FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to the premerger notification rules (''the rules'') that require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission (''the Commission'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. This document seeks comments on proposed amendments to clarify and improve the effectiveness of the rules, including corrections, clarifications, and updates to examples.

DATES: Comments must be received on or before March 19, 2001.

ADDRESSES: Address all comments concerning this proposal to Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by e-mail to hsr_rules@ftc.gov and the Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Room 10103, 601 D Street, NW, Washington, DC 20530. With regard to the Paperwork Reduction Act, send a copy of any comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, DC 20503; ATTN.: Edward Clarke, Desk Officer for the Federal Trade Commission.

FOR FURTHER INFORMATION CONTACT: Karen Berg or Tom Hancock, Attorneys, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Background

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

Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Rules (''the rules'') and Notification and Report Form for Certain Mergers and Acquisitions (''the Form''), has amended or revised the rules and Form on fourteen occasions, and now proposes these rules changes.

These proposed changes include updating examples in Sections 801.4, 801.14, 801.90 and 802.8; amending Section 801.15 to reflect the $50 million threshold and give proper reference to other rules sections; modifying Section 802.2 to remove an exemption for associated agricultural assets; revising Section 802.6(b) regarding federal regulatory approval; restructuring and revising Sections 802.50 and 802.51 to clarify and refocus exemptions for acquisitions of foreign assets and voting securities; and amending the example to Section 802.52 to correctly cite restructured Section 802.50.

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

Section 801.4 Secondary Acquisitions

Example 5 in section 801.4 will be amended so that it refers to ''B's shareholders'' instead of ''B'', correcting an original drafting error.

Section 801.14 Aggregate Total Amount of Voting Securities and Assets

The Commission proposes to add clarifying language to Example 2. This change does not alter the application of the rule, but essentially fills in gaps and makes the logic of the example easier to follow.

Section 801.15 Aggregation of Voting Securities and Assets the Acquisition of Which Was Exempt

In conjunction with the modifications to sections 802.50 and 802.51, changes proposed to section 801.15 will correspond with the proposed $50 million threshold for foreign transactions. The Commission also proposes amendments to the body of section 801.15 which cites paragraphs of current sections 802.50 and 802.51 which will no longer be correct due to our restructuring of these two rules. Accordingly, Example 4 of section 801.15 is also modified to correct the paragraph cited and to incorporate the proposed $50 million threshold. Examples 1, 5, 7 and 8 have received the benefit of clarifying language which will not alter the application of the rule but make the examples easier to follow.

Section 801.90 Transactions or Devices for Avoidance

As with other rules, the Commission proposes that clarifying language be added to Example 1. The reference to Section 802.20, which no longer exists, was deleted. Again, this change does not alter the application of the rule but makes the example more accurate.

Section 802.2 Certain Acquisitions of Real Property Assets

An amendment is proposed to section 802.2(g) to remove ''associated agricultural assets'' from the agricultural property exemption. Associated agricultural assets are defined in paragraph (1) as assets that are integral to the agricultural business activities conducted on the property. Such assets include inventory (*e.g.*, livestock, poultry, crops, fruit, vegetables, milk, eggs); structures that house livestock raised on the real property; and fertilizer and animal feed. Associated agricultural assets do not include processing facilities such as poultry and livestock slaughtering, processing and packing facilities. Proposed paragraph (1) has been rewritten to eliminate the exemption for associated agricultural property assets, while continuing to make clear that processing facilities are not exempt under section 802.2(g), and to move current paragraph (2) into this section. Proposed paragraph (1) now specifies two types of property that are not covered by the agricultural property exemption. Current paragraph (3) has been renumbered paragraph (2). Parenthetical language has been added describing assets incidental to the ownership of agricultural property as ''cash, prepaid taxes or insurance, rentals receivable, and the like.'' This

language comes from an earlier incarnation of the rule, 1978 section 802.1(a), but was not included in section 802.2(g) when it was promulgated in 1996 (see 61 FR 13666, Mar. 28, 1996). The Commission believes this parenthetical will help define what is meant when such assets are referenced.

