give rise to particularly sensitive issues of comity. When neither rationale applies and the acquisition is not exempt, the interest of the United States in comprehensive evaluation of the acquisition will generally outweigh the foreign state's interest in avoiding the burden of filing notification. Moreover, adopting the suggestion would undercut the distinction made between governments, whether foreign or domestic, which are not subject to the act, and governmental corporations, which in general are subject to the act. See § 801.1(a)(2) and its Statement of Basis and Purpose. Accordingly, all persons, including foreign governmental corporations, must file notification with respect to nonexempt acquisitions.

In the FEDERAL REGISTER notice accompanying the revised rules, the Commission stated that it would consider excluding from the exemption indirect acquisitions of assets located in the United States and indirect acquisitions of voting securities of United States issuers. 42 FR at 39045 (August 1, 1977). The Department of State in its comment (1072) opposed narrowing the exemption, citing the considerations supporting the exemption, and the likelihood that the agencies would learn of any acquisition of interest to them from public sources. In view of this comment, the final rule did not adopt the change proposed in the FEDERAL REGISTER.

SECTION 802.53 CERTAIN FOREIGN BANKING TRANSACTIONS

This rule exempts acquisitions that require the consent or approval of the Board of Governors of the Federal Reserve System ("the Board") under section 25 or section 25(a) of the Federal Reserve

Act from the requirements of the act on the same basis as those transactions listed in section 7A(c)(8), which require approval of the Board under section 4 of the Bank Holding Company Act.

The rule applies only to acquisitions by national banks of securities of entities engaged in foreign or international banking, which according to the applicable statutes and Board regulations transact, at most, only minimal business in the United States. This rule, like section 7A(c)(8), requires that copies of all information and documentary material filed with the Board be contemporaneously filed with the antitrust agencies at least 30 days prior to consummation of the acquisition. One of the provisions of § 802.6 is also made applicable to filings under this rule: Instead of filing with the antitrust agencies all documents filed with the Board, the reporting persons may provide an index describing all such material together with a certification that any such information not provided will be provided within 10 calendar days of a request to do so.

Under section 25 of the Federal Reserve Act, 12 U.S.C. 601-604, a national bank may, with the Board's approval, invest directly in the stock of a foreign bank not engaged in any activity in the United States (except activities that, in the judgment of the Board, are incidental to its international or foreign business). Under the same section, a national bank, with the Board's approval, may also make indirect investments in foreign banks by acquiring stock in a U.S. corporation principally engaged in international or foreign banking, either directly or through foreign subsidiaries. Such a corporation, to be eligible for investments by national banks, must enter into an agreement with the Board, under 12 U.S.C. 603, to restrict its operations or conduct its business in such manner or under such limitations as the Board may prescribe. This type of corporation is known as an "agreement" corporation.

A national bank may also, under section 25(a) of the Federal Reserve Act, 12 U.S.C. 611-631 (the "Edge Act"), invest in the stock of a United States or foreign corporation (known as an "Edge Act corporation") chartered with the Board's approval to engage in foreign or international banking or other foreign financial operations. An Edge Act corporation may, with the Board's consent, acquire and hold stock of foreign non-banking companies that do not transact any business in the United States other than activities incidental to their international or foreign business. 12 U.S.C. 615.

All of these types of investments require the consent or approval of the Board and are thus exempted by this rule. The Board, in granting or withholding this consent, is empowered by section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of the Clayton Act as it applies to stock acquisitions by banks, banking associations and trust companies. The Board's policy is to refer to the Assistant Attorney General all applications received pursuant to those provisions that appear to present antitrust issues.

BACKGROUND INFORMATION TO § 802.53

This rule had no counterpart in the original or the revised rules. Several comments (e.g., 90, 91; 1071) suggested that a new rule be inserted to exempt these acquisitions. The major reason they are exempted in the final rules is to achieve similarity of treatment with acquisitions subject to the approval of the Board under section 4(c)(13) of the Bank Holding Company Act of 1956, which are exempted under section 7A(c)(8). The standards applicable to those transactions—acquisitions by bank holding companies of shares of companies that do not do business in the United States except as an incident to their foreign business—are substantially the same as those applicable to agreement and Edge Act corporations. In each case, similar restrictions limit the amount of U.S. business that may be conducted by a company in which a national bank has an interest.

Accordingly, in each case the requirement of prior approval by the Board, along with the Board's working relationship with the Assistant Attorney General, should, in conjunction with the requirement that the antitrust agencies receive copies of the material filed with the Board (or indexes of such documents) 30 days in advance of consummation, suffice to identify any potential competitive problems. The final rules thus take the position that it would be inconsistent to require that investments made pursuant to sections 25 or 25(a) of the Federal Reserve Act fully comply with the notification and waiting period requirements, while similar acquisitions made pursuant to section 4(c)(13) of the Bank Holding Company Act have a qualified exemption.

Some of the transactions exempted by this rule may also be exempt from the act by virtue of § 802.50, which, inter alia, exempts certain acquisitions of voting securities of foreign issuers by U.S. persons. But when Edge Act and agreement corporations are U.S. persons, acquisitions of their stock by a national bank will never be exempted by § 802.50.

Several comments (e.g., 90, 91; 1071) recommended that transactions requiring Board approval under either the Bank Holding Company Act or the Federal Reserve Act be completely exempted from all reporting, including the section 7A(c)(8) requirement of contemporaneous filing. They asserted that these types of transactions are not likely to violate the antitrust laws, since the only companies in which an interest may be acquired are those with only incidental activities in the United States. This approach was rejected. The Commission believes that such transactions may present antitrust concerns. The Federal Reserve Board's comment (91) itself noted that three applications for approval have in the past been referred to the Assistant Attorney General for review. The procedure provided in section 7A(c)(8) should be adequate to identify any other such transactions that may pose competitive questions.

SECTION 802.60 ACQUISITIONS BY SECURITIES UNDERWRITERS

This rule exempts acquisitions of voting securities if (1) the acquiring person is acting as a securities underwriter, (2) the acquisition is made in the ordinary course of the business of the acquiring person, and (3) the acquisition is made in the process of underwriting. Because securities underwriters that purchase shares from issuers for resale to securities dealers or the investing public become beneficial owners of those securities prior to resale, and because such temporary holdings may exceed the limitations of § 802.64(b)(5), many acquisitions made in the process of an underwriting are subject to the act and, but for this exemption, would be reportable.

For the exemption to apply, the acquiring person must be functioning as in underwriter with respect to the particular voting securities to be acquired.

BACKGROUND INFORMATION TO § 802.60

This exemption is appropriate because a securities underwriter purchasing shares under the circumstances stated in the rule typically does not retain those shares for any period of time or use those shares to influence the management of the issuer. As long as all three limiting conditions in the rule are satisfied at the time of acquisition, the acquisition is exempt, regardless of the length of time the shares may subsequently be retained by the underwriter. However, during the time that such shares remain in the hands of the underwriter, they are "held" by the underwriter for purposes of

§ 801.1(c). Thus if the underwriter acquires any additional shares not in the process of underwriting, it must aggregate the shares to be acquired with any shares that are still held as a result of an acquisition that was exempt under § 802.60, in order to determine whether the subsequent transaction is reportable.

Original § 802.10(a) exempted acquisitions by brokers or dealer in securities if the acquisition was made in the process of underwriting. Revised § 802.62 extended the exemption to any person (not just a broker or dealer) but added the requirements that (1) the person be acting as an underwriter and making the acquisition for its own account, and (2) the acquisition be made in the normal course of business, solely for investment purposes, and in the process of an underwriting. The final rule deletes the separate requirement that the acquisition be made by the underwriter for its own account, since acquisitions by underwriter in the process of underwriting normally satisfy that requirement. Moreover, if an acquisition were made for the account of another person, that person, rather than the underwriter, would hold the securities and would thus be subject to reporting obligations. See § 801.1(c).

Comment 1091 also suggested deleting the requirement that an acquisition by an underwriter be made solely for investment purposes. The comment pointed out that such purchases normally are not made "for investment," as that term is generally understood, but rather for resale. The Commission agreed with the comment's suggestion that if an underwriter is "acting as a securities underwriter" when purchasing voting securities "in the process of underwriting," the additional requirement that the acquisition be solely for the purpose of investment is unnecessary to insure that the underwriter's purchase will not likely be used to influence the management of the issuer. This limiting requirement was therefore deleted from the final rule.

SECTION 802.63 CERTAIN TRANSACTIONS BY CREDITORS AND INSURERS

This rule exempts from the requirements of the act certain types of acquisitions made by creditors and insurers in the ordinary course of business. The rule should be read in conjunction with section 7A(c)(11), which exempts "acquisitions solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan or reorganization or dissolution; or (B) assets in the ordinary course of its business," and section 7A(c)(1), which exempts "acquisitions of goods or realty transferred in the ordinary course of business."

Paragraph (a) of the rule exempts several types of acquisitions by creditors: Acquisitions of collateral or receivables, acquisitions in foreclosure or upon default, acquisitions in connection with the establishment of a lease financing and acquisitions in connection with a bona fide debt work-out. The rule provides that such acquisitions are exempt only "if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business." Any transaction made with the primary motivation of extending credit to the debtor, as opposed to a transaction structured as a financing transaction for purpose of evading a reporting requirement, may be considered "bona fide."

Paragraph (b) exempts acquisitions by insurers pursuant to a condition in insurance contract relating to fidelity, surety or casualty obligations. The rule thus exempts acquisitions commonly made in connection with an insurer's normal insurance business. It does not exempt purchases of voting securities or assets made by insurance companies as investors in securities markets or elsewhere. Those transactions may, however, be exempt under section 7A(c)(9) and § 802.9, or under § 802.64.

BACKGROUND INFORMATION TO § 802.63

This rule exempts certain routine transactions by creditors and insurers in the ordinary course of business. They are typically not undertaken with the intention of influencing the affairs of the acquired person or even necessarily with the intention of making an investment. The acquiring person may not desire to retain the acquired property, such as assets or stock acquired in default or foreclosure situations, and the acquired assets or stock may frequently be disposed of as speedily as possible. Many transactions covered by this rule occur by operation of law, such as acquisitions by insurance companies of insured property upon payment of a claim under a casualty-loss insurance contract. In general, these acquisitions take place in circumstances and for reasons different from those underlying corporate mergers, acquisitions, tender offers, and similar transactions.

These transactions occur with great frequency in the insurance, banking, and finance industries. To interpose the act's notification and waiting period requirements before such acquisitions would severely impede the normal and essential procedures of these industries without achieving any significant gain in antitrust enforcement.

The original rules did not contain any exemption for creditors and insurers. During the first comment period, however, the Commission specifically solicited comments on the proper interpretation of section 7A(c)(11). Statements were requested on the questions of "with what frequency, and under what circumstances, do banks, banking associations, trust companies, investment companies, and insurance companies acquire voting securities pursuant to a plan of reorganization or dissolution, or assets (as distinguished from securities) in the normal course of business," and "to what extent the reporting and waiting requirements of (the act) may impede normal business practices by such companies." 41 FR at 55490 (December 20, 1976). Revised § 802.63 was drafted in response to a large number of comments from the banking and insurance communities explaining the reasons for exempting various common types of transactions in their industries.

For example, with respect to creditors' transactions, comment 90 described several customary bank financing transactions that the comment considered not competitively significant. The comment observed that banks often engage in lease financings, conditional sales transactions, and other arrangements in which they receive a security interest in property of various types, including voting securities. Transfers of property in foreclosure situations, including transfers to banks from their customers, are also common banking transactions. In credit transactions, banks frequently purchase from customers large quantities of accounts receivable, which may well exceed $15 million in value or be more than 15 percent of the customer's assets. The comment argued that these and similar common bank financing transactions have no competitive significance since they do not transfer to banking institutions managerial control over significant competitive assets. Indeed, they may increase competition by assisting companies to raise needed capital. The comment suggested a broad exemption of all acquisitions of voting securities or assets "by or from a bank or banking association in the ordinary course of its business."

Comment 97 suggested that acquisitions by financial institutions of voting securities be exempt if they arise from an event stipulated in a loan contract, such as a default. The comment stated that such acquisitions may be involuntary and thus may not be accompanied by an intent to obtain control. Moreover, banks are generally prohibited by law from holding securities for their own interest and must dispose of any they own within a specified time. Comment 102 also urged the exemption of acquisitions of stock or assets upon foreclosure. The Federal Deposit Insurance Corporation in its comment (56) also noted that section 7A(c)(11) appears to exempt relatively temporary acquisitions by banks arising from the liquidation of a defaulted loan.

With respect to transactions by insurers, several comments (e.g., 73, 77, 83, 98, 110) recommended that various types of transactions made in the normal course of the business of insurance be exempted. Specifically, comment 77 urges that acquisitions of securities or assets by an insurer pursuant to its insurance claims or surety operations be exempt. The comment explained that after an insurance company issues a surety bond to guarantee the performance of services by a building contractor, it may acquire some or all of the contractor's assets if the latter defaults. Alternatively, an insurance company often gains title, by operation of law, to the assets of an insured or a third party after it has paid a claim relating to those assets -- for example, when a large quantity of stock certificates are lost by an insured brokerage firm and the insurance company pays the loss. If any of the certificates are later found, they become the insurer's property. The comment also noted that insurance companies, like banks and finance companies, frequently acquire the stock or assets of corporations pursuant to bankruptcy reorganizations, foreclosures, and similar proceedings relating to loan defaults, and urged the exemption of such acquisitions. These comments, like the comments relating to creditors' transactions, all noted that in the acquisitions for which an exemption was proposed, the acquiring person has no intention of permanently acquiring any business assets.

Revised § 802.63 thus exempted acquisitions by creditors in bona fide credit transactions entered into in the ordinary course of the creditor's business, of collateral, in foreclosure, or upon default. It also exempted acquisitions by an insurer in the ordinary course of business, pursuant to a suretyship contract, or in the exercise of a right of subrogation.

The final rule represents an expansion of the exemption granted in the revised rule. Several comments on the revised rule suggested that it would not have exempted certain types of credit transactions that generally raise no antitrust concern. First, since the terms "creditor" and "credit transaction" were not defined, several comments (e.g., 1050, 1059, 1062) suggested that it was not clear whether transactions such as lease financings, conditional sales contracts, factoring operations, and other hybrid credit arrangements, which might be interpreted as assets acquisitions, were exempt. In a common type of lease financing, several equity investors contribute part of the cost of the leased equipment to a trustee (the owner trustee). The owner trustee, usually a commercial bank, then borrows the remaining funds from other investors (usually other institutional investors) and purchases the equipment, which is then leased to the actual user. Often, a second trust is established that takes a security interest in the leased property to protect the rights of the equity investors. The comment argued that none of these various "acquisitions" should be subject to the act. Any uncertainty on this point was removed in the final rule, which now specifically exempts transactions in connection with a bona fide lease financing.

Comment 1073 also suggested that the revised rule, which was limited to acquisitions of collateral in foreclosure or upon default, failed to exempt certain functionally similar transactions in which no formal foreclosure or default takes place. The term "collateral," the comment stated, may be limited to the acquisition of a security interest in tangible rather than intangible property, and the use of the words “in a bona fide credit transaction” might be interpreted as not including acquisitions by a creditor made at some time other than the commencement of a credit transaction or not specifically identified with a particular credit transaction. For example, in a bona fide debt work-out, a transaction whereby all or part of a debtor’s obligations to one or more creditors are reorganized, the debtor’s assets or voting securities, which may not technically be termed collateral, may be conveyed to a creditor. The comment argued that the economic and business realities of such transactions are substantially identical to the foreclosure of a pre-existing security interest and thus should be treated similarly. The final rule adopts this suggestion and exempts acquisitions of receivables in credit transactions and acquisitions in connection with bona fide debt work-outs.

Several comments (e.g., 1031, 1103) also suggested that the exemption in the revised rules for acquisitions by insurers was unclear. These comments pointed out that the revised rule may not have exempted certain acquisitions by insurers arising out of requirements in insurance contracts that technically were considered neither suretyship contracts nor acquisitions pursuant to rights of subrogation. Since the revised rule sought to exempt all acquisitions by insurers in the ordinary course of business occurring pursuant to conditions in contracts of insurance, the final rule exempts acquisitions arising from conditions in fidelity, surety, and casualty contracts.

Several comments (e.g., 1038, 1070, 1073) also maintained that the revised rule did not adequately solve a number of creditor’s-rights problems arising from public auction or bankruptcy sales. They stated that application of the statute to such transactions might chill bidding by large companies and hinder such sales generally, since speed is often a critical factor in protecting creditors’ interests. They therefore suggested that sales under the supervision of a bankruptcy court be exempt, and, more generally, that sales by creditors and insurers of property obtained pursuant to foreclosure or default be exempt so that creditors can obtain maximum value for foreclosed collateral. These recommendations were rejected. Purchases at bankruptcy sales may pose antitrust concerns, as may subsequent dispositions of property acquired pursuant to a credit relationship. A bankruptcy court has no responsibility to consider antitrust issues relating to dispositions of the debtor’s property. Any timing problems resulting from the necessity to observe the waiting period may be mitigated by requests for early termination of the waiting period under sections 7A(b)(2) and 803.11.

The final rule specifically exempts acquisitions of receivables in connection with a bona fide credit transaction. Thus an assignment of accounts receivable, with or without recourse, is exempt. Such transactions are crucial to the operation of consumer sales and credit institutions and, although they may occasionally meet the criteria of section 7A(a) of the act, they do not generally have antitrust implications. But for this rule, such assignments of receivables would not be exempt; although receivables are typically transferred in the ordinary course of business, they are neither goods nor realty. Cf. section 7A(c)(1).

Furthermore, there is an explicit reference in the legislative history of the act to the fact that these acquisitions ought to be exempt. Explaining the differences between the final bill and the original House and Senate versions, Senator Philip Hart stated on the floor of the Senate:

> Section 7A(c)(2) exempts acquisitions of bonds, mortgages, deeds of trusts, or other obligations which are not voting securities and section 7A(c)(l) exempts acquisitions or goods or

> realty transferred in the ordinary course of business. It is the intention of the managers that these provisions exempt consumer receivables and loans or other obligations, which are not voting securities, which are traditional financing arrangements and which normally are sold to banks or other financing agencies and acquired in the normal course of business.
>
> 122 Cong. Rec. S15417 (daily ed., Sept. 8, 1976).

SECTION 802.64 ACQUISITIONS OF VOTING SECURITIES BY CERTAIN INSTITUTIONAL INVESTORS

This rule provides a higher initial reporting threshold than that contained in section 7A(a)(3) of the act for certain voting securities purchases made by institutional investors. The rule does not apply to acquisitions of assets. Paragraph (a) of the rule lists the types of entities, denominated institutional investors, which may be entitled to the rule's special treatment. Paragraph (b) exempts acquisitions of voting securities by institutional investors whenever the conditions set forth in subparagraphs (b)(1) through (b)(5) are satisfied. Paragraph (c) sets forth two exceptions to the exemption—situations when the exemption does not apply even though paragraph (b)'s conditions are met.

Paragraph (a) of the rule contains an exclusive list of fourteen types of entities that can qualify for the rule's special treatment. Subject to the exceptions contained in paragraph (c), paragraph (b) exempts acquisitions of voting securities made by institutional investors as a result of which the acquiring person's holdings either would not exceed 15 percent, or would not exceed $25 million, of the issuer's voting securities, so long as four other conditions are met. First, the acquisition must be made by an entity that is one of the types of institutional investors listed in paragraph (a) of the rule. Second, the acquisition must be made in the ordinary course of the institutional investor's business. Third, the acquisition must be made "solely for the purpose of investment" as that term is defined in § 801.1(i)(1). Finally, as a result of the acquisition the acquiring person must not control the issuer.

If each of these conditions is met, the rule effectively eliminates the initial statutory reporting threshold of section 7A(a)(3) and § 801.1(h)(1). The rule allows an institutional investor to acquire voting securities without being subject to the requirements of the Act until its holdings exceed both 15 percent and $25 million. The acquisition that would first result in a holding exceeding both 15 percent and $25 million in value is reportable, and the waiting period must be observed. Once this initial reporting threshold is crossed, further acquisitions by institutional investors are treated exactly like those of other acquiring persons. Note that an institutional investor will never have to make a subsequent report upon reaching the 15 percent threshold of § 801.1(h)(2), since that threshold will be surpassed by the exemption provided in this rule. Thus, only the 25 percent threshold of § 801.1(h)(3) and the 50 percent threshold of § 801.1(h)(4) will apply.

In addition, since § 802.64(b)(5) refers to the holdings of the acquiring person, rather than the acquiring institutional investor entity, the rule does not permit each institutional investor within the same person to hold 15 percent and $25 million worth of an issuer's voting securities before reporting. That limitation thus applies to the aggregate holdings of all institutional investor entities included within the same person.

Paragraph (c) contains two limitations to the exemption granted by paragraph (b). These exceptions apply even though all of the conditions in paragraph (b) are satisfied. If either of these limiting conditions exists, the institutional investor's acquisitions are not exempt under paragraph (b), and the normal reporting thresholds of section 7A(a)(3) and § 801.1(h) apply.

The first exception, § 802.64(c)(1), provides that when the voting securities of an institutional investor are being acquired, if the acquiring person includes an institutional investor entity of the same type as the issuer or an entity controlled by the issuer, the exemption does not apply. For this purpose, each of the numbered subparagraphs in paragraph (a) of the rule is a "type." The second limitation, § 802.64(c)(2), withdraws the exemption granted in paragraph (b) whenever any voting securities of the issuer whose voting securities are to be acquired are already held by an entity included within the acquiring person that is not also an institutional investor.

BACKGROUND INFORMATION TO § 802.64

By providing a higher initial reporting threshold for voting securities purchases by institutional investors, this rule was designed to minimize the act's impact upon these entities' normal operations. The anticompetitive potential of the transactions exempted by the rule is low, and acquisitions by institutional investors that may have competitive significance should be reached by the notification threshold of this rule or by one of the exceptions of paragraph (c).

Paragraph (a) lists the types of entity entitled to the exemption. Acquisitions by any of the types of entities listed in paragraph (a) of the rule are likely to have a relatively insubstantial effect on competition, assuming that the conditions described in paragraph (b) exist and that neither of the exceptions in paragraph (c) apply. Some of these investors, such as nonprofit entities, are constrained by law or by their charters from participating in the management of most business corporations. Pension trusts, insurance companies and others are limited by their fiduciary duty to the ultimate beneficiaries of their investment. Entities such as broker-dealers and investment companies frequently engage in acquisitions that may meet the criteria of the act, but they generally have no interest in affecting the management of the companies whose stock they buy. The rule thus attempts to reduce the disruption of the securities markets that could result from requiring them to report and observe a waiting period before such acquisitions.

The conditions in paragraph (b) are intended to assure that the acquisitions exempted are in fact unlikely to violate the antitrust laws. Subparagraphs (b)(1) and (b)(2) simply state the basic criterion that the acquisition of voting securities must be made in the ordinary course of business by an institutional investor, as defined in paragraph (a). Subparagraph (b)(3), requiring that the purchase be made "solely for the purpose of investment," as defined in § 801.1(i), excludes from the exemption any acquisitions made by institutional investors with the intent of influencing management. The reasoning behind this exemption does not apply to such investments, and therefore they are treated like ordinary acquisitions. Similarly, the exclusion of control acquisitions in subparagraph (b)(4) is necessary, since if an institutional investor gains control, it will invariably participate in the management of the issuer. Subparagraph (b)(5), which states the special size-of-transaction test for such acquisitions, is designed to permit the majority of them to be exempt, while retaining the act's coverage for the very largest ones, which may, because of their size, have anticompetitive consequences.

The limitations contained in paragraph (c) are designed to impose the act's usual reporting and waiting period requirements on acquisitions that seem to pose a greater potential for anticompetitive impact even though the criteria of paragraph (b) are satisfied. Acquisitions described by subparagraph (c)(1) may indicate increasing concentration in an area of commerce related to the business of the type of institutional investor acquired. And the limitation of subparagraph (c)(2), which withdraws the exemption whenever any voting securities of the issuer are held by an entity included within the acquiring person that is not also an institutional investor, is present because the existence of such holdings calls into question the investment intent of the acquiring person. In each case, the special treatment for institutional investors afforded by the rule is not extended.

The original rules did not address acquisitions by institutional investors. Instead, the FEDERAL REGISTER notice accompanying their publication contained a "Statement With Respect to Certain Financial Transactions and Institutions" that specifically solicited comments on the treatment to be accorded normal business transactions by institutional investors (41 FR at 55490 (Dec. 20, 1976)). The revised rule resulted from these comments.

The list in paragraph (a) of the 14 types of entities that can qualify for the rule's special treatment is generally similar to the list in the revised rule, with certain changes. Mutual funds were deleted as superfluous in light of the inclusion of registered investment companies in (a)(6). The general inclusion of trusts was replaced by a narrower reference to qualified employee pension or other benefit trusts in (a)(10), because there are many types of trusts that may hold or acquire voting securities for purposes other than investment, to which the exemption would not be appropriate.

Added to the list of qualifying institutional investors were the following: Savings banks, (a)(2); building and loan companies, (a)(3); regulated small business and minority small business investment companies, (a)(9); bank holding companies, (a)(11); subsidiaries of institutional investors that perform functions that the institutional investors would ordinarily perform themselves, (a)(12); and holding companies that essentially own only other institutional investors, (a)(13). These entities were added in response to numerous comments, because they have similar characteristics to the other types of entities entitled to the exemption.

Comment 1070 suggested that real estate investment trusts (REIT's) be added. Since the holdings of REIT's will typically be either real estate or stock in realty holding companies, which may be exempt under § 802.1(a) when purchased, institutional investor status is not necessary to exempt their acquisitions. Furthermore, to the extent that REIT's may make short-term investments in other types of voting securities, the exemption in section 7A(c)(9) may often apply.

Comment 1090 also suggested partnerships holding voting securities for investment, investment advisers, and insurance company separate accounts as candidates for institutional investor status. The specific inclusion of insurance company separate accounts is unnecessary because subparagraph (a)(5) defines insurance companies as institutional investors, and because under § 801.1(c)(7) insurance companies hold all voting securities in their separate accounts. Thus, insurance company special accounts are in effect covered by the exemption given the insurance company. Partnerships holding voting securities for investment and investment advisers were rejected because no adequate reasons for affording institutional investor status to such entities were advanced, and because the safeguards characterizing the entities listed in § 802.64(a) do not appear to be present. These two types of entities, of course, may avail themselves of the exemption afforded by section 7A(c)(9) when appropriate.

Comment 1100 proposed that foreign entities of the types listed in paragraph (a) should be expressly included as institutional investors for purposes of the rule. This suggestion was not adopted. In certain cases, according foreign entities this treatment would be inappropriate; for example, foreign banks are not covered by the Glass-Steagall Act, 12 U.S.C. 24, and are therefore not prohibited from investing in common stock for their own account. Although it is possible that certain types of foreign entities will qualify as institutional investors under this rule's provisions, the comment did not supply adequate justification for a general provision on this point.

The final version of paragraph (b) is unchanged in substance from revised § 802.64. The final version of subparagraph (c)(1), however, is somewhat less restrictive than that contained in the revised rule. The revised rule would have withdrawn the exemption whenever voting securities of any type of institutional investor were to be acquired by an institutional investor. This change was made so that the rule would be less disruptive of normal capital markets. The final rule modifies revised § 802.64(c)(2), which would have withheld the exemption if the acquiring institutional investor was controlled by an entity that was not an institutional investor. The Commission considered that the revised rule's limitation was potentially too restrictive of normal investment operations of institutional investors, which are commonly controlled by other types of entities. The Commission will, for the time being, rely upon the conditions set forth in paragraph (b) of the rule in order to prevent evasion of the act's normal reporting requirements by entities controlling institutional investors.

CHOICE OF ALTERNATIVE PROPOSED RULES

The revised rules contained two alternative reporting schemes for institutional investors, §§ 802.64 and 802.64a. Revised § 802.64 was essentially similar to the final rule. Section 802.64a would have required an annual report of acquisitions qualifying under the rule during the preceding year, but no waiting period. The FEDERAL REGISTER notice accompanying the rules invited comments as to which approach should be adopted. 42 FR at 39046 (August 1, 1977).

Neither exemption scheme is compelled by the statute. On the contrary, section 7A(c)(9) indicates an apparent congressional intent to subject institutional investors to the preacquisition reporting and waiting period requirements of the act. Thus, the Commission has adopted revised § 802.64 and has rejected the postacquisition reporting approach of revised § 802.64a. Similarly rejected were those comments (e.g., 1020, 1043, 1050, 1054, 1067, 1083, 1089, 1110, 1111) that either expressly or by implication proposed eliminating all reporting and waiting requirements when the conditions of subparagraphs (b) (l)-(4) were satisfied.

The adoption of the preacquisition reporting scheme with its higher initial reporting threshold is also based upon the Commission's belief that the section 7A(c)(9) exemption may not in fact be sufficient for the ordinary operations of institutional investors. The holdings of institutional investors in particular issuers may frequently exceed 10 percent and $15 million, thus making reportable numerous acquisitions that merit exemption because of the restrictions of paragraph (b). However, the Commission believes that on those presumably rare occasions when an institutional investor's holdings exceed both 15 percent and $25 million the potential for anticompetitive consequences is sufficiently great to warrant obtaining a preacquisition report and imposing a waiting period. Except in instances in which control of an issuer would change hands (when subparagraph (b)(4) would preclude the exemption), the adoption of § 802.64a would have deprived the agencies of a primary enforcement tool encouraged by the act -- the preliminary injunction. The fact that antitrust problems can arise well before holdings reach the 50-percent (control) level reinforced the selection of § 802.64 over § 802.64a.

The comments that expressed a preference between the two approaches contained in the revised rules were divided. Numerous reasons were given for selecting one option or the other. Nearly all the comments, regardless of which rule they preferred, however, were concerned with the reporting burden and interference with normal investment operations. The Commission believes that the changes between the revised and final rule versions of § 802.64, together with the significant amendment of the definition of "hold," see § 801.1(c), will greatly reduce the impact of the act upon institutional investors in both of these areas of concern.

SECTION 802.70 ACQUISITION SUBJECT TO ORDER

This rule exempts two common types of acquisitions from the requirements of the act. Paragraph (a) exempts acquisitions of assets and voting securities from parties subject to divestiture orders issued by the Commission or, at the instigation of the Commission or the Department of Justice, by a Federal court. Paragraph (b) exempts any acquisition in which the acquiring party is subject to an order of the Commission or a Federal court that requires Commission, Justice Department, or judicial approval of the acquisition, and for which approval has been obtained.

BACKGROUND INFORMATION TO § 802.70

Because the information normally obtained by the courts, the Commission, or the Department of Justice in these divestiture situations will be much the same as that required by the Notification and Report form, the Commission determined that the imposition of the act's requirements was unnecessary. These groups of acquisitions are by their nature already subject to careful antitrust scrutiny by the agencies.

Comment 1026 suggested that the rule also should exempt acquisitions expressly permitted by the terms of Commission or Federal court orders. The Commission is unaware of any order that, by its terms, permits the acquisition of specifically identified assets or voting securities, and no example was cited.

