FEDERAL TRADE COMMISSION [Billing code 6750-01P]

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: The Commission is amending the premerger notification rules ("the rules") to reflect adjustment and publication of reporting thresholds as required by the 2000 amendments[1] to Section 7A of the Clayton Act, 15. U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-935, 90 Stat. 1390 (“the Act.”). The Act requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Federal Trade Commission ("the Commission") and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice ("the Assistant Attorney General") and to wait a designated period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation.

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

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SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

The 2000 amendments to Section 7A require the Commission to revise the Act’s jurisdictional and filing fee thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5) for each fiscal year beginning after September 30, 2004. The Commission,

[1]15 U.S.C. 18a(a). See Pub. L. 106-553, 114 Stat. 2762

with the concurrence of the Assistant Attorney General, is adopting these final rules to reflect the revised thresholds in the examples contained in the rules and to provide a method for future adjustments as required by the 2000 amendments. These final rules will also adjust references to the notification and filing fee thresholds and other limitations in the rules and the Antitrust Improvements Act Notification and Report Form and its Instructions to remain consistent with the revised jurisdictional and filing fee thresholds.

The Commission notes that the effective date of the new thresholds does not affect or void the waiting period expressly required under section 7A(b)(1) of the Act, which provides that the waiting period shall begin with the date the Commission and the Antitrust Division of the Department of Justice (collectively "the Agencies") receive the filing, and shall not end until thirty days after that date, absent early termination under section 7A(b)(2). Accordingly, the 30-day statutory waiting period shall continue to apply to all proposed transactions filed with the Agencies for review, even in cases where the Agencies receive a filing before the effective date of the new thresholds but the waiting period for that filing does not expire until after that date.

Implementing the threshold changes in examples to the rules.

Rather than attempt to revise the examples annually, a parenthetical "(as adjusted)" has been added where necessary throughout the rules to notify the filer where such a change in statutory threshold value occurs. The term "as adjusted" is then defined in new subsection 801.1(m) and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice will also contain a table showing adjusted values for the rules. This Federal Register notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the Federal Register notice and will remain effective until superceded in the next calendar year. The notice will also be available at http://www.ftc.gov. For ease of application, such adjusted values will be rounded up to the next highest $100,000.

In addition to the revisions to the examples throughout the rules as a result of the mandatory adjustments to the thresholds in the Act, the Commission will adjust the notification thresholds and certain limitations contained in the exemptions as discussed below. The notification thresholds and other limitations will be implemented in the same way as in the changes to the examples as discussed above (i.e. by adding the parenthetical "(as adjusted)" following the relevant threshold or limitation).

Non-mandatory revisions

Section 801.1(h) Definition of notification threshold.

The HSR statute provides that an acquisition is reportable if, as a result of the acquisition, the acquirer will hold voting securities of the acquired person valued in excess of $50 million. Under the statute, once an acquirer holds voting securities valued at more than $50 million, any additional purchase of even one voting share is reportable. As the antitrust agencies recognized

in the original rulemaking proceeding in 1978, [2] this provision would result in far more filings than are needed for effective antitrust review. At the same time, as the acquirer's holding in the company continue to increase in size through subsequent transactions, the agencies must have some opportunities to review the later transactions. That is, there must be some points (thresholds) where these additional acquisitions become reportable.

Section 801.1(h) defines the term "notification threshold" and sets forth five reporting thresholds. Failing to adjust these thresholds to correspond to adjusted thresholds for filing fees would create two different sets of thresholds, one for fees and another for notification requirements, creating confusion and difficult administrative problems. Therefore, the notification thresholds will be adjusted annually to correspond to the adjusted filing fee thresholds. Although adjustment of the $1 billion limitation associated with the 25 percent threshold is not mandated on this basis, this limitation will also be adjusted annually, by the same percentage as the other notification thresholds, in order to avoid its eventually coming too close to the $500 million notification threshold as it is adjusted. The Commission believes that such changes are consistent with Congressional intent and with encouraging efficient antitrust review.

Section 801.40 Formation of joint venture or other corporations.

Section 801.40 provides a special size-of-person test in the formation of new corporations. The values used to determine whether the transaction satisfies this test are the same as the jurisdictional size-of-person thresholds and will therefore be adjusted to remain be identical to them.

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

Section 802.4 exempts the acquisition of voting securities of issuers that hold certain assets the direct acquisition of which is exempt under the act or the rules, and do not hold other non-exempt assets with an aggregate fair market value of more than $50 million. The rationale for this rule is that the applicability of an exemption should not depend on the form the acquisition takes, since the antitrust analysis would be the same whether voting securities or assets are being acquired. The statute does not mandate adjustment to this $50 million limitation. However, since this threshold functions in the same manner as the size-of-transaction test in an asset acquisition, this limitation is adjusted to remain consistent with mandated adjustments to the $50 million jurisdictional threshold.

[2] 43 FR 33487 (July 31, 1978).

Section 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).

The annual adjustment of notification thresholds can make it difficult for filing parties to determine which notification thresholds are applicable for purposes of this exemption. For example, where a notification threshold increases after a party files but before a year has passed, a question may arise as to whether the notification threshold in place at the time it filed or the adjusted notification threshold would apply. Section 802.21 is amended to provide an acquiring person with a one year period to reach the notification threshold in place at the time that they filed, even though the notification threshold may have subsequently been adjusted during that year. Note, however, that an acquiring person may then acquire up to the next greater adjusted notification threshold (as opposed to the next notification threshold in place at the time of filing) during the five years following expiration of the waiting period. This is illustrated in two new examples to Section 802.21.

Sections 802.50 and 802.51 Acquisitions of foreign assets or voting securities of a foreign issuer.

