

FEDERAL TRADE COMMISSION

[16 CFR Parts 801, 802, 803]

HART-SCOTT-RODINO ANTITRUST
IMPROVEMENTS ACT OF 1976Premerger Notification; Reporting and
Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Proposed rulemaking.

SUMMARY: These proposed rules prescribe reporting and waiting period requirements for persons who intend to make certain acquisitions of assets or voting securities. The rules are needed in order to implement Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which relates to Premerger Notification. The intended impact of these rules is to explain which persons and transactions are subject to the statute (Part 801), which persons and transactions are exempt from the requirements of the statute (Part 802), and how persons who are subject to the statute shall comply with its requirements (Part 803).

DATES: Comments must be received on or before August 31, 1977.

ADDRESSES: Written comments should be submitted to both (1) the Secretary, Federal Trade Commission, Room 172, Washington, D.C. 20580 and (2) Assistant Attorney General, Antitrust Division, Department of Justice, Room 3214, Washington, D.C. 20530.

FOR FURTHER INFORMATION CON-
TACT:

Malcolm R. Pfunder, Premerger Notification Office, Bureau of Competition, Room 301, Federal Trade Commission, Washington, D.C. 20580. Telephone: 202-523-3894.

SUPPLEMENTARY INFORMATION:

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, requires persons contemplating certain direct or indirect mergers or acquisitions to give the Federal Trade Commission (hereafter referred to as the Commission) and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereafter referred to as the Assistant Attorney General) advance notice and to wait certain designated periods before consummation of such plans. The transactions to which the advance notice requirement is applicable and the length of the waiting periods required are set out in the Act, the complete text of which is reprinted below. The amendment to the Clayton Act does not change the standards to be used in determining the legality of mergers and acquisitions.

Section 7A of the Amended Clayton Act, 15 U.S.C. 18A, provides:

TITLE II—PREMERGER NOTIFICATION

NOTIFICATION AND WAITING PERIOD

Sec. 201. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 7 of such Act the following new section:

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

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

"(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 or more;

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

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

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

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

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

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

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

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

"(1) the completed notification required under subsection (a), or

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

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

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

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

"(3) As used in this section—

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

"(B) The amount of percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or as-

sets held or acquired by such other person and each affiliate thereof.

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

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

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

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

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

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

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

"(7) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1823 (c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

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

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

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

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

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

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

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

"(2) may—

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

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

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

"(e) (1) The Federal Trade Commission or the Assistant Attorney General may, prior to

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

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

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

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

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

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

"(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e) (1) of this section within the

waiting period specified in subsection (b) (1) and as may be extended under subsection (e) (2), the United States district court—

"(A) may order compliance;

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

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

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

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

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

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

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

EFFECTIVE DATES

Sec. 202. (a) The amendment made by section 201 of this Act shall take effect 150 days after the date of enactment of this Act, except that subsection (d) of section 7A of the Clayton Act (as added by section 201 of this Act) shall take effect on the date of enactment of this Act.

Subsection 7A(d) (1) of the amended Clayton Act, 15 U.S.C. 18A(d) (1), directs the Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with 5 U.S.C. 553, to require that the notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. Subsection 7A(d) (2) of the amended Act, 15 U.S.C. 18A(d) (2), grants the Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with 5 U.S.C.

553, the authority (A) to define the terms used in the amendment; (B) to exempt additional persons or transactions from the Act's notice and waiting period requirements; and (C) to prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

On December 20, 1976, the Federal Trade Commission published proposed rules and a proposed notification form in the FEDERAL REGISTER and invited written comments on those rules and form prior to January 19, 1977. The comment period was subsequently extended to February 18, 1977. More than 120 comments were received from interested persons; many were lengthy and detailed. Study of these comments and of the proposed rules by the staffs of the Commission and the Antitrust Division of the Department of Justice resulted in a very large number of substantive changes in individual rules, although the basic requirements embodied in the originally proposed rules were retained.

In an effort to make the order and numbering of these rules somewhat more logical, the Commission has renumbered many of the proposed rules. The following table indicates the number of the revised rule corresponding with the number of each rule originally published in the Federal Register on December 20, 1976.

As originally proposed, section:	As revised, section
801.05.....	801.1.
801.10.....	801.2.
801.15.....	801.3.
801.20.....	801.10.
801.25.....	801.11.
801.30.....	801.12.
801.35.....	801.13.
801.40.....	801.15.
801.45.....	801.20.
801.50.....	801.21.
801.55.....	801.40 and 802.41.
801.60.....	801.30.
802.05.....	802.70.
802.10.....	802.60 and 802.62.
802.15.....	802.61.
802.20.....	802.30.
802.25.....	803.32.
802.30.....	802.40.
802.35.....	802.50, .51 and .52.
802.40.....	802.20.
802.45.....	802.21.
802.50.....	Deleted.
802.75.....	802.6.
802.85.....	802.9.
802.90.....	802.10.
802.95 [Reserved].....	802.64 and .64a.
803.05.....	803.1.
803.10.....	803.10.
803.15.....	803.4.
803.20.....	803.5.
803.25.....	803.3.
803.30.....	803.20.
803.35.....	802.11.

The following revised rules have been added:

Sec. 801.4, 801.14, 802.8, 802.22, 802.23, 802.31, 802.63, 802.71, 803.2, 803.30.

There are three areas in which the originally proposed rules generated significant comment, but where the Commission has made no basic changes in the revised rules. In addition, significant changes from or additions to the rules

originally proposed have been made in about a dozen areas. The reasons for the Commission's actions are briefly explained below, in order to highlight significant areas for possible additional comment.

AREAS IN WHICH NO SIGNIFICANT CHANGES HAVE BEEN PROPOSED.

1. DEFINITION OF "PERSON"

Among the provisions in the proposed rules which drew widespread comment was the definition of "person" (proposed § 801.05(a)). The definition of this term has a significant impact upon both the coverage of the statute and the specific reporting requirements imposed by the rules. The problem arises from the fact that the statute does not refer to companies or firms, but instead speaks of "persons". Moreover, it uses the single term "person" in at least two different senses.

Section (a) of the statute says that, providing three conditions are satisfied, "no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons * * * file notification pursuant to rules (promulgated by the Commission) and the (prescribed) waiting period * * * has expired * * *." The first of these three conditions (subsection (a)(1)) is that either of the parties to the transaction be engaged in commerce or in any activity affecting commerce. The second (subsection (a)(2)) requires basically that one of the parties have annual net sales or total assets of \$100 million or more and that the other have annual net sales (if engaged in manufacturing) or total assets of \$10 million or more. The third (subsection (a)(3)) specifies that as a result of the transaction the acquiring person would hold either 15 percent of the voting securities or assets of the acquired person or an aggregate total amount of the voting securities and assets of the acquired person in excess of \$15 million.

It seems obvious, for purposes of testing the subsection (a)(2) size criteria of the Act, that the relevant "person" must be the entire corporate structure, rather than just the company or perhaps the particular subsidiary which is making the acquisition. In other words, whether the size criteria are met should depend upon the size of the overall corporate structure, rather than on the form of corporate organization that is acquiring legal title as a result of the transaction.

The 15 percent test in subsection (a)(3) raises a different problem. For example, suppose the transaction involves the purchase by a large corporation of a subsidiary of another large corporation. The definition of "person" as the entire corporate structure would dictate that the selling corporation's entire corporate structure be considered the "acquired person" for purposes of the \$100 million or \$10 million size criteria. But if the selling corporation and its subsidiary each issue their own stock, then a spe-

cific number of the subsidiary's shares cannot conveniently be expressed as a percentage of either the shares of the parent, or the combined shares of the parent and its subsidiary corporations. The problem is not as acute when the acquisition is of assets rather than voting securities, since assets could be valued without reference to the corporate forms.

There is, however, the anomaly that, in a statute designed to reach acquisitions by, and mergers between, large entities, the larger the acquired person, the more of its assets can be sold without reporting. This anomaly would be magnified if the acquired person were always the entire corporate structure of the seller.

The proposed rules sought to deal with this problem by defining "person" in two different ways. Each separate corporation or other entity was a "person," but all such persons controlling, controlled by, or under common control with another corporation were also collectively defined as a single, larger "person". In that way, any particular "person" could be used for purposes of the 15 percent criteria, but the collective "person" could be used for the size criteria. Although this approach was slightly awkward, the awkwardness stemmed from the statute itself, and the approach seemed to achieve the intent of the drafters.

The revised rules retain this basic approach but seek to clarify it by introducing a new term "entity" (§801.1(a)(2)) to describe and distinguish the component parts of the larger "person" (§801.1(a)(1)). For purposes of the subsection (a)(2) size criteria the rules look to the acquiring and acquired "persons," while for the 15 percent tests in subsection (a)(3), they look to the specific entity whose voting securities or assets are being acquired.

One specific alternative that was rejected envisioned that for all purposes the acquiring person would consist of the entire corporate structure, while the acquired person would always consist of the specific entity whose voting securities or assets were being acquired, along with any other entities which it controlled. The major disadvantage of this proposal is that it unnecessarily limits coverage of the Act. A very large corporation might sell the voting securities or assets of one of its subsidiaries and escape reporting, whereas the same transaction would have been reportable if the corporation had sold its own voting securities or assets. Apart from the problem of inconsistency, this arrangement would invite the possibility that a large corporation might transfer assets to one of its small subsidiaries and then sell them to another large corporation without reporting. Rather than bifurcating the definition of person between acquired and acquiring persons, the Commission determined in the revised rules that "persons" would be used for subsection (a)(2) size criteria, and "entities" would be used for subsection (a)(3) transaction criteria. This formula follows the basic approach of the originally proposed rules.