A number of comments (e.g., 1026, 1027, 1042, 1053, 1059, 1063, 1076, 1077, 1100) requested reinstatement of the business review/advisory opinion exemptions that appeared in § 802.05(c) and (d) of the original rules and were deleted from the revised rules. The deleted exemptions would have exempted acquisitions approved by the Commission under its advisory opinion procedure, 16 CFR 1.1, or by the Antitrust Division under its business review procedure, 28 CP 50.6. These exemptions have not been restored in the final rules. As the FEDERAL REGISTER notice accompanying publication of the revised rules explained:

> [S]ince the statute envisions that either the Commission or the Antitrust Division may investigate or seek to enjoin a projected acquisition, both agencies must receive completed Notification and Report Forms from the parties to the transaction. Even if one agency or the other were able to determine ahead of time that it would not investigate or challenge a particular transaction, the Commission feels that the other agency should be able to obtain sufficient information to permit its own informed judgment on the possible anticompetitive consequences of that transaction.

(42 FR at 39045 (Aug. 1, 1977).)

Furthermore, the Commission has never felt itself legally bound by business review letters issued by the Antitrust Division. Similarly, the Antitrust Division has not believed that its ability to challenge an acquisition was restricted by a Commission advisory opinion. Moreover, the exemptions would be philosophically at odds with section 7A(b)(2) of the act, in which Congress required the agreement of both agencies in order to grant early termination of a waiting period.

A statement of enforcement intent at the end of the waiting period was suggested in comment 1077 as an alternative to the business review/advisory opinion exemption. Such a proposal would transform the act from a premerger notification program to a premerger clearance system. The Commission does not plan to effect such a metamorphosis since it is clear from section 7A(i)(1) of the act that Congress permitted both the Commission and the Antitrust Division to be free to proceed against any acquisition even though no action was taken within the waiting period.

SECTION 802.71 ACQUISITIONS BY GIFT, SUCCESSION OR DEVISE, OR BY IRREVOCABLE TRUST

This rule exempts acquisitions resulting from gifts, intestate succession, testamentary dispositions, and transfers into irrevocable trusts by settlors. Acquisitions by trusts from persons other than settlors are not exempted by the rule. For such acquisitions the trust is the acquiring person, and the tests of section 7A(a) determine whether the act applies. See § 801.1(c)(3).

Note that transfers by a settlor into a revocable trust, or into any trust in which a settlor retains a reversionary interest, also are not exempted by the rule. However, such transfers are not reportable because the rules disregard the transfer. Under § 801.1(c)(4), the settlor continues to hold the assets or voting securities constituting the corpus of such trusts.

BACKGROUND INFORMATION TO § 802.71

The acquisitions exempted by the rule are typically involuntary and without consideration. The Commission believes that the likelihood of an antitrust violation resulting from such an acquisition is significantly less than from cases in which an acquiring person actively seeks to purchase assets or voting securities.

In response to comments 1071 and 1089, the rule exempts transfers into inter vivos trusts.

PART 803 OF THE RULES

SECTION 803.1 NOTIFICATION AND REPORT FORM

Paragraph (a) of this rule provides that the notification required by the act shall be the notification and report form, which is an appendix to Part 803 of the rules. All persons required by the act and the rules to file notification are directed to comply by completing and filing the notification and report form (or a photostatic or other equivalent reproduction of the form) in accordance with the instructions on the form and those contained in the rules. This portion of the rule also explains where copies of the form may be obtained, either in person or by mail. Paragraph (b) of the rule states that any person filing notification may, in addition to the submissions required by the rule, submit any other information or documentary material that it believes will be helpful to the enforcement agencies in assessing the impact of the acquisition upon competition. If the parties attempt to anticipate the analysis of the enforcement agencies or believe the information in the form provides and incomplete picture they may wish to augment their submissions in an effort to clarify or expand upon any required information or to demonstrate that the transaction would not violate the antitrust laws if consummated.

BACKGROUND INFORMATION TO § 803.1

Section 7A(d)(1) directs the Commission by rule to "require that the notification required (by the act) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisitions may, if consummated, violate the antitrust laws * * *." The Commission finds that complete responses to each of the items on the notification and report form, along with copies of the documentary materials required to be submitted with the form, are necessary and appropriate to enable the Commission and the Assistant Attorney General to discharge their responsibilities under the act.

Paragraph (a) of the final rule appears essentially as it did in original § 803.05(a) and revised § 803.l(a). Original § 802.50 contained a reference to a short form, which was to have been filed when acquiring persons made additional acquisitions of assets or voting securities of the same acquired person after filing a notification and report form. Since the short form reporting mechanism was eliminated from the revised and final rules, the reference to it was deleted. See the statement of basis and purpose to § 802.21.

Paragraph (b) was added in the final rules. Its purpose is to encourage persons filing notification to provide any other information or materials that may be helpful to the enforcement agencies in assessing the impact of a reportable transaction upon competition.

The revised rule contained two paragraphs (§ 803.1 (b) and (c)) that referred the Commission's existing reporting programs relating to certain acquisitions in the grocery and dairy industries. These programs require submission of special reports 60 days in advance of consummation of transactions to which they apply. The purpose of these paragraphs was to coordinate the timing requirements for persons required to file both under the act and rules and under either the grocery or the dairy acquisitions reporting program.

These provisions were eliminated from the final rule. The Commission has determined that it can accomplish the same purpose by altering the reporting obligations contained in its grocery and dairy acquisitions reporting programs. Because those programs were promulgated under the Federal Trade Commission Act, the anticipated changes do not appear in these rules but will appear in amended orders to be issued under the FTC Act.

When those orders are amended, persons required to file notification under the act which are to acquire voting securities or assets of a person engaged (in whole or in part) in wholesale or retail grocery distribution (SIC Groups 514 and 541, respectively) will, in addition to the notification required by § 803.1(a), simultaneously file FTC Forms 1859 A and B with Supplement, completed in accordance with the instructions contained on those forms and in the Commission's amended order. Persons required to file notification under the act which are to acquire voting securities or assets of a person engaged (in whole or in part) in the processing or distribution of Class I milk products (SIC product classes 20262 and 20264) will, in addition to the notification required by § 803.1(a), simultaneously file FTC Special Report on Acquisitions and Mergers by Corporations in the Fluid Milk Products Industry, completed in accordance with the instructions thereon and the Commission's amended order.

Because the requirement to file either the grocery or the dairy reporting forms does not stem from these rules, but from separate orders under the FTC Act, that requirement does not constitute a request for additional information within the meaning of section 7A(e) or § 803.20. As in the past, the special grocery and dairy reports will be filed only with the Commission.

SECTION 803.2 INSTRUCTIONS FOR NOTIFICATION AND REPORT FORM

Section 803.2 prescribes instructions for completing the Notification and Report Form. Some of its provisions are not contained within the form itself, and reference to § 803.2 is essential if the Form is to be completed correctly.

Paragraph (a) of the rule designates which entities or natural persons may file notification on behalf of the "person" to which the language of the act refers. Paragraphs (b) and (c) prescribe limited or separate responses for certain items on the Notification and Report Form under certain circumstances. Paragraph (d) defines the term "dollar revenues" that appears throughout the form.

SECTION 803.2(a)

Paragraph (a) of the rule specifies which entities may file notification on behalf of a "person" to which the act and rules apply. The first clause supplies the general rule: That the ultimate parent entity included within the person filing notification is responsible for filing the Notification and Report Form. Although paragraph (a) permits the ultimate parent entity to authorize another entity included within the same person to file the form on its behalf, the responsibility for fully complying with the act and rules nevertheless remains with the ultimate parent entity. The authorization need not be formalized; all that is necessary is that the entity actually filing the form submit a form complying with the act and rules.

A natural person who is the ultimate parent entity of a person required to file notification must do so just like any other ultimate parent entity. Notification may be filed on behalf of a natural person by a "legal representative." The term "legal representative" contemplates an attorney in fact, a legal guardian or custodian, or any other equivalent person. Of course, natural persons who control other entities may also authorize other entities included within the "person" to file on their behalf.

The proviso at the end of the paragraph directs that, notwithstanding other provisions in the rules, a natural person, spouse and minor children shall file only one Notification and Report Form reflecting the holdings of all of them. The example to the paragraph illustrates the proviso.

Section 803.4 also addresses the filing of the form, and contains a special procedure for certain circumstances when foreign persons refuse to file notification.

BACKGROUND INFORMATION TO § 803.2(a)

The general rule stated by paragraph (a), that the responsibility for filing the Notification and Report Form lies with the ultimate parent entity included within the person, is appropriate because the ultimate parent entity "controls" every other entity included within the person. See § 801.1(a)(1). The ultimate parent entity therefore can direct the actions of the other entities included within the person. Permitting the ultimate parent entity to delegate the task of filing the form reflects the fact that in some instances the ultimate parent entity may not be in the best position to gather the data necessary to complete the form.

The rule specifies that the preacquisition ultimate parent entity is to file notification in order to forestall any confusion if the ultimate parent entity of one or more of the reporting persons is to change as a result of the acquisition.

The provision permitting a legal representative of a natural person to file notification on behalf of a natural person simply attempts to ease the mechanics of compliance in such cases. The provision regarding the spouse and minor children of a person is necessary because the definition of "hold" in § 801.1(c)(2) attributes the holdings of a natural person, spouse and minor children to each other. In effect, each is viewed as holding the combined holdings of the group. Section 801.2, therefore, would designate each member of the group as an acquiring or acquired person if any of them is. Since multiple forms reflecting the same holdings are unnecessary, the rule provides that only one form should be filed.

No equivalent to § 803.2(a) appeared in the original rules. The final rule reflects only minor changes from revised § 803.2(a).

The revised rule provided that if a person had two ultimate parent entities, both would be required to file. This situation could have arisen only when an entity controlled by two persons, such as a corporation with two 50 percent shareholders or a two-person partnership, was party to a reportable acquisition. This provision was deleted because the final rules now treat such an entity as being part of two persons, rather than as one person with two ultimate parent entities. See the example to § 801.2(a). Under the final rules, each ultimate parent entity is required to file notification as part of a "person" comprising itself, the entity of which control is shared, and any other entities it may control (but not the other ultimate parent entity with which it shares control).

The proviso in the revised rule stated that either the natural person(s) or the trustee(s) could file the form in such cases. This provision was deleted since § 801.1(c)(3), part of the definition of "hold," provides that a trust generally "holds" securities which it acquires. Therefore, the trust, rather than its beneficiaries or its trustee(s), is the entity (and "person") to which the act applies.

SECTION 803.2 (b)

Paragraphs (b) and (c) of the rule instruct persons completing the Notification and Report Form that for certain acquisitions the acquiring or acquired persons must submit limited or separate responses to certain items on the form. The items on the form to which the paragraphs apply include those requiring the submission of revenue, geographic and other data. If the form is not completed in accordance with this rule, the enforcement agencies may be unable to determine whether the transaction may violate the antitrust laws, and may reject the form as improperly filed under § 803.10(c)(2) or may request additional information under section 7A(e) and § 803.20.

Clause (b)(1)(i) specifies that, in responding to items 5-9 and the appendix, acquiring persons must provide data with respect to all their activities.

Clause (b)(1)(ii) provides that in an acquisition of assets, the acquired person must respond only with respect to the assets to be acquired. If the assets to be acquired represent the entire acquired person, then the acquired person's response will be the same as it would have been without the instruction; but if the assets to be acquired represent only part of the acquired person, then that person must restrict its responses to the assets to be acquired.

Clause (b)(1)(iii) is analogous to clause (b)(1)(ii) for acquisitions of voting securities. For example, if only one subsidiary of the acquired person is, being acquired, then the acquired person should report on the activities of only that subsidiary (and any entities controlled by that subsidiary).

Clause (b)(1)(iv) specifies that persons that are both acquiring and acquired persons must respond separately in the manner that paragraph (b) directs, if such responses will be different. This situation will occur, for example, when less than all of the assets, or voting securities of a subsidiary, of the acquired person is to be acquired, and the acquired person is to receive stock or assets of the acquiring person in return. The acquired person will thus become an acquiring person as well; see § 801.2(c). In such cases the reporting person will submit data first as an acquiring person with respect to all its activities, and separately as an acquired person with respect only to the assets or voting securities to be acquired. Separate responses to the items, clearly labeled, are sufficient, rather than two entire Notification and Report Forms.

Items 7-9 of the form require the person filing notification first to decide whether it and other reporting persons derive revenues in one or more of the same four digit SIC code industries. Section 803.2(b)(1) dictates that in an asset acquisition, for example, the acquired person for purposes of items 7-9 should regard itself as deriving only the dollar revenues attributable to the assets to be acquired. Subparagraph (b)(2) of the rule requires the acquiring person, in the course of completing items 7-9, to compare its dollar revenues to only those same dollar revenues—that is, those attributable to the assets to be acquired. Subparagraph (b)(2) does this by directing the acquiring person, for purposes of the comparisons in items 7-9, to regard the acquired person in the manner specified by clauses (b)(1)(ii) and (b)(1)(iii) of the previous subparagraph.

Note that subparagraph (b)(1) also applies to items 7-9. Therefore, the acquired person, if it is also an acquiring person, must under clause (b)(1)(iv) answer items 7-9 separately in its capacity as an acquiring person (i.e., with respect to all its activities) as well as with respect to the assets or voting securities to be acquired, if the responses would be different.

An example illustrates paragraph (b).

BACKGROUND INFORMATION TO § 803.2(b)

The responses to items 5-9 of the Notification and Report Form will provide much of the data that the agencies will use to gauge the competitive impact of the acquisition. Paragraph (b), by specifying limited or separate responses, insures that the data supplied will enable the agencies to perform their initial review with reference to the specific impact of the acquisition. Thus, clause (b)(1)(i) specifies that acquiring persons must provide data on all their activities, because all their activities will be under common control with the stock or assets to be acquired. The proposal in comment 1027, which suggested that the acquiring person should disclose only activities matching or related to activities of the acquired person, was rejected. This approach is inappropriate since the purpose of the act is to permit the agencies to do their own analysis, rather than rely on the parties for that purpose.

Clauses (b)(1)(ii) and (b)(1)(iii), restricting the data submitted by the acquired person to the assets or voting securities to be acquired, are essential to a meaningful evaluation of partial acquisitions. Without the instruction, the data relevant to the assets or voting securities to be acquired would be mingled with the data reflecting assets or subsidiaries of the acquired person not being acquired. Comment 1115 complained that this requirement may be a hardship if the information is maintained by the filing person on a consolidated basis. The Commission believes that regardless of any hardship, the information is indispensable, and therefore meets the statutory standard of section 7A(d)(1) as “necessary and appropriate” to determine whether the acquisition may violate the antitrust laws. In addition, the data will in many cases have been segregated by the parties in the course of negotiating or analyzing the acquisition.

For the same reasons that other acquiring persons must disclose all their activities acquired persons that are also acquiring persons likewise must do so. Such persons report separately in each capacity because of the different focus of the antitrust analysis in each instance: In one case, the acquiring person’s acquisition of the acquired person’s assets or subsidiary, and in the other, the acquired person’s holdings of the acquiring person’s stock. Clause (b)(1)(iv) accomplishes this result.

Comment 1059 suggested language to clarify that the acquired person must meet the criterion of section 7A(a)(3) -- i.e., must satisfy the 15 percent-or-$15 million size-of-transaction test—independently as an acquiring person, before the more burdensome responses as an acquiring person must be provided. The comment cited the example of a $20 million asset sold principally for cash. The comment suggested that inclusion of a minor noncash asset, or a small amount of voting securities, should not trigger the acquired person’s responsibility to file as an acquiring person. The final rules reach this result by means of § 801.2(e), which provides that in such cases the acquisition of the stock or assets of the acquiring person is separately subject to the act, i.e., is not subject to the act and rules unless separately satisfying the criteria of section 7A(a), and § 801.21, which provides that cash is not an asset when acquired. See the Statements of Basis and Purpose to §§ 801.2(e) and 802.21.

Subparagraph (b)(1) (the four clauses just discussed) appeared in the original rules as the “Special Instruction” on page 2 of the Notification and Report Form and attracted virtually no comment. Its content was thought more appropriately embodied as a rule, and it appeared in the revised rules as § 803.2(b). Final § 803.2(b)(1) retains revised § 803.2(b) with only stylistic changes.

Subparagraph (b)(2) was added to the final rule to cure the omission noted by comment 1070. Responses to items on the form that require comparisons between the activities of the acquiring and acquired persons will yield responses meaningful to the agencies’ review only if the acquiring person compares its activities to the specific assets or voting securities about which the acquired person reports.

SECTION 803.2(c)

Paragraph (c) provides two additional instructions for completing items 5, 7, 8, 9, and the appendix to the form.

Subparagraph (c)(1) provides that information shall be supplied only with respect to operations conducted within the United States. See § 801.1(k).

Subparagraph (c)(2) provides that data need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the reporting and waiting-period requirements of the act under any provision of the act or rules.

BACKGROUND INFORMATION TO § 803.2(c)

Subparagraph (c)(1) is necessary to assure that the responses are as nearly as possible comparable to the data published by the U.S. Bureau of the Census in its Economic Censuses. It appeared on the instruction page of the Notification and Report Form in the original rules (and still appears there) and was added to § 803.2(c) of the revised rules. The final rules retain the provision unchanged save for adjusting the item numbers on the form.

The only comment to address the provision (1053) suggested that a dollar revenue threshold of $1 million in an SIC category should be satisfied before data must be supplied concerning that SIC category. The suggestion was rejected for the reasons stated in the Statement of Basis and Purpose to the various parts of item 5 of the form.

Subparagraph (c)(2) confirms that exempt acquisitions are totally exempt from the requirements of the act and are not subject to disclosure on the form even if acquired along with nonexempt assets or voting securities. The provision attracted no comments and was retained in the final rules without change.

SECTION 803.2(d)

Paragraph (d) of the rule defines the term “dollar revenues,” which appears throughout the Notification and Report Form. The term identifies which goods and services are to be taken into account for purposes of the form and how they are to be valued. It occurs in two principal contexts on the form. First, item 5 requires persons filing notification to disclose the dollar revenues derived in various SIC-based categories. Second, responses to items 7-9 are conditioned upon more than one reporting person’s deriving dollar revenues in the same industry.

For manufacturing operations, dollar revenues are value of shipments; for nonmanufacturing operations, dollar revenues are other appropriate measures of receipts, including, for example, insurance premiums and sales commissions. The definition specifies the treatment of returns, allowances, and the like. Dollar revenues include interplant transfers.

BACKGROUND INFORMATION TO § 803.2(d)

The definition was devised in order to permit comparison between the data supplied in item 5 on the form and the data compiled by the U.S. Bureau of the Census in its economic censuses. The

Census Bureau denominates its figures “value of shipments” for manufacturing operations, and “value of sales” for nonmanufacturing operations. The term “dollar revenues” was selected because “value of shipments” and “value of sales” are essentially equivalent, and “dollar revenues” embraces both census terms.

The definition of “dollar revenues” in the original rules appeared on page 1 of the Notification and Report Form. It was transferred into §803.2(d) of the revised rules along with other instructions to the Notification and Report Form; as part of a consolidation of most of the substantive instructions into the rules. The revised definition contained only stylistic changes, except that the last sentence of the original definition, requiring an explanation of the dollar revenues in certain two-digit SIC major groups, was transferred into items 5(a) and 5(c). The final definition is identical to the revised definition.

The only aspect of the definition which attracted comment was the inclusion of interplant transfers. Several comments (15, 26, 74; 1102) questioned this provision, suggested that it was burdensome, or requested its deletion. Interplant transfers were retained because their inclusion is essential if the data on the form are to be comparable to the census of manufactures. One comment (74) was incorrect in asserting that the census figures do not include interplant transfers: see, e.g., 1 U.S. Bureau of Census, Census of Manufactures, 1972, XXIX.

SECTION 803.3 STATEMENT OF REASONS FOR NONCOMPLIANCE

Section 803.3 requires that a complete response must be supplied to each item on the Notification and Report Form, and to any request for additional information under section 7A(e) and § 803.20. Whenever a person filing notification is unable to supply a complete response to any item on the form, any part of an item or any portion of a request for additional information, the person must submit a statement of reasons for noncompliance. Such a statement must indicate why the person is unable to supply a complete response; what information is required for a complete response; who, if anyone, has the required information; and what efforts were made to obtain that information. A separate statement must be provided for each item, part of an item, or portion of a request that is not fully answered.

Under section 7A(b)(1)(A), the waiting period begins when the reporting persons submit completed notification and report forms, or, if any responses are not complete, the forms to the extent completed together with statements of the reasons for such noncompliance. Section 7A(e)(2) contains a similar provision with respect to requests for additional information. Section 7A(g)(2) states that if a person fails substantially to comply with either of these requirements, a U.S. district court may order compliance and (with one exception) is required to extend the waiting period until there has been substantial compliance. The only exception is that when the issuer in a tender offer has failed substantially to comply, the court may order compliance but may not extend the waiting period. See section 7A(g)(2).

A complete response, within the meaning of the act and rules, is one that supplies all requested information. Anything less than a complete response potentially is not substantial compliance. The rule does not define substantial compliance, and the agencies contemplate resolving whether a person has substantially complied on a case-by-case basis. The provisions of § 803.3 are designed to focus on the information necessary to determine whether the filing person actually cannot supply the required information or documents, or whether the failure is based on a mere unwillingness to comply or misunderstanding of what is required by a particular item.

BACKGROUND INFORMATION TO § 803.3

The legislative history supports the focus of the rule. Senator Hart indicated:

> The submission of (the statement of reasons for noncompliance) is clearly not a substitute for compliance with the notification obligation. The explanation will, however, serve two salutary purposes. First, it will tend to reduce the disagreement between the agencies and the persons subject to the Act since the antitrust authorities will be informed of the reasons underlying noncompliance. Second, the explanation will be useful in any civil penalty proceeding that may be brought under subsection (g)(1).
>
> 122 Cong. Rec. S15417 (daily ed. Sept. 8, 1976).

By specifying in advance the type of information that must be included in the statement, the rules attempt to minimize such “disagreement between the agencies and the persons subject to the act.” In most cases, a controversy over the adequacy of a response to an item on the form or a request for additional information should be resolvable by reference to the statement of reasons for noncompliance. Vague, uninformative reasons for noncompliance could necessitate requests for additional information or documentary material pursuant to section 7A(e) and § 803.20, or an action in district court under section 7A(g)(2).

The original rule would have required a somewhat more detailed statement of reasons for noncompliance. Original § 803.25(b) required that whenever “less than a complete response has been supplied,” the filing person must indicate what additional work would be required to furnish the complete response; and whether a complete response was being prepared, and if so, when it would be submitted. See original § 803.25(b) (4), (5).

The original rule was refined and amended. Revised § 803.3 made clear that statements of reasons for non-compliance must indicate why the filing person cannot submit, rather than merely has not submitted, a complete response to any item on the form. The revised rule also specified that the rule applies to requests for additional information. The final rule added the requirement that a statement of reasons for noncompliance must describe all efforts made to obtain the required information from another person that has it.

These revisions were made, in part, to emphasize that the situations in which a person will be deemed “unable” to supply a complete response will be construed narrowly. A complete response cannot be supplied, for instance, if necessary information is in the hands of a person that refuses to make it available to the filing person. That it will be costly or burdensome to obtain requested information will not necessarily excuse a failure to comply substantially; nor does the fact that another person has the requested information, standing alone, excuse a filing person from seeking and submitting the information. The acceptability of reasons for noncompliance will be determined on a case-by-case basis.

Several comments (103, 115; 1108) disputed the Commission’s basic authority to promulgate a rule specifying what should be included in the statement of reasons for noncompliance. However, section 7A(d) clearly gives the Commission such power. Other comments suggested that the rule was too inflexible (1076) or misleading (1059) because the statute requires substantial rather than absolute compliance. These comments were rejected. The information necessary to complete the form is the type that a filing person normally can provide from its records, and complete compliance is necessary for the agencies to perform the review envisioned by the act. Thus, it is the Commission's position that anything less than complete compliance potentially is not substantial compliance. Another comment (1086) suggested that persons should be permitted to decide which items on the form are relevant or irrelevant to the acquisition and to answer only those items they deem relevant at the risk of a request for additional information. This approach is inappropriate; all items on the form were designed to evoke the information most relevant to an antitrust analysis. Therefore, an incomplete response to any item on the form diminishes the ability of the enforcement agencies to make a well-informed evaluation of the acquisition. A decision on the part of a filing person that an item is irrelevant does not relieve that person of the obligation to provide a complete response to the item.

SECTION 803.4 FOREIGN PERSONS REFUSING TO FILE NOTIFICATION

In certain situations in which a foreign acquired person refuses to file the notification required by the act and the rules, this rule permits any other party to the transaction to file notification on behalf of the foreign person. This provision is set forth in paragraph (a) of the rule; paragraphs (b), (c), and (d) establish the procedural framework for this special type of notification. The term "foreign person" is defined in § 801.1(e)(2)(i).

Under paragraph (a), the rule applies only to transactions to which § 801.30 does not apply--that is, to consensual two-party acquisitions. In addition, the rule applies only if the foreign person is an acquired person. Finally, the rule applies only if no assets located in the United States (other than investment assets) and no voting securities of United States issuers are to be acquired. If any assets located in the United States or voting securities of United States issuers are to be acquired indirectly --that is, because they are held by the issuer to be acquired --the rule is inapplicable. The term "investment assets" is defined in § 801.1(i)(2). The rule thus applies principally to acquisitions by United States persons that fail to gain exemption under § 802.50.

Paragraph (b) requires that the person filing on behalf of the foreign person must state in the affidavit required under § 803.5(b) that the foreign person has refused to file notification, and must explain all efforts it has made to obtain that person's compliance. Paragraph (c) provides that the substitute filing must contain all information and documentary material required of the foreign person that is reasonably available to the person actually filing. For example, information located abroad in the possession of the foreign person that the person refuses to disclose may not be reasonably available. If some information or documentary material is not available, the person filing on behalf of the foreign person must so indicate, but need not supply a formal statement of reasons for noncompliance as provided in § 803.3.

According to paragraph (d), however, even when this substitute filing procedure is used, the foreign person remains the "person filing notification" for the purposes of the Act and the rules. Therefore, the foreign person still may be issued a request for additional information under section 7A(e) and § 803.20, and the waiting period will be extended until twenty days after that person has responded. Section 803.4 does not permit substitute responses to a request for additional information under section 7A(e) and § 803.20. If a foreign acquired person refuses to respond to a second request, it is possible that the waiting period will continue indefinitely. (Note, however, that despite the pendency of a second request, the agencies retain the power to terminate the waiting period sua sponte pursuant to § 803.11(c). See the example to § 803.20(c).)

BACKGROUND INFORMATION TO § 803.4

The purpose of this rule is to permit the consummation of certain consensual two-party transactions when a foreign acquired person refuses to file notification. Under the limited circumstances described in the rule, another party to the acquisition may file on behalf of the foreign person so that the waiting period can begin, as section 7A(b)(1) requires, upon receipt of notification from both the acquiring and acquired persons. (The problem does not arise for transactions covered by § 801.30, because that rule conditions the start of the waiting period on receipt of only the acquiring person's completed Form.)

If either agency requires additional information or finds that some information not supplied on the form is needed for its analysis, a foreign person will not be able to thwart the agency's investigation by refusing to respond to a request for additional information. Paragraph (d) of the rule makes clear that the "person required to file notification," to which a request for additional information may be addressed, remains the foreign person. If the foreign person does not respond to the second request, the waiting period will not expire and the person may be subjected to a suit for compliance under section 7A(g) after failing to respond within a reasonable time. See § 803.21. In this situation, since the foreign person will in many cases have exclusive access to the additional information or documentary material requested, it is inappropriate to permit another party to the transaction to respond.

This rule does not permit another party to transaction to file on behalf of a foreign acquiring person under any circumstances. Furthermore, for similar reasons, the rule applies only to acquisitions of foreign assets and of voting securities of a foreign issuer.

This rule had no counterpart in the original or the revised rules. It was inserted in the final rules partly in response to comments (e.g., 1059, 1063) that argued that noncompliance by foreign persons may prevent U.S. companies from consummating certain kinds of transactions. The rule also responds in part to comment 87, which recommended an ad hoc exemption rule to permit the consummation of transactions in which a foreign acquired person refuses to file notification. For discussion of that specific suggestion, see the Statement of Basis and Purpose on the "ad hoc exemption" issue, below.

SECTION 803.5 AFFIDAVITS REQUIRED

Section 803.5 requires that affidavits attesting that certain pre-notification obligations have been fulfilled must accompany each Notification and Report Form. It thus governs when notification may be filed.

Paragraph (a) provides that before notification may be filed in connection with acquisitions described in § 801.30, the acquired person must receive from the acquiring person certain information relevant to the acquisition. In addition, in the case of a tender offer, the intention to make the offer must have been publicly announced. Paragraph (b) provides that in all other acquisitions notification may be filed after a contract, agreement in principle or letter of intent to merge or acquire has been executed.

Subparagraphs (a)(1) specifies the information that, in all acquisitions to which § 801.30 applies, the issuer of the voting securities must receive from the acquiring person. The information must be delivered to the issuer by certified or registered mail, by wire or by hand to its principal executive offices.

Subparagraph (a)(2) provides that the acquiring person must attest that it has a good faith intention to make the acquisition and, in the case of tender offers, that the intention to make the offer has been publicly announced. The public announcement may be effected by a press release announcing the acquiring person's intention to make the offer, by a filing under a state statute that has the effect of publicly announcing the acquiring person's intention to make the offer, or by actually publishing and commencing the offer. (In the latter case, of course, the tender offer could not be consummated until the waiting period expires or is terminated.)

Paragraph (b) of the rule provides that for all transactions to which § 801.30 does not apply—typically transactions which the parties have negotiated directly with each other—notification must be accomplished by an affidavit stating that a contract, agreement in principle, or letter of intent to merge or acquire has been executed. Thus, the parties may file notification at any time after one of those types of documents has been executed.

The rule requires that the affidavits be attached to the front of the notification. A Notification and Report Form submitted without the affidavits required by this rule is a deficient filing and will not begin the running of the waiting period. See § 803.10(c)(2).

BACKGROUND INFORMATION TO § 803.5

By requiring that certain affidavits accompany the Notification and Report Form, § 803.5 accomplishes two purposes. First, it ensures that the acquired person is informed of its obligation to file notification when the acquired person may not otherwise be aware of that duty. Second, it governs when persons may file notification.

Subparagraph (a)(1) accomplishes the first purpose of the rule, that of informing the acquired person of its obligation to file notification in instances when it might not be aware of the facts. Those instances are transactions of the types described in § 801.30, which do not necessarily involve agreement between the acquiring and acquired persons. The information set forth in clauses (a)(1)(i)-(vi) of the rule will provide the issuer with certain information necessary to complete its Form as an acquired person.

The requirement that the acquiring person attest that the information has been received (not merely that it has been sent) is intended to make certain that a delay in delivery will not reduce the time available to the acquired person to prepare and file its notification or the time within which the enforcement agencies must complete their review. The rule specifies that the information may be transmitted to the offices of the acquired person by wire primarily in order to accommodate foreign transactions.