The adjustment statute does not require adjustment of the limitations contained in sections 802.50 and 802.51 regarding acquisitions of foreign assets and voting securities. The Commission nonetheless is amending the rules to make such adjustments, inasmuch as the Commission has previously amended these limitations to correspond to changes to thresholds in the Act. For example, in 2002,[3] the Commission amended the limitations in these sections by adopting the $50 million size-of-transaction threshold established in the 2000 amendments to the act.[4] In doing so, the Commission noted that the principle underlying sections 802.50 and 802.51 was that the acquisitions of foreign assets or voting securities should not be subject to the reporting requirements unless the assets or voting securities being acquired have sufficient impact on U.S. commerce. The Commission noted that the $50 million threshold amount established in the 2000 legislation provided an appropriate measure of such an impact. The Commission also referenced the 1978 SBP which explained that the $110 million limitation contained in the sections was adopted to approximate the size-of-person criteria of the act. Therefore, the $50 million limitations in these exemptions will be adjusted annually to remain in sync with the adjusted size-of-transaction threshold. Similarly, the $110 million limitation on combined U.S. sales or assets of the acquiring and acquired person will be adjusted in sync with the annual adjustments to the size-of-person test amounts.

Appendix: Premerger Notification and Report Form

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[3] 67 FR 11898 (March 18,2002)

[4] See Pub. L. 106-553, 114 Stat. 2762.

Item 2(c) of the Form and Instructions requires the acquiring person to indicate the notification threshold that it will meet or exceed in an acquisition of voting securities. This item will be amended to add "(as adjusted)"to the appropriate notification thresholds on the Form and in the Instructions.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the 2000 amendments to the Act were intended to reduce the burden of the premerger notification program by exempting all transactions valued at $50 million or less. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3518, requires agencies to submit requirements for "collections of information" to the Office of Management and Budget ("OMB") and obtain clearance prior to instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The HSR premerger notification rules and Form contain information collection requirements, as defined by the Paperwork Reduction Act, that have been reviewed and approved by the Office of Management and Budget under OMB Control No. 3084-0005 through May 31, 2007. As noted earlier, these final rules implement amendments to Section 7A of the Clayton Act that require annual adjustments to the jurisdictional thresholds.

There were 1,104 transactions requiring notification in FY 2003. FTC staff estimates that 45 of these transactions would not have required notification had the thresholds been adjusted by the average percentage change in the gross national product over the fifteen years that the thresholds in Section 8 have been annually adjusted. Generally, each transaction involves two filings (because each party to the transaction is required to file). The existing OMB clearance is premised on the staff's estimate that each of these filings requires 39 hours to complete. Accordingly, staff estimates that the final rule changes will result in a reduction in the hours burden of 3,510 hours per year (45 transactions x 2) x 39 hours. This estimate is based on fiscal

year 2003 filings,[5] and constitutes approximately a 4% reduction from the previous burden estimate of 87,530 hours. Thus, the total burden hours under the HSR rules as revised will be 84,020 hours. Similarly, staff estimates the total labor costs under the final rules to be $35,708,000 (rounded to the nearest thousand), a decrease of $1,492,000 from the previous estimate of $37,200,000.[6]

On January 11, 2005, the Office of Management and Budget approved the new burden estimates resulting from these final rule changes.

Administrative Procedure Act

These final amendments are technical and non-substantive, to the extent they make conforming rule changes that merely incorporate by reference the adjusted filing thresholds to be published elsewhere in the Federal Register, or merely clarify the application of the existing rules under the adjusted thresholds, without amending the existing rules in any other way. Accordingly, the Commission has determined that these amendments are not subject to the public notice and comment procedures of the Administrative Procedure Act. See 5 U.S.C. 553(b)(A).

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

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission amends16 CFR parts 801, 802 and 803 as set forth below:

PART 801--COVERAGE RULES

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

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

[5]FY 2003 is the latest fiscal year for which statistics have been published in the Annual Report to Congress.

[6]The reduction of approximately $1,492,000 in labor costs in based on an estimated average of $425 per hour for executives' and attorneys' wages (3,510 hours x $425/hour = $1,491,750).

2. Amend § 801.1 by revising paragraph (h) and by adding paragraph (m) to read as follows:

§ 801.1 Definitions.

* * * * *

(h) Notification threshold. The term "notification threshold" means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than $50 million (as adjusted) but less than $100 million (as adjusted);

(2) An aggregate total amount of voting securities of the acquired person valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted);

(3) An aggregate total amount of voting securities of the acquired person valued at $500 million (as adjusted) or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion (as adjusted); or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million (as adjusted).

* * * * *

(m) (as adjusted). The parenthetical "(as adjusted)" refers to the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Threshold for Section 7A of the Clayton Act." This Federal Register notice will be published in January of each year and the values contained therein will be effective as of the effective date published in the Federal Register notice and will remain effective until superceded in the next calendar year. The notice will also be available at http://www.ftc.gov. Such adjusted values will be calculated in accordance with Section 7A(a)(2)(A) and will be rounded up to the next highest $100,000.

2. Amend § 801.2 by revising Examples 2 and 3 following paragraph (d); by deleting Example 4 following paragraph (d); and by renumbering Example 5 following paragraph (d) to Example 4 to read as follows.

§ **801.2 Acquiring and acquired persons.**

* * * * *

(d) * * *

Examples:

* * *

2. In the above example, suppose the consideration for Y consists of $8 million worth of the voting securities of A. With regard to the transfer of this consideration, "B" is an acquiring person because it will hold voting securities it did not previously hold, and "A" is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than $50 million (as adjusted), the acquisition of these securities is not reportable. "A" will therefore report as an acquiring person only and "B" as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued in excess of $50 million (as adjusted). "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

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3. Amend § 801.4 by revising Examples 1 and 5 to read as follows:

§ **801.4 Secondary acquisitions.**

* * * * *

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 $50 million (as adjusted) of the voting securities of corporation X (but does not control X), and "A" and "X" satisfy Sections 7A (a)(1) and (a)(2), "A" must file notification separately with respect to its secondary acquisition of voting securities of X. "X" must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after "A" files, pursuant to § 801.30.