2. COVERAGE OF JOINT VENTURES

The basic policy decision, reflected in § 801.55 of the originally proposed rules, to require reporting and waiting by persons forming certain joint ventures, generated substantial comment. Numerous comments insisted that, since the legislative history is silent on joint ventures, they may not appropriately be included within the scope of the rules. The Commission's determination to include coverage of joint ventures in the rules was, however, unanimously supported by the comments received from members of Congress. The Supreme Court opinion in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), supports the position that at least some types of joint ventures should be subject to antitrust scrutiny prior to formation. The Commission has determined that acquisitions of voting securities or other interests in connection with the formation of joint ventures are to be treated like other acquisitions subject to the Act.

In order to implement this approach in a manner consistent with the Act, both the proposed and revised rules (§ 801.40) define the joint venturers as "acquiring persons" (since they acquire shares or other interest in the joint venture), and the venture itself as the "acquired person" (since its shares or assets are being acquired). Thus, no change in the basic approach to coverage of joint ventures is embodied in the revised rules.

3. BASIC CONCEPT OF THE REPORT FORM

The most significant comments relating to the Notification and Report Form focused on the degree of detail demanded by the form. The general thrust of many of the comments was that the proposed form requires more data than Congress intended. It was argued that the statutory term "notification" implies a much less burdensome submission than the proposed form. Some maintained that the initial notification should do little more than inform the antitrust enforcement agencies of the participants to the transaction, the projected date of consummation, and other noncontroversial and generally uninformative data. After this initial notification, if the agency determined that the transaction may violate the antitrust laws, the transaction could be investigated in detail by requesting additional information from the reporting companies, as is provided by the Act.

This position fundamentally misconceives the amount of information necessary to make even a tentative determination whether a transaction may violate the antitrust laws. The information requested by the proposed form is necessary to a determination whether to issue a request for additional information, and what information to request at that time. The legislative history suggests that Congress did not intend these reports to be vehicles to amass an economic data base for generalized research, and they are not intended to be. The reports are designed to provide data needed to evaluate the legality of particular transac-

tions. Congress also intended that the reports would consist of data and documents reasonably available to reporting companies, and some revisions have been made in response to specific suggestions of this type in the comments.

Beyond these two criteria, the Commission does not believe that the legislative history contemplated any particular level of detail. Rather, the statute explicitly leaves to the Commission and the Antitrust Division the task of specifying what "documentary material and information relevant to a proposed acquisition * * * is necessary and appropriate to enable the * * * Commission and the [Division] to determine whether such acquisitions may, in consummated, violate the antitrust laws * * *."

Another reason for the decision to retain the overall approach to the Notification and Report Form embodied in the proposed rules is that it may permit a larger number of mergers and acquisitions to be consummated without extensions of the waiting period. Section (e) of the statute permits either the Commission or the Antitrust Division to request additional information. The waiting period may be extended during the time that a response to that request is being prepared, and for as long as twenty days after the response has been received. The greater the extent to which requests for data are deferred from the initial report until the request for additional information, the more likely it becomes that a second request may be necessary in order to satisfy an agency that no antitrust violation is likely. If second requests are issued more frequently, the average waiting period may be longer, rather than shorter, than it would be with a more comprehensive initial notification procedure. The requirements of the initial report will be publicly available, and companies will be able to begin compiling required data in advance of the transaction. By contrast, the second request and its content will not be regularly anticipated, and the reporting company will have to begin compiling the data during the waiting period, thus lengthening, possibly substantially, the time required for full compliance. Moreover, a second request after receipt of a sketchy initial report is likely to be more detailed and may require an even larger amount of time for preparation of a response.

In response to requests that the Notification and Report Form be made less burdensome, the Commission has made the following revisions.

1. With respect to assets being acquired, the revised form requests only a description of the "general classes of assets," rather than a description of all the assets required by Item 2(e) of the proposed form. In addition, the revised form does not request detailed information relating to the value of the assets, the method of valuation, date of valuation, or dollar sales or revenues attributable to the assets.

2. Both the proposed and revised form request copies of the contract or agreement embodying the proposed transac-

tion, but in lieu of the request in Item 2(g) to furnish copies of all contracts, options and agreements relating to the proposed transaction, the revised form requests only an index of the ancillary documents or classes of such documents.

3. In lieu of that portion of Item 2(h) which required submission of all studies, surveys, analyses, and reports which contain any information relevant to market shares, competition, competitors, markets, etc., the revised form requests only those documents prepared for the purpose of evaluating or analyzing the proposed transaction, along with a narrative description of the planning process and persons responsible for planning within the reporting person, so that meaningful second requests can be formulated where appropriate.

4. No 7-digit SIC-based produce data is requested in the revised form with respect to activities other than manufacturing, and no reporting companies are required to submit any 7-digit data for any year other than 1972, when such information would have been prepared for the Census of Manufactures. In lieu of the latter, companies engaged in manufacturing must report their revenues for the most recent year by 5-digit product class, which most large companies already prepare for purposes of the Annual Survey of Manufactures.

5. No export or import data is required on the revised form as such. However, manufactured products which are exported will be included (without separate identification) in the value of shipments of domestic producers, and imported products which are resold will be included upon resale in the United States (again without separate identification) in domestic sales figures. This treatment conforms with that of the Census Bureau.

6. The requirement in Item 6(c), for state-by-state breakdowns of shipments in 4-digit SIC code industries in which both the acquiring and acquired companies derive revenues, has been replaced. Companies must list instead the locations of establishments from which dollar revenues in such industries were derived, and, for 2-digit SIC major groups of industries for which it is appropriate, list the states which comprise the ultimate market for the product or service. In addition, Item 6(d), which requested state-by-state data when there was a 7-digit overlap, has been deleted.

7. Item 6(e), which required reporting companies to list their five most significant competitors for each of their ten largest selling product groups, has been deleted.

8. Items 8(a) and 8(b), which requested data relating to all products which either company could have sold to the other, have been substantially streamlined. The revised form requires identification of products as to which the parties had a vendor-vendee relationship during the most recent year.

Although information requests in several items have been somewhat expanded, the basic thrust of the proposed

Notification and Report Form has not been changed in the revised rules, and compliance with its requirements should be considerably less burdensome for reporting companies by reason of the above changes.

AREAS IN WHICH SIGNIFICANT CHANGES HAVE BEEN PROPOSED

1. DEFINITION OF "CONTROL"

Definition of the term "control" is crucial, because control is the concept used to link up the entire corporate structure which constitutes a "person" for purposes of testing the size criteria of the statute. The definition in the proposed rules (§ 801.05(b)) recognized that ownership of 50 percent or more of the outstanding voting securities of an issuer constituted control. That definition also sought to formulate a subjective test by focusing on the fact of control. A great many comments were critical of this wholly subjective standard, not only because it may be difficult to determine the precise percentage of voting securities which constitutes control of a particular enterprise, but also because many types of relationships may confer upon persons other than shareholders different kinds of "powers" which may resemble control.

The 50 percent stock ownership test has been retained (§ 801.1(b)), and a narrow additional test (where one party has a contractual power presently to designate a majority of the directors of another) has been added. The Commission is considering adoption of a further test, which would define "control" to include the holding of sufficient voting stock or the possession of sufficient voting power to designate or elect a majority of the directors. Where this type of "control" would arise at some future time or upon the happening of some contingency, one person would "control" another only from the time that such power vests. This result might be accomplished by changing the last clause of § 801.1(b) to read:

(B) Power to presently designate or elect a majority of the directors or trustees of an entity.

The Commission considered adoption of a percentage smaller than 50 as a wholly objective criterion for control. In some situations, particularly with relatively large corporations, there is no doubt that de facto control arises at some point below, sometimes well below, 50 percent. Because it is difficult to devise a test which determines an appropriate percentage based solely on objective criteria, the Commission may adopt a test which focuses on the objective factors of voting control (or contractual power), without relying on a specific percentage of voting securities held. Comments relating to these alternatives are especially invited.

2. CONVERTIBLE SECURITIES

Subsection (b) (3) (A) of the statute provides:

The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to

vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions. (emphasis supplied)

The proposed rules provided no detail concerning the manner in which convertible securities were to be treated, either when acquired or when held. The revised rules contemplate that the acquisition of convertible securities may be a reportable transaction and that convertibles are valued like other voting securities. Because the acquisition of convertibles is the point at which the reporting and waiting period requirements attach, the subsequent conversion of such securities into voting stock is exempted from these requirements (§ 802.31). An exception is created for options, warrants, and other rights to purchase voting securities upon payment of additional consideration; these are excluded from the definition of "voting securities" (§ 801.1(f)(1)) and their exercise is excluded from the definition of "conversion" (§ 801.1(f)(2)). The result is that these types of securities or rights can be acquired without reporting, but are subject to reporting and waiting period requirements at the time of their exercise.

Where convertible securities are acquired or held, the revised rules also clarify the procedures for calculating the percentage of the issuer's voting securities which the acquiring person will hold as a result of the transaction (§ 801.12). The rule provides that all securities held by the acquiring person which are convertible upon the happening of an event certain to occur within five years, plus all securities which are convertible at the option of the acquiring person, are treated as though they were presently entitled to vote. The purpose is to assess the maximum voting power that the acquired person could achieve for himself within a reasonable period of time by means of conversions; this projection is required by reason of the fact that a subsequent conversion of voting securities is an exempt transaction.

3. JOINT VENTURE EXEMPTIONS

The specific exemptions contained in proposed § 802.30 have been restated as coverage criteria and are embodied in § 801.40 of the revised rules. One exemption has been added in § 802.40 of the revised rules for tax-exempt nonprofit corporations, which seemed unlikely in most cases to pose significant antitrust problems.