Several comments (e.g., 19, 73, 74, 78, 93) suggested that original § 803.15 was inadequate in that open market or other acquisitions of voting securities from third-party holders (other than tender offers) were not addressed by the rule and were improperly included with consensual acquisition in paragraph (b). Revised § 803.4 added subparagraph (a)(1) to accommodate such acquisitions.

Revised § 803.4 also would have provided for service of the information by any means permitted under rule 4(d) of the Federal Rules of Civil Procedure. That provision would have permitted service to individuals or places other than the acquired person's principal executive offices, and consequently might have introduced a degree of uncertainty and delay into the timing of the waiting period. Accordingly, the reference to the Federal Rules of Civil Procedure was deleted, and final § 803.5(a)(1) specifies the permissible means of transmitting the information.

The final version also refers to § 803.30 transactions instead of referring to "tender offers and other acquisitions of voting securities from third parties." This change simply reflects the rephrasing and clarification of § 803.30. See the Statement of Basis and Purpose to that rule.

Two considerations motivate the inclusion of subparagraph (a)(2) and paragraph (b), which require a good faith intention to make the acquisition, public announcement of tender offers, and execution of a contract, agreement in principle or letter of intent. First, those provisions ensure that the parties intend to consummate the acquisition, and are not using notification as a means of testing the agencies' enforcement intentions. Because of the time and resource constraints upon the agency staffs, the agencies could not tolerate review of hypothetical transactions. Second, the requirement assures that the forms will contain sufficiently definitive information about the transaction to permit accurate analysis.

The original rule, § 803.15, would have required that in tender offers, the offeror must attest that the tender offer had been "published, sent or given" to the security holders of the issuer of the voting securities to be acquired. The SEC, in its comment (125) on the original rule, supported this provision. The comment urged that pre-commencement notification not be required. A pre-commencement notification, requirement, it said, would have "(tipped) the balance of regulation in favor of the subject company and undermined the extreme care taken by Congress in enacting the Williams act to balance the interest of both the bidder and the subject company, while providing full and fair disclosure to investors and others." See also the Statement of Basis and Purpose to § 803.30.

However, several comments (e.g., 12, 63, 93, 96) objected to this provision. Since some State statutes require persons intending to make certain types of tender offers to file notice of their intentions significantly in advance of making the offers, the waiting period required by the act would not begin to run until after the waiting period required by State law. Therefore, these comments requested that notification be permitted before commencement of the tender offer.

Revised § 803.4 eliminated the requirement that the tender offer be "published, sent or given" to security holders of the acquired issuer before notification could be filed. It substituted the requirements that the offeror state its good faith intention to make the acquisition, and that the tender offer must have been publicly announced.

Since filings under most State statutes of the type referred to by the comments have the effect of making public the acquiring person's intention to make the offer, the revised (and final) rule permits notification prior to commencement of the tender offer when such a filing has been made. In permitting such notifications, the commission, as it stated in the FEDERAL REGISTER notice accompanying the revised rules, 42 FR at 39046-47 (August 1, 1977), takes no position about whether any State statute requiring any type of filing by the acquiring person in a tender offer is preempted by Federal statute or regulations, or may be otherwise unlawful. The Commission specifically does not endorse or oppose the principle of required disclosure of planned tender offers which underlies such statutes.

The SEC suggested in its second comment (1058) that in view of the uncertainties surrounding tender offers (including the possible effects of State statutes, the increasing incidence of competing tender offers and possibility of litigation in connection with tender offers), the affidavit required in paragraph (a) should reflect only a good faith intent to make an offer, rather than the intent to make an acquisition. The final rule retains the word "acquisition," although as the comment noted developments subsequent to the attestation may thwart the tender offer.

Another comment (1102) suggested that public announcement of the tender offer should not be necessary when there is no legal requirement of publication. However, the purposes of the requirement support retaining it even when public announcement is not otherwise compelled.

Original § 803.15(b) and revised § 803.4(b) would have allowed notification only when a contract or agreement in principle had been executed. Several comments (e.g., 15, 93; 1040) however, urged that the execution of a letter of intent represented a sufficiently definite transaction to satisfy the agencies' concerns, and so the letter of intent was added to final § 803.5(b).

Several comments (e.g., 1011, 1090) objected to the requirement still present in paragraph (b) that a written agreement must be executed before notification can be filed. Comment 1011 suggested that since some acquisitions involve no written agreement prior to closing, the rules should permit notification regarding acquisitions not reduced to writing, provided that they are consummated within 180 days after the expiration of the waiting period. Similarly, comment 1019 urged that the affidavit mandated by paragraph (b) is improper since agreements to merge or otherwise acquire voting securities or assets of another company often are not reduce to writing for some time after they are made. It suggested that the waiting period should be permitted to commence and expire before finalization of the terms of the acquisition, rather than after the terms have been embodied in a written agreement. Not withstanding the comments, the agencies believe that oral agreements to engage in significant acquisitions are unusual. In view of the important purposes served by the requirement, the suggestions made by these two comments have been rejected.

SECTION § 803.6 CERTIFICATION

This rule states that the notification required by the act and the response to a request for additional information under section 7A(e) and § 803.20 must be certified and specifies who may perform that certification. With respect to notification, paragraph (a) provides that any general partner in a partnership or any officer or director of a corporation may do so. When a reporting person has neither officers, directors nor partners, the certification may be provided by any individual exercising functions similar to those of an officer, director or general partner. A natural person filing notification, or his or her legal representative, must certify a filing by or on behalf of such person.

Paragraph (b) requires that additional information or documentary material submitted pursuant to a request under section 7A(e) and § 803.20 must be accompanied by a certification in the format appearing at the end of the notification and report form, completed in accordance with paragraph (a) of this rule by the person or individual to whom the request was directed.

Paragraph (c) requires that the individual who certifies the form or a response to a request for additional information must possess actual authority to provide such certification on behalf of the person filing notification or responding to such request.

The certification consists of a sworn statement appearing at the end of the Notification and Report Form, which reads as follows:

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

BACKGROUND INFORMATION TO § 803.6

The purpose of the certification requirement is twofold. First, the certification places upon the individual who signs it the responsibility for determining that, to the best of that individual's knowledge, the information provided is true, correct, and complete in accordance with the act and the rules. Second, the certification is intended to estop the person on whose behalf the report is filed from later denying the completeness or accuracy of the information provided on the form, in the event that either enforcement agency seeks to introduce any such information into evidence in any proceeding. It is also possible that criminal prosecutions of certifying individuals might be appropriate if, for example, data has been knowingly falsified. The certification language is similar to that which has been used for a number of years on the reporting forms under the Commission's existing premerger notification program.

The certification requirement appeared in original § 803.20 and in revised § 803.5 in substantially the same form as the final rule, except that the listing of who may provide certification is somewhat expanded from that appearing in the original rule. Paragraph (b) of the final rule was inserted to insure that responses to requests for additional information and documentary material are also certified, for the same reasons applying to the initial notification.

Several comments in response to the original rules discussed the certification requirement. One (15) suggested deletion of the word "actual" from the phrase "actual authority" in subparagraph (b) of the rule, but provided no reason or explanation. The term "actual authority" is meant to insure that the certifying individual possesses the authority to certify. In other words, an individual may not perform a certification unless he or she has been authorized to do so by the person on whose behalf the report is filed. See §§ 801.1(a)(1), 803.2(a).

Another comment (28) objected to the certification requirement for an acquired firm, suggesting that this might constitute a warranty of some kind to the acquiring company. The comment did not explain why that result might occur, but in any case no such result is intended by the Commission.

Two comments (74, 88) suggested that the certification requirement was unreasonable. The former suggested that the certification attest merely "that a good faith effort to produce and deliver the information specified has been made." That comment also suggested "a modified certification format where certain categories of information or styles of presentation are practically, but not absolutely, beyond the ability of the reporting person." Comment 88 suggested that a "substantially accurate" standard be substituted for the "true, correct and complete" language in the certification. The Commission believes that each of these suggestions is inappropriate.

Section 7A(g)(2) requires substantial, rather than complete, compliance with the notification requirement and with any request for additional information. It is the function of the rules to define full compliance and to specify the content of the statement of reasons for noncompliance to be supplied whenever the act and the rules are not fully complied with. See section 7A(b)(1)(A)(ii), (e)(2)(B), § 803.3. The instructions on the Notification and Report Form permit the use of "best estimates" when books and records that provide accurate answers to items on the form are not available. Subject to these exceptions, the rules require full and complete compliance, and the certification at the end of the form attests that this requirement has been satisfied by providing information that is accurate and complete to the best of the knowledge of the individual who signs the form on behalf of the filing person.

SECTION 803.7 EXPIRATION OF NOTIFICATION

Section 803.7 provides that notification with respect to and acquisition expires 1 year after the related waiting period expires. Once notification expires, the situation is just as though notification had not been filed, and the parties must report and wait before any acquisition subject to the act may be consummated.

For acquisitions of assets, therefore, the rule means that the acquisition must be consummated within 1 year following the expiration of the waiting period.

For acquisitions of voting securities, the rule works in tandem with § 802.21. After an earlier acquisition with respect to which notification was filed, § 802.21 exempts, under certain conditions, acquisitions of voting securities not meeting or exceeding the next greater notification threshold than that attained in connection with the earlier notification. After notification expires, no notification threshold greater than the highest one met or exceeded within 1 year after expiration of the waiting period may be crossed without again filing notification, even if notification has been filed regarding a higher threshold. The term "notification threshold" is defined in § 801.1(h).

An example illustrates the rule. For more information, see the statements of basis and purposes to §§ 801.1(h) and 802.21.

BACKGROUND INFORMATION TO § 803.7

This rule serves two purposes. First, it limits the acquiring person to a reasonable period of time—l year from the expiration of the waiting period—during which to consummate the acquisition described in the notification. If the acquisition is to be consummated after that time, the possibility of changed circumstances warrants a fresh review by the enforcement agencies.

Second, the rule minimizes the likelihood that filings under the act will be used as a means of testing the agencies' enforcement intentions with respect to acquisitions that the reporting persons have no present intention to make. In this context the rule supplements § 803.5(a)(2), which requires that acquiring persons submit an affidavit with the form stating a good faith intention to make the acquisition.

This rule appears for the first time in the final rules.

SECTION 803.10 RUNNING OF TIME

Persons required by the act to file notification of an acquisition must thereafter wait 30 days (or, for a cash tender offer, 15 days) before consummating the transaction. This rule explains the procedures for determining precisely when this waiting period begins and ends.

Under § 803.10(a), the waiting period begins on the date of receipt of the notification and report form, or, if the form is not completed, upon receipt of the form to the extent completed and a statement or statements of reasons for noncompliance in accordance with § 803.3. Under subparagraph (a)(1), the waiting period for acquisitions to which § 801.30 applies begins when the acquiring person's form is received by both agencies. Subparagraph (a)(2) provides that for all other acquisitions, the waiting period begins when notification is received from all persons required to file.

Paragraph (b) of the rule describes how to determine the expiration date of the waiting period. Unless extended by a request for additional information under section 7A(e) and § 803.20 or by district court under section 7A(g)(2) or terminated under § 803.11, the waiting period ends at 11:59 p.m. eastern time on the 30th (or, for cash tender offers, the 15th) calendar day following the beginning of the waiting period. If extended by a request for additional information or documentary material, the waiting period expires 20 days (or in the case of a cash tender offer 10 days) after the receipt of such information or documentary material by the requesting agency. Not every request for additional information extends the waiting period; those directed to the acquired person in a tender offer do not, under section 7A(a)(2) and § 803.20(c). The paragraph also indicates that § 802.23, the exemption rule relating to amended or renewed tender offers, may provide that the waiting period ends on a different date.

If a request for additional information is issued early in the waiting period and is answered promptly, the 20- or 10-day extension could run simultaneously with the original waiting period. Subparagraph (b)(2)(ii) provides, however, that unless terminated pursuant to § 803.11, the waiting period cannot expire earlier than it would have expired if no request had been issued. See example No. I to the rule.

In the event that requests for additional information are directed to more than one person, the waiting period is extended until 20 days after the receipt by the requesting agency of the information requested from all such persons. Example No. 2 to the rule illustrates this point.

Subparagraph (e)(l) specifies that the date of receipt of notification, for purposes of determining when the waiting period begins, is the date on which delivery is effected by hand or by certified or registered mail during normal business hours to the offices designated in the rule. If delivery is effected after 5 p.m. eastern time (that is, after the close of normal business hours) or on any day other than a regular business day (such as a Saturday, Sunday, or Federal holiday) the date of receipt is considered to be the next regular business day. If delivery to both agencies is not effected on the same date, the later date is deemed the date of receipt.

Under subparagraph (e)(2), a notification and report form, or a response to a request for additional information that does not comply with the rules is insufficient to begin the running of time. In particular, if any item of the form is not fully completed, or any information or documentary material is not completely supplied, a statement of reasons for noncompliance conforming to § 803.3 must be submitted. Likewise, the affidavit(s) required by § 803.5 must accompany the acquiring person's notification. If a deficient filing is received, the Commission or the Assistant Attorney General will promptly notify the person of the deficiencies so that the person can rectify them. However, time will not begin to run until the deficiencies are cured.

BACKGROUND INFORMATION TO § 803.10

Section 7A(b)(l) provides that the waiting period "shall begin on the date of receipt by the Federal Trade Commission and the Assistant Attorney General" of the completed notification, or the notification to the extent completed and a statement of reasons for noncompliance in accordance with § 803.3. Section 7A(e)(2) provides that this waiting period may be extended by a request for additional information or documentary material for 20 (or, in the case of cash tender offers, 10) days after the appropriate agency receives all requested data. Under section 7A(b)(l)(A), the waiting period begins upon receipt of notification from both the acquiring and acquired persons, or, in a tender offer, from the acquiring person only.

Original § 803.10 matched the statutory scheme: Only for tender offers would the waiting period have begun upon receipt of the acquiring person's notification. Consequently, for all other acquisitions not involving a two-party agreement, in which the issuer may be indifferent or hostile, the original rules would have permitted such an issuer to prevent the waiting period from starting, and the transaction from taking place, by not filing. As explained in the statement of basis and purpose to § 801.30, with regard to beginning the waiting period the final rules treat all nonconsensual acquisitions similarly to the treatment afforded tender offers by the act. Final § 803.10(a)(1) thus makes clear that for all acquisitions to which § 801.30 applies, the waiting period begins as soon as the acquiring person files notification. The acquired person in such transactions must file notification no later than the 15th day (or, in the case of cash tender offers, the 10th day) after the date of receipt of the acquiring person's notification. See § 801.30(b)(2).

A request for additional information issued to the acquiring or acquired person before the waiting period expired automatically extends the waiting period, except for requests directed to acquired persons in tender offers. See section 7A(e)(2) and § 803.20(c)(2). Under those sections and subparagraph (b)(2) of this rule, whenever the waiting period for tender offers is extended it expires on the 20th day (or in the case of a cash tender offer, on the 10th day) following the receipt from the offeror of all additional information requested. A request for additional information in connection with all other types of acquisitions extends the waiting period for 20 days following the receipt of additional information from all persons required to submit it.

Comment 1086 suggested that if a request for additional information is made to the issuer whose stock is being acquired from a third party, the waiting period should be extended only for 20 days from the date the request in issued. However, the comment's concern that such an acquired person could indefinitely extend the waiting period by not responding to the request has been addressed by the addition of § 803.21 to the final rules. See the statement of basis and purpose to that rule.

Numerous technical changes were made from the revised rule. The time of receipt after which delivery would be deemed effected on the following day was changed from 3 to 5 p.m. to reflect the close of normal business hours. The time of day when the waiting period expires was changed from 5 to 11:59 p.m. This change provides the agencies with the full 30 (or 15) days within which to review the acquisition and reflects the statutory intent that parties wait the full 30 or 15 days before consummating.

A technical change urged in comment 1059 was rejected. That comment suggested that the date of receipt of mailed forms and additional information at the mailrooms of the agencies rather than at the premerger notification offices, be deemed the “date of receipt.” The comment expressed concern that reporting persons should not be subject to the uncertainty of guessing how long delivery from the mailrooms to the specified offices would take and should not bear the risk of delays over which they have no control. While it is true that requiring receipt at the offices that will undertake the review could subject the reporting person to some delay, this procedure will permit the agencies to review the submissions for the full waiting periods. Moreover, guesswork as to the date of receipt is eliminated if delivery in effected by mail with return receipt requested, or by hand. A reporting person that chooses not to employ one of these means of delivery retains the risk of delay.

Subparagraph (c)(2) of the rule provides that unless the notification and report form is submitted in compliance with the rules, it is not “received,” and the waiting period therefore does not begin. Similarly, the rule provides that whenever a response to a request for additional information does not comply with the rules, it too is not “received.” In the latter instance, the waiting period remains in effect until the deficiency is cured and for 20 days (in the case of cash tender offers, 10 days) thereafter.

The rule is intended to deal with instances of procedural noncompliance such as, for example, when the form or a response to a request for additional information has not been certified; when one or more of the affidavits required by § 803.5 are missing; when a required statement of reasons for noncompliance (see § 803.3) is missing or incomplete; or when the data submitted does not reflect the operations of the correct portions of the reporting person’s business as required by § 803.2. In these or other instances the procedural noncompliance the Commission will promptly notify the reporting person so that the problems can be corrected.

This provision generally will not be applicable when all items on the form or questions in a request for additional information have been properly answered or a complete statement of reasons for noncompliance explains any incomplete responses. In these situations any question of whether there has been substantial compliance with the act and the rules will be resolved by a district court as provided in section 7A(g)(2).

SECTION 803.11 TERMINATION OF WAITING PERIOD

Section 803.11 implements section 7A(b)(2) of the act. It sets forth the conditions and procedures under which the waiting period for an acquisition may be terminated prior to its normal expiration. Generally, the Commission and the Assistant Attorney General will terminate a waiting period only if termination has been requested in writing by one of the persons filing notification.

Paragraph (a) of the rule sets forth the conditions which must exist before a request for termination of a waiting period will be considered. First, all persons required by the act and the rules to file notification must have done so. Second, it must have been determined that no request for additional information will be made, or if any such requests have been made, the responses must have been received. Third, both the Commission and the Assistant Attorney General must have agreed that no further action (e.g., request for additional information, suit under section 7A(g), or action challenging the acquisition) is to be taken during the waiting period.

Paragraph (b) of the rule automatically denies any request for termination which is pending at the time a request for additional information is issued to any person, whether the request for termination accompanied the filing of notification or was submitted afterwards. In such a situation, no formal notice of denial will normally be given.

Paragraph (c) provides that a waiting period may be terminated either upon the written request (filed with the offices designated in § 803.10(c)) of any person that has filed notification, or sua sponte by the agencies without regard to the conditions contained in paragraph (a). The sua sponte termination provision makes it unnecessary to resubmit a request which was denied by operation of paragraph (b). Once a request has been made, it will be treated as continuing. In addition, this provision gives the Commission and the Assistant Attorney General the power, in appropriate circumstances, to terminate a waiting period even though a request for additional information remains unanswered.

Section 803.11(c) makes termination effective upon notice by telephone to any requesting person, states that written confirmation of termination will be sent to all parties that filed notification, and restates the requirement of section 7A(b)(2) that notice of termination must be published in the FEDERAL REGISTER.

The Federal Trade Commission has delegated the power to terminate the waiting period under section 7A(b)(2) and this rule to the Director and Deputy Directors of the Bureau of Competition, without power of redelegation.

BACKGROUND INFORMATION TO § 803.11

Section 7A(b)(2) provides:

> The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period * * * and allow any person to proceed with any acquisition subject to the (the act), and promptly shall cause to be published in the FEDERAL REGISTER a notice that neither intends to take any action within such period with respect to such acquisition.

Paragraph (a) of the rule announces the conditions the agencies will require before a request for early termination will be granted.

Two comments from the same organization (120; 1059) took issue with the provision in paragraph (c) of the rule that notice of all terminations shall be published in the FEDERAL REGISTER. The comments argued that Section 7A(b)(2) authorizes publication of a notice of termination only when the termination occurs within “the initial * * * 30-day waiting period.” The comments contended that publication of notice that a "*supplemental* waiting period" (emphasis in comment 120) has been terminated is not authorized by section 7A(b)(2) and would violate the confidentiality guarantees of section 7A(h).

This argument was rejected. Section 7A(b)(2) does not merely "authorize" publication of notices of termination. The language of the statute is mandatory and imposes an obligation on the Commission and the Assistant Attorney General to publish notice of all such terminations in the FEDERAL REGISTER. There is no basis for distinguishing between notices terminating waiting periods of ordinary length and those terminating waiting periods that have been extended by requests for additional information. Rather than contemplating an original waiting period followed by a "supplemental" waiting period, section 7A(b)(l)(B) creates only one waiting period that may be extended by a request for additional information or by a court order under section 7A(g)(2). Since there is only one waiting period which may or may not be extended, section 7A(b)(2) requires that all notices of termination be published in the FEDERAL REGISTER, regardless of when during that waiting period the termination occurs.

In addition, to the extent that any of the contents of published termination notices constitute "information * * * filed * * * pursuant to (the act)" within the meaning of section 7A(h), the Commission concludes that section 7A(b)(2) makes a necessary exception to section 7A(h).

Comment 1075 suggested that before termination is considered, it should be requested by the acquired person, especially in third-party (§ 801.30) transactions, or by both parties. The Commission recognizes that in hostile takeovers, the interests of the acquiring and acquired persons are divergent. But those conflicting interests alone would not appear to justify a rule which would give an advantage to an acquired company resisting the takeover. If the acquisition may be anticompetitive, a request for early termination is unlikely to be granted no matter which party or how many parties request it. If it does not appear anticompetitive, the Commission has no basis upon which to require that requests come from one party or the other, or that they be unanimous. Thus the suggestion was not adopted.

The rule retains the flexibility to terminate a waiting period sua sponte chiefly because § 803.20(c)(2) automatically extends the waiting period when a request for additional information is issued. The Commission and the Assistant Attorney General may occasionally be able to reach the determination set forth in subparagraph (a)(3) of this rule even though not all requested information has been provided by all the parties. In such instances, the waiting period may nevertheless be terminated. See also the statements of basis and purpose to §§ 803.4 and 803.21.

SECTION 803.20 REQUESTS FOR ADDITIONAL INFORMATION OR DOCUMENTARY MATERIAL

Section 7A(e) of the act permits the Commission and the Assistant Attorney General, before the expiration of the waiting period, to require one submission of additional information or documentary material from each person filing notification with respect to an acquisition. Section 803.20 details the procedures by which the agencies request additional information and persons filing notification comply with them. Paragraph (a) identifies the persons and individuals subject to such requests; paragraph (b) describes who may make the request, how the request is to be communicated, and when the request is effective; paragraph (c) details the impact of such requests on the waiting period; and paragraph (d) provides that all such requests must be clearly identified and should be distinguished from requests for clarification or amplification of responses.

Any person required to file notification may be required to respond to one request for additional information or documents, and more than one party to an acquisition may be required to do so. Furthermore, the act and rule specifically provide that such requests may be made of one or more entities within a filing person or of one or more officers, directors, partners, agents, or employees of the filing person. Thus requests for additional information or documentary material are not limited to the ultimate parent entity (the entity responsible for filing notification under § 803.2(a)), or to an entity authorized to file on its behalf.

Although either agency may issue a request for additional information, subparagraph (b)(1) provides that such a request may not be issued by both agencies to the same person or to any entity or individual within that person. The rule provides that the Commission and Assistant Attorney General may delegate the authority to make requests for additional information.

Pursuant to subparagraph (b)(2), a written request for additional information is effective when received by the ultimate parent entity of the person to which the request is directed (or the entity filing on its behalf). If the request is communicated in person or by telephone, it is effective when communicated, provided that a written confirmation is mailed within the 30-day waiting period to the ultimate parent entity (or the entity filing on its behalf). A request made to a natural person will be sent to the reporting person to which the individual is related; see § 803.20(b)(3). Such a request is effective as to the individual when it is effective as to the reporting person to which he or she is related. In addition, a written copy of the request will be delivered to the individual by hand, or by registered or certified mail.

Clause (b)(2)(ii) also requires that the filing person identify an individual who will be available during normal business hours throughout the waiting period, at a telephone number supplied in item 10 of the form, to respond to inquiries concerning notification. Telephoned requests for additional information will be made to that individual; written confirmation will be mailed to the ultimate parent entity of the filing person.

Subparagraph (c)(1) provides that, with one exception, the waiting period for an acquisition will remain in effect until all additional information requested has been submitted, even if the waiting period would have expired but for the request. The sole exception is that a request directed to the person whose voting securities are sought to be acquired in a tender offer, or to any officer, director, partner, agent, or employee of such a person, will not extend the waiting period. The target of the tender offer must still respond to the request within a reasonable time under § 803.21, and may be subject to an enforcement proceeding under section 7A(g).

Subparagraph (c)(2) makes extension of the waiting period automatic. For cash tender offers, a request for additional information or documentary material extends the waiting period for 10 days after receipt of the requested information from the acquiring person. For all other acquisitions, the waiting period is extended automatically for 20 days from receipt of the requested information from all persons to which a request was addressed, except the acquired person in a tender offer. See of § 803.10 and the example to § 803.20(c)(2).

Subparagraphs (d)(1) and (d)(2) emphasize the difference between requests for additional information under section 7A(e) and requests for clarification or amplification of a response to an item on the form. All requests for additional information or documentary material must be identified as such, regardless of the manner in which they are communicated. However, the agencies may make other inquiries not so identified. These are not to be considered requests for additional information, and they do not extent the waiting period.

The Federal Trade Commission has delegated the power to make requests for additional information or documentary material under section 7A(e) and this rule to the Director, the Deputy Directors, and the Associate Director for Premerger Notification of the Bureau of Competition, without power of redelegation.

BACKGROUND INFORMATION TO § 803.20

Comment 63 questioned whether the act permits the delegation of authority to make requests for additional information. The comments suggested that section 7A(e)(2), which provides that "the Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period," contemplates that the discretion of the Commission or Assistant Attorney General must be exercised before the consummation of a merger or acquisition may be postponed by a second request. The Commission's view is that section 7A(e)(2) should be read consistently with established agency policy. The Commission, under the authority provided by reorganization plan No. 4 of 1961, may delegate certain of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board. Pursuant to that authority, the Commission has delegated to (among others) the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition limited authority to initiate investigations. Since requests for additional information or documentary material may be compared to the initiation of investigations, decisions to issue such requests are similarly delegable.

Paragraph (c) extends the waiting period for all requests except those directed to acquired persons in tender offers. Requests directed to acquired persons in other transactions listed in § 801.30 thus extend the waiting period. For a discussion of the possibility that such acquired persons can thereby stall the consummation of a transaction, see the statement of basis and purpose to § 803.21.

Comments 120 and 1059 argued that the rule's automatic extension of the waiting period is inconsistent with the provision of section 7A(e)(2) that, if a request for additional information is made, the Commission or Assistant Attorney General may, "in its or his own discretion," extend the initial waiting period for "not more than" 20 days (or 10 days in the case of a cash tender offer). These comments interpret this language to require an individualized, discretionary judgment in every case as to whether and for how long the waiting period should be extended. The Commission rejected this suggestion and does not interpret the act in this manner. It believes that this approach might seriously interfere with the agencies' review of all relevant information and thus with the purposes of the act. In many cases, it will be impossible to predict, before the information is submitted, what materials will be supplied in response and how long it will take to review them. Since any further extension requires an order of a district court, the waiting period must be automatically extended for a full 20 (or 10) days. If the review is completed in less time, the extended waiting period may be terminated early under section 7A(b)(2) and § 803.11.

Comment 37 argued that the act does not permit extension of the waiting period while a request for additional information is outstanding. It argued that a request made late in the waiting period should have to be "reasonable" enough to be capable of a response within the original waiting period. This suggestion was rejected, since it would effectively prevent the agencies from making meaningful second requests late in the waiting period—a result not contemplated by the statute. Furthermore, the notion that requests for additional information must be answerable within the minimum statutory waiting period is inconsistent with the language of section 7A(3)(2), which contemplates extension of that period.

Numerous comments (e.g. 59, 77, 112, 115, 120; 1059) expressed concern that misunderstandings could occur if requests for additional information were issued orally. It should be noted that the rule provides that requests made in person or by telephone are effective only if a written confirmation is subsequently mailed during the waiting period.

Comment 25 suggested that "clarification" and "amplification" be defined; otherwise, if a person construed a request for additional information as a "clarification" or "amplification" it could violate the act if it then consummated a transaction without additional waiting. This ambiguity disappears in light of paragraph (d), which requires specific identification of requests for additional information and documentary material.

SECTION 803.21 ADDITIONAL INFORMATION SHALL BE SUPPLIED WITHIN REASONABLE TIME

Section 803.21 requires persons receiving requests for additional information or documentary material to supply the information and documentary material (or, if the request is not fully complied with, a statement of reasons for noncompliance in accordance with § 803.3) within a reasonable time. See section 7A (b)(1)(A) and (e), and § 803.30.

BACKGROUND INFORMATION TO § 803.21

This new rule is designed primarily to prevent an acquired person in a transaction subject to § 801.30 from frustrating the acquisition. Without this provision, an uncooperative acquired person could delay the expiration of the waiting period indefinitely by not responding to a request for additional information.

The act addresses this problem only in the context of tender offers. Section 7A(e)(2) provides that the waiting period cannot be extended by a request for additional information to an acquired person in a tender offer. Rather than extend this treatment to all other § 801.30 transactions, the Commission opted to impose a general obligation on all recipients to respond within a reasonable time to requests for additional information. This decision resulted from a balancing of conflicting interests. To imitate the statutory treatment of tender offers (i.e., to permit the waiting period to expire before the requesting agency receives the additional information from the acquired person) would frustrate the congressional intent of assuring that the enforcement agencies have adequate information to analyze the transaction. Although there was also a congressional concern that persons be able to conclude other nonconsensual transactions despite the recalcitrance of the acquired person, the act does not provide treatment for such transactions similar to that regarding tender offers. The Commission determined that imposing a specific duty on acquired persons to comply with requests for additional information within a reasonable time would create sufficient incentive to assure that neither congressional interest is frustrated.

A second purpose of the rule is to facilitate investigations of tender offers. In all other types of acquisitions, if the acquired person fails to respond to the request, then the waiting period will remain in effect indefinitely, blocking the acquisition (unless the agencies terminate the waiting period under § 803.11, despite the pendency of the request). But since the act provides that for tender offers the waiting period will not be extended, an acquired person, by failing to respond to a second request, could prevent the agencies from obtaining the information necessary to review the acquisition before it took place. Again, the congressional purpose would be frustrated.

Therefore, the rule creates an affirmative obligation to submit requested information within a reasonable time. A filing person's failure to comply with this obligation could subject that person to civil penalties under section 7A(g)(1) or equitable relief under section 7A(g)(2). What constitutes a reasonable time must be judged on a case-by-case basis, considering all the facts and circumstances.

Comments 1090 and 1108 recommended that the treatment accorded by the act to tender offers be followed, although 1090 mentioned the institution of a rule like § 803.21 as an alternative. Another suggestion offered by comment 1086 is discussed in the statement of basis and purpose to § 803.10. All of these suggestions were rejected since the Commission believes that this rule represents the most appropriate balance of the competing interests.