The removal of associated agricultural assets from section 802.2(g) is proposed because the general increase in the filing threshold to $50 million will itself exclude acquisitions involving associated agricultural assets that are likely to be of little or no competitive consequence. Maintaining an exemption for acquisitions where the associated agricultural assets, such as livestock on the property, are valued at greater than $50 million seems unnecessary and ill-advised. The section 802.2 exemption titled ''certain acquisitions of real property assets'' is based on the rationale that these categories of assets ''are abundant and used in markets that are generally unconcentrated''; where associated agricultural assets valued at greater than $50 million are being acquired in conjunction with agricultural property, there is little reason to presume that this justification for their exemption would still apply (see 61 FR at 13669).

In addition, amending the rule to remove ''associated agricultural assets'' from the exemption as well as making clear that ''agricultural property'' is limited to real property (by deleting ''and assets'' from its definition) will eliminate whatever ambiguity may arguably exist in section 802.2(g). Some parties have contended that the exemption covers, in addition to real property transferred in an acquisition and livestock raised on that real property, livestock raised by contract growers on other real property. The Commission's Premerger Notification Office (''PNO'') and the Antitrust Division of the Department of Justice, on the basis of both the rationale of the real property exemptions created by the antitrust enforcement agencies in 1996 and the language of the agricultural property exemption itself, have read the agricultural property exemption as not extending to assets located elsewhere. The Commission believes that the amendments proposed comport with the agencies' responsibility to exempt only those categories of transactions that are not likely to violate the antitrust laws and also eliminates any ambiguity in the language of the rule.

Section 802.6 Federal Agency Approval

In the 1978 rules (43 FR 33450, July 31, 1978), section 802.6 in its entirety consisted of what is currently section 802.6(a), namely, a description of the nature and manner of submission of ''information and documentary material'' for purposes of sections 7A(c)(6) and (c)(8) of the act. Section 802.6(b) was added in a 1983 rules change (48 FR 34427). Section 802.6(b)(1) of this new provision exempted acquisitions of parties involved in aeronautics and air transportation that required approval by the Civil Aeronautics Board (''CAB'') prior to consummation. Section 802.6(b)(2) of the 1983 rules made it explicit that this exemption did not exempt the acquisition of ''assets which are engaged in a business or businesses *other than* aeronautics or air transportation as defined * * *.'' (Emphasis added.) The acquisition of such assets did not require CAB approval and, accordingly, was not exempt under section 802.6(b)(1), even though portions of the acquisition may be exempt.

Pursuant to the Airline Deregulation Act of 1978, the CAB went out of existence in 1985. As airline deregulation progressed, the Department of Transportation assumed regulatory authority over airline mergers, but its authority to approve (and to grant antitrust immunity for) airline mergers sunsetted on January 1, 1989. See Formal Interpretation 14 (Nov. 14, 1988). Thus, except for paragraph (a), section 802.6 has no direct application at this time. This does not mean that the 1983 version of section 802.6(b) is without significance: The principle it embodies has been relied on several times. Formal Interpretation 14, while recognizing that section 802.6(b) would no longer directly apply to any transactions, recognized the value of leaving the provision in the rules because of its application to other regulated industries: '' * * * through informal interpretations * * *, the Commission's Premerger Notification Office has used the method reflected in section 802.6(b)(2). * * * The Premerger Notification Office will continue to apply this method to such other transactions consummated after December 31, 1989.''

On November 12, 1999, The Gramm-Leach-Bliley Act (''the GLB Act''), Public Law 106–102, was signed into law. The GLB Act allows bank holding companies and banks to affiliate with companies in financial services markets that were previously off limits to such entities. Section 133(c) of the GLB Act amends subsections (c)(7) and (c)(8) of section 7A of the Clayton Act, which exempt from premerger notification certain mergers and acquisitions involving banking institutions and thrifts that receive advance antitrust review by federal bank regulatory agencies. The amendments to these subsections make explicit in certain circumstances that where a transaction includes portions that receive premerger antitrust review by banking agencies and other portions that do not, the parts not so reviewed by the banking agencies must go through the HSR premerger notification process, provided the size criteria are met and no other exemption applies. In discussing these amendments, sponsors of the legislation described their approach as codifying the approach taken in section 802.6. *See, e.g.*, Cong. Rec. H11276 (Nov. 2, 1999).