The Commission received a large number of comments describing a variety of joint ventures which are frequently utilized in a number of industries. The comments uniformly asserted that these types of joint ventures were unlikely to violate the antitrust laws or were not intended to be covered by the Act, or that reporting and waiting period requirements would impose substantial burden on these industries because of the frequency with which joint ventures are utilized.

The Commission does not believe that, simply because joint ventures are widely utilized in certain industries, the likelihood of their possible anticompetitive

consequences is necessarily small. The Commission is particularly concerned that the formation of joint ventures contemplating ongoing manufacturing or service functions or of ventures in which two or more of the venturers are actual or potential competitors or could have a customer-supplier relationship may raise possible antitrust problems. Moreover, both the scope and duration of a proposed joint venture may affect the extent of the possible anticompetitive consequences raised by its formation.

The Commission invites comment in several specific areas. First, the Commission desires to learn the number of joint ventures, formed each year in each industry, which would be reportable under the revised requirements of § 801.40. With respect to these joint ventures, it would be helpful for comments to indicate:

- (a) Who the joint venturers generally are;
- (b) What the purposes of such ventures are;
- (c) Whether the ventures are typically incorporated;
- (d) Why a joint venture, rather than individual participation by the venturers, is typically used;
- (e) Whether the venture engages in marketing of any product or service or derives any revenues from its activity, and, if so, who its "customers" are;
- (f) The value of assets typically contributed by the venturers; the sources and magnitude of other assets obtained by the joint venture; and the extent to which the commitment of such assets is typically arranged at or prior to formation of the venture;
- (g) A description of the lines of business and geographic areas in which the venture typically does business;
- (h) Whether any of the venturers are typically competitors of one another in any market;
 - (1) Whether any of the venturers are typically customers or suppliers of one another in any market;
 - (j) The number of competitors and the degree of concentration in the industries in which the joint venturers and the joint venture do business;
 - (k) The duration of the joint ventures and the events upon which or conditions under which any of the ventures are typically dissolved; and

- (l) Whether there are any limitations on the scope of the individual joint ventures;

Second, the Commission would like to know in greater detail the reasons that formation of specific types of joint ventures might be unlikely to violate the antitrust laws, as many of the comments have alleged. Given the fact that some judgment concerning the possible anticompetitive impact of a joint venture must be made by the enforcement agencies at the time of its formation, the Commission specifically invites comments concerning appropriate tests that would prospectively distinguish ventures which might raise possible anticompetitive consequences from those that are unlikely to do so.

The Commission has difficulty with the suggestions, made in a significant number of comments received in response to the originally proposed rules, that narrow exemptions relating to specific types of

joint ventures in particular industries would be appropriate. The Commission invites specific suggestions concerning principles of general application to broad classes of joint ventures, regardless of the specific industry or particular purpose of the venture, which may serve to distinguish those ventures raising little likelihood of antitrust problems. The Commission is not inclined to grant exemptions absent clear indication that they are warranted under the Act. Comments which do not attempt to relate suggested exemptions to the underlying purposes of the Act are not likely to be helpful to the Commission.

4. ACQUISITIONS OF VOTING SECURITIES FROM THIRD PARTIES

Except with respect to tender offers, the proposed rules focused upon acquisitions of voting securities only from the issuers of those securities, or from other related sellers such as the parent of the issuer. No provision was made, however, for two other common types of transactions: the acquisition of blocks of stock from third parties unrelated to the issuer and the acquisition of stock through a securities exchange or other open market transaction. The major policy consideration which arises in connection with these transactions concerns the starting of the waiting period. Should the waiting period begin to run when the acquiring company files notification, as it does in the case of a tender offer? Or should the issuer have to file its notification within some time period (e.g., fifteen days) after filing by the acquiring person, before the waiting period begins to run?

The latter course would permit a hostile or indifferent issuer to block the proposed acquisition by simply refusing to file its notification, since it could effectively prevent the waiting period from ever beginning. However, the threat of civil penalties under subsection (g)(1) might deter such recalcitrance. On the other hand, the former approach appears inconsistent with the statutory language of subsections (a) and (b)(1) which are limited only in the case of tender offers. Section (a) states in part:

* * * no person shall acquire * * * any voting securities * * * of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification * * * and the waiting period * * * has expired * * * (emphasis supplied).

Moreover, subsection (b)(1) of the statute states in part:

The waiting period required under subsection (a) shall—

(A) begin on the date of receipt * * * of * * * completed notification required under subsection (a) * * * from both persons, or, in the case of a tender offer, the acquiring person * * *. (emphasis supplied)

The Commission's view is that, notwithstanding the language of subsections (a) and (b)(1), any third party (including an open market) transaction is more closely analogous to a tender offer than to a traditional two-party acquisition, although the market impact of the latter may be different from that of a public tender offer, and, of course, the Williams

Act does not apply. Under the broad rulemaking authority of subsection (d) (2) (C), §§ 801.30(b) and 803.10(a) of the revised rules thus provide that the waiting period begins to run upon the filing by only the acquiring person in any acquisition from a third party (including both tender offers and open market transactions).

It should be noted that while under subsection (e) (2) of the statute a request for additional information may be made of an issuer in a tender offer, such a request does not serve to extend the waiting period. The Commission felt that there was no reason to extend this specific form of special treatment to third party or open market transactions other than tender offers (as to which the statute is silent). Thus, in a third party transaction, the waiting period begins to run when the acquiring person files; the issuer then has fifteen days within which to file its report (§ 801.30 (c)); a request for additional information may be made to either the acquiring person or to the issuer, or to both, and the waiting period is extended in the event of any such request (§ 803.20(c)). Moreover, the waiting period, here as elsewhere, may upon request be terminated by the Commission and the Assistant Attorney General in advance of its normal expiration (§ 803.11).

5. INDIRECT ACQUISITIONS

When an acquiring person purchases a controlling interest in a corporation which holds 50 percent or more of the stock of another corporation, both the proposed and the revised rules treat that subsidiary as part of the acquired person. But where the acquiring person obtains control of a corporation which holds 15 percent or \$15 million worth of the stock of another corporation but does not control that other corporation, the indirect acquisition of that 15 percent or \$15 million block of stock would seem, logically, to fit within the statutory scheme. The proposed rules did not explain whether this transaction was separately reportable, but § 801.4 of the revised rules makes clear that it is. An indirect acquisition of the second corporation cannot occur, however, until the purchaser acquires control of the first corporation. Revised § 801.4 also specifies that if the direct acquisition transaction is exempt from reporting and waiting period requirements, the indirect acquisition may nevertheless be reportable, unless there is an independent basis for exemption of the indirect acquisition under the statute or the rules.

6. ADVISORY OPINION/BUSINESS REVIEW LETTER EXEMPTION

Subparagraphs (c) and (d) of proposed § 802.05 provided exemptions from the requirements of the statute if the acquiring person had obtained a favorable Advisory Opinion from the Commission or a favorable opinion under the Business Review Procedure of the Antitrust Division. Both exemptions have been deleted from the revised rules. The reason is that, since the statute envi-

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

7. FOREIGN COMMERCE EXEMPTIONS

The proposed rules (§ 802.35) stated a single exemption for transactions involving insufficient relation to United States foreign commerce. That involvement was measured, in the case of an issuer whose voting securities were being acquired, by looking at its annual domestic, import and export sales in U.S. commerce over the preceding three years, and at any assets that issuer may have held in the United States. In an assets acquisition, the involvement was measured by the annual domestic, import and export sales in U.S. commerce attributable to those assets. The threshold level of involvement, below which the exemption applied, was \$10 million. The comments generally suggested that threshold was too low.

The revised rules contain three types of exemptions applicable to foreign commerce. First, as to acquisitions of assets located in a foreign country or of voting securities of a foreign issuer, § 802.50 provides an exemption where the assets do not generate significant sales in or into the United States or where the issuer does not make significant sales in or into the United States and does not hold significant assets in the United States. Each of these thresholds is \$10 million. Second, where the parties to a transaction are not U.S. companies, § 802.51 exempts an acquisition of either assets or voting securities unless one or both parties have substantial sales in or into or assets located in the United States, and unless either significant assets in the United States or the stock of a U.S. company will be acquired in the proposed transaction. The threshold for substantial sales is reached when the combined sales of the acquiring and acquired persons in or into the United States reach \$110 million; the same figure is used to measure substantial assets in the United States held by the parties. The threshold applied to the assets or voting securities being transferred is \$10 million for all purposes under this rule, assuming the criteria of subsection (a) (3) are otherwise met.

Finally, where an acquisition involves only assets located in a foreign country or only voting securities or an issuer located in foreign country, and where either the acquiring or the acquired person is a corporation controlled by the government of that country, § 802.52 exempts the transaction from reporting and waiting period requirements. The

Commission is considering the appropriateness of limiting this exemption where assets located in the United States or voting securities of a U.S. issuer are indirectly acquired from a foreign government-controlled corporation.

For purposes of testing whether any foreign assets or foreign issuer, or any foreign purchaser or seller, is responsible for generating significant sales in U.S. commerce, all three of these revised rules look to sales made in or into the United States, but not to export sales made outside the United States.

These exemptions are somewhat complex because the underlying rationale involves superimposing upon the statutory tests of subsections (a) (2) and (a) (3) a similar set of tests which look to the sizes of the parties and the size of the transaction from the perspective of their impact on U.S. commerce. The Commission considered and rejected a simpler scheme along the lines of the proposed rule, but with a higher threshold such as \$50 million or \$100 million, because it is not clear that all transactions below those thresholds are unlikely to violate the antitrust laws.