* * *

5. In example 4 above, suppose the consideration paid by A for the acquisition of B is in excess of $50 million (as adjusted) worth of the voting securities of A. By virtue of § 801.2(d)(2), "A" and "B" are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although "B" is now also an acquiring person, unless B gains control of A in the

transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

4. Amend § 801.11 by revising Examples 1, 3 and 4 to paragraph (e), to read as follows:

§ **801.11 Annual net sales and total assets**.

* * * * *

(e) * * *

Examples: * * *

1. A will borrow $105 million in cash and will purchase assets from B for $100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $105 million that A will have at the time of the acquisition. Therefore, A has total assets of less than $10 million (as adjusted) and does not meet any size-of-person test of Section 7A(a)(2).

* * *

3. Assume that company A will make a $150 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than $10 million (as adjusted). $150 million is excluded because it will be consideration for the acquisition and $5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a $6 million person. Note that if A were making an acquisition valued at over $200 million (as adjusted), the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that "A" borrows $195 million to acquire $100 million of assets from "B" and $60 million of voting securities of "C." The balance of the loan will be used for working capital. To determine its size for purposes of its acquisition from "B," "A" subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $95 million for purposes of its acquisition from "B." To determine its size with respect to its acquisition from "C," "A" subtracts the $60 million that will be paid for "C's" voting securities. Thus, for purposes of its acquisition from "C", "A" has total assets of $135 million. In the first acquisition "A" meets the $10 million

(as adjusted) size-of-person test and in the second acquisition "A" meets the $100 million (as adjusted) size-of-person test of Section 7A(a)(2).

5. Amend § 801.13 by revising Examples 1 and 4 to paragraph (a) to read as follows:

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

* * * * *

(a) * * *

Examples:

1. Assume that acquiring person "A" holds in excess of $50 million (as adjusted) 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 in excess of $50 million (as adjusted) of the voting securities of X as a result of the acquisition. "A" must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under Section 7A(c), § 802.21 or any other rule.

* * *

4. On January 1, company A acquired in excess of $50 million (as adjusted) of voting securities of company B. "A" and "B" filed notification and observed the waiting period for that acquisition. Company A plans to acquire $1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), "A" and "B" do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is $1 million and it is not reportable.

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5. Amend § 801.14 by revising Examples 1 and 2 following paragraph (b), to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

* * * * *

(b) * * *

Examples:

1. Acquiring person "A" previously acquired less than $50 million (as adjusted) of the voting securities (not convertible voting securities) of corporation X. "A" now intends to acquire additional assets of X. 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). Therefore, if the voting securities have a present value which when combined with the value of the assets would exceed $50 million (as adjusted) , 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 $50 million (as adjusted) .

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 since the value of the securities to be acquired does not exceed the $50 million (as adjusted) size-of-transaction test.

7. Amend § 801.15 by revising Examples 1, 4, 6 and 7 following paragraph (c), to read as follows:

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

* * * * *

(c) * * *

Examples:

1. Assume that acquiring person "A" is simultaneously to acquire in excess of $50 million (as adjusted) of the convertible voting securities of X and less than $50 million (as adjusted) 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 $50 million (as adjusted), "A" must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. 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 size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and "A" need not observe the requirements of the act before acquiring the common stock. (Note, however, that the value of the convertible voting securities would be reflected in "A's" next regularly prepared balance sheet, for purposes of § 801.11).

* * *

4. Assume that acquiring person "B," a United States person, acquired from corporation "X" two manufacturing plants located abroad, and assume that the acquisition price was in excess of $50 million (as adjusted). In the most recent year, sales into the United States attributable to the plants were less than $50 million (as adjusted), and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, "B" seeks to acquire a third plant from "X," to which United States sales were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, "B" would hold all three plants of "X,"if the $50 million (as adjusted) 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 $50 million (as adjusted) in value, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant

* * *

6. "X" acquired 55 percent of the voting securities of M, an entity controlled by "Z," six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by "Z." M's assets consist of $150 million worth of producing coal reserves plus less than $50 million (as adjusted) worth of non-exempt assets and N's assets consist of a producing coal mine worth $100 million together with non-exempt assets with a fair market value of less than $50 million (as adjusted). "X's" acquisition of the voting securities of M was exempt under § 802.4(a) because M held exempt assets pursuant to § 802.3(b) and less than $50 million (as adjusted) of non-exempt assets. Because "X" acquired control of M in the earlier transaction, M

is now within the person of "X," and the assets of M need not be aggregated with those of N to determine if the subsequent acquisition of N will exceed the limitation for coal reserves or for non-exempt assets. Since the assets of N alone do not exceed these limitations, "X's" acquisition of N also is not reportable.

7. In Example 6, above, assume that "X" acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ``Z." Assume also that M's assets at the time of ``X's" acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of less than $50 million (as adjusted), and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value which when aggregated with M’s non-exempt assets would exceed $50 million (as adjusted). Since "X" acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ``Z," the assets of M and N must be aggregated, pursuant to Secs. 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt. "X" is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt. If "X" proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million (as adjusted), the acquisition would not be exempt.

* * * * *

8. Amend § 801.20 by deleting Examples 1 and 2.

§ 801.20 Acquisitions subsequent to exceeding threshold.

* * * * *

9. Amend § 801.30 by revising Example 2 to read as follows:

§ **801.30 Tender offers and acquisitions of voting securities from third parties.**

* * * * *

Examples:

* * *

2. Acquiring person "A" proposes to acquire in excess of $50 million (as adjusted) 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.