Note that under § 803.11(c) the enforcement agencies may terminate a waiting period sua sponte, despite the pendency of a request for additional information. See the example to § 803.20(c)(2). This course of action might be chosen, for example, if the agencies determine from other sources that the acquisition is unlikely to violate the antitrust laws, and if it has become apparent that the acquired person is delaying its response in an attempt to forestall consummation of the acquisition.

SECTION 803.30 FORMAL AND INFORMAL INTERPRETATIONS OF REQUIREMENTS UNDER THE ACT AND THE RULES

This rule creates a mechanism for requesting and giving both formal (written) and informal (oral) interpretations of requirements under the act and rules. Paragraph (a) authorizes the Commission staff to consider requests for formal or informal interpretations, and explains how a request for a formal interpretation shall be made and what it must contain. It permits the staff, in its discretion. to render either a formal or an informal response to any request, however made, or to decline to render any advice.

Paragraph (b) permits the Commission staff, in its discretion, to refer to the Commission any request for interpretation, however made. Paragraph (c) specifies that when formal interpretations are given by either the Commission staff or the Commission itself they must be given with the concurrence of the Assistant Attorney General or his or her designee.

Paragraph (d) states that either the Commission or the Assistant Attorney General may rescind any formal interpretation previously given; in that event, the party that originally requested the interpretation must be notified of the rescission in writing.

Under paragraph (e), the Commission will publish in the FEDERAL REGISTER a summary of formal interpretations given by the Commission (but not those given by the staff) and any rescissions of formal Commission interpretations.

BACKGROUND INFORMATION TO § 803.30

This rule serves several purposes. First, it authorizes the Commission staff to give both formal and informal interpretations of the act and the rules. It thus recognizes that persons who are or may be subject to the act may frequently require information and advice concerning their obligations, and that the staff should respond to their needs for the program to function. Requests for advice may be made orally by phone or in person, or they may be made in writing. The same variety of responses is available to the staff, so that straightforward problems can be handled expeditiously, while more difficult questions are given more deliberate consideration.

Second, the rule permits the staff, within its sole discretion, to refer novel or complex (or any other) questions to the Commission, thereby giving the Commission the opportunity to render formal interpretations in response. The rule does not, however, give any person the right to obtain an interpretation directly from the Commission or to "appeal" a staff interpretation to the Commission. Nor does it obligate the Commission to give its interpretation (or to take any action whatsoever) in response to any request.

A final purpose of § 803.30 is to give the Assistant Attorney General a role in the issuance of formal interpretations. The reason for participation by the Assistant Attorney General is that under section 7A(d) the rules themselves must be promulgated by the Commission with concurrence of the Assistant Attorney General.

Neither the Commission nor the Assistant Attorney General is bound by either the formal or the informal interpretations of the staff under this rule. However, it is envisioned that the Commission or the Assistant Attorney General would, prior to taking any action contrary to a position embodied in a formal interpretation of the staff, first withdraw that opinion and give notice of that rescission to the party that originally requested the interpretation.

The purpose of the FEDERAL REGISTER summary described in paragraph (e) of the rule is to inform the public of the enforcement agencies' position on complex or novel issues referred by the staff, so that these interpretations may assist compliance with the act and the rules. All formal interpretations will be available for public inspection and copying in the Public Reference Branch of the Commission (Room 130 of the main Federal Trade Commission Building in Washington, D.C.).

Revised § 803.30 was more limited than the final rule, providing only for formal interpretations, and, only by the Commission with the concurrence of the Assistant Attorney General.

SECTION 803.90 SEPARABILITY

Section 803.90 states that if any provision of the rules or form is held invalid, or the application of the rules or form to any person or circumstances is held invalid, to the extent possible neither other provisions nor application of the provision in question to other persons or circumstances shall be affected. The reporting and waiting period obligations are to remain in effect to the full extent not specifically invalidated.

BACKGROUND INFORMATION TO § 803.90

Section 803.90 appears for the first time in the final rules.

OTHER COMMENTS

SUNSET RULE

Comment 1049 proposed the adoption of a "sunset" provision, providing for the expiration of the rules 4 years from the day they become effective. Comments 1059 and 1063 endorsed this suggestion. The final rules, however, do not adopt this proposal, and thus, like the original and the revised rules, do not contain a "sunset" or automatic expiration provision.

Comment 1049 made three arguments for the inclusion of the "sunset" provision. The comment contended that mandatory periodic review of the rules by the antitrust agencies is desirable because: (1) The rules represent a new type of undertaking for the agencies and make antitrust enforcement more of a "regulatory" process than ever before, (2) the rules are experimental and complex and only time can tell whether their scope was properly framed, and (3) the provision that amendments be made by rule with the participation of both agencies is cumbersome and may make change difficult to achieve. The "sunset" provision, the comment declared, would oblige the agencies to examine the rules after a reasonable period of time and make whatever changes appear necessary.

The Commission, though rejecting the mechanism proposed by this suggestion, agrees with certain of its underlying premises. The actual experience of operating the premerger notification program will unquestionable suggest changes in the rules and form that cannot be anticipated prior to the effective date. The agencies intend to respond to questions or unexpected difficulties with the rules by means of formal and informal interpretations under § 803.30 when appropriate, and by amendment to the rules when necessary. However, the adoption of a "sunset" provision would introduce the possibility of a lapse in coverage. If the rules are to expire at some stated time, a renewed program would have to be promulgated by rule in advance of that time to insure that no such lapse occurs. The rulemaking scheme of section 7A(d) requires that both agencies agree on a new set of rules, and if no agreement is achieved for some reason, they will be faced with an intolerable problem. In the Commission's view, the possibility that the program could thus be suspended because no rules implement it—a situation directly opposed to the intent of the statute, which contains no "sunset" provision and contemplates a permanent program—is unacceptable.

Furthermore, section 7A(j) requires that the Commission, with the concurrence of the Assistant Attorney General, annually prepare a report to Congress on the operation of the act, including an assessment of the effects of the act and of the effects, purpose, and need for the rules, and any recommendations for revision of the act. This annual procedure compels the periodic review of the workings of the rules and of any necessary changes. Thus, the primary objective of a "sunset" rule is achieved by section 7A(j). It is also achieved in the rulemaking section of the Administrative Procedure Act, pursuant to which the rules are promulgated. Any interested person has the right to petition for the issuance, amendment, or repeal of a rule. 5 U.S.C. 553(e). Anyone who believes a rule is unworkable, unfair, or unduly burdensome may petition for its amendment or repeal, and anyone who believes a new rule should be added can petition for its addition. Rulemaking petitions afford an opportunity for consideration of any suggestion or review of any rule.

One additional comment (1100), while not literally endorsing a "sunset" provision, recommended that the rules should provide for public review and discussion of the program after the first 2 years and regular review thereafter. The Commission does not find it necessary to adopt such a rule. Informal and formal interpretations, annual reports to Congress, and petitions under section 553 of the Administrative Procedure Act should insure adequate public participation.

EFFECTIVE DATE OF FINAL RULES

At least two comments (1032, 1070) suggested that the Commission provide a period longer than 30 days between the publication of the final rules in the FEDERAL REGISTER and their effective date. Thirty days is the minimum time allowable under the Administrative Procedure Act, 5 U.S.C. 553(d), except in special circumstances. Comment 1032 suggested that the Commission allow a longer period, of unspecified duration, in order to afford other Federal agencies adequate time to conform their regulations to the final rules, as necessary. Comment 1070 proposed a period of at least 90 days so that affected segments of the business community could digest the final rules and institute appropriate compliance programs. The comment stated that the complexity of the act and the rules would necessitate more than 30 days, especially for financial institutions with wide-ranging investment activities.

Although the Commission did not adopt these suggestions, the result these comments desire has nevertheless been achieved. On February 14, 1978, the Commission tentatively approved and made public the final version of the rules and form. Interested business and government entities were thus made aware of the final rules several months before the effective date and have had adequate time to make the appropriate preparations. It is therefore unnecessary to provide an effective date later than 30 days after publication.

RETURN OF MATERIALS SUBMITTED

Several comments (e.g., 70, 120; 1050, 1059) suggested that the rules should provide that all documents and information submitted under the premerger notification program be returned after a decision has been made not to challenge an acquisition, or after the completion of any proceedings opposing the acquisition. Another comment (1023) proposed that the agencies adopt a policy of prompt return, though it did not specifically suggest adding a rule for this purpose.

The comments made several arguments supporting the prompt return of the data submitted. For example, comment 1050 declared that since the legislation was intended solely to allow the agencies to determine whether or not to challenge an acquisition prior to its completion, no statutory purpose would be served by retaining the material after this determination has been made. Comment 1023 stressed the "highly sensitive and confidential nature of the data," apparently fearing that improper disclosure would be more likely to occur if the agencies retained the documents. Comment 1059 asserted that the premerger notification program was not intended by Congress as a means of obtaining an economic data base for generalized research and inferred that if the documents are not to be used for such purposes, they therefore ought to be returned after the agencies decide not to challenge an acquisition.

The Commission rejected these proposals because they take an excessively narrow view of the agencies' enforcement responsibilities and the permissible uses of materials received under the act. Section 7A(i)(1) explicitly states that an acquisition not challenged by either agency during the waiting period may still be challenged after its expiration. Nothing in the language or legislative history of the act appears to prohibit the use of data submitted under the act for subsequent challenge to a reported acquisition or, in fact, for any other law enforcement purpose. A challenge after the waiting period might result from subsequent developments, such as additional acquisitions. Submitted material can also be useful in investigations and challenges to other acquisitions. To return the materials after the waiting period expires could seriously hinder later enforcement efforts.

The confidentiality issue raised by comment 1023 is not considered a major problem. See section 7A(h) of the act and the statement of basis and purpose under the heading "confidentiality," below.

DUPLICATION OF FILINGS UNDER EXISTING NOTIFICATION PROGRAM

Two comments (1044, 1082) noted that under certain circumstances a firm that has previously filed notification of an acquisition under the Commission's existing premerger notification program must file again under the act and rules. Specifically, a transaction reported under the old program because the agreement was concluded before the effective date of the act must also be reported under the act if it will be consummated after the effective date. The comments objected that the dual filing requirement would be burdensome and unfair and would unnecessarily delay the completion of such acquisitions. They suggested that no further filing be required under the act and rules for transactions previously reported under the existing program.

The Commission did not adopt this suggestion, choosing to place all transactions on the same footing under the act. The Commission has already addressed this issue in the statement of basis and purpose to the transitional rule implementing the act, 42 FR 6365-66 (February 2, 1977).

However, the Commission has amended its existing premerger notification program to provide that, as of the effective date of the premerger notification rules, persons that file, and persons that are not required to file, a notification and report form under the act and the rules need not file a special report under the Commission's existing premerger notification program.

AD HOC EXEMPTIONS

Comments 87 and 1063 proposed that a rule permit the agencies, in appropriate circumstances, to grant ad hoc discretionary exemptions from the filing and waiting-period requirements. This approach was rejected. Section 7A(d)(2)(B) of the act requires that all exemptions be made by rule in accordance with 5 U.S.C. 553. Therefore, all exemptions must be of general application. Ad hoc exemptions of otherwise reportable transactions are apparently not permitted.

TRANSACTION SUBJECT TO PUBLIC UTILITY HOLDING COMPANY ACT

Comment 1084 recommended that transactions subject to SEC approval under section 9 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79i, be granted a limited exemption on the same terms as the transactions exempted by section 7A(c)(8) of the act and § 802.8 of the rules. The comment urged conditioning the exemption upon filing copies of all information and documentary material filed with the SEC contemporaneously with the antitrust agencies at least 30 days prior to consummation. The comment suggested this exemption in order to provide the agencies with a form of pretransaction notification yet avoid duplicative filings.

The transactions to which this comment refers are: (1) direct or indirect acquisitions by public utility holding companies of “any securities or utility assets or any other interest in any business,” and (2) acquisitions of any securities of a public utility company by any person which is an affiliate of such company as well as of any other public utility or public utility holding company, or becomes such an affiliate as a result of the acquisition. 15 U.S.C. 79(i)(a). These types of acquisitions require approval by the SEC before consummation.

The Commission rejected this proposal because it is unable to conclude that these acquisitions are unlikely to violate the antitrust laws. It thus believes that the comment failed to provide adequate justification for the proposed exemption.

CONFIDENTIALITY

Several comments made suggestions concerning the confidential treatment to be accorded materials submitted in response to the form or to requests for additional information. Several of these comments specifically referred to the nondisclosure provision of section 7A(h). That subsection exempts all such material from disclosure under the Freedom of Information Act, and provides as well that:

> no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

One group of comments (e.g., 48, 70, 101, 120; 1050, 1059) urged the Commission to promulgate rules which state the agencies’ interpretation of section 7A(h) and spell out what steps the agencies plan to take to preserve the confidentiality it requires. For example, comment 120 suggested, among other things, that the rules provide that all data and documents submitted in the premerger notification program be maintained in a separate file by the Secretary of the Commission and by an appropriate Department of Justice custodian; that they be inspected only at one location at each agency and only by the employees assigned to the particular premerger investigation; and that no other copies be made.

The Commission did not promulgate a rule concerning section 7A(h) because it did not believe rulemaking to be necessary or appropriate for this purpose. The act is unequivocal that no public disclosure may be made, and the agencies will take appropriate measures to assure this confidentiality.

The Commission also rejected the specific suggestions in comment 120 that the documents not be copied, that they be maintained only at one location at each agency, and that they be inspected only by the premerger office employees. The Commission believes it is not only unnecessary but also inappropriate to restrict access to the documents and information to particular agency staff members. Confidential information received under this program will be accorded the same treatment accorded to confidential information obtained by other means, such as by subpoena.

Comment 1050 cited *FTC v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977), in support of the suggestion that materials received under this program should not be made available by the agencies to individuals not involved in the premerger review process. The Commission takes the view that the *Atlantic Richfield* case has no relevance to this situation. In *Atlantic Richfield* the court suggested "various plausible arguments" (id. at 103) for the proposition that the FTC rules of practice and the due process clause bar the Commission staff participating in an adjudicative proceeding before an administrative law judge from obtaining access to documents or information obtained pursuant to subpoena in a separate FTC investigation, without notice to the parties and approval of the administrative law judge. The court ordered the Commission to make public its own interpretation of its rules, but did not purport to mandate the content of that interpretation. This interpretation was recently issued by the Commission and would in no way bar use of materials obtained through this program in any other Commission investigation or proceeding.

The Commission interprets the provision of section 7A(h) that the information submitted may be made public "as may be relevant to any administrative or judicial action or proceeding" to authorize making it public, in the agency's discretion, in any proceeding brought by or against the Commission or the Assistant Attorney General, whether the submitting person is a party or not. Nothing in the legislative history or intent of the act supports the more limited interpretations urged implicitly by comment 1050 and explicitly by other comments (e.g., 70, 120). Comments 70 and 120 suggested that the materials should only be made public in judicial or administrative proceedings brought by the Government to challenge the particular acquisition that is the subject of the notification and then only when the reporting person is a party. However, comment 120 conceded in a footnote that if the use of the submitted data is not so limited, it should at least be limited to proceedings against the submitting party. The comment argued that to use the data against another party would make a mockery of the statute and would undermine the effectiveness of the act.

The Commission does not agree. The language of the act contemplates that the data may be made public by the Commission or the Assistant Attorney General in any administrative or judicial proceeding to which the Commission or the Department of Justice is a party. There is no reason to believe that the act's effectiveness will be hampered by such a policy. As long as information is lawfully obtained, it may be used by the agencies for any law enforcement purpose.

Comment 1075 suggested that whenever material submitted pursuant to the act is to be used in an administrative or judicial proceeding, the submitting person should be given prior notice so that a protective order may be sought in appropriate situations. When the submitting person is a party to the proceeding, no special notice procedures are contemplated since the act contemplates such use by the agencies. The comment was therefore viewed as applying to situations in which the person that submitted the material is not a party to the proceeding in which the material is to be introduced.

Because section 7A(h) does not restrict or qualify the ability of the agencies to use submitted material, the Commission does not believe that any formal notice provision is required by the act, and none has been adopted in the final rules. However, the Commission recognizes that reporting persons have an interest in protecting their sensitive competitive data from public disclosure in the course of law enforcement proceedings to which they are not parties. Therefore, as a matter of policy, the Commission and the Assistant Attorney General will instruct their staffs in such cases to give persons reasonable notice, when possible, prior to introduction or other use of such material that would result in its becoming part of the public record of the proceeding.

Two comments (70, 120) urged that 10 days' notice be provided to the reporting party before the data is submitted to Congress. Within the constraints sometimes imposed by congressional requests for data, the Commission and Assistant Attorney General will also instruct their staffs to give reporting persons reasonable notice of any release of such data to Congress, when possible.

Comment 120 suggested a rule to limit permissible disclosure to congressional committees or subcommittees to "official" requests made by majority vote containing an intent to respect the confidential nature of the information. This suggestion was rejected. It is inappropriate to attempt to prescribe by rule the procedural acceptability of a Congressional request.

RISK ARBITRAGEURS

Comment 1095 urged that acquisitions of voting securities in risk arbitrage transactions be entirely exempted from the act. According to the comment, risk arbitrageurs are investment banking firms or other securities dealers that, upon the announcement of a pending merger, acquisition, or tender offer, buy the securities of the company to be acquired or sell short the securities of the acquiring company. They realize a profit if the merger actually takes place as planned, since ordinarily the value of the stock of the acquired person increases and the value of the acquiring person's stock declines. The comment stated that arbitrageurs assume substantial capital risks but serve a useful function by helping to stabilize the frequently volatile market resulting from a merger or tender offer announcement. The comment recommended that arbitrage transactions be exempted since arbitrageurs do not ordinarily hold voting securities on a long-term basis, nor do they typically have any interest in participating in the business decisions of the companies whose stock they purchase. It argued that they are competitively irrelevant and serve only a market-stabilizing function.

This comment was rejected. Arbitrageurs should not be treated differently from other institutional investors that enjoy only a limited exemption under § 802.64. Since arbitrageurs may qualify as broker-dealers within § 802.64(a)(9), their purchases of voting securities in the ordinary course of business solely for the purpose of investment may be exempt under the final rules until their holdings reach the level of at least 15 percent of the outstanding stock of the issuer worth at least $25 million. Beyond that point, arbitrageurs, like all other institutional investors, must comply with the act.

Specifically, the Commission was not satisfied that the holdings of arbitrageurs never have anticompetitive consequences. There is no assurance, when an arbitrageur makes a purchase of stock, that it will not hold the shares for a longer period than it anticipates or that it will not act to influence or control management. In some circumstances, it is possible that the existence of large holdings by arbitrageurs may have an effect on management. In addition, it seems difficult to define with any degree of accuracy or certainty, for the purpose of drafting an exemption, which transactions are to be considered arbitrage transactions, and the comment did not suggest a solution.

NOTIFICATION AND REPORT FORM

CONCEPT OF FORM

The notification and report form appears as an appendix to part 803 of the rules. It is designated in § 803.1 as the notification required by section 7A(a) of the act. Thus, in cases of noncompliance use of § 803.10(c)(2) procedures or the enforcement proceedings specified in sections 7A (g)(1) and (g)(2) may follow if, the form is not properly completed and filed. As § 803.1(a) states, all persons required by the act to file notification must do so by completing and filing a copy of the form, including any documents required to be supplied in response to any items on the form. The form is designed to provide the Commission and the Assistant Attorney General with the information necessary and appropriate for an initial evaluation of the potential anticompetitive impact of an acquisition. Its completion by all parties required to file will ordinarily permit both agencies to determine whether the waiting period should be allowed to expire, or whether a request for additional information should be made under section 7A(e) and § 803.20, potentially leading to a preliminary injunction or administrative proceeding challenging the acquisition, or to an enforcement action under section 7A(g).

The form is not intended to elicit all potentially relevant information relating to an acquisition. Relevant information not specifically requested by any of the items on the form may be obtained by either agency by means of a request for additional information under section 7A(e) and § 803.20. The reporting person may also supply additional information voluntarily pursuant to § 803. 1 (b).

The information requested by the form includes, in summary:

The identities of the persons involved and the type of acquisition (item 1);

A description of the voting securities or assets to be acquired and of the means by which the acquisition is to be carried out (item 2);

The percentage and total dollar amount of the assets and voting securities of the acquired person to be held by the acquiring person as a result of the acquisition (item 3);

Copies of various SEC filings, annual reports and financial statements of the reporting person, as well as studies or analyses of the acquisition (item 4).

A listing of dollar revenues derived by the reporting person, broken down separately by industry, product class, and product (item 5);

Information about the entities included within the reporting person, as well as information about the shareholders of the reporting person and the shareholdings of the reporting person in other persons (item 6);

Geographic market information relating to industries in which the reporting person and another party to the acquisition both derived dollar revenues (item 7);

Information about revenues resulting from certain vendor-vendee relationships existing between the reporting person and another party to the acquisition (item 8);

Any other recent acquisitions by the acquiring person in an industry from which both it and the acquired person derive dollar revenues (item 9).

The purpose of the act is to assist the agencies in identifying, before they are consummated, transactions that may violate the antitrust laws. Section 7A(d)(1) therefore provides that the Commission "shall require that the notification * * * be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate" to enable the agencies "to determine whether such acquisitions may, if consummated, violate the antitrust laws." The Commission has determined that each of the items on the form fulfills the statutory mandate.

Another possible course of action, which was rejected by the Commission, would have been to require only a perfunctory notification and seek detailed data by means of requests for additional information. This course, which several comments (e.g., 1023, 1080) suggested, was rejected for several reasons. First, this position misconceives the amount of information necessary to make even a tentative determination of whether a transaction may violate the antitrust laws. The act clearly contemplates that the initial notification should contain all information and documents "necessary and appropriate" for the purpose of determining the competitive impact of the acquisition. It explicitly leaves to the Commission, with the concurrence of the Assistant Attorney General, the determination of what constitutes such information. A perfunctory initial report would not fulfill the congressional intent expressed in section 7A(d)(1).

Second, to require a shorter initial notification would more frequently lead to the issuance of a request for additional information, with its consequent delay and burden on the reporting person or persons. If second requests were issued more frequently, the average waiting period would be longer, rather than shorter, than it would be with a more comprehensive initial notification procedure. In many cases the more data the receipt of which is deferred, the greater would be the ultimate burden on the reporting person.

One comment (1059) suggested that the interests of reporting persons would be better served if the most burdensome questions were made optional and the reporting person allowed to balance for itself the risk of a second request. The comment argued that for clearly innocuous acquisitions and clearly irrelevant information, the reporting burden, and the agencies' burden of reviewing this information, could thus be mitigated. The Commission did not adopt this suggestion. The Commission believes that section 7A(e) provides the mechanism of requests for additional information in order to assist the agencies in their efforts to obtain additional information about acquisitions that the agencies believe, based on information contained in the initial report, may require a petition for judicial or administrative relief. To permit optional compliance with the provisions of the initial report would undermine the usefulness of the second request mechanism, would seriously hinder the agencies in their efforts to carry out their congressionally mandated review, and would be administratively unworkable.

Furthermore, optional compliance with the provisions of the form could create a temptation on the part of reporting persons to withhold potentially crucial information concerning an acquisition's impact on competition. In order to discourage such practices, the agencies would be forced routinely to make second requests for information not supplied on the Form. This result would create longer delays for reporting persons, and would defeat the purpose of the suggestion.

Several comments (e.g., 1011, 1023) complained about what they felt was an excessive burden of paperwork related to the form. The Commission has determined that the information required is only that which is necessary and appropriate to implement the congressional mandate to create an effective premerger notification program.

EXPLANATION AND INSTRUCTIONS

The explanation and instructions found on pages 1-3 of the notification and report form are intended to supply certain basic information. They must be read in conjunction with the act and the rules. Some of the explanations and instructions for completing the form are found in the rules themselves, especially in § 803.2. The terms used in the form are defined in the rules rather than in the form itself. The definition of one term used in the form but not the rules, "dollar revenues," has been moved from the "definitions" portion of the form, where it was in the original form, to § 803.2(d). The balance of the terms are defined in § 801.1

As § 803.1(a) implies, one need not necessarily file notification by completing a preprinted copy of the form provided by one of the agencies. Photostatic or other equivalent reproductions are permitted, and many items requiring detailed responses will require separate additional sheets.

The third paragraph of the instructions describes how many copies of the form are to be sent to each agency and gives their addresses. The affidavit required by § 803.5 should be attached to the front page. Without the affidavit, notification is incomplete. See the Statement of Basis and Purpose to § 803.5.

A box is provided on the first page of the form for the reporting person to check whether the acquisition is a cash tender offer. This box gives the agency staff immediate notice that the waiting period is only 15 days and begins upon receipt of the acquiring person's form, as provided in section 7A(b)(1)(B), and that review must therefore be expedited.

The "name and date" blanks are provided to help the agency staff immediately identify the report as belonging to a particular person. The blanks under (b) and (c) call for additional information when rules are employed permitting an entity other than the ultimate parent entity to file notification; see the discussions of § 803.2(a) and 803.4 on these instances. The name of the reporting person is repeated at the top of each page of the form in order to assure the identification of each page should they become accidentally separated.

In general, the form employs the Standard Industrial Classification ("SIC") system employed by the Bureau of the Census. The SIC-based product and industry categories are available in the "Standard Industrial Classification Manual" and other publications; the instructions provide the exact citation for that volume as well as for additional publications noted as references for 5-digit (SIC-based code) product class and 7-digit (SIC-based code) product. For 7-digit product codes ending in 00, the instructions request that more detailed information be supplied from appendix A to the Numerical List of Manufactured Products, because codes ending in 00 do not provide sufficient detail on the precise product involved.

The instructions provide that if precise information is not available, best estimates may be supplied, but must be indicated by the notation "est." The sources of such estimates must also be indicated. Furnishing an estimate in these circumstances will ordinarily not be regarded as a failure to supply a complete response within the meaning of § 803.3 and does not require a statement of reasons for noncompliance as provided in that section. Persons which have information on a fiscal year, rather than calendar year, basis may supply the requested data for the fiscal year which most nearly corresponds to the calendar year specified.

The final paragraph of the instructions reminds the individual completing the form of certain special provisions of § 803.2 that may increase or decrease the amount of information required. These provisions are explained in the Statement of Basis and Purpose to § 803.2.

ITEM 1(a)

Item l(a) requires the reporting person to check boxes to indicate the basic character of the reportable transaction. All applicable boxes should be checked.

ITEM 1(b)

Item l(b) requires the reporting person to indicate whether it is the acquiring or acquired person in the transaction, or, when applicable, both. If the reporting person is both an acquiring and an acquired person in a single transaction, it need not submit two entirely separate reports. It may instead file one report as both an acquired and an acquiring person, but must respond to certain items separately in each capacity. See § 803.2(b).

BACKGROUND INFORMATION TO ITEM 1(b)

Original item l(b) required listing all "active entities" included within the reporting person. The final form requires listing the entities included within the reporting person in response to item 6(a). See the Statement of Basis and Purpose to item 6.

ITEM 1(c)

Item l(c) requires the name and address of the preacquisition ultimate parent entity.

ITEM 1(d)

Item l(d) requires the reporting person to indicate the legal form or organization of the reporting person, i.e., corporation, partnership, etc. If a corporation, the reporting person must indicate the state of incorporation; if a partnership, the state of jurisdiction.

ITEM 1(e)

Item 1(e) requires the reporting person to indicate whether the data submitted on the notification and report form is furnished by calendar or fiscal year, and if by fiscal year, the dates of the fiscal year.

ITEM 1(f)

Item 1(f) need not be completed if the ultimate parent entity is itself the acquiring or acquired entity. If the acquiring or acquired entity is not the ultimate parent entity listed in item 1(c), the reporting person must identify the name and mailing address of the acquiring or acquired entity, and (if applicable) its state of incorporation. The percentage of voting securities of this entity held by the ultimate parent entity described in item 1(c) must also be indicated. If the ultimate parent entity controls the acquiring or acquired entity indirectly, the report must describe this indirect control.

DELETION OF REVISED ITEM 1(g)

See the Statement of Basis and Purpose to item 6.

ITEM 2(a)

Item 2(a) requires the reporting person to list the name and mailing address of each acquiring and acquired person, whether or not each such person is itself required to report. The major instance in which fewer than all the parties to an acquisition may be required to file notification is the creation of a joint venture or other corporation. See § 801.40(b).

Item 2(a) requires a brief description of the assets or voting securities to be acquired, the consideration to be received by the acquired person and, if known, the identity of any holders other than the issuer from which the voting securities are to be acquired. Acquisitions from holders other than the issuer may occur in tender offers and the other types of transactions described in § 801.30. In tender offers for widely-held entities, as well as in purchases of stock traded on securities exchanges, the number of such holders will be extremely large. Item 2(a) thus requires disclosing the identity of nonissuer holders only when the acquired entity is not widely held.

BACKGROUND INFORMATION TO ITEM 2(a)

Original item 2(a) required the listing of all other companies "involved in the transaction." A number of comments (e.g., 25, 28, 71, 112, 120) criticized the use of this phrase as ambiguous, since it could conceivably refer to (among others) law firms, banks, escrow agents, auditors, brokers, or other persons incidentally participating in the acquisition. The item did not seek to identify so broad a category of persons. Final item 2(a) clarifies that only acquiring and acquired persons and, if applicable, non-issuer holders need be listed.

ITEM 2(b)

Item 2(b) requires the reporting person to indicate, if known, the scheduled consummation date of the acquisition. If the date is unknown at the time of filing, an estimated date should be provided and the basis of the estimate explained. If the parties have agreed to a formula by which the closing date will be determined (e.g., "60 days after termination of the waiting period"), this formula should be provided.

ITEM 2(c)

Item 2(c) requires the reporting person to describe the manner in which the acquisition is to be carried out, including the expected dates of major events in the acquisition, such as stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers, etc.

BACKGROUND INFORMATION TO ITEM 2(c)

Original item 2(c) required the description of "each necessary step" in the transaction. A number of comments (e.g., 71, 89, 112) criticized the use of this phrase as overly broad or unnecessary for law enforcement purposes. In addition, others (e.g., 30; 1098) argued that this provision might require the submission of information not available to the reporting company at the time of filing. Two comments (28, 112) recommended that the only vital date for law enforcement purposes should be the prospective closing date of the transaction.

The language of final item 2(c) has been clarified. The use of the phrase "necessary steps" has been abandoned. Instead, reporting companies are required to describe generally the intended course of the transaction including the expected dates of major events. The item gives examples of such events.

ITEM 2(d)(i)

Item 2(d)(i) need be completed only by persons engaged in an assets acquisition; persons engaged in an acquisition of voting securities need not submit this information. The item requires the reporting person to describe and provide an approximate dollar value for all general classes of assets (other than cash and securities) to be acquired by each party to the acquisition. If the acquisition is the formation of a joint venture or other corporation, the description must include all general classes of assets to be acquired by the joint venture pursuant to agreement among the persons forming the corporation.

For each general class of assets, the reporting person must (when applicable) indicate the page or paragraph number of the contract or other document submitted with the form in which the assets are more particularly described.