8. SUBSEQUENT ACQUISITIONS AFTER ONE REPORT

Once a notification report has been filed in connection with an acquisition of voting stock, the proposed rules (§ 802.45) permitted the acquiring person to purchase up to 5 percent more of the voting securities of the same issuer without reporting. But for each transaction involving the purchase of 5 percent or more of the voting securities of that issuer, a separate report and waiting period was required. (Once the acquiring person reaches 50 percent, any subsequent acquisition of voting securities is exempt under subsection (c) (3).)

The revised rules seek to reduce the burden of reporting these subsequent acquisitions of the same issuer's stock. Revised § 802.21 provides essentially that, within the six-month period after notification has been filed, the purchaser must again file notification and observe the waiting period only when his holdings would reach 25 percent and 50 percent of the outstanding voting securities of that issuer. In other words, the first report is required at either 15 percent or \$15 million, whichever is smaller, and subsequent reports are required within six months only when the purchaser would reach 25 percent, and again when the purchaser would control the issuer. If more than six months have elapsed since an earlier notification, any additional purchase would be subject to reporting and waiting period requirements. The revised rule also permits the acquiring person to cross two or more of these three reporting thresholds at once by stating in his notification the intention to make such additional acquisitions within 180 calendar days. Finally, under revised § 802.22 if an acquiring company crosses a threshold and files notification, then sells some of that stock (or for some other reason falls below the same threshold), and within 180 days of the first

filing makes a purchase which results in crossing the same threshold, a new notification is not required.

The Commission believes that the 180-day time periods in §§ 802.21(b)(3)(A) and 802.22(b)(3) may be shorter than necessary to implement the underlying purposes of the Act. The Commission specifically invites comment on the length of time during which the information contained in the earlier notification remains reasonably current and is thus reasonably likely to reflect the sizes and operations of the acquiring and acquired persons.

9. INSTITUTIONAL INVESTORS

The entire subject of financial institutions is complex. The "Statement with Respect to Certain Financial Transactions and Institutions," which was published with the proposed rules, was meant to evoke comments indicating the types of transactions in which financial institutions normally engage, which might fall within the ambit of the statute. The comments were helpful, but they did not provide sufficient information to permit the Commission systematically to identify the transactions unlikely to pose any potentially significant antitrust problems.

The revised rules contain a series of five related exemptions (§§ 802.60 through 802.64), one of which is also stated in the alternative (§ 802.64a). Revised § 802.60 exempts certain persons, rather than certain transactions from reporting and waiting period requirements. Where a broker or dealer in securities, a trustee or fiduciary, or any agent makes an acquisition on behalf of, and at the specific direction of another person, this rule, in effect, obligates the beneficial owner to file any notification which the statute may require. (In contrast to the originally proposed rules, a broker, trustee, or agent who purchases stock for the benefit of another person, but not at his specific direction, would be subject to the requirements of the Act.) Revised § 802.61 exempts acquisitions in escrow and essentially embodies § 802.15 of the proposed rules. Revised § 802.62 exempts acquisitions by securities underwriters, on the theory that their holding of any voting securities is temporary; purchases from an underwriter are treated like any other acquisition from a third party. Revised § 802.63 exempts acquisitions of collateral by creditors and acquisitions by creditors in foreclosure or upon default, so long as the creditor relationship arose from a bona fide credit transaction in the ordinary course of the creditor's business. The rule also exempts acquisitions by insurance companies pursuant to a surety contract or through subrogation. All of these appear to be temporary situations, where the acquiring person seems unlikely to be interested in retaining control or in exercising continuing influence over management.

The rules that have caused the greatest difficulty are the alternative §§ 802.64 and 802.64a. These rules deal with organizations which regularly buy and sell voting (and non-voting) securities in the

ordinary course of business, usually for investment purposes only. The Commission believes that some type of exemption for these transactions in addition to subsection (c)(9) of the Act may be appropriate, but invites comment on three problems which remain unresolved: (1) The specific types of investors which ought to be able to take advantage of the exemption; (2) appropriate limits of such an exemption where it applies; and (3) appropriate exceptions where the exemption should not apply at any level.

The Commission has proposed §§ 802.64 and 802.64a as alternative exemptions, in an effort to stimulate comments that will clarify the problem and shed additional light on whether other types of investors should also be listed, whether any types of investors are inappropriately included, or whether greater precision is needed adequately to define any of the categories listed. It is the intention of the Commission to include a version of either § 802.64 or § 802.64a in the final rules, but not both.

Both alternative rules have three important limitations. No exemption from the reporting or waiting period requirements applies if (1) the acquisition is not made in the ordinary course of business, (2) the acquisition is not made solely for investment purposes, or (3) if as a result of the acquisition the acquiring company would control the issuer whose stock is being acquired.

Both alternative rules also have two significant exceptions. First, if the acquiring entity is an institutional investor controlled by another entity which is not an institutional investor, the exemptions do not apply. For example, an insurance company controlled by a company engaged in manufacturing is not an institutional investor for purposes of these exemptions. Second, if the acquisition is of the voting securities of another institutional investor, whether directly or through a person who controls another institutional investor, then the exceptions do not apply. These broad exceptions are designed to encourage institutional investors to provide comments which will help clarify which transactions are covered by which statutory exemptions, and which transactions not covered by those statutory exemptions nevertheless are unlikely to violate the antitrust laws.

For the acquisitions by institutional investors which meet all of the above criteria, two alternative exemption schemes are proposed. Revised § 802.64 exempts such transactions unless they result in the acquiring person's holding both 15 percent and \$25 million of the voting securities of the issuer. If those thresholds (which essentially supersede subsection (a)(3) of the statute for this limited purpose) are exceeded, the transaction would be subject to both reporting and waiting period requirements.

The reporting requirements triggered at 25 percent and at 50 percent would apply to subsequent acquisitions by institutional investors, just as they do to acquisitions by other types of purchasers.

Alternate § 802.64a would continue to use the subsection (a)(3) criteria, but would exempt all acquisitions by institutional investors meeting the above tests, on condition that such investors file an annual report summarizing the transactions as to which the exemption had been claimed during the previous year. The Commission is hopeful that additional comments will indicate a preference as between these alternatives, and will explain the reasons for such preference.

10. FILING NOTIFICATION IN TENDER OFFERS

Proposed § 803.15 stated that the notification required by the statute in a tender offer situation must contain an affidavit attesting that the tender offer had been published, sent or given to security holders of the issuer whose voting securities were sought to be acquired. Numerous comments pointed out that statutes in a number of states require that persons who intend to make certain tender offers must file notice of their intentions significantly in advance of the time when those offers will be made. The comments objected to the "tacking" of a waiting period under this statute onto the waiting period required by a state statute, and requested that an acquiring person be permitted to file notification at any time after a state filing or after the intention to make the tender offer has been made public.

The reason for the proposed rule was to assure, before notification would be permitted, that the tender offer would be made. The Commission wanted to avoid requiring the target to report unnecessarily and sought also to avoid reviewing hypothetical transactions and perhaps giving even an informal indication of concern (or lack of it) by the enforcement agencies before the acquiring person had actually decided whether to make its tender offer. The comments appear convincing that the likelihood of receiving notification reports with respect to hypothetical transactions is relatively low after the prospective tender offeror has filed under a state statute or publicly announced the intention to make the tender offer. Thus revised § 803.4(a)(2) permits the filing of notification at any time after the intention to make the tender offer has been publicly announced (which presumably occurs as soon as a filing is made under a state statute). Subparagraph (a)(1) of revised § 803.4 also requires that the acquiring person in any acquisition from a third party, including tender offers, file an affidavit attesting that the issuer has been previously (or is being contemporaneously) served with a written statement containing information which the issuer will need in order to comply with its reporting requirements.

In permitting the acquiring person to file notification under this statute prior to the time when the tender offer has been published, sent or given to security holders of the issuer, the Commission takes no position on the question whether any state statute requiring any

type filing by the acquiring person at any time may be pre-empted by Federal statute or regulations, or may be otherwise unlawful, and the Commission specifically does not endorse or oppose the principle of required disclosure of planned tender offers which underlies such statutes.

11. SUBSECTION (C) (9) EXEMPTION

Subsection (c) (9) of the statute exempts acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer.

Proposed § 802.85 purported to condition this statutory exemption upon the filing, by an acquiring person, of a certified statement containing certain information relating to such transactions. In its place, revised § 802.9 seeks to interpret the statutory exemption, but does not require any type of filing when the exemption applies, although the Commission is continuing to consider a filing requirement of the type contained in § 802.85 of the originally proposed rules. The Commission specifically invites comments concerning the circumstances under which a person may hold securities solely for investment purposes and may nevertheless vote for the election of directors. Where a person claims to be holding voting securities "solely for the purpose of investment," but nevertheless votes that stock for election of directors, the Commission believes it may be "necessary and appropriate to carry out the purposes" of the Act to obtain further information from the person as a condition of the person's claiming exemption under subsection (c) (9) of the Act.

Because of the difficulty in establishing criteria for determining when voting securities are held "solely for the purpose of investment," the Commission also invites comment on the desirability of exempting from the reporting requirements all acquisitions of voting securities which do not result in the acquiring person holding more than 10 percent of the outstanding voting securities of the issuer regardless of the acquiring person's intent.

The requirement that holdings of voting securities be "solely for investment purposes" also appears in §§ 802.64 and 802.64a. Because the exemption contained in subsection (c) (9) does not apply to any holdings of the stock of an issuer after 10 percent of the issuer's stock is held, the Commission is considering the possibility of changing the 15 percent figure in § 802.64(b) (5) (A) to 10 percent, so that the conditional exemption and reporting requirements for institutional investors would apply to any holdings which are too large to qualify for exemption under subsection (c) (9). The Commission specifically invites comment concerning whether the \$25 million figure in proposed § 802.64(b) (5) (B) should be changed in this event, and, if so, what figure would be appropriate and why.