* * * * *

10. Amend § 801.31 by revising the Example to read as follows:

§ **801.31 Acquisitions of voting securities by offerees in tender offers.**

* * * * *

Example: Assume that "A," which has annual net sales exceeding $100 million (as adjusted), 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 (as adjusted), wishes to tender its holdings of X and in exchange would receive shares of A valued in excess of $50 million (as adjusted). 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 Sec. 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.

11. Amend § 801.32 by revising the Example to read as follows:

§ **801.32 Conversion an acquisition.**

* * * * *

Example: Assume that acquiring person "A" wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued in excess of $50 million (as adjusted). If "A" and "X" satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), 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.

12. Amend § 801.40 by revising paragraph (c) and Examples 1 and 2 to read as follows:

§ 801.40 Formation of joint venture or other corporations.

* * * * *

(c) * * *

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

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

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

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

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

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

* * *

Examples:

1. Persons "A," "B," and "C" agree to create new corporation "N," a joint venture. "A," "B," and "C" will each hold one third of the shares of "N." "A" has more than $100 million (as adjusted) in annual net sales. "B" has more than $10 million (as adjusted) in total assets but less than $100 million (as adjusted) in annual net sales and total assets. Both "C"'s total assets and its annual net sales are less than $10 million (as adjusted). "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of $18 million in assets and each to make additional contributions of $21 million in each of the next three years. Under paragraph (d), the assets of the new corporation are $207 million. Under paragraph (c), "A" and "B" must file notification. Note that "A" and "B" also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for in excess of $50 million (as adjusted). N need not file notification; see § 802.41.

2. In the preceding example "A" has over $10 million (as adjusted) but less than $100 million (as adjusted) in sales and assets, "B" and "C" have less than $10 million (as adjusted) in sales and assets. "N" has total assets of $500 million. Assume that "A" will acquire 50 percent of the voting securities of "N" and "B" and "C" will each acquire 25 percent. Since "A" will acquire in excess of $200 million (as adjusted) in voting securities of "N", the size-of-person test in § 801.40(c) is inapplicable and "A" is required to file notification.

13. Amend 801.90 by revising Examples 1 and 2 to read as follows:

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples:

1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over $100 million (as adjusted) in the joint venture; persons "A" and "B" each have total assets in excess of $100 million (as adjusted). Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of $3000. "A" then sells 50 percent of its A1 stock to "B" for

$1500. Thereafter, "A" and "B" each contribute in excess of $50 million (as adjusted) to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). A's creation of A1 was exempt under Sec. 802.30; its $1500 sale of A1 stock to "B" did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by "A" and "B" was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over $10 million (as adjusted) 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 in excess of $50 million (as adjusted). "A" proposes to sell the stores to "B" for in excess of $50 million (as adjusted). 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 $12 million is below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

PART 802 - EXEMPTION RULES

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

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

15. Revise § 802.1 by revising Examples 1 through 7, 9 and 10, to read as follows:

§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

* * * * *

Examples:

1. Greengrocer Inc. intends to sell to "A" all of the assets of one of the 12 grocery stores that it owns and operates throughout the metropolitan area of City X. Each of Greengrocer's stores constitutes an operating unit, i.e., a business undertaking in a particular location. Thus "A's" acquisition is not exempt as an acquisition in the ordinary course of business. However, the acquisition will not be subject to the notification requirements if the acquisition price or fair market value of the store's assets does not exceed $50 million (as adjusted).

2. "A," a manufacturer of airplane engines, agrees to pay in excess of $50 million (as adjusted) to "B," a manufacturer of airplane parts, for certain new engine components to be used in the manufacture of airplane engines. The acquisition is exempt under § 802.1(b) as new goods as well as under § 802.1(c)(3) as current supplies.

3. "A," a power generation company, proposes to purchase from "B," a coal company, in excess of $50 million (as adjusted) of coal under a long-term contract for use in its facilities to supply electric power to a regional public utility and steam to several industrial sites. This transaction is exempt under § 802.1(c)(2) as an acquisition of current supplies. However, if "A" proposed to purchase coal reserves rather than enter into a contract to acquire output of a coal mine, the acquisition would not be exempt as an acquisition of goods in the ordinary course of business. The acquisition may still be exempt pursuant to § 802.3(b) as an acquisition of reserves of coal if the requirements of that section are met.

4. "A," a national producer of canned fruit, preserves, jams and jellies, agrees to purchase from "B" for in excess of $50 million (as adjusted) a total of 20,000 acres of orchards and vineyards in several locations throughout the U.S. "A" plans to harvest the fruit from the acreage for use in its canning operations. The acquisition is not exempt under § 802.1 because orchards and vineyards are real property, not "goods." If, on the other hand, "A" had contracted to acquire from "B" the fruit and grapes harvested from the orchards and vineyards, the acquisition would qualify for the exemption as an acquisition of current supplies under § 802.1(c)(3). Although the transfer of orchards and vineyards is not exempt under § 802.1, the acquisition would be exempt under § 802.2(g) as an acquisition of agricultural property.

5. "A," a railcar leasing company, will purchase in excess of $50 million (as adjusted) of new railcars from a railcar manufacturer in order to expand its existing fleet of cars available for lease. The transaction is exempt under § 802.1(b) as an acquisition of new goods and § 802.1(c), as an acquisition of current supplies. If "A" subsequently sells the railcars to "C," a commercial railroad company, that acquisition would be exempt under § 802.1(d)(2), provided that "A" acquired and held the railcars solely for resale or leasing to an entity not within itself.