On April 3, 2000, the PNO, with the concurrence of the Assistant Attorney General, published Formal Interpretation 17 describing the changes in sections 7A(c)(7) and (c)(8) of the Clayton Act mandated by the GLB Act. Employing the term ''mixed transactions'' to apply to those that have some portions subject to regulatory premerger competitive review and other portions not, this Formal Interpretation gives examples of the analysis under section 7A for certain types of ''mixed transactions'' in the banking industry that were not explicitly addressed by the GLB Act. Again referring to section 802.6(b), Formal Interpretation 17 reiterates the PNO's position that the portions of such mixed transactions not subject to advance competitive review and approval by a regulatory agency will be subject to the HSR filing and waiting period requirements if they meet the HSR size criteria and are not otherwise exempt.

Because of the importance of maintaining a readily accessible statement of the treatment of mixed transactions in the rules, the Commission is proposing to revise section 802.6(b) rather than to remove it. Proposed section 802.6(b) has been revised to state a general rule regarding mixed transactions rather than one that is industry specific. Paragraph (b)(1) defines a ''mixed transaction'' as one that has some portion that is exempt pursuant to subsections (c)(6), (c)(7), or (c)(8) of the act because it requires regulatory agency premerger competitive review and approval and another portion that does not require such review. (Note that subsection (c)(6) also requires that the regulatory approval grant antitrust immunity for

the exemption to be effective, and (c)(8) also requires that all information and documentary material submitted to the regulatory agency be contemporaneously filed with the Commission and the DOJ at least thirty days prior to consummation.) Paragraph (b)(2) then states the principle that the portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is reportable under HSR as if it were a separate transaction—that is, if the Act's thresholds are met and there is no other applicable exemption. Finally, the Example has been amended to concern the application of section 802.6(b) to the banking industry.

Section 802.8 Certain Supervisory Acquisitions

In section 802.8, the Commission proposes to amend the section to substitute the word ''if'' for ''it'', correcting a typographical error.

Sections 802.50 and 802.51 Acquisitions of Foreign Assets and Voting Securities

The Commission proposes both structural and substantive revisions to sections 802.50 and 802.51. The structural changes are intended to make the rules governing foreign transactions easier to understand and apply. The PNO receives numerous calls each year requesting advice on the applicability of sections 802.50 and 802.51 of the rules. As global merger activity has increased, the exemptions for foreign assets and foreign voting securities have become more relevant to determinations of a party's HSR reporting requirements. In response to input from the private sector, the Commission proposes revising these rules for greater ease of comprehension. The proposals frame the rules more straightforwardly by organizing the sections by the type of acquisition they deal with, rather than by the type of acquiring person involved. Thus, proposed section 802.50 applies to the acquisition of foreign assets and section 802.51 to the acquisition of foreign voting securities. Each section begins with general criteria for reportability for U.S. and foreign acquiring persons and then proceeds to outline further criteria that exempt a transaction from reporting requirements in certain circumstances.

The new organization should make the parallels and the differences between the treatment of assets and voting securities more readily apparent, and thereby facilitate the application of both rules.

The substantive revisions simultaneously narrow and expand the reporting requirements so that they apply to those foreign transactions that are most likely to have an appreciable and direct impact on U.S. commerce. In addition to the threshold changes discussed below, the Commission also proposes to add to the rules the longstanding interpretation by the PNO of requiring the aggregation of U.S. sales and assets of multiple foreign issuers if controlling interests in such issuers are being acquired. Additionally, the Commission proposes that sales in or into the United States be determined by the amount of such sales in the most recent fiscal year combined with the amount of such sales since the end of the most recent fiscal year, calculated no more than sixty days prior to the filing of notification or if notification is not required, within sixty days prior to the consummation of the acquisition. This change is intended to ensure that where U.S. sales generated by foreign assets and voting securities have been trending steeply upward prior to the acquisition, a filing will be required if that trend has resulted in over $50 million in U.S. sales. Finally, for the sake of consistency with the rest of the rules, the Commission has also changed the measure of the value of assets located in the U.S. from book value to fair market value.