The Commission is also considering whether assets may ever be held "solely for investment purposes" (see proposed § 802.51) and may delete this reference.

12. SPECIAL REPORTS CONCERNING CERTAIN GROCERY AND MILK PRODUCTS ACQUISITIONS

Under the Commission's Special Order of February 14, 1973 (pursuant to its Resolution of November 29, 1967), certain persons contemplating acquisitions of voting securities or assets of a person engaged in whole or in part in wholesale or retail grocery distribution (SIC Groups 514 and 541, respectively), are required to file FTC Forms 1859 A and B with Supplement. Under the Commission's Special Order of October 7, 1974 (pursuant to its Resolution of October 7, 1974), certain persons contemplating acquisitions of voting securities or assets of a person engaged in whole or in part in the processing or distribution of Class I milk products (SIC product classes 20262 and 20264) are required to file an FTC Special Report on Acquisitions and Mergers by Corporations in the Fluid Milk Products Industry. Under each of these programs, the required reports must be submitted under a timetable different from that required for the Notification and Report Form under these rules.

In order to obtain the information requested in these special reports at the same time that the Notification and Report Form is submitted, § 803.1 (b) and (c) require that the special reports be filed simultaneously with the Notification and Report Form by those companies subject to both the Act and either of these special reporting programs. At the time that final rules are promulgated, the Commission intends to modify these reporting programs so that duplicative filings of the special reports will not be required.

13. STATEMENT OF REASONS FOR NONCOMPLIANCE

Under the Act, a person required to file notification by section (a) or to provide additional information or documentary material pursuant to a supplemental request under section (e) is required to provide a "complete response" or, if the response is not complete, to provide a "statement of the reasons for such noncompliance." Subsection (g) (2) of the Act states that in the event a person fails substantially to comply with either of these requirements, a U.S. district court may order compliance and (except where the issuer in a tender offer has failed substantially to comply) shall extend the waiting period until there has been substantial compliance.

The Commission has taken the position, in § 803.3, that a complete response within the meaning of the Act is one which includes all requested information. When the person filing notification cannot supply a complete response, § 803.3 requires further information concerning the reasons for noncompliance. In the event that an enforcement agency believes that an incomplete response does not constitute substantial compliance, it

may seek civil penalties under subsection (g) (1) or an order requiring compliance, an extension of the waiting period, and other equitable relief under subsection (g) (2). The meaning of "substantial compliance" may thus be determined by the district courts when such relief is sought.

PROPOSED RULEMAKING

The Commission believes it desirable to invite additional comments on these revised proposed rules, because of their complexity and because of the number of changes from the originally proposed rules. During the period prior to promulgation of final rules, the Commission's Transitional Rule, published in the FEDERAL REGISTER of February 2, 1977 (Volume 42, number 22, at pages 6365-6366) remains in effect. The Commission does not intend to alter the filing requirements under its existing premerger notification program (pursuant to its Resolution Requiring Notification and Submission of Special Reports Relating to Corporate Mergers or Acquisitions, dated August 15, 1974) until after these rules become effective and are in operation.

The Commission proposes the following amendment to Title 16, Chapter I, by adding a new Subchapter H—Rules, Regulations, Statements, and Interpretations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976—and Parts 801, 802, and 803 under the Subchapter (Part 800 would be reserved).

PART 801—COVERAGE RULES

- Sec.
- 801.1 Definitions.
- 801.2 Acquiring and acquired persons.
- 801.3 Activities in or affecting commerce.
- 801.4 Indirect acquisitions.
- 801.10 Value of voting securities and assets.
- 801.11 Annual net sales and total assets.
- 801.12 Calculating percentage of voting securities or assets.
- 801.13 Voting securities or assets to be held as a result of acquisition.
- 801.14 Holdings of affiliates.
- 801.15 Aggregate total amount of voting securities and assets.
- 801.20 Incremental acquisitions prior to exceeding threshold.
- 801.21 Acquisitions subsequent to exceeding threshold.
- 801.30 Tender offers and acquisitions of voting securities from third parties.
- 801.40 Formation of joint ventures.

§ 801.1 Definitions.

When used in this section and these rules—

(a) (1) *Person*. Except as provided in § 801.12, the term "person" means an entity together with any and all other entities controlled by, controlling, or under common control (by an entity) with, such entity.

Examples: 1. In the case of corporations, "person" encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions (whether consolidated or unconsolidated, and whether incorporated or unincorporated), and all related corporations under common control with any of the foregoing.

2. Corporations A and B are each controlled by the same foreign state. They are not included within the same "person," although

the corporations are under common control, because the foreign state which controls them is not an "entity" (see § 801.1(a)(2)). Therefore, the corporations are not "under common control (by an entity)" within the meaning of this subparagraph. Corporations A and B, however, each constitute a separate "person" which includes any entities each may control.

3. Since a natural person is an entity (see § 801.1(a)(2)), a natural person and a corporation which he or she controls are part of the same "person." If that natural person controls two otherwise separate corporations, both corporations and the natural person are all part of the same "person."

(2) *Entity.* The term "entity" means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, foundation, fund, institution, society, union, club or other group organized for any purpose whether incorporated or not, wherever located and of whatever citizenship or domicile; or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture which has not been formed but the acquisition of the voting securities or other interest in which would require notification under this section and these rules: *Provided however,* That the term "entity" shall not include any foreign state, foreign government, or agency thereof (other than a corporation or other business or commercial operation engaged in commerce), nor any of the United States, or any political subdivision or agency thereof (other than a corporation engaged in commerce).

(3) *Ultimate parent entity.* The term "ultimate parent entity" means that entity included within a person which is not controlled by any other entity, and which controls directly or indirectly all other entities included within such person.

Examples: 1. If corporation A holds 100 percent of the stock of subsidiary B, and B holds 75 percent of the stock of its subsidiary C, corporation A is the ultimate parent entity, since it controls subsidiary B directly and subsidiary C indirectly, and since it is the entity within the person which is not controlled by any other entity.

2. If corporation A is controlled by natural person D, natural person D is the ultimate parent entity.

(b) *Control.* (1) The term "control" (as used in the terms "control," "controlling," "controlled by," and "under common control * * * with") means either (A) holding (excluding any holdings of affiliates) 50 percent or more of the outstanding voting securities of an issuer; or (B) contractual power to presently designate a majority of the directors or trustees of an entity.

Example: Corporation A holds 100 percent of the stock of corporation B, 75 percent of the stock of corporation C, 50 percent of the stock of corporation D, and 30 percent of the stock of corporation E. Corporation A controls corporations B, C, and D, but not corporation E. Corporation A is the ultimate parent entity of a person comprised of corporations A, B, C, and D, and each of these corporations (but not corporation E) is "included within the person."

(c) *Hold.* The term "hold" (as used in the terms "hold," "holds," "holding," and "held") means record or beneficial ownership, whether direct, or indirect through agents, brokers, nominees, controlled entities, or other means. The holdings of the spouse and minor children of a natural person shall be deemed holdings of that person.

Example: If a stockbroker holds stock in "street name" for the account of a natural person, both the stockbroker (who has record title) and the natural person (who has beneficial ownership) "hold" that stock. (But the acquisition of the stock by the broker may be exempt; see § 802.60.)

(d) *Affiliate.* A person is an "affiliate" of another person if either (1) the entities included within such person hold an aggregate total of at least 25 but less than 50 percent of the outstanding voting securities of the ultimate parent entity of such other person; or (2) the entities included within such other person hold an aggregate total of at least 25 but less than 50 percent of the outstanding voting securities of the ultimate parent entity of such person.

Examples: 1. Corporation A is the ultimate parent entity within person A; corporation B is the ultimate parent entity within person B. Person A is an "affiliate" of person B if the aggregate holdings of the voting securities of corporation B by corporation A (and all other entities included within person A) are equal to or exceed 25 percent, but are less than 50 percent, of the outstanding voting securities of B. (If the holdings equal or exceed 50 percent, then A controls B and they are not affiliates.) Person A may also be an affiliate of person B if the aggregate holdings of the voting securities of corporation A by person B amount to at least 25 percent, but less than 50 percent, of the outstanding voting securities of corporation A.

2. Corporation C is controlled by corporation D. Corporation C cannot itself be an "affiliate" of anyone else, because "entities" cannot be affiliates of other "entities." Only "persons" may be affiliates, and they may be affiliates only of other "persons." The holdings of corporation C must be aggregated with those of its ultimate parent and of all other entities within that person, for purposes of determining whether that person is an affiliate of any other person.

3. A partnership, a natural person, or any other entity which does not issue voting securities can be an "affiliate" of another person only by reason of its holdings (or the holdings of any entities it controls) of the stock of the ultimate parent entity of that other person.

(e) *Security.* The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral-trust certificate, certificate of interest or participation in any profit-sharing agreement, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or to purchase, any of the foregoing.

(f) (1) *Voting securities.* The term "voting securities" means any securities which at present or upon conversion en-

title the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(2) *Conversion.* The term "conversion" means the conversion, without the payment of additional consideration, of securities not presently entitled to vote into securities entitled to vote. Transfer costs and fees, and any payments made to complete fractional shares, shall not be deemed additional consideration.

Examples: 1. The acquisition of convertible debentures which are convertible without the payment of additional consideration is an acquisition of "voting securities." Notification must be filed prior to acquisition of such securities if the criteria of subsection (a) are satisfied.