6. "A," a major oil company, proposes to sell two of its used oil tankers for in excess of $50 million (as adjusted) to "B," a dealer who purchases oil tankers from the major U.S. oil companies. "B's" acquisition of the used oil tankers is exempt under § 802.1(d)(1) provided that "B" is actually acquiring beneficial ownership of the used tankers and is not acting as an agent of the seller or purchaser.

7. "A," a cruise ship operator, plans to sell for in excess of $50 million (as adjusted) one of its cruise ships to "B," another cruise ship operator. "A" has, in good faith, executed a contract to acquire a new cruise ship with substantially the same capacity from a manufacturer. The contract specifies that "A" will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to "B." Since "B" is acquiring a used durable good that "A" has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3).

* * *

9. Three months ago "A," a manufacturing company, acquired several new machines that will replace equipment on one of its production lines. "A's" capacity to produce the same products increased modestly when the integration of the new equipment was completed. "B," a manufacturing company that produces products similar to those produced by "A," has entered into a contract to acquire for in excess of $50 million (as adjusted) the machinery that "A" replaced. Delivery of the equipment by "A" to "B" is scheduled to occur within thirty days. Since "A" purchased new machinery to replace the productive capacity of the used equipment, which it sold within six months of the purchase of the new equipment, the acquisition by "B" is exempt under § 802.1(d)(3).

10. "A" will sell to "B" for in excess of $50 million (as adjusted) all of the equipment "A" uses exclusively to perform its billing requirements. "B" will use the equipment to provide "A's" billing needs pursuant to a contract which "A" and "B" executed 30 days ago in conjunction with the equipment purchase agreement. Although the assets "B" will acquire make up essentially all of the assets of one of "A's" management and administrative support services divisions, the acquisition qualifies for the exemption under § 802.1(d)(4) because a company's internal management and administrative support services, however organized, are not an operating unit as defined by Sec. 802.1(a). Management and administrative support services are not a ``business undertaking'' as that term is used in Sec. 802.1(a). Rather, they provide support and benefit to the company's operating units and support the company's business operations. However, if the assets being sold also derived revenues from providing billing services for third parties, then the transfer of these assets would not be exempt under Sec. 802.1(d)(4), since the equipment is not being used solely to provide management and administrative support services to ``A".

* * * * *

16. Amend § 802.2 by revising examples 2 through 7, 9, 10, and 12 to read as follows:

§ **802.2 Certain acquisitions of real property assets.**

* * * * *

Examples:

* * *

2. B, a subsidiary of “A,” a financial institution, acquired a newly constructed power plant, which it leased to “X” pursuant to a lease financing arrangement. “A's” acquisition of the plant through B was exempt under §802.63(a) as a bona fide credit transaction entered into in the ordinary course of “A's” business. “X” operated the plant as sole lessee for the next eight years and now proposes to exercise an option to buy the plant for in excess of $50 million (as adjusted). “X's” acquisition of the plant is exempt pursuant to §802.2(b). The plant is being acquired from B, the lessor, which held title to the plant for financing purposes, and the purchaser, “X,” has had sole and continuous possession and use of the plant since its construction.

3. "A" proposes to acquire a tract of wilderness land from "B" for consideration in excess of $50 million (as adjusted). Copper deposits valued in excess of $50 million (as adjusted) and timber reserves valued in excess of $50 million (as adjusted) are situated on the land and will be conveyed as part of this transaction. During the last three fiscal years preceding the sale, the property generated $50,000 from the sale of a small amount of timber cut from the reserves two years ago. "A's" acquisition of the wilderness land from "B" is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding $5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. "A" proposes to purchase from "B" for in excess of $200 million (as adjusted) an old steel mill that is not currently operating to add to "A's" existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued in excess of $50 million (as adjusted) that "A" plans to refurbish for use in its operations. "A's" acquisition of the mill and the land on which it is located is exempt as unproductive real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

5. "A" proposes to purchase two downtown lots, Parcels 1 and 2, from "B" for in excess of $50

million (as adjusted). Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated $9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, i.e., it has not generated annual revenues in excess of $5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

6. “A” plans to purchase from “B,” a manufacturer, a newly-constructed building that “B” had intended to equip for use in its manufacturing operations. “B” was unable to secure financing to purchase the necessary equipment and “A”, also a manufacturer, will be required to invest in excess of $50 million (as adjusted) in order to equip the building for use in its production operations. This building is not a new facility under §802.2 (a), because it was not constructed or held by “B” for sale or resale. However, the acquisition of the building qualifies for exemption as unproductive real property pursuant to §802.2(c)(1). The building is not yet a manufacturing facility since it does not contain equipment and requires significant capital investment before it can be used as a manufacturing facility.

7. "A" proposes to purchase from "B," for in excess of $50 million (as adjusted), a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by "B" for storage of supplies and equipment. The factory and the unimproved acreage have an aggregate fair market value of in excess of $50 million (as adjusted). The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

* * *

9. "A" intends to acquire three shopping centers from "B" for a total of in excess of $200 million (as adjusted). The anchor stores in two of the shopping centers are department stores, the businesses of which "A" is buying from "B" as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, "A's" acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds $50 million (as adjusted), "A" must comply with the requirements of the act for this part of the transaction.

10. "A" wishes to purchase from "B" a parcel of land for in excess of $50 million (as adjusted). The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than $50 million (as adjusted), "A" will have to file notification for the

purchase of the race track.

* * *

12. "A" proposes to purchase the prescription drug wholesale distribution business of "B" for in excess of $50 million (as adjusted). The business includes six regional warehouses used for "B's" national wholesale drug distribution business. Since "A" is acquiring the warehouses in connection with the acquisition of "B's" prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

17. Amend § 802.3 by revising Examples 2 and 3 to read as follows:

§ **802.3 Acquisitions of carbon-based mineral reserves.**

* * * * *

Examples:

* * *

2. "A," an oil company, proposes to acquire for $180 million oil reserves currently in production along with field pipelines and treating and metering facilities which serve such reserves exclusively. The acquisition of the reserves and the associated assets are exempt. "A" will also acquire from "B" for in excess of $50 million (as adjusted) a natural gas processing plant and its associated gathering pipeline system. This acquisition is not exempt since § 802.3(c) excludes these assets from the exemption in § 802.3 for transfers of associated exploration or production assets.