The term "general classes of assets" refers to general types and categories of assets, rather than any specific meaning in accounting terminology or otherwise. Examples are land, merchandise inventory, manufacturing inventory, manufacturing plants, retail stores, goodwill and other intangibles. The term "approximate dollar value" refers to an approximation of value, rather than a value resulting from a formal appraisal.

BACKGROUND INFORMATION TO ITEM 2(d)(i)

Original item 2(d)(i) required the reporting person to describe "all * * * assets" to be acquired. The final version of the item refines this requirement to permit the description of general classes of assets.

A number of comments (e.g. 1057, 1098) criticized item 2(d)(i) on the grounds that the compilation of this data would be too burdensome. The Commission believes that information concerning general classes of acquired assets is necessary and appropriate to antitrust analysis, and is unlikely to constitute a significant burden for reporting persons. Another comment (77) suggested that any description of assets be limited to the degree of detail necessary in order to identify the product or service generated by the asset. The latter comment has been adopted in substance in the final version of this item.

Another comment (1086) suggested that reporting companies will have difficulty determining "approximate dollar values" for classes of assets without undertaking an extensive appraisal of those assets. The "approximate dollar value" requirement of item 2(d)(i) is intended only to provide the agencies with a rough estimate of the value of each class of acquired assets. It does not require an appraisal. The more structured determination of dollar value under § 801.10 applies to the aggregate dollar value of all assets to be acquired, and it must be reported under item 3. If the acquired person holds only one class of assets, that value is the proper response to item 2(d)(i) as well as item 3.

However, if the acquired person holds more than one class of assets, and the acquiring person is acquiring more than one such class, item 2(d)(i) requires more detail. The aggregate dollar value should in this case be broken down into approximate dollar values for each general class of acquired assets. Alternatively, the book value of each class of the acquired assets can be used if it bears a reasonable relationship to fair market value.

ITEM 2(d)(ii)

If the acquiring person, at the time of the signing of the agreement to acquire assets of the acquired person, holds any assets of that person that it acquired in the previous 180 days, it must describe and provide a dollar value for each general class of the earlier-acquired assets. The rule applies only if the second acquisition is of assets, not voting securities. See **?** 801.13(b)(2). The term "dollar value" means "approximate dollar value," as employed in item 2(d)(i). See the statement of basis and purpose to item 2(d)(i).

ITEM 2(e)

Item 2(e) need be completed only by parties to a voting securities acquisition. The item requires all reporting persons to provide, for each issuer whose voting securities will be acquired, information on the classes and dollar values of those issuers' voting securities. When voting securities of an issuer are being acquired indirectly, those securities are not listed in response to this item, although the issuers of such securities will be listed in response to item 6(a) of the acquired person's form. Similarly, when voting securities are being acquired in a secondary acquisition, those securities are not listed in response to this item on the form submitted for the primary acquisition, since separate notification and report forms must be submitted for the secondary acquisition. See the statement of basis and purpose to **?** 801.4. This information must be submitted for all classes of securities, regardless of whether securities, within a particular class will actually be acquired in the transaction. This information is relevant to the review process since it will assist the agencies in determining the actual degree of control arising from the acquisition. The required information includes:

(i) A list of all classes of voting securities that will be outstanding after the acquisition (regardless of whether stock in each particular class will be acquired in the transaction), and a list of all classes of non-voting securities that will be acquired in the acquisition. When more than one class of voting securities is outstanding, the reporting person must include a description of the voting rights of each class;

(ii) The total number of shares of each class listed under (1) that will be outstanding after the acquisition;

(iii) The total number of shares of each class listed under (i) that will be acquired in the acquisition;

(iv) The identity of each person acquiring the securities of any class listed under (i);

(v) The dollar value of securities of each class listed under (i) that are to be acquired in the acquisition (for purposes of determining dollar value, the provisions of § 801.10(a) must be followed);

(vi) The total number of shares of each class of securities listed under (i) that will be held by the acquiring person(s) after the acquisition;

(vii) The percentage of each class of securities listed under (vi) that will be held by the acquiring Person(s) after the acquisition;

For subsections (iii)-(vii), if there is more than one acquiring person, separate data must be submitted for each such person.

BACKGROUND INFORMATION TO ITEM 2(e)

The version of item 2(a) appearing in the original form required the description of assets to be received in the transaction. These provisions were redesignated item 2(d) in the revised and final forms. Revised and final item 2(e) require the description of voting securities to be acquired.

A number of comments (e.g., 26, 30; 1098) stated that the information sought was too detailed and would impose an undue burden on the reporting person. The Commission disagrees. This type of data is easily available to reporting persons. In order to evaluate fully a voting securities acquisition, the agencies must be informed of the details of the acquisition and its effect on the capital structure of the acquired person. If this information is not obtained, the agencies' evaluation will be incomplete. Another comment (77) suggested that since item 2(e) does not reflect the transfer of new issues or treasury stock, the form should be amended to require the submission of data concerning the pre- and post-acquisition capital structures of the acquired issuer. The Commission has concluded that the submission of preacquisition data would be unnecessary for law enforcement purposes. Any anti competitive effect arising from the transaction will be primarily the result of the post acquisition structure.

ITEM 2(f)(i)

Item 2(f)(i) requires that the reporting person furnish copies of final or most recent versions of all documents constituting the agreement between the acquiring and acquired persons. Only documents embodying the actual agreement are requested, and ancillary documents need not be submitted. If only a letter of intent has been signed, it should be provided. In the case of a tender offer, the acquiring person should submit a copy of the tender offer, and the acquired person need not do so. For secondary acquisitions and transactions described by § 801.31, the background of the acquisition should be explained, but no documents need be submitted. If there are no such documents because of the nature of the transaction (for example, when the acquiring person intends to acquire voting securities on a stock exchange or exercise a conversion privilege), no submission in response to this item is required.

BACKGROUND INFORMATION TO ITEM 2(f)(i)

The predecessor of this item, original item 2(g), required the reporting person to furnish copies of all documents "relating to" the acquisition. A substantial number of comments criticized this provision.

A number of comments (e.g., 37, 47, 63, 71, 77, 87, 90, 103, 112, 115) criticized the item as too broadly worded and likely to require the production of largely irrelevant documents. Several comments (e.g., 11, 37, 63, 88, 112) suggested possible limitations on the item, including limiting it to documents that are "governing," "basic," "in sufficiently final form" or contain "material terms." While the suggested terms were considered unworkably imprecise, they do describe in a general sense those documents that the Commission believes are necessary and appropriate to preliminary review. Accordingly, the Commission concluded that the scope of the item should be narrowed considerably. Final item 2(f)(i) requires the submission of only those documents that actually constitute the agreement, and no ancillary documents.

Several comments (e.g., 41, 77, 90) suggested that documents containing confidential business and financial information should be exempt from submission. The Commission believes that these comments are the result of an erroneous interpretation of the scope and purpose of the act. The act exempts no relevant information from disclosure to the enforcement agencies, regardless of its sensitivity or confidentiality. If anything, a careful reading of the act indicates that the congressional intention was exactly the opposite. Section 7A(h) specifically exempts information and documents received by the agencies pursuant to the act from disclosure under the Freedom of Information Act. Thus, it appears that Congress envisioned the submission of confidential information. In light of the statutory language, the final rules take the position that no exception will be made under item 2(f)(i) merely because the contents of these documents are allegedly confidential.

ITEM 2(f)(ii)

Item 2(f)(ii) requires the reporting person to furnish an index containing a brief description of each ancillary document or class of documents related to the agreement underlying the reported acquisition. The phrase "related to" is considerably broader than the term "constitute" used in item 2(f)(i). Specific examples of relevant ancillary documents include documents relating to personnel matters, third-party financing agreements, leases, subleases and other documents relating to the transfer of realty. An index to these documents will permit the agencies to identify particular documents in a second request.

BACKGROUND INFORMATION TO ITEM 2(f)(ii)

Original item 2(g) would have required the submission of all documents related to the transaction. This item, which first appeared in the revised form, requires the submission of an index of ancillary documents, rather than the documents themselves.

A number of comments suggested that the compilation of such an index was unnecessary (1044, 1104) and too burdensome (1044, 1053). However, an index of ancillary documents is both necessary and appropriate to antitrust review. The information contained in such an index will permit the agencies to identify particular documents appropriate to second requests, should such requests be necessary.

Another comment (1028) suggested that the required compilation of an index was beyond the statutory authority because the information contained in the index would be irrelevant to antitrust consideration. The Commission disagrees. Section 7(A)(d)(1) states that the notification shall contain such relevant information and documentary material as is necessary and appropriate to enable the agencies to determine whether the acquisition will violate the antitrust laws. The documents required to be indexed in item 2(f)(ii) are expressly limited to those "relating to" the reported acquisition. The agencies have found such documents to be useful in evaluating the legality of past acquisitions. Thus, the information submitted in response to item 2(f)(ii) falls within the mandate of section 7A(d)(1). Furthermore, inasmuch as the compilation of an index will be essentially a clerical function, it cannot be said to be an excessively burdensome task.

ITEM 3

Item 3 requires the reporting person to state the percentage of assets and voting securities of the acquired person, and the aggregate total dollar amount of such assets and securities, that will be held by each acquiring person as a result of the acquisition. In the majority of transactions, reporting persons will respond to either 3(a) or 3(b), but not both. All reporting persons must respond to 3(c). The responses to item 3 are intended to confirm the basis on which the acquisition meets the size-of-transaction test of section 7A(a)(3).

Item 3 requires only approximations of the percentages and aggregate total dollar amounts of assets and voting securities. Particularly as to those criteria of the 15 percent or 15 million test that are self-evidently either satisfied or not satisfied, precise figures are not required. Furthermore, the reporting persons may concede that certain criteria contained in item 3 are satisfied, and submit approximate answers to those criteria that are not satisfied.

BACKGROUND INFORMATION TO ITEM 3

Item 3 is intended to be a recapitulation of the 15 percent or $15 million test of section 7A(a)(3).

Several comments (e.g., 5, 120) suggested that information submitted under item 3(b) would be superfluous inasmuch as the same information is required under item 2(e). This interpretation is incorrect. The information contained in item 3 is needed to verify the computations of the reporting persons under section 7A(a)(3) and thus that the act applies to the transaction. The information contained in item 2(e), on the other hand, provides a more detailed picture of the overall capital structure of the acquired person. That information is designed to assist substantive antitrust review by the law enforcement agencies and has no bearing on the reportability of the transaction. For this reason item 3 is not duplicative. Furthermore, since the response to item 3 will require no more than disclosure of the calculations the reporting person must perform under section 7A(a)(3), the item cannot be said to constitute an unreasonable burden upon reporting persons.

Revised item 3 would have required separate reporting for the holdings of the acquiring ultimate parent entity and its affiliates. Since the final rules define the term "affiliate" to exclude persons or entities not included within the acquiring person, see § 801.1(d), final item 3 has been amended to remove this separate reporting requirement.

ITEM 4

Item 4 requires the reporting person to furnish copies of a number of documents commonly prepared for filing with the SEC or for other corporate purposes. The reporting person must submit copies of its own documents and, if entities included within the reporting person have their own documents that are different from those of the reporting person, copies of those entities' documents as well.

In the heading to the item, the reference to documents "of the person filing notification" merits explanation. If the person is a corporation that treats all its controlled (as defined in **?** 801.1(b)) subsidiaries as components of a single unit, then the documents "of the person" naturally will be the documents that apply to that corporation.

ITEM 4 (a)

Item 4(a) requires the reporting person to furnish copies of certain documents if they were filed with the SEC within 3 years prior to the date of filing the notification and report form, or if they are to be filed contemporaneously with the SEC in connection with the acquisition. These documents include the most recent proxy statement and most recent form 10-K. In addition, all registration statements, forms 10-Q and forms 8-K filed since the end of the period reflected by the most recent form 10-K must be submitted. If the acquisition is a tender offer, schedule 14D-1 must also be submitted if it has already been filed with the SEC or will be filed with the SEC contemporaneously with the filing of the notification and report form with the Commission and the Assistant Attorney General. If schedule 14D-1 has not been filed with the SEC prior to the filing of the notification and report form, and will not be filed contemporaneously with the notification and report form, it need not be submitted in response to item 4(a).

BACKGROUND INFORMATION TO ITEM 4(A)

The documents requested by Item 4(a) contain information which will prove helpful to the enforcement agencies in evaluating the impact of the acquisition upon competition. Since these documents will be readily at hand, requiring their submission imposes no undue burden on reporting person.

If the reporting person does not have copies of responsive documents readily available, the reporting person may instead identify each document and indicate its date and place of filing.

Item 4(a) has undergone some change since the original form. First, original item 4(a) required the submission of the most recently filed copies of all enumerated types of documents, regardless of how long ago such documents may have been filed. Several comments (e.g., 11, 15, 59, 77, 104) argued that only relatively recent documents would be useful for review purposes. Accordingly, the final item required that such documents be submitted only if they were filed with the SEC within the 3 years prior to the date of filing of the notification and report form. Second, the revised item required the reporting person to submit all registration statements filed with the SEC during the 3 years prior to the filing of the premerger notification report. Comment 1091 noted that all of this information, to the extent not outdated, would be included in the most recent form 10-K. The final version requires the submission of only those registration statements filed since the end of the period reflected by the most recent form 10-K.

The SEC comment (1058) suggested that problems could arise with regard to the filing of SEC schedule 14D-1, relating to tender offers. The comment suggested that in many cases tender offerors will not have access to all of the information required to be disclosed under schedule 14D-1 at the time of submission of the notification and report form and thus may not have prepared schedule 14D-1 at time of filing the form. Under these circumstances, to require the submission of schedule 14D-1 at the time of filing might delay the filing until schedule 14-1 was completed. The comment recommended that item 4(a) of the notification and report form be construed in such a manner as to require schedule 14D-1 to be submitted to the Commission and the Assistant Attorney General as a supplement to item 4(a) contemporaneously with its filing with the SEC.

The final version of item 4(a) does not follow the suggestion of the SEC. The final rules require that the reporting person submit schedule 14D-1 in response to item 4(a) only if the schedule has already been filed with the SEC or will be filed with the SEC contemporaneously with the filing of the notification and report form. Instead of requiring a supplemental filing, whenever the schedule is unavailable at the time the acquiring person completes item 4(a), the agencies may request it as part of a second request. Furthermore, reporting persons may wish to submit schedule 14D-1 voluntarily as a supplement to item 4(a). See § 803.1(b).

Another comment (35) suggested that submission of the requested documents under item 4(a) was unnecessary because these documents are available from the SEC. Although the documents are generally available, the agency staffs will be under severe time constraints in reviewing filings under the act. Obtaining the required documents for each reporting person would be extremely time-consuming. The added burden of requiring the agencies to obtain these documents from the SEC would impede the effective and timely review envisioned by the act. By contrast, for reporting persons the burden of submitting copies of these documents should be minimal, if copies are available.

Finally, comment 77 suggested that reporting persons furnish only those documents filed with the SEC that contain primarily financial statements, rather than nonfinancial information such as proxy statements. The final version of the item does not follow this suggestion. Regardless of the presence of financial statements, SEC filings are likely to contain information concerning the structure, operations and plans of the person that will facilitate review of the acquisition by the agencies.

ITEM 4(B)

Item 4(b) requires the reporting person to furnish copies of the most recent annual reports and annual audit reports of the person filing notification and of all unconsolidated United States issuers included within the person. In addition, if the most recent regularly prepared balance sheets of the person or of the unconsolidated United States issuers contain information more recent than (and different from) that contained in the most recent annual report and annual audit report, the balance sheets must also be submitted. This situation may rise, for example, when the most recent regularly prepared balance sheet is a quarterly or monthly balance sheet prepared after the most recent annual report. The term "unconsolidated issuer" means an entity whose operations and financial position are not reflected in the financial statements of the ultimate parent entity or the entire reporting person. It is immaterial for purposes of item 4(b) whether such unconsolidated issuers are involved in the reported acquisition. The term "United States issuer" is defined in § 801.1(e)(1)(ii). Note that all persons must respond to item 4(b) without regard to whether they are required to file reports with the SEC.

BACKGROUND INFORMATION TO ITEM 4(b)

The annual reports, audit reports, and balance sheets to be submitted in response to item 4(b) constitute basic data that the agencies will employ in gaging the likely impact of the acquisition upon competition. Original item 4(b) would have required the submission of "all documents issued during the 3 years prior to the filing of this report which contain information directly pertaining to the reported transaction." A large number of comments (e.g., 15, 28, 30, 37, 41) criticized the breadth and obscurity of this language. In response to these comments, the information sought under original item 4(b) is described in more detail in the final version of item 4(c).

The revised version of item 4(b) was substantially similar to the final version. However, revised item 4(b) would have required the reporting person to furnish information for all unconsolidated entities included within the reporting person. Several comments (e.g., 1026, 1094, 1099) criticized the requirement of submitting such documents for unconsolidated foreign entities. One comment (1094) suggested that the submission of such documents for unconsolidated foreign entities might violate foreign corporate secrecy statutes. The Commission reexamined the need for these statements, and determined that information regarding foreign entities can be relegated to requests for additional information. Accordingly, final item 4(b) requires the submission of annual reports, annual audit reports, and regularly prepared balance sheets only for unconsolidated "United States issuers" included within the reporting person. This amendment renders item 4(b) consistent with items 5, 7 through 9, and the insurance appendix, which require the submission of information with respect to United States operations alone. See § 803.2(c).

ITEM 4(c)

Item 4(c) requires the submission of all studies, surveys, analyses and reports prepared by or for officers or directors for the purpose of evaluating or analyzing the acquisition with respect to various aspects of competition.

The reporting person must submit only those documents prepared in connection with the reported acquisition. Documents pertaining to other mergers or acquisitions by the acquiring person, even if in the same market as the acquired person in the reported transaction, need not be submitted. Further, only those documents relating to markets, competition, competitors, potential for sales growth or expansion into product or geographic markets, and geographic and product market shares need be supplied. Documents relating to other matters, such as pension arrangements, labor contracts, financing agreements or securities matters need not be supplied. Finally, only documents prepared "by or for any officer(s) or director(s)" need be submitted. Officers or directors of any entity included within the reporting person meet this standard. The language "by or for" embraces documents prepared by any persons, including consultants, for officers or directors. The date of preparation and name and title of the individual who prepared each document must be indicated if not contained in the document itself.

BACKGROUND INFORMATION TO ITEM 4(c)

Item 4(c) requires the submission of documents that the Commission views as essential to perform preliminary evaluations of mergers or acquisitions adequately. Internal documents of the parties to an acquisition provide a perspective on matters of antitrust concern that even detailed statistical information is unlikely to yield. SIC data, while the most satisfactory data available, are occasionally imperfect for determining product markets. Likewise, the other items on the form, while designed to elicit appropriate information, cannot be expected to answer all of the basic questions in every acquisition. The agencies have found from past experience that the viewpoints of the participants are extremely valuable in analyzing the antitrust implications of an acquisition and have determined that some of these perceptions are indispensable to the preliminary review envisioned by the act. As later portions of this discussion indicate, the final version of the items represents a substantial reduction in the scope of the document request.

Furthermore, the documents submitted under this item will enable the agency staffs to determine rapidly which statistical information is likely to be important. Since the waiting period may provide a very short time in which to analyze a relatively complex acquisition acceleration, of the review process by means of internal documents is essential.

Item 4(c) and its earlier drafts provoked many critical comments. Comment 35, for instance, suggested that any information derived from documents sought under either version of the item would be speculative at best. Numerous other comments considered the documents more properly the subject of a request for additional information and documentary material (e.g., 59, 85, 87, 94, 111, 115, 120; 1075, 1104), or a discovery motion in the course of litigation (e.g., 112; 1108). The Commission disagrees. Item 4(c) requests the production of a narrow class of documents that is necessary and appropriate for purposes of preliminary antitrust review. As noted by Congressman Rodino on the House floor:

> [I]n most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.

122 Cong. Rec. H10293 (daily ed. Sept. 16, 1976). Documents analyzing or evaluating a merger generally form the basis of a party's decision to proceed with an acquisition. As such, those documents are highly relevant for review purposes. In light of the agencies' congressional mandate to evaluate reported mergers and acquisitions effectively, any further limitation on the scope of item 4(c) would seriously impair the agencies' efforts to fulfill their delegated responsibility.

A large number of comments (e.g., 37, 59, 63, 70, 77, 78, 101, 109, 111, 112, 120; 1050, 1088) recommended that documents containing sensitive financial information or trade secrets be exempt from production under item 4(c). This suggestion was rejected. The Commission believes that fears of improper public disclosure of confidential information are unfounded in light of § 7A(h). That subsection provides that information filed with the agencies is exempt from disclosure under the Freedom of Information Act, and may not be made public except in an administrative or judicial proceeding, or to Congress.

Other comments (e.g., 59, 63, 77, 109, 111, 1044, 1058) suggested that documents protected by the attorney-client or other privileges should be exempt from disclosure under Item 4(c). The Commission has declined to follow this suggestion. Section 7A(d)(1) contemplates the submission of all relevant documents and provides no exemption for privileged documents. Therefore, none is provided in the rules. If allegedly privileged documents are withheld, notification is incomplete and a statement of reasons for noncompliance conforming to § 803.3 must be submitted. Whether a reporting person has substantially complied with the act and rules when allegedly privileged documents have been withheld will be determined on a case-by-case basis by the enforcement agencies, and, when necessary, by courts under section 7A(g).

Original item 2(h), the predecessor of item 4(c), was considerably broader than the final item. It would have required submission of all documents prepared within the 3 years preceding notification that "discuss the reasons for or analyze the proposed transaction." In addition, it would have called for any documents that pertain to markets, competitors, expansion, etc., into any product or service manufactured or sold by the other reporting company.

Most of the comments received were highly critical of this original, broader draft. Numerous comments (e.g., 15, 28, 30, 37, 47, 59, 85, 103, 111, 112, 120) objected that the item was burdensome. Others (e.g., 47, 59, 78, 112) suggested that much of the information submitted would be irrelevant for purposes of reviewing the antitrust implications of the reported acquisition. These comments led to a substantially streamlined revised version of the request. Revised item 4(c) would have required the submission of documents prepared "by or for any officer(s) or director(s) for the purpose of evaluating, or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product and geographic markets." Thus, the revised version would have required the submission of documents prepared for the purpose of evaluating or analyzing the reported acquisition alone, and excluded documents prepared for other purposes. Although a number of comments (e.g., 1029, 1050, 1075, 1098, 1104, 1108) still objected to the inclusion of the item, this version was adopted unchanged in the final rules.

By so limiting the scope of documents required under item 4(c), the Commission acknowledges that the agencies may not gain access to some relevant documents at the time of their initial review. However, requiring the submission of a broader range of documents would entail searches of historical files by reporting persons for documents prepared at other times for other purposes, and could produce too large a number of documents for purposes of effective preliminary antitrust review. Since additional documents may be sought by either agency in a request for additional information and documentary material under section 7A(e) and § 803.20 or other discovery procedures, the limitation on the scope of documents required under item 4(c) is unlikely to impede effective review of reported acquisitions.

The proviso in item 4(c) that only those documents prepared "by or for any officer(s) or director(s)" need be submitted also represents a considerable limitation of the language contained in its predecessor. Original item 2(h) would have required the submission of all documents "prepared by or for the company." Yet a number of comments (e.g., 1053, 1108) urged that the language be further limited to encompass only directors or "high-level management." These suggestions were rejected. The criterion in the item is easily administrable and should yield a reasonable number of genuinely important documents.

DELETION OF REVISED ITEM 4(d)

Item 4(d) first appeared in the revised form, but has been deleted from the final notification and report form. Item 4(d) would have required the reporting person to describe its overall planning process and to name the individuals responsible for planning possible entry into the product or geographic markets of other parties to the transaction.

A number of comments criticized revised item 4(d). In general, these comments described item 4(d) as burdensome and unnecessary (e.g., 1075, 1086, 1098) and of doubtful relevance for purposes of preliminary antitrust review (e.g., 1057, 1104). The type of information sought in item 4(d) was considered by most comments to be more properly the subject of a request for additional information and documentary material (e.g., 1059), if not a discovery motion in litigation (e.g., 1044, 1055, 1108). One comment (1075) described the type of information sought as confidential and beyond the scope of discovery.

The Commission has concluded that at the present time the type of information requested in item 4(d) does not seem necessary to obtain at the preliminary review stage. Accordingly, item 4(d) has been deleted from the final notification and report form. Should experience under the act indicate that this conclusion should be reexamined at some time in the future, the Commission may consider amending the form to include an item along the lines of revised item 4(d). In addition, persons filing notification may wish to provide such information voluntarily pursuant to § 803.1(b), since the enforcement agencies may request such information as part of a request for additional information or documentary material pursuant to section 7A(e) and § 803.20.

ITEM 5

Item 5 requires the submission of annual revenue data by single four-digit standard industrial classification ("SIC") code industries, and, for manufacturing industries, by five-digit (SIC-based code) product classes and seven-digit (SIC-based code) products. The SIC code is employed by the U.S. Bureau of the Census to identify products and services for which aggregate data is published in the Bureau's various economic census and its annual survey of manufactures.

Item 5 requires the submission of dollar revenue data for the most recent year and for 1972, the year of the last economic censuses. Upon publication of the 1977 economic censuses by the Bureau of the Census, item 5 will be amended. The revenue data requested by item 5 is by design similar to that required by the Bureau of the Census in its economic censuses and annual survey of manufactures, so that the data provided in response to item 5 will be reasonably comparable with the aggregate data contained in those publications. Because of the similarity of the inquiry, reporting persons should be generally familiar with the derivation of such information from their books and records.

An important distinction exists, however, between the data submitted to the Bureau of the Census and that required by item 5. Data is submitted to the Bureau of the Census on an establishment basis (i.e., a separate report is submitted for each plant or other facility operated by the reporting firm). By contrast, the information submitted in response to item 5 must be an aggregate figure for all operations of the reporting person in each relevant four-, five-, or seven-digit category. While some companies maintain such data on a consolidated basis, others do so only with respect to smaller operating units, such as divisions or establishments. In the latter situations, the reporting person needs simply to combine by category the dollar revenues of all establishments operated by each entity included within the reporting person, and then combine by category the dollar revenues of all such entities. The "total dollar revenues" provided in response to the various inquiries in item 5 will thus be an aggregate figure representing the entire operations of the reporting person in each relevant four-, five-, or seven-digit (SIC code) category.

A second distinction will arise in certain cases. The instructions to the form require that reporting persons employ the four-digit industry categories contained in the 1972 edition of the "Standard Industrial Classification Manual," and the seven-digit (SIC-based code) product categories contained in the numerical list of manufactured products, "1972 Census of Manufactures" (MC72-1.2) (new 1972 SIC basis) or volume II, "Industry Statistics," "1972 Census of Manufactures." The categories contained in these reference materials reflect the categories employed by the Bureau of the Census in its tabulation and publication of the 1972 economic censuses. The Commission is aware that companies reporting for purposes of the 1972 censuses were instructed to report on the basis of the SIC format contained in the 1967 economic censuses and that a number of 1967 census categories were changed at the time of publication of the 1972 economic censuses. For those categories in which such changes occurred, reporting persons may be able to comply with item 5 by reviewing underlying records compiled in accordance with the 1967 classifications for purposes of the 1972 economic censuses, and retabulating such data according to 1972 classifications. The Commission has determined that any inconvenience so occasioned is unavoidable in light of the agencies' need to be able to compare quickly an individual company's submissions with published census aggregate data.

Information must be submitted according to 1972 classifications in response to items 5(a) (revenues by industry for 1972), 5(b)(i) (revenues by product for 1972), 5(b)(iii) (revenues by product class for most recent year), 5(c) (revenues for nonmanufacturing industries for the most recent year) and, if census classifications are known, 5(b)(ii) (new or deleted products since 1972).

The note above item 5(a) cautions that § 803.2 of the rules may require limited or separate responses to item 5 by the person filing notification. The instructions contained in § 803.2 are significant in several ways.

First, § 803.2(b) requires limited or separate responses by acquired persons filing notification. Acquiring persons must complete item 5 with respect to all entities included within the acquiring person. Acquired persons must complete item 5 with respect to only those assets being acquired or that issuer whose securities are being acquired (and all entities controlled by such issuer). Responses not so confined do not comply with the instructions and will be treated as deficient.

Second, § 803.2(c)(1) provides that information need not be provided with respect to operations conducted outside the United States. See § 801.1(k).

Third, § 803.2(c) also provides that information need not be supplied with respect to assets or voting securities the acquisition of which is exempt. For further explanation of this brief summary, see the statement of basis and purpose to § 803.2.

The term "dollar revenues" used in item 5 is defined in § 803.2(d).

A large number of comments were received concerning the submission of data by SIC code categories. First, several comments (e.g., 48, 109) suggested that the use of aggregated dollar volumes was unduly burdensome since reporting persons are required to furnish data to the Bureau of the Census by establishment and will not have aggregate figures readily available. The Commission finds this argument to be without merit. If, as the comment suggests, reporting persons have unaggregated revenue data available on an establishment or other basis, the compilation of aggregate figures will require, at most, the simple addition of establishment and entity figures. This burden is likely to be minimal.

Second, a number of comments (e.g., 120; 1050, 1159, 1108) informed the Commission that many companies do not employ SIC-based categories data in their internal accounting procedures. Several of these comments recommended that if reporting companies do not normally organize their internal records by SIC-based categories, those persons should be permitted to report under other systems. Suggested systems included the system employed by the reporting person, if that system approximates the SIC format (e.g., 26, 120; 1050); any generally accepted accounting system (e.g., 1059); or any system used by all of the parties to a transaction (e.g., 1077). Alternatively, another comment (29) suggested that reporting companies be permitted to use the format of Financial Accounting Standard No. 14, "Financial Reporting for Segments of a Business Enterprise", at least as an option in lieu of seven digit reporting. The Commission has considered these suggestions and concluded that final item 5 should continue to require the submission of data under the SIC-based categories. For effective antitrust review, the agency staffs must be able to determine the impact of an acquisition on the market for a particular product, group of products, or service. The agency staffs will be able to perform this review only if the data submitted by reporting persons can be compared to data for the entire market. Data for the entire market is difficult to establish unless all persons submit revenue figures under a basically uniform classification system. Since there may be as many internal accounting systems as there are reporting persons, data reflecting diverse internal accounting systems are not a useful basis for review. Such data would not be readily comparable with the aggregate data published by the Bureau of the Census, which provides, through the SIC code, the most generally available and widely used source of universe data. While the Commission is well aware that the SIC code is not a perfect system, it has concluded that information reported by SIC-based categories currently provides the only feasible basis for effective preliminary review of reported acquisitions within the time limits imposed by the act.

Furthermore, the use of SIC-based categories should not be unduly burdensome. Reporting persons are presumably required to compute SIC-based data for submission to the Bureau of the Census. Thus, reporting persons may have available, in addition to regular accounting books and records, other records compiled to aid in answering comparable inquiries in reports to the Bureau of the Census. In addition, the reporting persons' experience in the preparation of Census reports should substantially reduce the burden of completing item 5.