2. Options and warrants are not "voting securities" for purposes of this section, since the payment of additional consideration is necessary to exercise the options or warrants. Notification need not be filed prior to the acquisition of such securities, but may be required prior to exercising the options or warrants, if the criteria of subsection (a) are otherwise satisfied at that time.

(g) *Tender offer.* The term "tender offer" means any offer to purchase voting securities which is a tender offer within the meaning of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. 78n.

(h) *Cash tender offer.* The term "cash tender offer" means any tender offer in which cash is the only consideration offered to the holders of the voting securities sought to be acquired.

(i) *Solely for investment purposes.* Voting securities are held or acquired "solely for investment purposes" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer.

Example: If a person holds stock "solely for investment purposes" and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held "solely for investment purposes."

(j) *Engaged in manufacturing.* A person shall be deemed to be "engaged in manufacturing" if it produces and derives annual sales or revenues in excess of \$1 million from products within industries 2000-3999 as coded in the Standard Industrial Classification Manual (1972 edition) published by the Executive Office of the President, Office of Management and Budget.

(k) *United States.* The term "United States" shall include the United States, the commonwealths, possessions and territories thereof, and the District of Columbia.

(l) *Commerce.* The term "commerce" shall have the meaning ascribed to that term in section 1 of the Clayton Act, 15 U.S.C. 12, and 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

(m) *This section.* References to "this section" refer to section 7A of the Clayton Act, 15 U.S.C. 18A, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435. References to specific subsections refer to subsections thereof.

§ 801.2 Acquiring and acquired persons.

(a) Any person who is acquiring voting securities or assets (other than cash), either directly or indirectly, or through one or more agents, brokers, or other entities acting on behalf of and at the specific direction of such person, shall be deemed an acquiring person.

(b) Any person whose voting securities or assets (other than cash) are being acquired shall be deemed an acquired person.

(c) For purposes of this section and these rules, a person may be both an acquiring person and an acquired person in a single transaction.

Example: Corporation A plans to transfer certain of its assets to corporation B in return for voting securities of B. Since corporation A is acquiring voting securities, A is an acquiring person; since corporation B is acquiring assets, B is also an acquiring person. In addition, both A and B are acquired persons, since the assets of A are being acquired, and the voting securities of B are being acquired.

(d) A merger, consolidation, or other transaction combining all or any part of the business of two or more persons shall be deemed to be an acquisition subject to this section, and each party to such a transaction shall be deemed both an acquiring and acquired person.

§ 801.3 Activities in or affecting commerce.

Subsection (a)(1) is satisfied if any entity included within the acquiring person, or any entity included within the acquired person, is engaged in commerce or in any activity affecting commerce.

Examples: 1. A foreign subsidiary of a United States corporation seeks to acquire a foreign business. The acquiring person includes the United States parent corporation. If the United States corporation, or the foreign subsidiary, or any entity controlled by either one of them, is engaged in commerce or in any activity affecting commerce, the acquisition satisfies subsection (a)(1). Note, however, that §§ 802.50-802.52 may exempt certain acquisitions otherwise within subsection (a)(1).

2. Even if none of the entities in example #1 is engaged in commerce or in any activity affecting commerce, the acquisition nevertheless satisfies subsection (a)(1) if any entity included within the acquired person is so engaged.

§ 801.4 Indirect acquisitions.

(a) *Indirect acquisitions.* If the acquiring person prior to an acquisition did not, but as a result of an acquisition would, control the issuer whose voting securities are being directly acquired, and such issuer (and all entities it controls) hold an aggregate amount of the voting securities of another issuer insufficient to control such other issuer, then such voting securities of such other issuer shall be deemed indirect acquisitions of the acquiring person. Such indirect acquisitions shall be subject to the requirements of this section if the criteria of subsection (a) are satisfied with respect to such acquiring person and the person within which such indirectly acquired issuer is included.

(b) *Indirect acquisitions: Exemptions.* (1) No indirect acquisition shall be exempt from the requirements of this section solely because the direct acquisition of which it is a part is exempt from the requirements of this section.

(2) An indirect acquisition may be exempt from the requirements of this section under subsection (c) or any of these rules.

Examples: 1. Acquiring person A proposes to acquire the voting securities of corporation S, and the requirements of subsection (a) are otherwise satisfied. The voting securities of issuers held but not controlled by S and all entities which it controls are being acquired indirectly by A. Thus, if S holds \$15 million of the voting securities of corporation X, and A and X also satisfy subsections (a)(1) and (a)(2), A must file notification separately with respect to its indirect acquisition of voting securities of X. X must file notification within fifteen days after A files, pursuant to § 801.30.

2. In the previous example, if A's acquisition of the voting securities of S is exempt, A may still be required to file notification with respect to its indirect acquisition of the voting securities of X, unless it is also exempt.

3. In the previous example, assume that A's acquisition of S was exempt, but that A's indirect acquisition of X was not exempt. If A wishes to acquire S prior to the expiration of the waiting period with respect to X, S must place its holdings of X into escrow, or A must otherwise refrain from acquiring the holdings until the expiration of the waiting period.

§ 801.10 Value of voting securities and assets.

The value of voting securities and assets, except as provided in § 801.13, shall be determined as follows:

(a) *Voting securities.* (1) If the security is traded on a national securities exchange or is authorized to be quoted in an inter-dealer quotation system of a national securities association registered with the United States Securities and Exchange Commission—

(i) And the acquisition price has been determined, the value shall be the market price or the acquisition price, whichever is greater; or if

(ii) The acquisition price has not been determined, the value shall be the market price.

(2) If subparagraph (1) of this paragraph is inapplicable—

(i) But the acquisition price has been determined, the value shall be the acquisition price; or if

(ii) The acquisition price has not been determined, the value shall be the fair market value.

(b) *Assets.* (1) The total assets of a person shall be as stated in accordance with § 801.11.

(2) For all purposes other than determining the total assets of a person, the value of assets shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price.

(c) For purposes of this rule and § 801.13(a)(2):

(1) *Market price.* The market price shall be the closing quotation on the

last business day of the week prior to the filing of the notification required by this section. If such closing quotations are available in more than one market, the person filing notification may select any such quotation.

(2) *Acquisition price.* The acquisition price shall include the value of all consideration to be received for such voting securities and/or assets.

(3) *Fair market value.* The fair market value shall be determined in good faith by the board of directors of the entity controlling the acquiring person, or, in the case of unincorporated persons, officials exercising similar functions; or by a person delegated that responsibility by such board or officials. In all cases, such determination must be made as of any day within fifteen calendar days prior to the filing of the notification required by this section.

§ 801.11 Annual net sales and total assets.

(a) The annual net sales and total assets of a person shall include all sales and assets, whether foreign or domestic, except as provided in paragraph (d) of this section.

(b) The annual net sales and total assets of a person shall be as stated on the most recent financial statement of that person; *Provided:*

(1) That the annual net sales and total assets of each entity included within such person are consolidated therein. If the annual net sales and total assets of any entity or entities included within the person are not consolidated in such statement, such annual net sales and total assets of the person filing notification shall be computed in accordance with generally accepted accounting principles to include the non-duplicative annual net sales and non-duplicative total assets of each such entity or entities; and

(2) That the annual net sales and total assets of the person shall be restated, in accordance with generally accepted accounting principles, to reflect all significant acquisitions and dispositions (except dispositions of assets which continue to be attributed to an acquired person pursuant to § 801.13(b)) by any entity included within the person which have occurred since the date of the most recent financial statement.

Examples: 1. Person A is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries C1 and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of B1, C1, and C2, but not B2 and C3. In order to determine whether person A meets the criteria of subsection (a)(2), whether as an acquiring or acquired person, A must restate its annual net sales and total assets to reflect a consolidation into A's financial statement of the non-duplicative annual net sales and non-duplicative total assets of the previously unconsolidated subsidiaries, B2 and C3. This consolidation must be performed in accordance with the generally accepted accounting principles used by A to consolidate the annual net sales and total assets of B1, C1 and C2.

2. In example No. 1, if, since A's most recent financial statement, A has made a significant acquisition of assets, the total assets of A must be restated to reflect this acquisition. If the acquisition is of assets which have a significant amount of sales attributable thereto, the net annual sales of A must be restated to reflect the annual net sales attributed to those assets in accordance with generally accepted accounting principles.

(c) The financial statement used for purposes of determining annual net sales and total assets must have been prepared in accordance with the generally accepted accounting principles normally used by such person and shall be as of a date not more than fifteen months prior to the date of notification under this section.

(d) No assets of any natural person, other than voting securities and income-producing property, shall be included in determining the total assets of a person.

§ 801.12 Calculating percentage of voting securities or assets.

(a) *Voting securities.* Any issuer whose voting securities are being acquired shall be deemed an "acquired person" in calculating the percentage of voting securities to be held or acquired for purposes of subsection (a) (3) (A).

Example: Person A is composed of entity A and subsidiary A1; person B is composed of entity B and subsidiary B1. Assume that A1 proposes to sell assets to B1 in exchange for common stock of B1. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the "acquired person" is B1. (For all purposes, the "acquiring persons" are A and B.)

(b) *Percentage of voting securities.* (1) Whenever this section or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired by a person, the percentage shall be the ratio, expressed as a percentage, of:

(i) The sum of the number of votes for directors of the issuer presently entitled to be cast by the voting securities to be held or acquired by such person, plus the votes which such person would be entitled to cast upon conversion of all voting securities to be held or acquired by such person which are not presently entitled to vote, but which are convertible upon the occurrence of an event certain to occur within five years or convertible at the option of the holder; to

(ii) The sum of the number of votes for directors of the issuer presently entitled to be cast by all outstanding voting securities, plus the votes represented by conversion of voting securities of the issuer which are included in the numerator by reason of paragraph (b) (1) (i) of this section.