3. "A," an oil company, proposes to acquire a coal mine currently in operation and associated production assets for $90 million from "B," an oil company. "A" will also purchase from "B" producing oil reserves valued at $100 million and an oil refinery valued at $13 million. The acquisition of the coal mine and the oil reserves is exempt pursuant to § 802.3. Although § 802.3(c) excludes the refinery from the exemption in § 802.3 for transfers of associated exploration and production assets, "A's" acquisition of the refinery is not subject to the notification requirements of the act because its value does not exceed $50 million (as adjusted).

* * * * *

18. Amend § 802.4 by revising paragraph (a) and Examples 1 and 2 following paragraph (c) to read as follows:

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

(a) An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirements of the act pursuant to Section 7A(c)(2) of the act, § 802.2, § 802.3 or § 802.5 of these rules is exempt from the reporting requirements if the acquired issuer and all entities it controls do not hold other non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted).

* * * * *

(c) * * *

Examples:

1. "A," a real estate investment company, proposes to purchase 100 percent of the voting securities of C, a wholly-owned subsidiary of "B," a construction company. C's assets are a newly constructed, never occupied hotel, including fixtures, furnishings and insurance policies. The acquisition of the hotel would be exempt under § 802.2(a) as a new facility and under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a) since C holds assets whose direct purchase would be exempt under § 802.2 and does not hold non-exempt assets exceeding $50 million (as adjusted) in value.

2. "A" proposes to acquire 60 percent of the voting securities of C from "B." C's assets consist of a portfolio of mortgages valued at $55 million and a small manufacturing plant valued at $26 million. The manufacturing plant is an operating unit for purposes of § 802.1(a). Since the acquisition of the mortgages would be exempt pursuant to Section 7A(c)(2) of the act and since the value of the non-exempt manufacturing plant is less than $50 million (as adjusted), this acquisition is exempt under § 802.4(a).

* * * * *

19. Amend § 802.5 by revising Example 2 to read as follows:

§ **802.5 Acquisitions of investment rental property assets.**

* * * * *

Examples:

* * *

2. "X" intends to buy from "Y" a development commonly referred to as an industrial park. The industrial park contains a warehouse/distribution center, a retail tire and automobile parts store, an office building, and a small factory. The industrial park also contains several parcels of vacant land. If "X" intends to acquire this industrial park as investment rental property, the acquisition will be exempt pursuant to § 802.5. If, however, "X" intends to use the factory for its own manufacturing operations, this exemption would be unavailable. The exemptions in § 802.2 for warehouses, rental retail space, office buildings, and undeveloped land may still apply and, if the value of the factory is $50 million (as adjusted) or less, the entire transaction may be exempted by that section.

20. Amend § 802.9 by revising Example 1 to read as follows:

§ **802.9 Acquisition solely for the purpose of investment.**

* * * * *

Examples:

1. Suppose that acquiring person "A" acquires 6 percent of the voting securities of issuer X, valued in excess of $50 million (as adjusted). If the acquisition is solely for the purpose of investment, it is exempt under Section 7A(c)(9).

* * * * *

21. Amend § 802.21 by revising the heading, paragraph (a)(3), and the four examples following paragraph (a); by adding new Examples 5 and 6; and by removing paragraph (c), to read as follows.

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

threshold (as adjusted).

(a) * * *

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

Examples:

1. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the $50 million threshold. 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 $100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required.

2. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the $50 million threshold. Suppose that in year three following the expiration of the waiting period, the $50 million notification threshold has been adjusted to $56 million pursuant to Section 7A(a)(2)(a) of the Act. “A” now intends to acquire an additional $5 million of the voting securities of B. “A” is not required to file another notification even though it now holds voting securities in excess of the $56 million notification threshold (which is greater than the $50 million notification threshold indicated in its filing), because it has not met or exceeded a notification threshold (as adjusted) greater than the notification threshold exceeded in the earlier acquisition (i.e. $100 million (as adjusted) or 50% notification thresholds).

3. Same facts as in Example 2 above except now the five year period has expired. Suppose that, the $50 million notification threshold has been adjusted to $57 million pursuant to Section 7A(a)(2)(a) of the Act. “A” now holds $58 million of voting securities of B. Because 802.21(a)(2) is no longer satisfied, the acquisition of any additional voting securities of B will require a new filing because “A” will hold voting securities valued in excess of the $57 million notification threshold. If, however, the $50 million notification threshold had been adjusted to $60 million at the end of the five year period, A could acquire up to that threshold without a new filing.

4. This section also allows a person to recross any of the threshold notification levels that were in effect at the time of filing notification any number of times within 5 years of the expiration of the waiting period following notification. Thus, if in Example 1, "A" had disposed of some voting securities so that it held less than $50 million of the voting securities of B, and thereafter

had increased its holdings to more than $50 million but less than $100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period.

5. A files notification at the $50 million notification threshold and acquires $51 million of the voting securities of B in the year following expiration of the waiting period. The next greater notification threshold at the time of filing was $100 million. In year three, the $100 million notification threshold has been adjusted to $106 million. A can now acquire up to, but not meet or exceed, voting securities of B valued at $106 million. As the original $100 million threshold is adjusted upward in years four and five, A can acquire up to those new thresholds as the adjustments are effected.