Another comment (94) suggested that item 5 be clarified to indicate whether SIC-based data is requested on an "establishment basis" or a "product class basis" as those terms are used by the Bureau of the Census. "Establishment basis" and "product class basis" are methods by which the Bureau of the Census reports data which it has collected and do not affect the method by which data is reported, either to census or on the form. Therefore, this suggestion was not followed. The item requests aggregate data for the person filing notification.

Reporting persons may believe that information contained in a previously or contemporaneously submitted Corporate Patterns Report ("CPR") or Special Report on Mergers and

Acquisitions in the Dairy Industry ("Dairy Industry Report") is responsive to a subpart of item 5. The Commission believes that because of the definition of "person" contained in the premerger notification rules, § 801.1(a), and the distinction between the reporting person's obligations as an acquiring or acquired person, § 803.2(b), such instances will be rare. However, if in fact the exact information required by item 5 is contained in a CPR or Dairy Industry Report, the reporting person may complete the applicable subpart of item 6 by identifying the portion of the specific CPR or Dairy Industry Report that contains the responsive data.

The staff is presently reviewing its Special Report on Mergers and Acquisitions in the Food Distribution Industries ("Food Industries Report") and will recommend to the Commission that the Food Industries Report be amended to eliminate any duplication between it and item 5 of the form.

CENSUS ACT

Other comments (e.g., 15, 59, 115, 120; 1050) suggested that to required submission of revenue data by reference to SIC-based categories used by the Bureau of the Census is impermissible in view of section 9 of the Census Act, 13 U.S.C. section 9, which provides, in applicable part, that retained copies of reports filed with the Bureau of the Census may not be required by other Government agencies.

This claim is not unique to the present form. In litigation concerning the Commission's Corporate Patterns Survey Report ("CPR") and Line of Business Report ("LB"), the court rejected the same argument and held that the Census Act does not preclude the Commission from requiring answers to questions concerning shipments similar or identical to questions asked in a census report. In re *FTC Corporate Patterns Report Litigation,* 432 F. Supp. 291, 304-07 (D.D.C. 1977), appeal pending, Nos. 77-1728, et al., (D.C. Cir.). The Commission believes that its request for data based on census classifications is not impermissible under section 9.

In any event, there is a strong statutory basis for the required submission of data according to SIC-based categories in the notification and report form, regardless of the outcome of the CPR litigation. Item 5 seeks information pursuant to the express mandate of the act, in which Congress, aware of the Commission's use of such classifications in its previous premerger notification program, provided in section 7A(d)(1) that the Commission shall require that the notification required [(by the act)] be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisitions may, if consummated, violate the antitrust laws.

Congress instructed the Commission to determine what information is necessary and appropriate, and in what form such information should be submitted, in order for the enforcement agencies to fulfill their statutory mandate. The Commission has determined that the submission of data according to SIC-based categories is necessary and appropriate in order to make a preliminary determination of the lawfulness to reported acquisitions under the antitrust laws.

ITEM 5(A)

Item 5(a) requires the reporting person to submit information concerning the four-digit (SIC code) industries in which the reporting person engaged in 1972. For each such four-digit industry, the reporting person must indicate the industry code number, the census description of the industry corresponding with the code, and total dollar revenues for the year 1972.

The reporting person must report the revenue derived during 1972 by all entities presently included within the person filing the notification and report form, regardless of whether such entities were included within the reporting person during 1972. Thus, data submitted in response to item 5(a) will include revenues derived during 1972 from the operations of entities acquired by the reporting person since 1972.

Special instructions are provided for reporting persons engaged in certain non-manufacturing industries.

BACKGROUND INFORMATION TO ITEM 5(a)

Item 5(a) requests dollar revenues by four-digit (SIC code) industry for 1972 in order to estimate the reporting person's share of the relevant four-digit industries. The year 1972 was chosen so that the data provided can be compared to the aggregate figures for the industry published in the 1972 Economic Censuses.

Original item 5(a) would have required the submission of four-digit industry data for both 1972 and the most recent year. The revised version of the form deleted the most recent year data from item 5(a) and added two new items. Item 5(b)(iii) required the submission of most recent year five-digit product class data for manufacturing industries. Another new item, 5(c), required the submission of most recent year four-digit industry data for non-manufacturing industries. The final version of the Form retains this arrangement.

Several comments (e.g., 59, 80) stated that compiling four-digit data for 1972 would be cumbersome, time-consuming and expensive, and might require the reconstruction of documents no longer available since records underlying census reports need only be retained for three years (104). Similarly, another comment (11) suggested that data for 1972 would be outdated and irrelevant and suggested that item 5(a) should require the submission of four-digit industry data for the past 1 or 2 years alone. These suggestions either are without merit or result from a misunderstanding of the purposes of the act. First, compiling such data should present no undue burden for reporting persons. Item 5(a) requests the submission of four-digit industry data for 1972 alone. Reporting persons should still have available ordinary books and records for relatively recent years, including 1972. Furthermore, because 1972 was a year for which reporting persons presumably had to collect this type of data for purposes of the economic censuses, reporting persons may also have available other records complied for use in the preparation of 1972 census reports.

Second, the use of 1972 data is essential at the present time for antitrust review purposes. The last year for which complete data from the economic censuses was published by the Bureau of the Census was 1972. Thus, it is the most recent year for which detailed statistical breakdowns of market universes exist.

Another group of comments (e.g., 115; 1050, 1108) suggested that reporting persons be permitted to omit dollar revenues totaling less than a threshold figure. This suggestion was also rejected. Small dollar values may, under certain circumstances, constitute a significant share of particular markets. For these markets the imposition of a minimum dollar threshold might seriously impair the review process. Moreover, the burden entailed is unlikely to be significant.

Finally, one comment (1104) suggested that the submission of data by four-digit industry for 1972 was superfluous because such data would merely be an aggregation of the data for all the seven-digit (SIC-based code) products included within that four-digit industry, which would be supplied in response to item 5(b)(i). In view of the serious time constraints under which the agencies will review reported acquisitions, the Commission has determined that the minimal burden of aggregation entailed in response to item 5(a) should be borne by reporting persons rather than by the agencies.

ITEM 5(b)(i)

Item 5(b)(i) requires reporting persons to submit information concerning each seven-digit (SIC-based code) product manufactured by the reporting person in 1972. For each seven-digit product within SIC major groups 20-39, the reporting person must supply the Census description of the product and the total dollar revenues derived during 1972. As noted in the instructions to the form, for seven-digit product codes ending in 00 the reporting person instead should submit information by the more detailed product breakdown provided in appendix A to the Numerical List of Manufactured Products, 1972 "Census of Manufactures" (MC72-1.2).

The reporting person must report the revenue derived during 1972 by all entities presently included within the person filing the notification and report form, regardless of whether such entities were included within the reporting person during 1972. Thus, data submitted in response to item 5(b)(i) will include 1972 revenues of entities and assets acquired by the reporting person since 1972.

BACKGROUND INFORMATION TO ITEM 5(b)(i)

Item 5(b)(i) requests dollar revenues by seven-digit product in order to estimate the reporting person's share of the relevant seven-digit product markets. The year 1972 was chosen so that the data provided can be compared to the aggregate figures published for the 1972 Census of Manufactures.

A number of comments questioned the use of seven-digit product data for 1972. Several (e.g., 11, 32, 103, 109; 1059) recommended that seven-digit product data be required only for products in those four-digit industries in which the acquiring and acquired persons both derive revenues, or for products with respect to which a customer-supplier relationship exists. These suggestions have been rejected for several reasons.

First, reporting persons may have incomplete knowledge of whether the other party derives dollar revenues in the same four-digit industry. Particularly, but not only, in acquisitions accomplished through tender offers, the reporting person may be unaware of all of the operations of the other reporting person. In such cases the agencies would be forced to make requests for additional information and documentary material under section 7A(e) and § 803.20 in an effort to obtain basic rather than supplementary data.

Second, a limitation of seven-digit product information to those cases in which there is a four-digit industry overlap would be inappropriate for analysis of vertical or product extension acquisitions. In such cases the agencies would not necessarily receive any seven-digit product revenue data in those industries between which vertical relationships or product extensions are probable, since a four-digit overlap would be fortuitous. Again, the request for additional information would have to be used to obtain basic, rather than specialized, market data.

Other comments (e.g., 29, 104; 1029) suggested that the seven-digit product data requested in item 5(b)(t) is too detailed, or that such information should be submitted only if annual dollar revenues exceeded a specific threshold figure (e.g., 29, 74, 103, 115; 1050, 1108). Both of these suggestions have been rejected. In order to evaluate fully the possible anticompetitive effects of reported acquisitions, the agencies must have access to reasonably detailed and complete information. Exclusive reliance on four- and five-digit data or insertion of an arbitrary dollar revenue threshold could seriously impair the agencies' ability to perform this review and would thus frustrate the purposes of the act. Furthermore, the added burden on reporting persons to report all information should be minimal.

Original item 5(b)(i) would have required the submission of seven-digit product data for both 1972 and the most recent year. It also would have required a statement of the percentage of dollar revenues attributable to exports.

Quite a few comments (e.g., 26, 29, 32, 37, 88, 104, 115; 1029) maintained that compiling seven-digit data for years other than census years would be unduly burdensome, asserting that few companies collect or maintain such data at that level of detail except for years for which they are required to respond to Bureau of the Census inquiries. Other comments (e.g., 15, 35, 85, 94, 99) protested that since the Bureau of the Census does not require manufacturers to submit separate reports for exports, very few companies maintain separate export records and the compilation of export data would be unduly burdensome to reporting persons.

In response to these comments, revised item 5(b)(i) deleted both the requirement of dollar revenues by seven-digit product in the most recent year and the separate breakdown for export figures. Instead, item 5(b)(iii) was added, requiring reporting persons to submit dollar revenues for the most recent year by five-digit (SIC-based code) product categories. No provision in the form was made for the separate reporting of export information, which can be obtained, if necessary, by a request for additional information or documentary material under § 7A(e) and § 803.20. The final form retains revised item 5(b)(i) without change, except for addition of a clarifying instruction.

ITEM 5(b)(ii)

Item 5(b)(ii) requires the reporting person to identify each manufactured product that has been added or deleted since 1972. Products must be identified by seven-digit product category unless the reporting person is unsure of the proper seven-digit product category for a product added since 1972, in which case the product may be identified in the manner ordinarily used by the reporting person. For each such product the reporting person must indicate the year of addition or deletion and, for products added, total dollar revenues during the most recent year.

The instructions to item 5(b)(ii) clarify that, while products added due to the acquisition of entities since 1972 should be reported in response to item 5(b)(i), products deleted since 1972 by reason of the disposition of assets or voting securities should be included in response to this item.

BACKGROUND INFORMATION TO ITEM 5(b)(ii)

Item 5(b)(ii) first appeared in the revised rules, and is similar to item 6(b) of the special report form for the Commission's existing premerger notification program. Comment 1023 asserted that the information sought under item 5(b)(ii) was irrelevant for purposes of antitrust analysis. This comment is without merit. It is possible that product lines of reporting persons have changed considerable since 1972, the year of the last census of manufacturers. Effective preliminary antitrust analysis of a merger or acquisition requires review of the most current information available. The submission of such information is thus both necessary and appropriate for review purposes.

ITEM 5(b)(iii)

Item 5(b)(iii) requires the reporting person to submit information concerning each five-digit (SIC-based code) product class in which the reporting person is engaged. For each product class within SIC major groups 20-39 (manufacturing industries), the reporting person must indicate the product class code number, the census description of the product class and the total dollar revenues derived during the most recent year. Total dollar revenue data should reflect revenues derived by all entities that are included within the reporting person at the time the form is filed.

BACKGROUND INFORMATION TO ITEM 5(b)(iii)

Item 5(b)(iii) requests dollar revenues by five-digit product class for the most recent year in order to obtain information concerning the current activities of reporting persons. By comparing this data to the aggregate figures for the product class published in the annual survey of manufactures, the agencies will be able to approximate the reporting person's share of the relevant five-digit product classes.

For the origin of item 5(b)(iii), see the statement of basis and purpose to item 5(b)(i).

Comment 1077 suggested that a request for five-digit product class data for the most recent year was inappropriate because such data would not be comparable to the seven-digit product data for 1972 submitted under item 5(b)(i). However, five-digit dollar revenues for the most recent year can be compared generally to seven-digit dollar revenues for 1972 by simply aggregating all seven-digit revenues for products within the same five-digit product class. While the two types of data might not be strictly comparable because the market changes between 1972 and the most recent year, the comparison will provide the agencies with a useful preliminary evaluation of changes since 1972 in the reporting person's share of relevant product markets. Should either agency decide to investigate the acquisition in depth, it could secure more comparable data by means of a request for additional information under section 7A(e) and § 803.20, or by other means.

ITEM 5(c)

Item 5(c) requires reporting persons to submit the dollar revenues derived in the most recent year in four-digit (SIC code) nonmanufacturing industries, that is, industries in all SIC major groups other than 20-39. For each four-digit industry, the reporting person must indicate the four-digit code number, the census description of the industry and the total dollar revenues derived in the most recent year. Total dollar revenue data should reflect revenues derived by all entities that are included within the reporting person at the time the form is filed. Industries for which dollar revenues totaled less than $1 million may be omitted.

Special instructions are provided for insurance carriers, credit agencies other than banks, security and commodity brokers, holding and other investment offices, and real estate companies.

BACKGROUND INFORMATION TO ITEM 5(c)

Item 5(c) is designed to provide the agencies with current information concerning the nonmanufacturing activities of reporting persons.

Original item 5(c) would have required the reporting person to state, by seven-digit product categories, the dollar value of products imported into the United States for resale. A large number of comments criticized this requirement. Several comments (e.g., 35, 99, 115) suggested that few companies kept segregated data concerning imports. Other comments (e.g., 32, 59, 88, 115) suggested that even if such data existed, it would not be maintained by seven-digit (SIC-based code) product categories.

In response to these comments, the Commission reexamined the submission of import data under item 5(c). While the Bureau of the Census publishes monthly reports concerning aggregate value for imported products and commodities, the classification system employed in such reports is based on the Tariff Schedules of the United States ("TSUS"), 19 U.S.C. 1202. The TSUS is provided by the Tariff Act of 1930 and bears no relation to the SIC system. Thus, aggregate data provided in reports employing the TSUS would not be comparable to aggregate data provided in census publication employing the SIC system. In light of these facts, the Commission has determined that a separate breakdown of import data will not be required at the initial review stage. Should a separate breakdown of imports be desired, either agency may request such information in a request for additional information or documentary material pursuant to section 7A(e) and § 803.20. Accordingly, the provisions of original item 5(c) were deleted from the revised and final versions of the Notification and Report Form.

Comment 1022 suggested that the $1 million threshold in item 5(c) be raised to $10 million. This suggestion was rejected. Firms are generally not required to compile and submit to the Bureau of the Census information concerning their nonmanufacturing activities during noncensus years. The $1 million threshold was thus inserted to lessen the burden for reporting persons that would not otherwise compile annual data by four-digit industry for such years. Inserting a higher threshold might prevent the agencies from being informed of significant economic activities of reporting persons and thus could seriously impair review of acquisitions.

ITEM 5(d)

Item 5(d) need be completed only by acquiring persons engaged in the formation of a joint venture or other corporation. The item requires the reporting person to provide various information concerning the creation and planned operations of the corporation and the respective interests of all participating persons.

Specific information required to be submitted includes:

(i) The identity of the corporation, and its mailing address.

(ii) A description of the agreements creating the corporation, including:

(A) The value and timing of each acquiring person's contribution to the corporation. This description should include contributions in any form, including cash, voting securities of any issuer, real estate, equipment, patent rights, trademarks, etc. All contributions envisioned by the forming parties at the time of formation should be described, regardless of when the contributions will actually be made.

(B) Any contracts or agreements to obtain assets or capital for the corporation from sources other than the persons forming it. Examples of contracts or agreements to obtain assets include contracts for the purchase or lease from third parties of real estate, equipment, patent rights, or trademarks by or on behalf of the corporation. Examples of contracts or agreements to obtain capital include the sale of the securities of the corporation to third parties, and loans from banks or other sources.

(C) Whether and in what amount the persons forming the corporation have agreed to guarantee its credit or obligations. The description of such guarantee arrangements will include guarantees of loans, leases of equipment and real estate, and credit purchases.

(D) The consideration each person forming the corporation will receive in exchange for its contribution(s). This description would include all forms of consideration that the persons forming the corporation will acquire, including voting securities, nonvoting securities, debt instruments or other securities. The response should also reveal any rights to future consideration such as rights to patents or technology, mineral discoveries or other assets developed by the corporation.

(i) A general description of the business in which the corporation will engage, including locations of facilities and geographic market areas.

(ii) The four-digit (SIC code) industries in which the corporation will derive income. For corporations which will be engaged in manufacturing, the five-digit (SIC-based code) product classes in which it will derive revenues must also be identified.

BACKGROUND INFORMATION TO ITEM 5(d)

Revised item 5(d) required the reporting of various types of data from institutional investors. These provisions are subsumed in item 6 of the final version, and former item 5(d) has been deleted.

Item 5(e) of the revised form has been redesignated item 5(d) in the final form. The language of the revised version of item 5(e) has been amended to conform to the final version of § 801.40, which uses the term "joint venture or other corporation."

ITEM 6

Item 6 must be completed by all persons required to file notification except acquired persons in transactions in which only assets are to be acquired. It requests three kinds of information.

In response to paragraph (a) of this item, reporting persons must list the name and headquarters mailing address of each entity included within the person filing notification. At the option of the reporting person entities with total assets of less than $1 million may be omitted from this listing.

Paragraph (b) requires a separate listing with respect to each entity included within the person filing notification whose voting securities are held by one or more persons other than the person filing notification. For each entity meeting this criterion a separate list containing the following information must be provided: The name of the issuer, the designation of each class of voting securities of that issuer which is held by other persons, the name and headquarters mailing address of each other person (if any) which holds 5 percent or more of the outstanding voting securities of the class, and the number and percentage of such securities held by that person. For purposes of this paragraph, percentages are computed by class of voting securities, rather than according to § 801.12. An example of a listing for each issuer would be:

XYZ SUBSIDIARY

Class A common:

ABC Co., 123 Main Street, Chicago. Ill. 60603, 5,000 shares (6.2 percent)

DEF Corp., 456 Seventh Avenue, New York, N.Y. 10017, 7,500 shares (9.3 percent)

Class B common:

GHI Co., and its subsidiaries, 789 Texas Avenue, Dallas, Tex. 75201, 1,000 shares (10 percent)

At the option of the reporting person, the listing may be omitted with respect to any entity included in the reporting person the total assets of which are less than $10 million.

Paragraph (c) of the item requires a single listing by the reporting person, if that person holds voting securities of any issuer not included within the person. The required listing is an aggregate of those holdings and shows: The issuer and class of securities, the number and percentage of outstanding securities held, and, at the option of the reporting person, the entity within the person filing notification that actually holds the securities. The filing person is permitted to omit its holdings of less than 5 percent of the outstanding voting securities of any issuer; in addition, holdings of any number or percentage of the outstanding voting securities of issuers with total assets of less then $10 million may also be omitted.

BACKGROUND INFORMATION TO ITEM 6

This item appears on the notification and report form for the first time in the final rules but is derived from items l(b) of the original form and l(g), 2(e)(ii), 3(b) and 5(d) of the revised form.

Item 5(d) of the revised form requested information similar to items 6(a) and 6(c), but only with respect to institutional investor entities included within the person filing notification and holdings of voting securities by such institutional investors.

Item l(b) of the original form requested information similar to item 6(a); the earlier version requested the name, mailing address, and date and state of incorporation (if applicable) of each "active entity" included within the reporting person. The comments criticized the requirement to list active entities on two grounds. First, a number of comments (e.g., 26, 112, 120) suggested that the meaning of the term "active entity" was unclear. That term has been used for some time in the Commission's existing premerger notification program. For purposes of the final form, however, it makes no difference whether an entity included within the reporting person is an "active entity"; item 6(a) requires a listing of all entities, whether or not they are "active," although entities with minimal assets may be excluded.

A second suggestion in the comments (e.g., 11, 74, 77, 109) was that subsidiaries below a certain size, or foreign subsidiaries not doing a significant amount of business in U.S. commerce, should be excluded. In response, a size threshold of $1 million has been inserted into item 6(a) of the final form. Entities with total assets of less than that amount may be omitted from the listing. If it is easier for the reporting person simply to list all entities, regardless of whether they are larger than that threshold, that is also permissible. Since item 6 relates to stock holdings, the Commission did not believe that the extent of an entity's sales was an appropriate threshold for item 6(a). Since the size of a reporting person under the act may be as small as $10 million (assets or sales), the Commission did not believe it appropriate to permit entities larger than $1 million in size—perhaps representing 10 percent of the reporting person—to be excluded from the required listing.

The Commission decided not to provide a separate exclusion for foreign subsidiaries based upon the amount of business done in the United States. One important purpose of the listing in item 6(a) is to permit evaluation of the information requested in item 6(b)—that is, the identification of persons that hold the stock of the reporting person or of any entities included within that person. For that purpose, the Commission believes it is not relevant whether the entity included within the reporting person is a foreign entity or a domestic entity. Holdings of stock in any entity included within the reporting person may be relevant to an assessment of the impact of an acquisition upon competition. Thus the reporting person is required to list all of its component entities.

Item 6(b) applies whenever 5 percent or more of the stock of any entity included within the reporting person is held by one or more persons other than the reporting person. In that event, the reporting person is required to list the issuer and class of that issuer's stock, to identify the holder, and to state the number and percentage of those shares so held. The reporting person may, at its option, omit this information if the issuer's total assets are less than $10 million. In responding to item 6(b) the reporting person may find it helpful to consult copies of schedules 13D and 13G filed with the SEC. The SEC requires that copies of such filings be sent to the issuer, 17 CFR 240.13d-1 (a) and (b). However, the reporting person should remember that the beneficial owner for purposes of the SEC schedules will not necessarily be the same as the holder for purposes of the rules and form and, in the case of schedule 13G, that the information may not be current. The reporting person must also list any other 5 percent holders of which it has knowledge, even if no schedules 13D or 13G have been filed with the SEC. The terms "person" and "hold" used here have the same meanings as they do throughout the rules.

Item 6(c) requires disclosure of stock of issuers not included within the person filing notification which is held by that person. If the issuer has assets of less than $10 million, or if the holdings do not equal or exceed 5 percent of the outstanding shares of the issuer, the information need not be submitted. Again, this optional approach is taken because some reporting persons may find it more convenient to report all holdings than to separate those which do not meet the optional criteria of item 6(c).

The three parts of item 6 are designed to alert the enforcement agencies to situations in which the potential antitrust impact of the reported transaction does not result solely or directly from the acquisition, but may arise from direct or indirect shareholder relationships between the parties to the transaction. This may occur, for example, when a significant shareholder of the acquiring person already holds shares of the acquired person, or when an entity whose stock is held (but which is not controlled) by the acquiring person either holds stock of the acquired person or is partly controlled by the acquired person. A comparison of the acquiring and acquired persons' responses to items 6(b) and 6(c) should reveal such situations.

A similar comparison may also reveal other situations of possible antitrust concern. Examples might be occasions when a person known to be a competitor or customer or supplier of one of the parties is also a significant shareholder of the other party, or when the acquiring company holds stock in a competitor or customer or supplier of the acquired company or vice versa.

The addition of item 6, coupled with changes in the definition of "affiliate" in § 801.1(d), has made it possible for items l(g), 2(e)(ii), and 3(b) of the revised form to be deleted. Those items had requested information concerning "affiliates" (as defined in those earlier rules) of the acquiring person, when those affiliates held stock or assets of the acquired person, or when the affiliates were doing business in any industry in which the acquired person was also doing business.

The kinds of information required by item 6 are analogous to the kinds of information which the agencies would have obtained in response to the original and revised versions of the form, if the earlier versions of the definition of "affiliate" had been retained. Item 6 is thus a response to the narrowing of that definition to encompass only entities included within the reporting person. Item 6 also represents a recognition that the information sought in revised item 5(d), concerning the holdings of institutional investors, is potentially equally relevant to the analysis of transactions not involving an institutional investor. When entities which are not under common control are nevertheless related to one another by shareholdings, the agencies must assess the relevance of that relationship in the course of their assessment of the competitive impact of an acquisition involving one of those entities directly.

In a transaction in which only assets are to be acquired, the stock holdings of, and stock holdings in, the acquired person would not be affected by the transaction. Thus, the acquired person need not respond to item 6 in this situation. The acquiring person responds to this item in all cases, and the acquired person must respond whenever any voting securities will be acquired.

ITEM 7

Item 7 is designed to provide information about geographic markets. Whenever any party to an acquisition knows or has reason to believe that it derives dollar revenues from any of the same four-digit (SIC code) industries as any other party, it must identify the geographic areas in which it derives those dollar revenues. The item must be completed separately for each four-digit industry in which such an overlap of dollar revenues occurred during the most recent year. If the transaction is the formation of a joint venture or other corporation, the reporting person should compare the four-digit industries in which it derived revenues to those in which the new corporation is expected to derive revenues (without time limit), as well as to those in which other acquiring persons, whether or not required to report, derive revenues.

Item 7(a) requires identification, by code number and description, of the four-digit industries in which the overlap exists or is believed to exist. Item 7(b) calls for the name of every other party to the transaction which is engaged in that industry. Item 7(c) seeks geographic information about the reporting person's operations in each four-digit industry listed in item 7(a). Each of the five subparts of item 7(c) combines various two-digit SIC major groups which, because of their industry characteristics, lend themselves to similar treatment. Note that although item 7(c) refers to two-digit major groups for convenience and brevity, the information is sought by four-digit industry within those groups.

Item 7(c)(i) applies to manufacturing industries, those four-digit industries within SIC major groups 20-39. It calls for geographic information about where manufactured products are sold in substantially the same form, whether by the person filing notification or by others to whom such products have been sold or resold. If manufactured products are consumed in or incorporated into the manufacture of other goods, the response should reveal where the product is sold to such manufacturers,. and not where the remanufactured product is ultimately sold. In other words, the geographic areas sought are all areas in which the product is consumed or sold as an identifiable unit, rather than as a component of another product. For example, if the manufactured product is axles, the response should disclose where the axles are sold, and not where the vehicles into which the axles are incorporated are sold. If the product is simply resold without alteration, all such sales, through the sale to the final purchaser, are sought.

The areas must be identified by States, or, if desired, portions of States. Only the listing by States is required. The optional finer breakdown is intended to be used whenever the parties believe that the listing by States could be misleading in the antitrust analysis of the acquisition. The item specifies a knowledge and belief standard for the response, since manufacturers may not know the precise geographic distribution of their products.

For item 7(c)(ii), which applies to four-digit industries within SIC major groups 1-17 and 40-49, the reporting person must list the States or portions thereof in which the agricultural, mining, or other specified operations are conducted. For item 7(c)(iii), which applies to four-digit wholesale trade industries within SIC major groups 50 and 51, the reporting person must list the States or portions thereof in which customers are located.

For item 7(c)(iv), which applies to four-digit industries in SIC major groups 52-62 and 64-89, the reporting person must furnish a list, arranged by State, county, and city or town, of addresses of establishments from which dollar revenues were derived. "Establishment" means any retail location, location where services are offered or rendered, or other business location from which dollar revenues were derived. Item 7(c)(v) calls for a list of the States in which the reporting person is licensed to write insurance.

No dollar revenues need be provided in response to any part of this item.

Item 7 is a slightly altered version of item 6 of the revised form. Final item 7(a) and 7(c)(i)-(iii) are substantially similar to the corresponding provisions of revised item 6. Because revised item 6(b)—which sought a complete list of establishments, regardless of the nature of the industry—has been deleted, and because many SIC major groups had no specific requirement beyond that, a new item 7(c)(iv) has been added. For those groups, reporting persons are required to list their business locations. Item 7(c)(v) is essentially the same as revised item 6(c)(iv).

Some of the comments (e.g., 1053) appear to have interpreted revised items 6(c)(i)-(iii) to require the geographic analysis by portions of States in all cases. The final version of the item makes clear that a breakdown finer than by States is optional. Comment 1055 suggested that a reporting party should be able to report that it sells nationwide and thereby eliminate the need to list every State. The Commission has no objection to such a practice. In fact, so long as a clearly defined geographic area can be determined, other simplified methods of reporting would also be acceptable, e.g., all States east of the Mississippi River, all States except California and Texas. Not acceptable because of their imprecise nature, however, would be such descriptions as the west coast, the Midwest, or Southern New England.

Some comments (e.g., 1026, 1040) complained that manufacturers would not be able to supply geographic resale information by plant-of-origin. Neither revised item 6(c)(i) nor final item 7(c)(i) requires such a breakdown. A number of comments (e.g., 1029, 1053, 1055, 1059, 1075, 1086, 1104, 1108) also suggested that manufacturers generally do not know where their products are resold, that it would be difficult (if not illegal) for them to obtain that information, and that the information is in any event irrelevant to an antitrust analysis. There can be no doubt that when the parties to an acquisition are engaged in the production and sale of the same or a closely related product, an inquiry into where those products are sold is necessary and appropriate to any antitrust analysis of the transaction. Therefore, comments raising issues of relevance and burden must be rejected. Furthermore, the Commission does not believe that it is illegal, without more, for a manufacturer merely to know or to determine the general geographic areas where its products are resold to their ultimate users. Therefore, comments suggesting that it might be unlawful to collect the required information have also been rejected.

Contrary to the assertions made in the comments regarding the availability of information on areas of resale of manufactured products, the Commission's experience has been that manufacturers invariably know where their products are sold, regardless of the number of intermediate resellers involved. This is not to say that manufacturers will always know the name and address of every reseller of every product, although this often may be the case, especially when the manufacturer sells directly to its retailers. Nor is such detailed information necessary for the purpose of responding to this item. Important here is the fact that a manufacturer will always know, at least in general terms (i.e., States or portions thereof), the geographic areas in which its product has penetrated the market. Because this information is crucial to establishing production quotas and marketing plans, opening new sales outlets (either wholesale or retail) and making related business decisions, the Commission has little doubt that at this level of generality the requested information will be readily available in all but the most unusual situations.

Comments 1029, 1053, 1059, and 1108 argued that responses to this item should not be required unless the reporting person (or persons) derived a minimum dollar amount of revenue in the four-digit industry. The suggested amounts range from \$1 million to \$5 million. The

Commission is unable to conclude that geographic areas in which less than such sums are derived from the sale of identical or similar products are competitively irrelevant and therefore need not be reported. Since the transfer of control of a company as small as $10 million in annual sales may be reportable, a $1 million minimum potentially could eliminate a geographic analysis of roughly 10 percent of the company's business; a $5 million minimum could eliminate nearly half the business of a $10 million company and significant portions of the sales of much larger companies which may be direct competition in addition, even where such amounts are not a major portion of a reporting, person's sales, they can easily often represent a major portion of a local or regional market. The suggestion therefore, has been rejected.

Comment 1040 requested clarification of the location of a sale for purpose of revised item 6(c)(i), now item 7(c)(i). The relevant States are those in which the purchaser will consume or substantially alter the character of the product or incorporate it into another product, or in which the final purchaser of the original product is located. The location of the sales office that sold the goods or the plant that shipped the goods is not relevant to this item.