The first major proposed change to these sections consists of raising both the $15 million and $25 million thresholds that trigger reporting obligations for foreign transactions to $50 million. This change is intended to preserve the principle underlying these sections, that acquisitions of foreign assets or voting securities should not be subject to the reporting requirements unless the assets or voting securities being acquired have a direct impact on U.S. commerce. That direct impact would be measured by the $50 million threshold amount established in the new legislation. For asset transactions, the impact would be reflected by the amount of sales in or into the U.S. For voting securities transactions, the impact would be reflected either by the amount of sales in or into the U.S. or by the total value of assets, measured by fair market value, held by the issuer in the U.S. Sales or assets of multiple foreign issuers are to be aggregated where controlling interests in these issuers are being acquired, in accordance with the PNO's longstanding position. Sales in or into the United States would be determined by the amount of such sales in the most recent fiscal year plus the amount of such sales since the end of the most recent fiscal year, in order to assure that the acquisition of assets or voting securities that have only recently begun to generate large U.S. sales not escape notification. Sales since the end of the most recent fiscal year should be calculated no more than sixty days prior to the filing of notification or if notification is not required, within sixty days prior to the consummation of the acquisition. Fair market value would replace book value of assets in order to harmonize these sections with the rest of the rules.

The Commission also proposes to exempt an acquisition between foreign persons that do not meet the $110 million aggregate sales and assets test only where such acquisition is not valued at over $200 million. The 1978 Statement of Basis and Purpose explains that the $110 million threshold was adopted to approximate the size-of-person criteria of Section 7A(a)(2), as it seemed appropriate and consistent with congressional intent not to exempt a transaction involving two foreign persons with a U.S. presence similar in size to the general criteria of the act for all persons. 43 FR 33498 (July 31, 1978). Since the new legislation removes the size-of-person test for acquisitions valued at over $200 million, the Commission believes it is appropriate and consistent with congressional intent to require filings from foreign persons, regardless of the size of their U.S. presence, where the transaction is valued at over $200 million and the $50 million threshold of these exemption rules is satisfied.

The remaining substantive proposed change is the extension of reportability to acquisitions of foreign assets by foreign persons. The 1978 Statement of Basis and Purpose justified the blanket exclusion of these transactions in existing section 802.51(a) on the grounds that asset transactions were less likely to affect the U.S. economy than voting securities transactions. Experience at both agencies has shown that foreign assets acquisitions can and do have a direct impact on the U.S. economy. This is more likely to be true where the assets generate over $50 million in sales in or into the U.S. Thus, it appears to be appropriate to require that their acquisition be reported where minimum contacts are present. Finally, the examples to these rules and to section 802.52 have been revised to reflect these changes.

Section 802.52 Acquisitions By or From Foreign Governmental Corporations

The proposed change to the example following section 802.52 incorporates the proposed change to section 802.50

which would raise the threshold of sales in or into the U.S. for acquisitions of foreign assets. The figure ''$50 million'' has been substituted for ''$25 million'' in the parenthetical at the end of the proposed example to reflect the fact that the sale of assets in the example would also be exempt under Section 802.50 if the aggregate sales in or into the U.S. were $50 million or less.

Regulatory Flexibility Act

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

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 recent amendments to section 7A of the Clayton Act, which these rule amendments implement, were intended to reduce the burden of the premerger notification program by exempting all transactions valued at less than $50 million. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, 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 before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The Hart-Scott-Rodino Premerger Notification rules and report Form contain information collection requirements, as defined by the Paperwork Reduction Act, that have been reviewed and approved by OMB under OMB Control No. 3084–0005. Because the proposed amendments would affect the information collection requirement of the premerger notification program, the proposed amendments are being submitted to OMB for review pursuant to the Paperwork Reduction Act. As noted in the Supporting Statement accompanying the Request for OMB Review, however, staff believes that the proposed rules will not pose any net change to paperwork burden estimates regarding filing entities.