(2) Authorized but unissued voting securities and treasury securities shall not be considered securities presently entitled to vote for directors of the issuer.

Example: In the example to paragraph (a), to determine what percentage of B1's voting securities will be held by A after the transaction, all voting securities of B1 held by A, the "acquiring person" (including A1), and by A's affiliates, must be aggregated. See also § 801.14. In addition, if A holds convertible securities of B1 which meet the definition of

voting securities in § 801.1(f), and which are convertible at A's option or which automatically convert within five years, then in calculating the percentage of voting securities held by A these securities must be treated as though converted.

(c) *Assets.* Any entity whose assets (other than cash) are being acquired shall be deemed an "acquired person" in calculating the percentage of assets to be held or acquired for purposes of subsection (a) (3) (A).

Example: In the example to paragraph (a), for purposes of calculating the percentage of assets to be held, the "acquired person" is A1.

(d) *Percentage of Assets.* Whenever this section or these rules require calculation of the percentage of assets of a person to be held or acquired, the percentage shall be the ratio, expressed as a percentage, of:

(1) The value of the assets to be held or acquired, stated in accordance with § 801.10(b) (2); to

(2) The total assets of the entity whose assets are being acquired (including all entities controlled by such entity), determined in accordance with generally accepted accounting principles.

Example: In the example to paragraph (a), the percentage of the assets of A1 to be held or acquired by B, the "acquiring person," is the following percentage fraction. The numerator is the value of all assets to be acquired in the transaction, valued in accordance with § 801.10(b) (2). The denominator is the total assets of A1, prior to the acquisition, determined in accordance with the generally accepted accounting principles.

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

(a) *Voting securities.* (1) All voting securities of the issuer which will be held by the acquiring person after the consummation of the acquisition shall be deemed voting securities held as a result of such acquisition. The value of such voting securities shall be the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10, and the value of the voting securities previously held by the acquiring person, determined in accordance with subparagraph (2) of this paragraph.

(2) The value of voting securities of the issuer held prior to an acquisition shall be:

(i) If the security is traded on a national securities exchange or is authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission, the market price calculated in accordance with § 801.10(c) (1); or

(ii) If subdivision (i) is not applicable, the fair market value as provided in § 801.10(c) (3).

(b) *Assets.* (1) All assets being acquired from the acquired person shall be assets held as a result of the acquisition. The value of such assets shall be determined in accordance with § 801.10.

(2) Assets which were acquired by the acquiring person from the acquired person within 180 calendar days preceding

the date of filing of the notification required by this section:

(i) Shall be deemed assets of the acquired person held by the acquiring person as a result of the acquisition for purposes of subsection (a) (3) (B), but not for purposes of subsection (a) (3) (A). The value of such assets shall be determined in accordance with § 801.10(b) (2), as of the time of their acquisition;

(ii) Shall be deemed assets of the acquired person for purposes of subsection (a) (2), but not for purposes of subsection (a) (3) (A) or § 801.12(d) (2). Such assets shall not be deemed "dispositions" of the acquired person for purposes of § 801.11(b) (2);

(iii) Shall be deemed assets of the acquired person held by the acquiring person as a result of the acquisition for all purposes under this section and these rules not specified in subdivisions (i) or (ii) of this subparagraph.

Example: Acquiring person A makes two acquisitions of assets from person B, ninety days apart, and wishes to determine whether notification is necessary prior to the second acquisition. For purposes of the percentage test of subsection (a) (3) (A), A would hold only the assets it acquired in the second acquisition. For purposes of the §15 million test of subsection (a) (3) (B), however, A must aggregate both of its acquisitions and must value each as of the time of its acquisition. The total assets of B, for purposes of subsection (a) (2), shall be the total assets of B prior to the first acquisition by A; for purposes of the denominator in the percentage test of subsection (a) (3) (A), the total assets of B may reflect the earlier sale as a "significant disposition"; see § 801.11(b) (2). The total assets of A do not include the assets acquired by A in its first acquisition from B.

§ 801.14 Holdings of affiliates.

(a) Pursuant to subsection (b) (3) (B), the amount or percentage of voting securities or assets of a person which are acquired or held by an acquiring person, whenever required to be determined by this section or these rules, shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such acquiring person and each affiliate thereof.

Examples: 1. In the examples of §§ 801.12, 801.13, 801.15, 801.20, and 801.21, and any other rules which refer to an acquiring person, the amount or percentage of voting securities or assets held by the acquiring person, for purposes of subsection (a) (3), should be determined by aggregating the holdings of the acquiring person with those of its affiliates.

2. Person A is composed of corporation A and subsidiaries B1 and B2. Corporation B1 proposes to acquire voting securities of corporation T. B1 and B2 together hold 25 percent of the voting securities of corporation F. If corporation F is the ultimate parent entity within another person, then person F is an affiliate of person A. See § 801.1(d). Subsection (b) (3) (B) requires that A aggregate F's holdings in T with its own holdings in determining whether the test of subsection (a) (3) is satisfied.

(b) For purposes of subsection (b) (3) (B), the holdings of an affiliate shall not include the holdings of any affiliate of such affiliate.

Example: In example No. 2 to paragraph (a) of this rule, if corporation F and the entities it controls hold 25 percent of the outstanding voting securities of corporation N, and N is an ultimate parent entity, then N is an affiliate of F. Paragraph (b) of this rule provides that N's holdings of T's voting securities need not be aggregated with the holdings of F for purposes of A's proposed acquisition of the voting securities of T. Only the voting securities held by A's own affiliate F (and the entities controlled by F), and not the holdings of F's affiliates, must be aggregated with the holdings of A.

§ 801.15 Aggregate total amount of voting securities and assets.

For purposes of subsection (a) (3) (B), the aggregate total amount of voting securities and assets shall be the sum of:

- (a) The value of all voting securities of the acquired person, calculated in accordance with §§ 801.10(a) and 801.13(a), which the acquiring person would hold as a result of the acquisition; and
- (b) the value of all assets of the acquired person, calculated in accordance with §§ 801.10(b) (2) and 801.13(b), which the acquiring person would hold as a result of the acquisition.

Examples: 1. Acquiring person A and its affiliates previously acquired \$6 million of the voting securities of corporation X. A now intends to acquire \$8 million of X's assets. Pursuant to § 801.13(a), A must determine the present value of the previously acquired securities in order to determine whether the proposed acquisition is subject to the requirements of this section. If these securities have a present value of more than \$7 million, the acquisition is subject to the requirements of this section since, as a result of it, A would hold an aggregate total amount of the voting securities and assets of B in excess of \$15 million.

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur more than six months after the first acquisition. Since the assets are no longer to be considered assets of B, see § 801.13(b) (2), they need not be aggregated with the second acquisition. Therefore, the second acquisition would be subject to the requirements of this section by reason of subsection (a) (3) (B) only if the acquisition price or market value of the securities to be acquired exceeds \$15 million.

§ 801.20 Incremental acquisitions prior to exceeding threshold.

Any particular acquisition, even though part of a sequence eventually attaining a threshold level of subsection (a) (3), is not subject to the requirements of this section unless as a result of the acquisition the acquiring person's holdings would meet or exceed a threshold level of subsection (a) (3).

§ 801.21 Acquisitions subsequent to exceeding threshold.

Example: Corporation A plans to acquire \$16 million of corporation B's voting securities in a series of four equal acquisitions, and the requirements of subsections (a) (1) and (a) (2) are satisfied. The requirements of this section need be observed only with respect to the fourth acquisition.

Acquisitions meeting the criteria of subsection (a), and not otherwise ex-

empted by subsection (c) or § 802.21 or any other of these rules, are subject to the requirements of this section even though:

(a) Earlier acquisitions of assets or voting securities may have been subject to the requirements of this section;

(b) The acquiring person's holdings initially may have passed a threshold level of subsection (a) (3) before the effective date of these rules; or

(c) The acquiring person's holding initially may have passed a threshold level of subsection (a) (3) by increases in market values or other events other than acquisitions.

Examples: 1. Person A acquires \$10 million of the voting securities of person B before the effective date of these rules. If A wishes to acquire an additional \$6 million of the voting securities of B after the effective date of the rules, notification will be required under subsection (a) (3) (B) if the other criteria of subsection (a) are satisfied.

2. In example #1, assume that the value of the voting securities of B originally acquired by A has reached a present value exceeding \$15 million. If A wishes to acquire any additional voting securities or assets of B, notification will be required if the other criteria of subsection (a) are satisfied. See § 801.13(a).

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

In the case of all transactions other than mergers or consolidations, but including tender offers, in which securities are to be acquired from a holder other than the issuer (or an entity included within the same person as the issuer, or any agent or broker for the issuer or any such entity):

(a) The person within which such issuer is included shall be deemed the acquired person.

(b) The waiting period required under this section shall commence upon the filing of notification by the acquiring person as provided under §§ 803.1 and 803.10.

(c) The acquired person shall file the notification required by this section, in accordance with these rules, no later than 5 p.m. Eastern Time on the fifteenth (or, in the case of cash tender offers, the tenth) calendar day following the date of receipt, as defined by § 803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. Should the fifteenth (or, in the case of cash tender offers, the tenth) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 10 a.m. Eastern Time on the next following business day.

Examples: 1. Acquiring person A proposes to acquire the voting securities of corporation B's wholly-owned subsidiary, corporation S, and the criteria of subsection (a) are otherwise satisfied. Since A is acquiring the shares of S from B, an entity controlling S, this rule does not apply and the waiting period does not begin until both A and B file notification.