ITEM 8

Item 8 requests information on any vendor-vendee (customer-supplier) relationships existing in the most recent year between an acquiring person and an acquired person with respect to any manufactured product that the vendee either resells or consumes in or incorporates into the manufacture of a product. Manufactured products that the vendee does not resell or use in the manufacturing process, such as office supplies and equipment, need not be included in the response. However, the vendor need not have been the manufacturer of the product.

If the acquisition is the formation of a joint venture or other corporation, the reporting person must determine whether the new corporation will supply any of the persons forming it—the acquiring persons under § 801.40—with any manufactured product which any of the persons forming the corporation purchased from any other of those persons in the most recent year. The persons forming the joint venture must respond to the item if they should reasonably believe that the joint venture will commence supplying a product in the future, without time limit.

If such a relationship exists or will exist, reporting persons which are vendees of any such product, and only such persons, are required to list the following information: the product purchased, the vendors of the product that are party to the acquisition, and the dollar amount purchased from each such vendor during the most recent year. Manufactured products are defined as those within two-digit SIC major groups 20-39. The reporting person may, at its option, omit from this listing any products purchased in annual amounts of less than $1 million.

The item states that products, the manufacture, consumption, or use of which by the vendee is not attributable to the assets to be acquired (in an asset acquisition) or to the issuer whose voting securities are to be acquired (in a stock acquisition), may also be omitted. Thus, if a person acquires a subsidiary of the person from which it purchases a certain manufactured product, it need not list that product in Item 8 unless the subsidiary (or any issuer it controls) sells the product.

BACKGROUND INFORMATION TO ITEM 8

The purpose of item 8 is to identify certain instances in which a reported acquisition may result in vertical foreclosure or in an increase in vertical integration in an industry. Only vendees are required to respond to this item because vendors may not know the purpose for which the vendee purchases the product. The item is limited to manufactured products because the Commission believes those vertical relationships are more likely to violate the antitrust laws.

The item is virtually identical to item 7 of the revised form, with editorial changes necessitated by the alteration in final § 801.40 relating to the formation of joint venture and other corporations. Revised item 7, however, had considerably narrowed the scope of the analogous items 8 (a) and 8 (b) of the original form.

Items 8(a) and 8(b) of the original form inquired more broadly into potential vertical antitrust issues presented by a transaction. They requested data on all products or services manufactured or sold by either the acquiring or the acquired person (regardless of the buyer) that were used or consumed by the other party (regardless of the seller). Final item 8, on the other hand, is limited to manufactured products, not services, and only to those products sold directly by one reporting person to another party to the transaction.

Several comments on the original rules (11, 37, 59, 74, 103) noted that a company often has little or no information on who the final purchasers of its products are (in the case of an indirect sales relationship) and that compilation of the requested data would thus be extremely burdensome. The Commission decided to adopt the suggestion made in comment 59 and to limit the question to direct vendor-vendee situations.

Several comments (e.g., 35, 37, 63, 103, 1022, 1029) urged that the $1 million reporting floor for sales of any product by one person to another be raised to $5 million or $10 million. The Commission did not adopt these suggestions. Since the size of a reporting person under the act may be as small as $10 million in assets or sales, raising this threshold might eliminate the reporting of a vendor-vendee relationship in a particular product which accounts for 50 percent or even 100 percent of a person’s sales. The purpose of the $1 million floor is to eliminate the reporting of transactions or relationships which are less likely to be significant. Setting this figure any higher might exclude some highly significant relationships.

Comments 1086 and 1098 argued that, even as revised and limited, this item is excessively burdensome for reporting persons that are vendees. The Commission did not accept this argument. Ordinarily, information on major suppliers, the products supplied, the dollar volume, and the uses made by the company of the product is readily available in most companies. As explained above, this information is necessary and appropriate to the agencies’ consideration of the vertical aspects of a proposed transaction, and completion of this item will therefore be required, regardless of burden.

ITEM 9

Item 9 is to be answered only by the acquiring person and requires it to supply information about certain prior acquisitions. In particular, it must report its domestic acquisitions (within the previous 10 years) of the voting securities or assets of other companies which derived dollar revenues in any industry in which both it and the acquired person in the present transaction are also substantially engaged.

The acquiring person is asked to go through a two-step process. First, it is to determine each four-digit (SIC code) industry in which it derived $1 million or more in dollar revenues in the most recent year. Of those four-digit (SIC code) industries, it should determine those in which, in the case of a stock acquisition, to its knowledge or belief the issuer whose stock will be acquired also derived $1 million or more in dollar revenues in the same year, or, in the case of an assets acquisition, those in which, to its knowledge or belief, $1 million or more in revenues was attributable to the assets to be acquired. If the acquiring person identifies any industries through this procedure, it must provide certain specified information.

This second step consists of listing the acquiring person's previous acquisitions of entities or assets engaged in any of the four-digit (SIC code) industries identified in the first step. It must list acquisitions within the past 10 years of voting securities of U.S. issuers which derived any dollar revenues from any industry it has identified, as well as of assets located in the United States to which any dollar revenues in that industry were attributable. The term "U.S. issuer" is defined in § 801.1(e). In addition, the acquiring person is required to provide, for each such prior acquisition, the name and address of the entity acquired, its total assets and net sales in the year prior to the acquisition, the type of acquisition (securities or assets), the date of the acquisition, and the particular four-digit industry or industries involved. Only acquisitions of more than 50 percent of the voting securities or assets of entities which had annual net sales or total assets greater than $10 million in the year prior to the acquisition need be reported.

BACKGROUND INFORMATION TO ITEM 9

The purpose of this item is to assist the agencies in identifying any prior acquisitions by the acquiring person that may suggest a pattern of acquisitions in a particular industry by that person. The present transaction may frequently take on competitive significance in the light of others in the same industry involving the same acquiring person. Such a pattern may indicate a significant anticompetitive trend and thus may be an important factor in the agencies' ultimate decision as to whether to challenge the acquisition. Reporting persons are unlikely to find the inquiry burdensome, since a somewhat broader inquiry has been complied with routinely in the Commission's existing premerger notification program.

The 10-year limit was felt to demark a reasonable period for which to obtain this information on the form, even though earlier acquisitions may be of significance. Information regarding earlier acquisitions can be obtained by requests under section 7A(e) and § 803.20 when necessary. The item permits the omission of prior transactions that did not involve the acquisition of more than 50 percent of the voting securities or assets of a person with preacquisition sales or assets of $10 million, since smaller acquisitions are likely to be less significant from an antitrust standpoint.

This item contains a major change from both its predecessors, item 7 of the original form and item 8 of the revised form. Both of the earlier drafts required information about both domestic and foreign mergers and acquisitions.

Several comments (e.g., 11, 15, 59, 63, 70, 99, 109) objected to this requirement and suggested limiting its scope to prior acquisitions of companies with some connection to U.S. commerce. A number of comments on the revised form (e.g., 1044, 1048, 1094, 1099, 1109) similarly made the argument that some minimum amount of U.S. revenue should be required before a prior acquisition became reportable in response to this item.

The final rules require information only with respect to prior acquisitions of voting securities of U.S. issuers and of assets located in the United States. This change as made partly in response to the comments and partly to reflect the reasoning behind the foreign commerce exemptions in the rules, particularly §§ 802.50 and 802.51. It should be noted, however, that certain acquisitions excluded under item 9 may not be exempt under § 802.50 or § 802.51 or any other rule. For example, an acquisition by a U.S. person of the voting securities of a foreign company with assets in the United States greater than $10 million is not exempt under § 802.50, but need not later be included in a response to item 9, since only prior acquisitions of voting securities of U.S. issuers must be reported under this item.

Another reason for this limitation in item 9 is that it makes the coverage of this item consistent with the general instructions applicable to items 5, 7 through 9, and the insurance appendix contained in § 803.2(c)(1). These, as noted above, require information only with respect to operations conducted within the United States. The reason for this instruction is that census data relating to SIC codes is collected only with respect to revenues derived from establishments located within the United States. See the statement of basis and purpose to § 803.2(a).

In addition to the change relating to foreign mergers and acquisitions, the final version of this item also contains several editorial revisions. The structure of the question has been reworded to suggest the two-step process, which should assist reporting persons in correctly answering the item.

ITEM 10

Item 10 asks for the name, title, business address, and business telephone number of the individual to contact regarding the notification and report form. Section 803.20(b)(2)(ii) provides that a request for additional information or documentary material is effective if telephoned and a written confirmation is mailed during the waiting period. It therefore requires that the reporting person keep a designated individual reasonably available during normal business hours throughout the waiting period to receive such a telephoned request. The request is effective, and the waiting period is extended, as soon as this individual receives the telephoned request (providing the written confirmation is thereafter mailed during the original waiting period). Requests for clarification pursuant to § 803.20(d)(2) may also be telephoned to the individual named.

BACKGROUND INFORMATION TO ITEM 10

This item, which appeared below the certification on the original form, and as item 9 on the revised form, attracted no comments and was retained with only minor editorial changes. For further information, see the statement of basis and purpose to § 802.30.

CERTIFICATION

See the statement of basis and purpose to § 803.6.

APPENDIX TO NOTIFICATION AND REPORT FORM: INSURANCE

Whenever voting securities of an insurance carrier are to be acquired directly or indirectly, each reporting person that contains an entity operating as an insurance carrier (SIC major group 63) must provide information concerning various types of insurance operations during the most recent year. The information required by the insurance appendix should be submitted for SIC major group 63 in lieu of the data required under item 5(c). However, reporting persons that complete the insurance appendix must also complete item 5(c) with respect to their activities in industries other than SIC major group 63.

For life insurance operations, reporting persons must provide the amount of premium receipts (calculated on an accrual basis) and new insurance issued in the United States for specific types of life and health insurance and annuities. For property liability insurance the reporting person must provide, for each line of insurance specified in part 2 of the underwriting and investment exhibit of the carrier's annual convention statement, the amount of direct and net premiums written. For title insurance, the reporting person must provide, for each line of insurance specified in part 2 of the underwriting and investment exhibit of the carrier's annual convention statement, the amount of net direct insurance premiums written and the amount of direct insurance premiums earned.

BACKGROUND INFORMATION TO INSURANCE APPENDIX

The Bureau of the Census does not publish revenue data for insurance operations. Thus, no "universe" figures for entire markets exist under the SIC system. The categories employed in the insurance appendix are derived from categories found in various trade publications. These include the "Life Insurance Fact Book," published by the American Council of Life Insurance; "Insurance Facts," published by the Insurance Information Institute; publications of the A. M. Best Co.; and reports of various State insurance commissions. Thus, the data requested in the insurance appendix should be generally comparable to the universe figures revealed in those publications.

The insurance appendix is based on an appendix to the special report required under the Commission's existing premerger notification program.

No comments addressed the insurance appendix.

COMMENTS

Received in response to Dec. 20, 1976, publication of proposed rules implementing title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to premerger notification (comment period Dec. 20, 1976–Jan. 19, 1977)

No.	Date of letter	Organization
1	1 2-30-76	Federal Home Loan Bank Board.
2	1 2-29-76	American Council of Life Insurance.

No.	Date of letter	Organization
3	1 2-28-76	Exchange Oil & Gas Corp.
4	1 2-17-76	U.S. Senate, Committee on the Judiciary, Subcommittee on Antitrust and Monopoly (Howard E. O'Leary, Jr., Esq.).
5	1-17-77	Getty Oil Co.
6	1-14-77	Pillsbury, Madison & Sutro (Wallace L. Kaapcke, Esq.).
7	1-6-77	Investment Co. Institute.
8	1-11-77	Texas Pacific Oil Co., Inc.
9	1-11-77	Skadden, Arps, Slate, Meagher & Flom (Stephen M. Axinn, Esq.)
10	1-17-77	National Realty Committee.
10A	1-11-77	Do.
11	1-14-77	American Standard, Inc.
12	1-19-77	Foley & Lardner (Edwin P. Wiley, Esq.).
13	1-17-77	Stanley M. Dub, Esq.
14	1-19-77	The Association of the Bar of the City of New York, Committee on Trade Regulation (Eleanor M. Fox, Esq., and Peter D. Standish, Esq.).
15	1-15-77	Ohio State Bar Association, Antitrust and Corporate Counsel Sections (David Holmquist, Esq., and John F. McClatchey, Esq.).
16	1-21-77	Marathon Oil Co.
17	1-14-77	American Petrofina, Inc.
18	1-14-77	Skadden, Arps, Slate, Meagher & Flom (Stephen M. Axinn, Esq.).
19	1-13-77	David Lasky, Esq.
20	1-14-77	American Insurance Association.
21	1-11-77	Miller, Anderson, Nash, Yerke & Wiener (John J. DeMott, Esq.).
22	1-19-77	Nixon, Hargrave, Devans & Doyle.
23	1-3-77	Prof. Stanley E. Boyle.
24	1-21-77	General American Oil Co. of Texas.
25	1-19-77	The B. F. Goodrich Co.

No.	Date of letter	Organization
26	1-17-77	The Gulf Cos.
27	1-27-77	Federal Communications Commission.
28	1-18-77	The Nestle Co., Inc.
29	1-18-77	American Institute of Certified Public Accountants.
30	1-19-77	Winthrop, Stimson, Putnam & Roberts (Terence H. Benbow, Esq.).
31	1-19-77	United States League of Savings Associations.
32	1-18-77	Allis-Chalmers Corp.
32A	1-19-77	American Life Insurance Association.
33	1-19-77	Dresser Industries, Inc.
34	1-18-77	National Exploration Co.
34A	1-8-77	Do.
35	1-19-77	Union Oil Co. of California.
36	1-19-77	Do.
37	Undated	Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd. (David A. Nelson, Esq.).
38	1-17-77	C. Daniel Ward, Esq.
39	1-13-77	Interstate Commerce Commission.
40	1-17-77	United States Steel Corp.
41	1-17-77	Suburban Propane Gas Corp.
42	1-19-77	Federal Communications Commission.
43	1-19-77	Arnold & Porter (Robert B. Hummel,, Esq.).
44	1-21-77	Financial Accounting Standards Board
45	1-18-77	Sperry Rand Corp.
46	1-19-77	American Gas Association.
47	U	Holiday Inns, Inc.

No.	Date of letter	Organization
	ndated	
48	1-19-77	General Counsel of the U.S. Department of Commerce.
49	1-8-77	American Financial Corp.
50	1-19-77	Chamber of Commerce of the United States.
51	1-7-77	Federal Maritime Commission.
52	1-19-77	General Counsel of the Treasury.
53	1-18-77	Federal Maritime Commission.
54	1-5-77	National Association of Manufacturers.
55	1-18-77	Comptroller of the Currency.
56	1-31-77	Federal Deposit Insurance Corporation.
57	1-18-77	American Natural Gas Service Co.
58	1-18-77	Minnesota Mining & Manufacturing Co.
59	Undated	National Association of Manufacturers.
60	2-7-77	Intereal Co.
61	2-7-77	The Associated General Contractors of America.
62	2-11-77	Cook & Henderson, P.C. (Marlow W. Cook, Esq., and James F. Falco, Esq.).
63	2-9-77	Sec. 7 (Clayton Act) Committee of the ABA Antitrust Section (Eleanor M. Fox, Esq.).
64	2-10-77	Thelen, Marrin, Johnson & Bridges (Frank D. MacDowell, Esq.).
65	2-9-77	Gatenbey, Spuller & Law (Cooperative Food Distributors of America).
66	2-1-77	Civil Aeronautics Board.
67	2-16-77	Motion Picture Association of America, Inc.
68	2-14-77	Investment Co. Institute.
69	2-14-77	Perini Corp.
70	2-9-77	General Mills, Inc.
71	2-16-77	Allied Chemical.
72	2-	Columbia Gas System Service Corp.

No.	Date of letter	Organization
	15-77	
73	2-15-77	David H. Marks, Esq.
74	2-17-77	Ashland Oil, Inc.
75	2-15-77	Texas Pacific Oil Co., Inc.
76	2-15-77	American General Insurance Co.
77	2-17-77	Aetna Life & Casualty Co.
78	2-18-77	Association of the Bar of the City of New York, Committee on Trade Regulation.
79	2-16-77	National Association of Independent Insurers.
80	2-16-77	Minnesota Mining & Manufacturing Co.
81	2-18-77	Skadden, Arps, Slate, Meagher & Flom (Blaine V. Fogg, Esq.).
82	2-16-77	Cadwalader, Wickersham & Taft (Horace P. Moulton, Esq.).
83	2-17-77	American Council on Life Insurance.
84	2-18-77	Howrey & Simon (William J. Boyd, Esq.).
85	2-17-77	International Telephone & Telegraph Corp.
86	2-18-77	Department of Army Engineers.
87	2-18-77	Covington & Burling (Exxon Corp.).
88	2-18-77	W. R. Grace & Co.
89	2-18-77	Sullivan & Cromwell.
90	2-18-77	Shearman & Sterling (Citicorp).
91	2-18-77	Board of Governors of the Federal Reserve System.
92	2-14-77	McBride, Baker, Wienke & Schlosser (James H. Ryan, Esq.).
93	2-16-77	Association of the Bar of the City of New York, Committee on Securities Regulation (John E. Merow, Esq.).
94	2-18-77	Glassman-Oliver Economic Consultants, Inc.
95	2-18-77	Hon. John F. Seiberling, Member of Congress.

No.	Date of letter	Organization
96	2-18-77	Hon. Edward M. Kennedy, U.S. Senator.
97	2-18-77	American Bankers Association.
98	2-17-77	American Insurance Association.
99	2-14-77	Borden, Inc.
100	2-16-77	Dillingham Corp.
101	2-17-77	Financial Executives Institute.
102	2-17-77	Foley & Lardner (Edwin P. Wiley, Esq.).
103	2-18-77	Grocery Manufacturers of America.
104	2-18-77	Haskins & Sells, Certified Public Accountants.
105	2-18-77	Hill, Christopher and Phillips, P.C. (Association of Closed-End Investment Companies).
106	2-18-77	Independent Bankers Association of America.
107	2-17-77	Investment Counsel Association of America, Inc.
108	2-18-77	Investors Diversified Services, Inc.
109	2-18-77	Machinery & Allied Products Institute.
110	2-15-77	Metropolitan Life Insurance Co.
111	2-18-77	Morgan Stanley & Co., Inc.
112	2-18-77	Nixon, Hargrave, Devans & Doyle.
113	2-17-77	Ropes & Gray (Edward P. Lawrence, Esq.).
114	2-16-77	Thelen, Marrin, Johnson & Bridges (Frank D. McDowell, Esq.).
115	2-16-77	Union Carbide Corp.
116	2-18-77	Weil, Gotshal & Manges (Columbia Pictures Industries, Inc.).
117	2-16-77	Westinghouse Electric Corp.
118	2-22-77	Chairman of the Board of Governors, Federal Reserve System.
119	2-18-77	Department of the Army, Office of the Chief of Engineers.
120	2-18-77	Chamber of Commerce of the United States.

No.	Date of letter	Organization
121	2-18-77	U.S. Department of the Interior.
122	2-18-77	American Gas Association.
123*	2-28-77	International Council of Shopping Centers.
124*	2-27-77	American Insurance Association.
125*	3-21-77	Securities and Exchange Commission.
126*	3-9-77	Hon. Peter W. Rodino, Jr., Member of Congress (to Hon. Griffin B. Bell, Attorney General).
127*	3-28-77	Donald I. Baker, Assistant Attorney General.
128*	3-18-77	American Insurance Association.
129*	5-31-77	Hon. Peter W. Rodino, Jr., Member of Congress (to Michael Pertschuk, Chairman, Federal Trade Commission).
130*	5-31-77	Hon. Peter W. Rodino, Jr., Member of Congress (to John H. Shenefield, Acting Assistant Attorney General).
131*	6-14-77	Independent Bankers Association of America.
132*	6-17-77	J. C. Penney Co., Inc.
133**	12- 7-76	Covington & Burling (Exxon Corp.).

*This comment was received after the comment period.
**This comment was received before the comment period.

COMMENTS

Received in response to Aug. 1, 1977, publication of revised proposed rules implementing title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to premerger notification (comment period Aug. 1–Sept. 30, 1977)

No.	Date of letter	Organization
1001	8-8-77	Covington & Burling (Exxon Corp.).
1002	8-8-77	American Council of Life Insurance.
1003	8-4-77	American Insurance Association.
1004	Undated	Federal Communications Commission.
1005	8-	American Bankers Association.

No.	Date of letter	Organization
	15-77	
1006	8-12-77	Association of the Bar of the City of New York, Committee on Trade Regulation (Peter D. Standish, Esq.).
1007	8-17-77	Grocery Manufacturers of America, Inc.
1008	8-18-77	Arnold & Porter (Robert B. Hummel, Esq.).
1009	8-19-77	Cleary, Gottlieb, Steen & Hamilton (J. Eugene Marans, Esq.).
1010	8-17-77	German American Chamber of Commerce.
1011	8-17-77	Sperry Rand Financial Corp.
1012	8-16-77	Sec. 7 (Clayton Act) Committee of the ABA Antitrust Section (Stephen M. Axinn, Esq.).
1013	8-18-77	International Trade Committee of the ABA Antitrust Section (Barry E. Hawk, Esq.).
1014	8-19-77	Shaw, Pittman, Potts & Trowbridge (Institute of Foreign Bankers).
1015	8-19-77	Department of the Army, Office of the Chief of Engineers.
1016	8-18-77	Sullivan & Cromwell.
1017	8-23-77	W. R. Grace & Co.
1018	8-22-77	Getty Oil Co.
1019	8-26-77	Texas Pacific Oil Co., Inc.
1020	8-29-77	Investment Co. Institute.
1021	8-24-77	Stuart Paul Jasper, Esq.
1022	8-29-77	Union Oil Co. of California.
1023	8-26-77	Dresser Industries, Inc.
1024	8-25-77	The Gulf Cos.
1025	8-26-77	Tenneco Oil.
1026	8-24-77	Union Carbide Corp.
1027	8-29-77	Pillsbury, Madison & Sutro (Wallace L. Kaapcke, Esq.).
1028	8-24-77	Suburban Propane Gas Corp.
1029	8-26-77	Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd. (David A. Nelson, Esq.).
1030	8-	American Natural Service Co.

No.	Date of letter	Organization
	26-77	
1031	8-30-77	National Association of Independent Insurers.
1032	8-29-77	Federal Home Loan Bank Board.I601033
	8-25-77	Hunt Oil Co.
1034	8-30-77	Shank, Irwin, Conant, Williamson & Grevelle (Ray B. Williamson, Esq., and Karen S. Bedell, Esq.).
1035	8-16-77	BOC International, Ltd.
1035A	2-7-77	Do.
1036	8-23-77	Imperial Group, Ltd.
1037	8-26-77	The Depository Trust Co.
1038	8-26-77	Sidley & Austin (Mark E. MacDonald, Esq.).
1039	8-31-77	Metropolitan Life Insurance Co.
1040	8-26-77	Diamond Shamrock Corp.
1041	8-29-77	Gatenbey, Spuller & Law (Cooperative Food Distributors of America).
1042	8-29-77	Cadwalader, Wickersham & Taft (Horace P. Moulton, Esq.).
1043	8-29-77	Prof. Roy A. Schotland.
1044	8-30-77	American Standard, Inc.
1045	8-30-77	Medusa Corp.
1046	8-29-77	General American Oil Co. of Texas.
1047	9-2-77	U.S. Department of the Interior (Office of the Secretary).
1048	8-31-77	General Mills, Inc.I601049
	8-30-77	Prof. Donald I. Baker.
1050	9-7-77	Standard Oil Co. (Indiana).
1051	9-13-77	Hill, Christopher & Phillips, P.C. (Association of Publicly Traded Investment Funds).
1052	9-12-77	Sambo’s Restaurants, Inc.

No.	Date of letter	Organization
1053	9-13-77	Allis-Chalmers Corp.
1054	9-20-77	Comptroller of the Currency.
1055	9-20-77	International Telephone & Telegraph Corp.
1056	9-21-77	Exchange Oil & Gas Corp.
1057	9-26-77	General Mills, Inc.
1058	9-29-77	Securities and Exchange Commission.
1059	9-29-77	Chamber of Commerce of the United States.
1060	9-29-77	General Crude Oil Co.
1061	9-27-77	Aetna Life & Casualty Co.
1062	9-30-77	Shearman & Sterling (Citicorp).
1063	9-29-77	Covington & Burling (Exxon Corp.).
1064	9-30-77	Winston & Strawn (International Council of Shopping Centers).
1065	9-29-77	Building Owners & Managers Association International.
1066	9-29-77	Motion Picture Association of America.
1067	9-29-77	Investment Council of America, Inc.
1068	9-27-77	Continental Oil Co.
1069	9-30-77	Texaco Inc.
1070	9-30-77	American Council of Life Insurance.
1071	9-30-77	Morgan Guaranty Trust Co.
1072	9-30-77	U.S. Department of State.
1073	9-28-77	Bank of America.
1074	9-29-77	National Association of Small Business Investment Companies.
1075	9-29-77	Allied Chemical.
1076	9-29-77	The Nestle Co., Inc.
1077	9-29-77	Ashland Oil, Inc.

No.	Date of letter	Organization
1078	9-30-77	Independent Bankers Association of America.
1079	9-28-77	Squire, Sanders & Dempsey (Edward J. DeBartolo Corp.).
1080	9-26-77	McCormick & Co., Inc.
1081	9-29-77	Coastal States Gas Corp.
1082	9-26-77	Doherty, Rumble & Butler (Thomas E. Rohricht, Esq.).
1083	9-29-77	Board of Governors of the Federal Reserve System.
1084	9-28-77	Columbia Gas System Service Corp.
1085	9-26-77	The Rouse Co.
1086	9-30-77	Financial Executives Institute.
1086A	10-12-77	Do.
1087	9-30-77	Independent Petroleum Association of America.
1088	9-29-77	Marathon Oil Co.
1089	9-30-77	American Bankers Association.
1090	9-30-77	Association of the Bar of the City of New York, Committee on Securities Regulation (Leonard M. Leiman, Esq.).
1091	9-30-77	Sullivan & Cromwell.
1092	9-30-77	The Associated General Contractors of America.
1093	9-26-77	Montgomery Ward & Co., Inc.
1094	9-28-77	Nestle Enterprises, Inc.
1095	9-30-77	Breed, Abbot & Morgan.
1096	9-30-77	American Petroleum Institute.
1097	9-29-77	Transco Cos., Inc.
1098	9-29-77	Winthrop, Stimson, Putnam & Roberts (Terrence H. Benbow, Esq.).
1099	9-30-77	International Trade Committee of the ABA Antitrust Section (Barry E. Hawk, Esq.).
1100	9-	Association of the Bar of the City of New York, Committee on

No.	Date of letter	Organization
	29-77	Trade Regulation (Peter D. Standish, Esq.).
1101	9-30-77	Morgan Stanley & Co., Inc.
1102	9-30-77	Ohio State Bar Association, Antitrust and Corporate Counsel Sections (Victor Marsh, Jr., Esq., and John F. McClatchey, Esq.).
1103	9-30-77	American Insurance Association.
1104	9-28-77	Borden, Inc.
1105	9-30-77	Shaw, Pittman, Potts & Trowbridge (Institute of Foreign Bankers).
1106	9-29-77	Husky Oil Co.
1107	9-29-77	United Energy Resources, Inc.
1108	10- 3-77	Kellogg Co.
1108A	10- 3-77	Do.
1109	9-29-77	Lord, Day & Lord (Stephen M. Hudspeth, Esq.).
1110	10- 7-77	American Financial Corp.
1111	10- 3-77	Continental Bank.
1112	10- 5-77	Dillingham Corp.
1113	9-28-77	Hon. Charles McC. Mathias, Jr., U.S. Senator.
1114	9-29-77	Associated General Contractors of America, Inc. (Oregon Columbia Chapter).
1115	10-11-77	The Gulf Cos.
1116*	11-25-77	Fair Trade Commission (Japan) (Jotaro Yabe, Counselor).

*This comment was received after the comment period.

Pursuant to section 7A(d) of the act, 15 U.S.C. 18a(d), the Federal Trade Commission, with the concurrence of the Assistant Attorney General, hereby formally promulgates the following rules to amend title 16, chapter I, by adding new parts 801, 802, and 803 as set forth below.

Issued July 18, 1978.

By direction of the Commission.

CAROL M. THOMAS,

Secretary.

The Federal Trade Commission promulgates the rules contained in this part (801) pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18A(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94435, 90. Stat. 1390.

PART 801—COVERAGE RULES

Sec.

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

§ 801.1 Definitions.

When used in the act and these rules—

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

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

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

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

4. See the example to § 801.2(a).

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

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

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

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

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

(b) *Control*. The term "control" (as used in the terms "control(s)," "controlling," "controlled by," and "under common control with") means either (1) holding 50 percent or more of the outstanding—voting securities of an issuer; or (2) having the contractual power presently to designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f)(1) *Voting securities.* The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer, or, with respect to unincorporated entities, individuals exercising similar functions.

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

(3) *Conversion.* The term "conversion" means the exchange, without the payment of additional consideration, of voting securities which do not presently entitle the owner or holder to vote for directors of the issuer, or of an entity included within the same person as the issuer, for securities which do so entitle the owner or holder. Transfer costs and fees, and any payments made to complete fractional shares, shall not be additional consideration within the meaning of this subparagraph.

Examples: 1. The acquisition of convertible debentures which are convertible into common stock without the payment of additional consideration is an acquisition of "voting securities." However, § 802.31 exempts the acquisition of such securities from the requirements of the act.

2. Options and warrants are not "voting securities" for purposes of the act, since the payment of additional consideration is necessary to exercise the options or warrants. Notification need not be filed prior to the acquisition of options and warrants, but may be required prior to exercising them.

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

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

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

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

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

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

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

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

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

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

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

(j) *Engaged in manufacturing.* A person is "engaged in manufacturing" if it produces and derives annual sales or revenues in excess of $1 million from products within industries 2000–3999 as coded in the Standard Industrial Classification Manual (1972 edition) published by the Executive Office of the President, Office of Management and Budget.

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

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

(m) *The act.* References to “the act” refer to section 7A of the Clayton Act, 15 U.S.C. 18A, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390. References to “section 7A()” refer to subsections thereof. References to “this section” refer to the section of these rules in which the term appears.

? **801.2 Acquiring and acquired persons.**

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

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

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

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

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

(c) For purposes of the act and these rules, a person may be both an acquiring person and an acquired person in a single transaction.

Example: Corporation A (an entity within person “A”) plans to transfer certain of its assets to corporation B (an entity within person “B”) in return for voting securities of B. Since corporation A is acquiring voting securities. “A” is an acquiring person; since corporation B is acquiring assets, “B” is also an acquiring person. In addition, both “A” and “B” are acquired persons, since the assets of A are being acquired, and the voting securities of B are being acquired.

(d) A merger, consolidation, or other transaction combining all or any part of the business of two or more persons shall be an acquisition subject to the act, and each party to such a transaction shall be both an acquiring and an acquired person.