List of Subjects in 16 CFR Parts 801 and 802

Antitrust.

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

PART 801—COVERAGE RULES

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

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

2. Amend § 801.4 by revising Example 5 in paragraph (b) to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: * * *

5. In example 4 above, suppose the consideration paid by ''A'' for the acquisition of B is $60 million worth of the voting securities of ''A.'' By virtue of § 801.2(d)(2), ''A'' is both an acquiring and acquired person; B is an acquired person and B's shareholders are acquiring 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's shareholders are now also acquiring persons, unless one of them gains control of ''A'' in the transaction, no B shareholder makes a secondary acquisitions of stock held by ''A.'' If the consideration paid by ''A'' is the voting securities of one of ''A''s subsidiaries and a shareholder of B thereby gains control of that subsidiary, the shareholder will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

3. Amend § 801.14 by revising Example 2 to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

* * * * *

Examples: * * *

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 the previously acquired assets are not treated ''as part of the present acquisition'' because the second acquisition is of voting securities and not assets; thus, 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 size-of-transaction test.

4. Amend § 801.15 by revising the introductory text, paragraphs (a)(2) and (b), and Examples 1, 4, 5, 7, and 8, to read as follows:

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

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities and assets of the acquired person held by the acquiring person under section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) * * *

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 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 §§ 802.3, 802.4, 802.50(a), 802.51(a), 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

* * * * *

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire $51 million of the convertible voting securities of X and $12 million of the voting common stock of X. Since the overall value of the voting securities to be acquired (§ 801.1 defines convertible voting securities as ''voting securities'') is greater than $50 million, ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. However, because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, ''A'' would not hold the convertible voting securities as a result of this acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the $12 million of 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 $51 million of 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 $160 million. In the most recent fiscal year and to date since the end of that fiscal year, sales into the United States attributable to the plants were $40 million, and thus the acquisition was exempt under § 802.50(a). Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales of $12 million were attributable in the most recent fiscal year and to date since the end of that fiscal year. Since under § 801.13(b)(2), as a

result of the acquisition, ''B'' would hold all three plants of ''X,'' and the $50 million limitation in § 802.50(a) 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 in value, would not qualify for the exemption in § 802.50(a), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant.

5. ''A'' acquires producing oil reserves valued at $400 million from ''B.'' Two months later, ''A'' agrees to acquire oil and gas rights valued at $75 million from ''B.'' Paragraph (b) of this section and § 801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceeds the $500 million limitation on the exemption for oil and gas reserves in § 802.3(a), ''A'' and ''B'' will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when aggregated, is less than $500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceed $500 million, ''A'' need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of ''A.'' Instead, ''A'' is directed by § 801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with § 801.10(b).

* * * * *

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 $39 million, and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value of $28 million. 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 §§ 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt or whether it is reportable pursuant to the terms of § 802.4(c). ''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 under § 802.3(b). 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 under § 802.4. 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, the acquisition would not be exempt.

8. ''A'' acquired 49 percent of the voting securities of M and 45 percent of the voting securities of N. Both M and N are controlled by ''B.'' At the time of the acquisition M held rights to producing coal reserves worth $90 million and N held a producing coal mine worth $90 million. This acquisition was exempt since the aggregated holdings fell below the $200 million limitation for coal in § 802.3(b). A year later, ''A'' proposes to acquire an additional 10 percent of the voting securities of both M and N. In the intervening year, M has acquired coal reserves so that its holdings are now valued at $140 million, and the value of N's assets remained unchanged. ''A's'' second acquisition would not be exempt. ''A'' is required to determine the value of the exempt assets and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless ''A'' already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the $200 million exemption for acquisitions of coal reserves in § 802.3, and thus do not qualify for the exemption of voting securities provided by § 802.4(a).