6. A files notification at the $50 million threshold in January of year one. In February of year one, the $50 million threshold is adjusted to $52 million. A only needs to acquire in excess of $50 million of voting securities of B, not in excess of $52 million, to have exceeded the threshold which was filed for in the year following expiration of the waiting period (see § 803.7). It may then acquire up to the next greater notification threshold (as adjusted) during the five years following expiration of the waiting period.

22. Amend § 802.35 by revising Examples 1 and 2 to read as follows:

§ **802.35 Acquisitions by employee trusts.**

* * * * *

Examples:

1. Company A establishes a trust for its employees that meets the qualifications of section 401 of the Internal Revenue Code. Company A has the power to designate the trustee of the trust. That trust then acquires 30% of the voting securities of Company A for in excess of $50 million (as adjusted). Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for in excess of $50 million (as adjusted). Neither acquisition is reportable.

2. Assume that in the example above, "A" has total assets of $100 million (as adjusted). "C" also has total assets of $100 million (as adjusted) and is not controlled by Company A. The trust controlled by Company A plans to acquire 40 percent of the voting securities of Company C for in excess of $50 million (as adjusted). Since Company C is not included within "A," "A" must observe the requirements of the act before the trust makes the acquisition of Company C's shares.

* * * * *

23. Amend § 802.41 by revising Examples 1 and 2 to read as follows:

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

* * * * *

Examples:

1. Corporations A and B, each having sales of in excess of $100 million (as adjusted), each propose to contribute in excess of $50 million (as adjusted) 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 in excess of $50 million (as adjusted). 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.

* * * * *

24. Amend § 802.50 by revising paragraphs (a), (b)(2) and (b)(3) and Examples 2 through 4 to read as follows:

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year.

(b) * * *

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less

than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) are less than $110 million (as adjusted) ; and

* * *

Examples:

* * *

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, when combined with the sales into the United States of the first plant, totaled in excess of $50 million (as adjusted) 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” held by “B” as a result of the second acquisition (see §801.13(b)(2) of this chapter). Since the total sales in or into the United States exceed $50 million (as adjusted), the acquisition of the second plant would not be exempt under this paragraph (a) of this section.

3. Assume that “A” and “B” are foreign persons with aggregate sales in or into the United States of in excess of $110 million (as adjusted). If “A” acquires only foreign assets of “B,” and if those assets generated $50 million (as adjusted) or less in sales in or into the United States, the transaction is exempt.

4. Assume that “A” and “B” are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $110 million (as adjusted). If “A” acquires only foreign assets of “B”, and those assets generated in excess of $50 million (as adjusted) in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at $200 million (as adjusted) or less, but is reportable if valued at greater than $200 million (as adjusted).

25. Amend § 802.51 by revising paragraphs (a), (b), (c)(2) and (c)(3) and Examples 1 through 3 to read as follows:

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* (1) The 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: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year.

(2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded.

(c) * * *

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

* * *

Examples:

1. “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 in excess of 50 million (as adjusted) in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that “A” and “B” are foreign persons with aggregate sales in or into the United States in excess of $110 million (as adjusted), and that “A” is acquiring 100% of the voting securities of “B.” Included within “B” is U.S. issuer C, whose total U.S. assets are valued in excess of $50 million (as adjusted). Since “A” will be acquiring control of an issuer, C, with total U.S. assets of more than $50 million (as adjusted), and the parties' aggregate sales in or into the U.S. in the relevant time period exceed $110 million (as adjusted), the acquisition is not exempt under this section.

3. “A,” a foreign person, intends to acquire 100 percent of the voting securities of two wholly owned subsidiaries of “B” for a total of in excess of $50 million (as adjusted). BSUB1 is a foreign issuer with less than $50 million (as adjusted) in sales into the U.S. in its most recent fiscal year and with assets of less than $50 million (as adjusted) located in the U.S. Less than $50 million (as adjusted) of the acquisition price has been allocated to BSUB1. BSUB2 is a U.S. issuer with more than $50 million (as adjusted) in U.S. sales and more than $50 million (as adjusted) in assets located in the U.S. Less than $50 million (as adjusted) of the acquisition price is allocated to BSUB2. Since BSUB1 does not exceed the $50 million (as adjusted) limitation for U.S. sales or assets in §802.51(b), its voting securities are not held as a result of the acquisition (see §801.15(b) of this chapter). Since the acquisition price for BSUB2 alone would not result in “A” holding in excess of $50 million (as adjusted) of voting securities of the acquired person, the transaction is non-reportable in its entirety. Note that the U.S. sales and assets of BSUB1 are not aggregated with those of BSUB2 for purposes of determining whether the limitations in paragraph (b) of this section are exceeded. If BSUB2 were also a foreign issuer, such aggregation would be required under paragraph (b)(2) of this section, and the transaction in its entirety would be reportable.

26. Amend § 802.52 by revising its Example to read as follows:

§ 802.52 Acquisitions by or from foreign governmental corporations.

* * * * *

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is "A," a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were $50 million (as adjusted) or less, the transaction would also be exempt under §802.50).

27. Amend § 802.64 by revising Example 1 following paragraph (c), to read as follows:

§ **802.64 Acquisitions of voting securities by certain institutional investors**.

* * * * *

(c) * * *

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 paragraphs (b)(2), (3) and (4) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $50 million (as adjusted) as long as the aggregate amount held by person "A" as a result of the acquisition does not exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would exceed 15 percent, "A" may acquire no more than $50 million (as adjusted) worth of voting securities without being subject to the requirements of the act.

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PART 803--TRANSMITTAL RULES

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

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

29. Amend § 803.5 by revising Examples 2 and 3 to paragraph (a)(2), to read as follows:

§ **803.5 Affidavits required.**

(a) * * *

(2) * * *

Examples:

* * *

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

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

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30. Amend § 803.7 by revising its example to read as follows:

§ 803.7 Expiration of notification.