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

Example: Suppose that corporations A and B are to merge, and that “A” and “B” have filed notification. A will be the surviving corporation, and the shareholders of B will receive stock of A in exchange for their B shares. Under this section, the acquisition of A shares by the shareholders of B is separately subject to the act. Thus, if “C,” a shareholder of B, will receive sufficient shares of A to satisfy section 7A(a)(3), and if “A” and “C” meet the criteria of section 7A(a)(1) and (2), then “C’s” acquisition of A’s voting securities would be separately subject to the requirements of the act.

Before "C" may acquire the voting securities of "A," "C" must file notification as an acquiring person, "A" (an acquiring person to the merger) must file notification as an acquired person, and "C" and "A" must observe a waiting period with respect to the acquisition of A shares by "C"—which is separate from the waiting period with respect to "A" and "B."

§ 801.3 Activities in or affecting commerce.

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

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

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

§ 801.4 Secondary acquisitions

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

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

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

Examples: 1. Assume that acquiring person "A" proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by "A." Thus, if B holds more than $15 million of the voting securities of corporation X (but does not control X), and "A" and "X" satisfy sections 7A (a)(1) and (a)(2), "A" must file notification separately with respect to its secondary acquisition of voting securities of X. "X" must file notification within fifteen days after "A" files pursuant to **?** 801.30.

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

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

? **801.10 Value of voting securities and assets to be acquired.**

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

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

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

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

(2) If subparagraph (1) of this paragraph is inapplicable—

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

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

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

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

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

(ii) For acquisitions not subject to § 801.30, the market price shall be the lowest closing quotation, or, in an interdealer quotation system, the lowest closing bid price, within the 45 or fewer calendar days which are prior to the consummation of the acquisition but not earlier than the day prior to the execution of the contract, agreement in principle or letter of intent to merge or acquire.

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

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

(3) *Fair market value*. The fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days

prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition.

> Example: Corporation A, the ultimate parent entity in person "A," contracts to acquire assets of corporation B, and the contract provides that the acquisition price is not to be determined until after the acquisition is effected. Under paragraph (b) of this section, for purposes of the act the value of the assets is to be the fair market value of the assets. Under paragraph (c)(3), the board of directors of corporation A must in good faith determine the fair market value. That determination will control for 60 days whether "A" and "B" must observe the requirements of the act; that is, "A" and "B" must either file notification or consummate the acquisition within that time. If "A" and "B" neither file nor consummate within 60 days, the parties would no longer be entitled to rely on the determination of fair market value, and, if in doubt about whether required to observe the requirements of the act, would have to make a second determination of fair market value. Note that since item 2(d)(i) of the Notification and Report Form only requests the approximate dollar value of assets, a second formal determination of the fair market value would not be necessary for that purpose.

? 801.11 Annual net sales and total assets.

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

(b) Except for the total assets of a joint venture or other corporation at the time of its formation which shall be determined pursuant to § 801.40(c), the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c) of this section: *Provided*: (1) That the annual net sales and total assets of each entity included within such person are consolidated therein. If the annual net sales and total assets of any entity included within the person are not consolidated in such statements the annual net sales and total assets of the person filing notification shall be recomputed to include the nonduplicative annual net sales and nonduplicative total assets of each such entity; and

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

> Example: Person "A" is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries Cl and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of Bl, Cl, and C2, but not B2 or C3. In order to determine whether person "A" meets the criteria of section 7A(a)(2), as either an acquiring or an acquired person, A must recompute its annual net sales and total assets to reflect consolidation of the nonduplicative annual net sales and nonduplicative total assets of B2 and C3.

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

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

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

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

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

? **801.12 Calculating percentage of voting securities or assets.**

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

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

(b) *Percentage of voting securities.* Whenever the act or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired, the percentage shall be the ratio, expressed as a percentage, which—

(i) The number of votes for directors, of the issuer which voting securities presently entitle the holder to cast, or, as a result of the acquisition, will entitle the acquiring person to cast, bears to; and

(ii) The total number of votes for directors of the issuer which presently may be cast, or which will be entitled to be cast, after the acquisition, whichever is greater.

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

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

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

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

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

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

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

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

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

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

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

(a) Voting securities. (1) Subject to the provisions of § 801. 15, all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition. The value of such voting securities shall be the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10(a), and the value of the voting securities held by the acquiring person prior to the acquisition, determined in accordance with subparagraph (2) of this paragraph.

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

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

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

Examples: 1. Assume that acquiring person "A" holds $19 million of the voting securities of X, and is to acquire another $1 million of the same voting securities. Since under paragraph (a) of this rule all voting securities "A" will hold after the acquisition are held "as a result of" the acquisition, "A" will hold $20 million of the voting securities of X as a result of the acquisition. "A" must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under § 7A(c), § 802.21 or any other rule.

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

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

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

(2)(i) If the acquiring person has signed a letter of intent or entered into a contract or agreement in principle to acquire assets from the acquired person, and

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

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

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of section 7A(a)(3)(B) and § 801.1(h)(1), the aggregate total amount of voting securities and assets shall be the sum of:

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

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

Examples: 1. Acquiring person "A" previously acquired $6 million of the voting securities (not convertible voting securities) of corporation X. "A" now intends to acquire $8 million of X's assets. Under paragraph (a) of this section. "A" looks to § 801.13(a) and determines that the voting securities are to be held "as a result of" the acquisition. Section 801.13(a) also provides that "A" must determine the present value of the previously acquired securities. Under paragraph (b) of this section, "A" looks to § 801.13(b)(1) and determines that the assets to be acquired will be held "as a result of" the acquisition, and are valued under § 801.10(b) at $8 million. Therefore, if the voting securities have a present value of more than $7 million, the asset acquisition is subject to the requirements of the act since, as a result of it, "A" would hold an aggregate total amount of the voting securities and assets of "X" in excess of $15 million.

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. "A" now looks to § 801.13(b)(2) and determines that because the second acquisition is of voting securities and not assets, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act by reason of section 7A(a)(3)(B) since the value of the securities to be acquired does not equal or exceed $15 million.

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

Notwithstanding § 801.13, for purposes of section 7A(a)(3) and § 801.1(h), none of the following will be held as a result of an acquisition:

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

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

(2) Sections 802.8, 802.31, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

(b) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under section 7A(c)(9) and §§ 802.50(a)(2), 802.50(b), 802.51(b) and 802.64 unless the limitations contained in section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

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

Examples: 1. Assume that acquiring person "A" is simultaneously to acquire $50 million of the convertible voting securities of X and $12 million (which is less than 15 percent) of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than $15 million, "A" must determine whether it is obliged to file notification and observe a waiting period before acquiring the common stock. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this rule, "A" would not hold the convertible voting securities as a result of the acquisition. Therefore, since as a result of the acquisition, "A" would hold only the common stock, the test of section 7A(a)(3) would not be satisfied, and "A" would not observe the requirements of the act before acquiring the common stock.

(Note, however, that the $50 million of convertible voting securities would be reflected in "A's" next regularly prepared balance sheet, for purposes of § 801.11.)

2. In the previous example, the rule was applied to voting securities the present acquisition of which is exempt. Assume instead that "A" had acquired the convertible voting securities prior to its acquisition of the common stock. "A" still would not hold the convertible voting securities as a result of the acquisition of the common stock, because the rule states that voting securities the previous acquisition of which was exempt also fall within the rule. Thus, the test of section 7A(a)(3) would again not be satisfied, and "A" need not observe the requirements of the act before acquiring the common stock.

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

4. Assume that acquiring person "B," a United States person, acquired from corporation X two mines located abroad, and assume that the acquisition price was $40 million. In the most recent year, sales in the United States attributable to the mines were $6 million, and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, "B" seeks to acquire a third mine from X, to which United States sales of $7 million were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, "B" would hold all three mines of X, and the $10 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, "B" would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, "B" would hold assets of X exceeding $15 million, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act before consummating the acquisition.

§ 801.20 Acquisitions subsequent to exceeding threshold.

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

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

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

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

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

2. In example 1, assume that the value of the voting securities of "B" originally acquired by "A" has reached a present value exceeding $15 million. If "A" wishes to acquire a T3 any additional voting securities or assets of "B", notification will be required. See § 801.13(a).

§ 801.21 Securities and cash not considered assets when acquired.

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

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

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

Examples: 1. Assume that acquiring person "A" acquires voting securities of issuer X from "B," a person unrelated to X. Under this subparagraph, the acquisition is treated only as one of voting securities, requiring "A" and "X" to comply with the requirements of the act, rather than one in which "A" acquires the assets of "B," requiring "A" and "B" to comply. See also example 2 to § 801.30. Note that for purposes of section 7A(a)(2)—that is, for the next regularly prepared balance sheet of "A" referred to in § 801.1l—the voting securities of X must be reflected after their acquisition; see § 801.1l(c)(2).

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

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

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

(a) This section applies to:

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

(2) Acquisitions described by § 801.31;

(3) Tender offers;

(4) Secondary acquisitions;

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

(6) Conversions; and

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

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

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

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

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

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

or federal holiday, the notification shall be filed no later than 10 a.m. eastern time on the next following business day.

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

2. Acquiring person "A" proposes to acquire $20 million of the voting securities of corporation X on a securities exchange. The waiting period begins when "A" files notification. "X" must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

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

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

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

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

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

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

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

Example: Assume that "A," which has annual net sales exceeding $100 million, makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. "S," a shareholder of X with total assets exceeding $10 million, wishes to tender its holdings of X and in exchange would receive shares of A valued at $16 million. Under this section, "S's" acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before "S" may acquire the voting securities of A, "S" must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to "A" and "X." Since § 801.30 applies, the waiting period applicable to "A" and "S" begins upon filing by "S," and "A" must file with respect to "S's" acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to "A" and "X" expire or be terminated prior to the waiting period with respect to "S" and "A," "S" may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

§ 801.32 Conversion an acquisition.

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

Example: Assume that acquiring person "A" wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued at $20 million. If "A" and "X" satisfy the criteria of section 7A(a)(1) and section 7A(a)(2), then "A" and "X" must file notification and observe the waiting period before "A" completes the acquisition of the X common stock, unless exempted by section 7A(c) or these rules. Since § 801.30 applies, the waiting period begins upon notification by "A," and "X" must file notification within 15 days.

§ 801.40 Formation of joint venture or other corporations.

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

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of section 7A (a)(1) and (a)(3) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

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

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

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

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

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

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

(c) For purposes of paragraph (b) of this section the assets of the joint venture or other corporation shall include:

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

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

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

Example: Persons "A," "B," and "C" agree to create new corporation N, a joint venture. "A" has more than $100 million in annual net sales. "B" has more than $10 million in total assets. Both "C's" total assets and its annual net sales are less than $10 million. "A," "B," and "C" are each engaged in commerce. The corporations have agreed to make an aggregate initial contribution to the new entity of $6 million in assets and to make additional contributions of an aggregate $6 million in each of the next three years. Under paragraph (c), the assets of the new corporation are $24 million. Under paragraph (b), only "A" must file notification, and only then if "A" meets a criterion of section 7A(a)(3)—that is, if it will be acquiring 15 percent or $15 million of the voting securities of the new entity. N need not file notification; see § 802.41.

§ 801.90 Transactions or devices for avoidance.

Any transactions or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

Examples: 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of $30 million in the joint venture; persons "A" and "B" each have total assets in excess of $100 million. Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, Al, which issues half of its authorized shares to A. Assume that Al has total assets of $1,000. "A" then sells 50 percent of its Al stock to "B" for $500. Thereafter, "A" and "B" each contribute $15 million to Al in exchange for the remaining authorized Al stock (one-fourth each to "A" and "B"). A's creation of Al was exempt under § 802.30; its sale of Al stock to "B" was exempt under § 802.20; and the second acquisition of stock in Al by "A" and "B" was exempt under § 802.30 and sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over $10 million in assets. Such a transaction would be covered by § 801.40 and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than $10 million. The aggregate fair market value of the assets of the twenty store corporations is $60 million. "A" proposes to sell the stores to "B" for $60 million. For various reasons it is decided that "B" will buy the stock of each of the store corporations from "A". Instead of filing notification and observing the waiting period as contemplated by the act, "A" and "B" enter into a series of five stock purchase-sale agreements for $12 million each. Under the terms of each contract the stock of four stores will pass from "A" to "B". The five agreements are to be consummated on five successive days. Because, after each of these transactions, the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because § 802.20(b) exempts the acquisition of control of each of the store corporations, none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

The Federal Trade Commission promulgates the Rules contained in this part (802) pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18A(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

PART 801—EXEMPTION RULES

Sec.

AUTHORITY: Sec. 7A(d) of the Clayton Act, 15 U.S.C. 18A(d), as added by sec. 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390.

§ 802.1 Acquisitions of goods or realty in the ordinary course of business.

(a) *Acquisitions of voting securities of entities holding only realty.* For purposes of section 7A(c)(1), an acquisition of the voting securities of an entity whose assets consist or will consist solely of real property and assets incidental to the ownership of real property (such as cash, prepaid taxes or insurance, rentals receivable and the like) shall be deemed an acquisition of realty.

(b) *Certain acquisitions of assets.* No acquisition of the goods or realty of an entity (except for entities described in paragraph (a) of this section) shall be made "in the ordinary course of business" within the meaning of section 7A(c)(l), if, as a result thereof, the acquiring person will hold all or substantially all of the assets of that entity or an operating division thereof.

§ 802.6 Federal agency approval.

For the purposes of section 7A (c)(6) and (c)(8), the term "information and documentary material" includes one copy of all documents, application forms, and all written submissions of any type whatsoever. In lieu of providing all such information and documentary material, or any portion thereof, one copy of an index describing such information and documentary material may be provided, together with a certification that any such information or documentary material not provided will be provided within 10 calendar days upon request by the Federal Trade Commission or Assistant Attorney General, or a delegated official of either. Any material submitted pursuant to this section shall be submitted to the offices specified in § 803.10(c).

§ 802.8 Certain supervisory acquisitions.

A merger, consolidation, purchase of assets, or acquisition requiring agency approval under sections 403 or 408(e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 shall be exempt from the requirements of the Act, including specifically the filing requirement of section 7A(c)(8), it the agency whose approval is required finds that approval of such merger, consolidation, purchase of assets, or acquisition is necessary to prevent the probable failure of one of the institutions involved.

§ 802.9 Acquisition solely for the purpose of investment.

An acquisition of voting securities shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held.

Examples: 1. Suppose that acquiring person "A" acquires 6 percent of the voting securities of issuer X, valued at $30 million. If the acquisition is solely for the purpose of investment, it is exempt under section 7A(c)(9).

2. After the acquisition in example 1, "A" decides to acquire an additional 7 percent of the voting securities of X. Regardless of "A's" intentions, the acquisition is not exempt under section 7A(c)(9).

3. After the acquisition in example 1, acquiring person "A" decides to participate in the management of issuer X. Any subsequent acquisitions of X stock by "A" would not be exempt under section 7A(c)(9).

§ 802.10 Stock dividends and splits.

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

§ 802.20 Minimal dollar value.

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

(a) Assets of the acquired person values at more than $10 million; of

(b) Voting securities which confer control of an issuer which, together with all entities which it controls, has annual net sales or total assets of $10 million or more.

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

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

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

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

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

(a) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(b) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to § 803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

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

Examples: 1. Corporation A acquires 15 percent of the voting securities of corporation B and both "A" and "B" file notification as required. Within five years of the expiration of the original waiting period, "A" acquires additional voting securities of B but not in an amount sufficient to meet or exceed 25 percent of the voting securities of B. No additional notification is required.

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

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

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

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

§ 802.23 Amended or renewed tender offers.

Whenever a tender offer is amended or renewed after notification has been filed by the offeror, no new notification shall be required, and the running of the waiting period shall be unaffected, except as follows:

(a) If the number of voting securities to be acquired pursuant to the offer is increased such that a greater notification threshold would be met or exceeded, only the acquiring person need again file notification, but a new waiting period must be observed;

(b) If a noncash tender offer is amended to become a cash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of

§ 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is earlier; or

(c) If a cash tender offer is amended to become a noncash tender offer, (1) one copy of the amended tender offer shall be filed in the manner prescribed by § 803.10(c) with the Federal Trade Commission and Assistant Attorney General, and (2) subject to the provisions of § 803.10(b)(1), the waiting period shall expire on the 15th day after the date of receipt (as determined in accordance with § 803.10(c)) of the amended tender offer, or on the 30th day after filing notification, whichever is later.

Examples: 1. Assume that corporation A makes a tender offer for 20 percent of the voting securities of corporation B and that "A" files notification. Under this section, if A subsequently amends its tender offer only as to the amount of consideration offered, the waiting period so commenced is not affected, and no new notification need be filed.

2. In the previous example, assume that A makes an amended tender offer for 27 percent of the voting securities of B. Since a new notification threshold will be crossed, this section requires that "A" must again file notification and observe a new waiting period. Paragraph (a) of this section, however, provides that "B" need not file notification again.

3. Assume that "A" makes a tender offer for shares of corporation B. "A" includes its voting securities as part of the consideration. "A" files notification. Five days later, "A" changes its tender offer to a cash tender offer, and on the same day files copies of its amended tender offer with the offices designated in § 803.10(c). Under paragraph (b) of this section, the waiting period expires (unless extended or terminated) 15 days after the receipt of the amended offer (on the 25th day after filing notification), since that occurs earlier than the expiration of the original waiting period (which would occur on the 13th day after filing).

4. Assume that "A" makes a cash tender offer for shares of corporation B and files notification. Six days later, "A" amends the tender offer and adds voting securities as consideration, and on the same day files copies of the amended tender offer with the offices designated in § 803.10(c). Under paragraph (c) of this section, the waiting period expires (unless extended or terminated) on the 13th day following the date of filing of notification (determined under § 803.10(c)), since that occurs later than the 15th day after receipt of the amended tender offer (which would occur on the 21st day).

§ 802.30 Intra-person transactions.

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

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

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

3. Corporation A, which controls corporation B by a contract giving A the power to name a majority of B's directors, but which holds no voting securities of B, proposes to acquire 15 percent

of B's voting securities. The transaction is not exempt under this section, since "A" and "B" are not the same person "by reason of holdings of voting securities."

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

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

§ 802.31 Acquisitions of convertible voting securities.

Acquisitions of convertible voting securities shall be exempt from the requirements of the act.

Example: This section applies regardless of the dollar value of the convertible voting securities held or to be acquired and even though they may be converted into 15 percent or more of the issuer's voting securities. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See § 801.32.

§ 802.40 Exempt formation of Joint venture or other corporations.

Acquisitions of the voting securities of a joint venture or other corporation at the time of formation under § 801.40 shall be exempt from the requirements of the act if the joint venture or other corporation will be not for profit within the meaning of Sections 501(c)(l)–(4), (6)–(15), (17)–(20) or (d) of the Internal Revenue Code.

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

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

Examples: 1. Corporations A and B, each having sales of $100 million, each propose to contribute $10 million in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both "A" and "B" must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in example 1 above, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for $15 million. Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, "A," "B" and "C" must file with respect to the proposed acquisition of C and must observe the waiting period.

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

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

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

(2) The acquisition of assets located outside the United States, to which sales in or into the United States are attributable, shall be exempt from the requirements of the act unless as a result of the acquisition the acquiring person would hold assets of the acquired person to which such sales aggregating $10 million or more during the acquired person's most recent fiscal year were attributable.

Examples: 1. Assume that "A" and "B" are both U.S. persons. "A" proposes selling to "B" a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled 68 million in the most recent fiscal year. The transaction is exempt under this paragraph.

2. Sixty days after the transaction in example 1, "A" proposes to sell to "B" a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled $5 million in the most recent fiscal year. Since "B" would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of "A" now held by "B." See § 801.13(b)(2). Since the total annual sales in or into the United States exceed $10 million, the acquisition of the second plant would not be exempt under this paragraph.

(b) *Voting securities.* An acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either:

(1) Holds assets located in the United States (other than investment assets and voting or nonvoting securities of another person) having an aggregate book value of $10 million or more; or

(2) Made aggregate sales in or into the United States of $10 million or more in its most recent fiscal year.

Example: "A," a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of $12 million in the most recent fiscal year. The transaction is not exempt under this section.

§ 802.51 Acquisitions by foreign persons.

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

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

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

(1) An issuer which holds assets located in the United States (other than investment assets) having an aggregate book value of $10 million or more, or

(2) A U.S. issuer with annual net sales or total assets of $10 million or more;

(c) The acquisition is of less than $10 million of assets located in the United States (other than investment assets); or

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

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

2. In example 1, assume that "A" is acquiring "B's" stock and that included within "B" is issuer C, a U.S. issuer whose total assets are valued at $12 million. Since C's voting securities will be acquired indirectly, and since "A" thus will be acquiring control of a U.S. issuer with total assets of more than $10 million, the acquisition cannot be exempt under this section.

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

§ 802.52 Acquisitions by or from foreign governmental corporations.

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

(a) The ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign state, foreign government, or agency thereof; and

(b) The acquisition is of assets located within that foreign state or of voting securities of an issuer organized under the laws of that state.

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is "A," a US. person. Regardless of the aggregate annual sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate annual sales were low than $10 million, the transaction would also be exempt under § 802.50.)

§ 802.53 Certain foreign banking transactions.

An acquisition which requires the consent or approval of the Board of Governors of the Federal Reserve System under section 25 or section 25(a) of the Federal Reserve Act, 12 U.S.C. 601, 615, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Board of Governors are contemporaneously filed with the Federal Trade Commission and Assistant Attorney General at least 30 days prior to consummation of the acquisition. In lieu of such information and documentary material or any portion thereof, an index describing such material may be provided in the manner authorized by § 802.6.

§ 802.60 Acquisitions by securities underwriters.

An acquisition of voting securities by a person acting as a securities underwriter, in the ordinary course of business, and in the process of underwriting, shall be exempt from the requirements of the act.

§ 802.63 Certain acquisitions by creditors and insurers.

(a) *Creditors.* An acquisition of collateral or receivables, or an acquisition in foreclosure, or upon default, or in connection with the establishment of a lease financing, or in connection with a bona fide debt work-out shall be exempt from the requirements of the act if made by a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business.

(b) *Insurers*. An acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations shall be exempt from the requirements of the act if made by an insurer in the ordinary course of business.

Examples: 1. A bank makes a loan and takes actual or constructive possession of collateral in any form. Since the bank is not the beneficial owner of the collateral, the bank's receipt of it in not an acquisition which is subject to the requirements of the act. However, if upon default the bank becomes the beneficial owner of the collateral, that acquisition is exempt under this section.

2. This section exempts only the acquisition by the creditor or insurer, and not the subsequent disposition of the assets or voting securities. If a creditor or insurer sells voting securities or assets that have come into its possession in a transaction which is exempt under this section, the requirements of the act may apply to that disposition.

§ 802.64 Acquisitions of voting securities by certain institutional investors.

(a) *Institutional investor.* For purposes of this section, the term "institutional investor" means any entity of the following type:

(1) A bank within the meaning of 15 U.S.C. 80b-2(a)(2);

(2) Savings bank;

(3) Savings and loan or building and loan company or association;

(4) Trust company;

(5) Insurance company;

(6) Investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.);

(7) Finance company;

(8) Broker-dealer within the meaning of 15 U.S.C. 78c(a)(4) or (a)(5);

(9) Small Business Investment Company or Minority Enterprise Small Business Investment Company regulated by the U.S. Small Business Administration pursuant to 15 U.S.C. 662;

(10) A stock bonus, pension, or profit-sharing trust qualified under section 401 of the Internal Revenue Code;

(11) Bank holding company within the meaning of 12 U.S.C. 1841;

(12) An entity which is controlled directly or indirectly by an institutional investor and the activities of which are in the ordinary course of business of the institutional investor;

(13) An entity which may supply incidental services to entities which it controls directly or indirectly but which performs no operating functions, and which is otherwise engaged only in holding controlling interests in institutional investors; or

(14) A nonprofit entity within the meaning of sections 501(c)(l)-(4), (6)-(15); (17)-(20), or (d) of the Internal Revenue Code.

(b) *Exemption.* An acquisition of voting securities shall be exempt from the requirements of the act, except as provided in paragraph (c) of this section, if:

(1) Made directly by an institutional investor;

(2) Made in the ordinary course of business;

(3) Made solely for the purpose of investment;

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

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

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

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

(c) Exception to exemption. Notwithstanding paragraph (b) of this section:

(1) No acquisition of voting securities of an institutional investor of the same type as any entity included within the acquiring person shall be exempt under this section; and

(2) No acquisition by an institutional investor shall be exempt under this section if any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired.

Examples: 1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this section, that X is not, and that the conditions set forth in subparagraphs (2), (3) and (4) of paragraph (b) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $25 million as long as the aggregate amount held by person "A" as a result of the acquisition does not equal or exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would equal or exceed 15 percent, "A" may acquire no more than $25 million worth of voting securities without being subject to the requirements of the act.

2. In example 1, assume that B plans to make the acquisition, but that corporation B's parent, corporation A, is not an institutional investor and is engaged in manufacturing. Subparagraph (c)(2) provides that acquisitions by B can never be exempt under this section if A owns any amount of X's voting securities.

3. In example 1, the exemption does not apply if X is also an institutional investor of the same type as either A or B.

4. Assume that H is a holding company which controls a life insurance company, a casualty insurer and a finance company. The life insurance company controls a data processing company which performs services for the two insurers. Any acquisition by any of these entities could qualify for exemption under this section.

5. In example 4, if H also controls a manufacturing entity, H is not an institutional investor, and only the acquisitions made by the two insurance companies, the finance company and the data processing company can qualify for the exemption under this section.

§ 802.70 Acquisitions subject to order.

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

(a) The voting securities or assets are to be acquired from an entity ordered to divest such voting securities or assets by order of the Federal Trade Commission or of any Federal court in an action brought by the Federal Trade Commission or the Department of Justice; or

(b) The acquiring person or entity is subject to an order of the Federal Trade Commission or of any Federal court requiring prior approval of such acquisition by the Federal Trade Commission, such court, or the Department of Justice, and such approval has been obtained.

§ 802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

Acquisitions resulting from a gift, intestate succession, testamentary disposition or transfer by a settlor to an irrevocable trust shall be exempt from the requirements of the act.

The Federal Trade Commission promulgates the Rules contained in this Part (803), and Notification and Report Form set forth in the appendix to this Part (803), pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18A(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat.1390.

PART 803—TRANSMITTAL RULES

Sec.

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

§ 803.1 Notification and Report Form.

(a) The notification required by the act shall be the Notification and Report Form set forth in the appendix to this Part (803), as amended from time to time. All acquiring and acquired persons required to file notification by the act and these rules shall do so by completing and filing the Notification and Report Form, or a photostatic or other equivalent reproduction thereof, in accordance with the instructions thereon and these rules. Copies of the Notification and Report Form may be obtained in person from the Public Reference Branch, Room 130, Federal Trade Commission, Sixth Street and Pennsylvania Avenue N.W., Washington, D.C., or by writing to the Premerger Notification Office, Room 303, Federal Trade Commission, Washington, D.C. 20580.

(b) Any person filing notification may, in addition to the submissions required by this section, submit any other information or documentary material which such person believes will be helpful to the Federal Trade Commission and Assistant Attorney General in assessing the impact of the acquisition upon competition.

§ 803.2 Instructions applicable to Notification and Report Form.

(a) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding § 801.1(c)(2) and § 801.2, only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example: Jane Doe, her husband and minor child collectively hold more thin 50 percent of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the "ultimate parent entity" of a "person" composed to herself (or her husband or minor child) and F; see paragraphs (a)(3), (b) and (c)(2) of § 801.1. If corporation F is to acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband and minor child collectively.

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

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

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

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

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

(2) For purposes of items 7-9 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in subdivisions (ii) and (iii) of the previous subparagraph.

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

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

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

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

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

§ 803.3 Statement of reasons for noncompliance.

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

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

(b) What information would have been required for a complete response;

(c) Who, if anyone, has the required information, and a description of all efforts made to obtain it.

§ 803.4 Foreign persons refusing to file notification.

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

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

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

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

§ 803.5 Affidavits required.

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

(i) The identity of the acquiring person;

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

(iii) The specific classes of voting and nonvoting securities of the issuer, and the number of securities of each such class sought to be acquired;

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

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

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

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

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

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

§ 803.6 Certification.

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

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

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

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

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

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

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

§ 803.7 Expiration of notification.

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

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

§ 803.10 Running of time.

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

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

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

(b) *Expiration of waiting period.* (1) For purposes of section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 13th (or in the case of a cash tender offer, the 15th) calendar day (or if § 802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to section 7A(e) and § 803.20, or section 7A(g)(2), or unless terminated pursuant to section 7A(b)(2) and § 803.11.

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

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

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

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

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

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

§ 803.11 Termination of waiting period.

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

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

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

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

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

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

Example: See the example to § 803.20(c).

§ 803.20 Requests for additional information or documentary material.

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

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

(2) All the information and documentary material required to be submitted pursuant to a request under paragraph (a)(l) of this section shall be supplied to the Commission or to the Assistant Attorney General, whichever made such request, at the office designated in § 803.10(c), or, if such request is not fully complied with, a statement of reasons for noncompliance pursuant to § 803.3 shall be provided for each item or portion of such request which is not fully complied with.

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

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

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

(ii) In the case of a request communicated in person or by telephone, upon communication of the request, provided that a written confirmation of the request is mailed within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides). The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period through the telephone number supplied on the certification page of the Notification and Report Form. A request for additional information or documentary material need be communicated by telephone only to that individual. The written confirmation of the request shall be mailed to the ultimate parent entity of the person filing notification, or, if another entity included within the person filed notification pursuant to § 803.2(a), then to such entity.

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

> Example: A designee of the Federal Trade Commission sends, by certified letter which is received within the 30-day writing period, a written request for additional information to corporation W, the ultimate parent entity within a person which filed notification. The request is effective under clause (b)(2)(i). If the later also addressed a request for documentary material to the secretary of corporation W, a named individual under subparagraph (b)(3), the request would likewise be effective as to the individual upon receipt of the letter by W. In the latter case, the Federal Trade Commission also would send a copy of the request to the Secretary of the corporation at his or her home or business address.

(c) *Waiting period extended*. (1) During the time period when a request for additional information or documentary material remains outstanding to any person other than. in the case of a tender offer, the person whose voting securities are sought to be acquired by the tender offeror (or any officer, director, partner, agent or employee thereof), the waiting period shall remain in effect, even though the waiting period would have expired (see **?** 803. 10(b)) if no such request had been made.

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

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

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

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

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

? 803.21 Additional information shall be supplied within reasonable time.

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

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

(a) The Commission staff may consider requests for formal or informal interpretations as to the obligations under the act and these rules of any party to an acquisition. A request for a formal interpretation shall be made in writing to the offices designated in § 803. 10(c), and shall state: (1) All facts which the applicant believes to be material, (2) the reasons why the requirements of the act are or may be applicable and (3) the question(s) that the applicant wishes resolved. The Commission staff may, in its discretion, render a formal or informal response to any request, however made, or may decline to render such advice.

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

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

(d) Any formal interpretation shall be without prejudice to the right of either the Commission or the Assistant Attorney General to rescind any such interpretation rendered pursuant to this section. In the event of such rescission, the party which requested the interpretation shall be so notified in writing.

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

§ 803.90 Separability.

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