5. Amend § 801.90 by revising Example 1 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 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, 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 $53 million 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 § 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 acquisitions of stock in A1 by ''A'' and ''B'' were exempt under Sections 7A(c)(3) and (10), because ''A'' and ''B'' each already controlled A1, based on their holdings of 50 percent of A1's then-outstanding shares. 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.

* * * * *

PART 802—EXEMPTION RULES

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

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

7. Revise § 802.2(g) to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (activities within SIC Major Groups 01 and 02).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

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

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

* * * * *

8. Amend § 802.6 by revising paragraph (b) and the Example to read as follows:

§ 802.6 Federal agency approval.

* * * * *

(b)(1) A mixed transaction is one that has some portion that is exempt under section 7A(c)(6), (c)(7) or (c)(8) because it requires regulatory agency premerger competitive review and approval, and another portion that does not require such review.

(2) The portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is subject to the act and these rules as if it were being acquired in a separate acquisition.

Example: Bank ''A'' acquires Bank ''B'', which owns a financial subsidiary engaged in securities underwriting. ''A''s acquisition of ''B'' requires agency approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System

or Federal Deposit Insurance Corporation (depending on whether ''A'' is a national bank, state member bank, or state non-member bank under section 18(c) of the FDI Act), and therefore is exempt from filing under section 7A(c)(7). However, the acquisition of the financial subsidiary is subject to HSR reporting requirements, and ''A'' and ''B'' each must make a filing for that portion of the transaction and observe the waiting period if the act's thresholds are met.

9. Revise § 802.8(a) to read as follows:

§ 802.8 Certain supervisory acquisitions.

(a) 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), if 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.

* * * * *

10. Revise § 802.50 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 during the acquired person's most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in (a) above, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years, combined with such sales to date since the end of those 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(c)(2)) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

(c) Any determination of sales in or into the U.S. must be made within 60 calendar days prior to the filing of notification or if such notification is not required, within 60 calendar days prior to the consummation of the acquisition.

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 $13 million in the most recent fiscal year and to date. 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 $38 million in the most recent fiscal year and to date. 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)). Since the total sales in or into the United States exceed $50 million, the acquisition of the second plant would not be exempt under this paragraph.

3. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of $200 million. If ''A'' acquires only foreign assets of ''B,'' and if those assets generated $50 million or less in sales 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 $100 million. If ''A'' acquires only foreign assets of ''B'', and those assets generated in excess of $50 million in sales into the United States during the most recent fiscal year and to date, the transaction is exempt from reporting if the assets are valued at $200 million or less, but is reportable if valued at greater than $200 million.

11. Revise § 802.51 to read as follows:

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* 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:

(1) 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(c)(2)) having an aggregate total value of over $50 million; or

(2) Made aggregate sales in or into the United States of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(b) *By foreign persons.* 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:

(1) 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(c)(2)) having an aggregate total value of over $50 million; or

(2) Made aggregate sales in or into the United States of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(3) 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 the $50 million thresholds are exceeded.

(c) where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) or (b)(2) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years, combined with such sales to date since the end of those 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(c)(2)) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

(d) Any determination of sales in or into the U.S. must be made within 60 calendar days prior to the filing of notification or if such notification is not required, within 60 calendar days prior to the consummation of the acquisition.

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 $77 million in the most recent fiscal year and to date. 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 of $200 million, 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 at $161 million. Since ''A'' will be acquiring control of an issuer, ''C'', with total U.S. assets of more than $50 million, and the parties' aggregate sales in or into the U.S. in the relevant time period exceeds $110 million, the acquisition is not exempt under this section.

12. Amend § 802.52 by revising the Example to read as follows:

§ 802.52 Acquisitions by or from foreign governmental agencies.

* * * * *

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 or less, the transaction would also be exempt under § 802.50.)

Dated: January 24, 2001.

By direction of the Commission.

Donald S. Clark,

Secretary.

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