* * * * *

Example: “A” files notification that in excess of $100 million (as adjusted) of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, “A” has acquired less than $100 million (as adjusted) of B's voting securities. Although § 802.21 will permit "A" to purchase any amount of B's voting securities short of $100 million (as adjusted) within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the $100 million (as adjusted) notification threshold without "A" and "B" again filing notification and observing a waiting period.

31. Amend § 803.9 by revising Examples 1 through 6 to paragraph (a) to read as follows:

§ **803.9 Filing fee**.

(a) * * *

Examples:

1. "A" wishes to acquire voting securities issued by B, where the greater of the acquisition price and the market price is in excess of $50 million (as adjusted) but less than $100 million (as adjusted) pursuant to § 801.10. When "A" files notification for the transaction, it must indicate the $50 million (as adjusted) threshold and pay a filing fee of $45,000 because the aggregate total amount of the acquisition is less than $100 million (as adjusted), but greater than $50 million (as adjusted).

2. "A" acquires less than $50 million (as adjusted) of assets from "B." The parties meet the size of person criteria of Section 7A(a)(2)(B), but the transaction is not reportable because it does not exceed the $50 million (as adjusted) size of transaction threshold of that provision. Two months later "A" acquires additional assets from "B" valued at between $50 million (as adjusted) and $100 million (as adjusted). Pursuant to the aggregation requirements of § 801.13(b)(2)(ii), the aggregate total amount of "B's" assets that "A" will hold as a result of the second acquisition is in excess of $100 million (as adjusted). Accordingly, when "A" files notification for the second

transaction, "A" must indicate the $100 million (as adjusted) threshold and pay a filing fee of $125,000 because the aggregate total amount of the acquisition is less than $500 million (as adjusted), but not less than $100 million (as adjusted).

3. "A" acquires in excess of $50 million (as adjusted) of voting securities issued by B after submitting its notification and $45,000 filing fee and indicates the $50 million (as adjusted) threshold. Two years later, "A" files to acquire additional voting securities issued by B valued at $50 million (as adjusted) because it will exceed the next higher reporting threshold (see § 801.1(h)). Assuming the second transaction is reportable and the value of its initial holdings is unchanged (see § 801.13(a)(2) and 801.10(c)), the provisions of § 801.13(a)(1) require that "A" report that the value of the second transaction is in excess of $100 million (as adjusted) because "A" must aggregate previously acquired securities in calculating the value of B's voting securities that it will hold as a result of the second acquisition. "A" should pay a filing fee of $125,000.

4. "A" signs a contract with a stated purchase price in excess of $100 million (as adjusted), subject to adjustments, to acquire all of the assets of "B." If the amount of adjustments can be reasonably estimated, the acquisition price -- as adjusted to reflect that estimate -- is determined. If the amount of adjustments cannot be reasonably estimated, the acquisition price is undetermined. In either case the board or its delegee must also determine in good faith the fair market value. (§ 801.10(b) states that the value of an asset acquisition is to be the fair market value or the acquisition price, if determined and greater than fair market value.) "A" files notification and submits a $45,000 filing fee. "A"'s decision to pay that fee may be justified on either of two bases, and "A" should submit an attachment to the Notification and Report Form explaining the valuation. First, "A" may have concluded that the acquisition price can be reasonably estimated to be less than $100 million (as adjusted), because of anticipated adjustments -- e.g., based on due diligence by "A's" accounting firm indicating that one third of the inventory is not saleable. If fair market value is also determined in good faith to be less than $100 million (as adjusted), the $45,000 fee is appropriate. Alternatively, "A" may conclude that because the adjustments cannot reasonably be estimated, acquisition price is undetermined. If so, "A" would base the valuation on the good faith determination of fair market value. The acquiring party's execution of the Certification also attests to the good faith valuation of the value of the transaction.

5. "A" contracts to acquire all of the assets of "B" for in excess of $500 million (as adjusted). The assets include hotels, office buildings, and rental retail property, all of which are exempted by § 802.2. Section 802.2 directs that these assets are exempt from the requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, § 801.15(a)(2) states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is in excess of $100 million (as adjusted), but less than $500 million (as adjusted). "A" will be liable for a filing fee of $125,000, rather than $280,000,

because the value of the transaction is not less than $100 million (as adjusted) but less than $500 million (as adjusted). Note, however, that "A" must include an attachment in its Notification and Report Form setting out both the in excess of $500 million (as adjusted) total purchase price and the basis for its determination that the aggregate total amount of the acquisition under the rules is between $100 million (as adjusted) and $500 million (as adjusted) rather than in excess of $500 million (as adjusted), in accordance with the Instructions to the Form.

6. "A" acquires coal reserves from "B" valued at $150 million. No notification or filing fee is required because the acquisition is exempted by § 802.3(b). Three months later, A proposes to acquire additional coal reserves from "B" valued at $500 million (as adjusted). This transaction is subject to the notification requirements of the act because the value of the acquisition exceeds the $200 million limitation on the exemption in § 802.3(b). As a result of § 801.13(b)(2)(ii), the prior $150 million acquisition must be added because the additional $500 million (as adjusted) of coal reserves were acquired from the same person within 180 days of the initial acquisition. Because aggregating the two acquisitions exceeds the $200 million exemption limitation, § 801.15(b) directs that "A" will also hold the previously exempt $150 million acquisition; thus, the aggregate amount held as a result of the $500 million (as adjusted) acquisition exceeds $500 million (as adjusted). Accordingly, "A" must file notification to acquire the coal reserves valued in excess of $500 million (as adjusted) and pay a filing fee of $280,000.

* * * * *

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

[insert .pdf file]

By direction of the Commission.

Donald S. Clark
Secretary