2. Acquiring person A proposes to acquire \$20 million of the voting securities of corporation X on a securities exchange, and the criteria of subsection (a) are otherwise sat-

isfied. The waiting period begins when A files notification. Corporation X must file notification within fifteen calendar days of A. The seller of the X shares is not subject to any obligations under this section.

§ 801.40 Formation of joint ventures.

(a) Persons who contribute to the formation of a joint venture in return for voting securities or other interests in the joint venture shall be deemed acquiring persons. The joint venture to be formed shall be deemed the acquired person.

(b) Unless otherwise exempted by this section or these rules, in the formation of a joint venture, an acquiring person otherwise meeting the criteria of subsections (a) (1) and (a) (3) shall be subject to the requirements of this section if:

(1) (i) Such acquiring person has annual net sales or total assets of \$100 million or more;

(ii) The joint venture will have assets of \$10 million or more; and

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

(2) (i) Such acquiring person has annual net sales or total assets of \$10 million or more;

(ii) The joint venture will have total assets of \$100 million or more; and

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

(c) The assets of the joint venture shall be deemed to include:

(1) All assets which any persons (whether or not subject to the requirements of this section) contributing to the formation of the joint venture have agreed to contribute at any time;

(2) All assets for which agreements have been secured for the joint venture to obtain at any time; and

(3) Any amount of credit or any obligations of the joint venture which the persons contributing to its formation have agreed to guarantee, at any time.

(d) The commerce requirement of subsection (a) (1) shall be deemed satisfied if:

(1) The activities of any acquiring person are in or affect commerce, or

(2) It is contemplated by the joint venture agreement among the acquiring persons that the activities of the joint venture will be in or will affect commerce.

Example: Corporations A, B, and C agree to enter into a joint venture V. A has more than \$100 million in annual net sales. B has more than \$10 million in total assets. Both C's total assets and its annual net sales are less than \$10 million. All of the corporations are engaged in commerce. The corporations have agreed to make a total initial contribution to the joint venture of \$6 million in assets and to make contributions of an additional \$6 million in each of the next three years. Under paragraph (c), the assets of the joint venture are \$24 million. Under paragraph (b), only corporation A must file notification, and only then if corporation A meets a criterion of subsection (a) (3)—that is, if it will be acquiring 15 percent or \$15 million of the voting securities of the joint venture. The joint venturers need not file notification on behalf of V, but V will be subject to the waiting period; see § 802.41.

PART 802—EXEMPTION RULES

Sec.	
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§ 802.6 Federal agency approval.

For the purposes of subsections (c) (6) and (c) (8), the term "information and documentary material" includes all documents, application forms, and all written submissions of any type whatsoever. In lieu of providing all such information and documentary material, or any portion thereof, an index describing such information and documentary material may be provided, together with a certification that any such information or documentary material not provided will be provided within ten calendar days upon request by the Federal Trade Commission or Assistant Attorney General, or a delegated official thereof.

§ 802.8 Certain supervisory acquisitions.

Pursuant to subsections (c) (12) and (d) (2) (B), a merger, consolidation, purchase of assets, or acquisition requiring agency approval under section 403 or 408 (e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owner's Loan Act of 1933, 12 U.S.C. 1464, shall be exempt from the requirements of this section, including specifically the filing requirement of subsection (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.

§ 802.9 Acquisitions solely for investment purposes.

No acquisition of voting securities shall be exempt from the requirements of this section under subsection (c) (9):

(a) Even though as a result of the acquisition the holdings of the acquiring person would not exceed 10 percent of the outstanding voting securities of the issuer, unless such acquisition is solely for investment purposes; or

(b) If as a result of the acquisition, the acquiring person would hold more than 10 percent of the outstanding voting securities of the issuer.

Examples: 1. Acquiring person A acquires 6 percent of the voting securities of issuer X, solely for investment purposes, and the requirements of subsection (a) are satisfied. The acquisition is exempt under subsection (c) (9).

2. After the acquisition in example #1, A decides to acquire an additional 7 percent of the voting securities of X. Regardless of A's intentions, the acquisition is not exempt under subsection (c) (9).

3. After the acquisition of example No. 1, acquiring person A decides to participate in the management of issuer X. Any subsequent acquisitions of X stock by A would not be exempt under subsection (c) (9).

4. The affiliates of acquiring person B hold an aggregate total of 10 percent of the voting securities of issuer X. If B makes any acquisition of the voting securities of X, it cannot be exempt under subsection (c) (9).

§ 802.10 Stock dividends and splits.

The acquisition of voting securities, pursuant to a stock split or pro rata stock dividend, or pursuant to an issue of new shares offered proportionally to all shareholders, shall be exempt from the requirements of this section under subsection (c) (10).

§ 802.20 Minimum dollar value.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition (other than in connection with the formation of a joint venture) which would be subject to the requirements of this section and which satisfies subsection (a) (3) (A), but which does not satisfy subsection (a) (3) (B), shall be exempt from the requirements of this section if as a result of the acquisition the acquiring person would not hold:

(a) Assets of the acquired person valued at more than \$10 million;

(b) Voting securities of the issuer valued at more than \$10 million; or

(c) Any lesser amount of voting securities which confers control of an issuer with annual net sales or total assets of \$10 million or more.

Examples: 1. Acquiring person A intends to acquire 16 percent of the voting securities of corporation X. If the value of A's holdings in X (including all voting securities of X held by the entities included within person A prior to the acquisition, or by affiliates of A) would be \$10 million or less, the acquisition would be exempt under this rule.

2. Acquiring person B holds voting securities of corporation X valued at \$9 million.

B now intends to acquire assets of X valued at \$7 million. Since the aggregate total amount of voting securities and assets of X to be held by B would exceed \$15 million, subsection (a) (3) (B) is satisfied, and the acquisition cannot be exempt under this rule.

§ 802.21 Acquisitions of voting securities after exceeding notification threshold.

(a) For purposes of this rule and § 802.22, the term "notification threshold" means:

(1) (i) For all acquisitions other than those subject to § 802.64, 15 percent of the outstanding voting securities of an issuer, or an amount of such securities valued at \$15 million; or

(ii) In the case of an acquisition subject to § 802.64, the least amount of voting securities exceeding both 15 percent of the outstanding voting securities of an issuer and \$25 million;

(2) 25 percent of the outstanding voting securities of an issuer; or

(3) 50 percent of the outstanding voting securities of an issuer.

(b) Pursuant to subsection (d) (2) (C), an acquisition of voting securities shall be exempt from the requirements of this section if:

(1) The acquiring person and all other persons required by this section and these rules to file notification previously filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The acquisition will be consummated within 180 days of the date of filing of the acquiring person's earlier notification; and

(3) (i) The acquisition will not increase the holdings of the acquiring person to reach or exceed a notification threshold; or

(ii) The acquiring person declared its intention, in an affidavit filed with the earlier notification, to increase its holdings to reach or exceed such notification threshold.

Examples: 1. Corporation A acquires 15 percent of voting securities (or \$15 million in value of such securities) of corporation B and files notification as required. Within 180 days, A acquires additional voting securities of B but not in a sufficient amount to reach 25 percent of the voting securities of B. No additional notification is required for these subsequent acquisitions.

2. In example No. 1, A continues to acquire B's securities. Before A's holdings exceed 25 percent of B's outstanding voting securities, A must file notification and wait the prescribed period before making the next acquisition.

3. In example No. 2, within the 180 days after notification A continues to acquire voting securities of B. No further notification is required until A plans to make the acquisition that will give it 50 percent ownership of B. (After acquiring 50 percent further acquisitions of voting securities are exempt under subsection (c) (3).)

4. In examples No. 2 and No. 3, A may avoid the need to file reports at the 25 and 50 percent levels, or to observe a waiting period, by stating in the affidavit filed with its initial notification that it intends to

acquire 25 (or 50) percent or more of B's voting securities within the next 180 days. No affidavit would be necessary if A stated in its initial notification that it would acquire 25 (or 50) percent or more of B's voting securities in the original, single, acquisition.

§ 802.22 Acquisitions of voting securities recrossing same notification threshold.

(a) For purposes of this rule, the term "notification threshold" shall have the meaning assigned by § 802.21(a).

(b) Pursuant to subsection (d) (2) (C), an acquisition of voting securities shall be exempt from the requirements of this section if:

(1) The acquiring person and all other persons required by this section and these rules to file notification previously filed with respect to an earlier acquisition of voting securities of the same issuer;

(2) The acquisition will increase the holdings of the acquiring person to reach or exceed the same notification threshold with respect to which the earlier notification was filed, but not to reach or exceed any greater notification threshold; and

(3) The acquisition will be consummated within 180 days of the date of filing of the acquiring person's earlier notification.

Example: This rule allows a person to cross any of the three threshold notification levels—15 percent/\$15 million, 25 percent and 50 percent—any number of times within 180 days of the filing of notification for that level. Thus, if an example No. 1 to § 802.21, A had disposed of some voting securities so that it held less than 15 percent and \$15 million of its voting securities of B, and then had increased its holdings to more than 15 percent but less than 25 percent of B, notification would not be required if the increase occurred within 180 days of filing its original notification. Similarly in examples No. 2 and No. 3 to § 802.21, A could decrease its holdings below, and then increase its holdings above, 25 percent and 50 percent, respectively, without filing notification, if done within 180 days of the respective earlier notifications.

§ 802.23 Amended or renewed tender offers.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition of voting securities pursuant to a tender offer shall be exempt from the requirements of this section if:

(a) Within 180 calendar days prior to the consummation of such acquisition, the acquiring person previously filed the notification required by this section, with respect to a tender offer for the same class of the voting securities of the same issuer;

(b) Any voting securities which are to constitute consideration for such acquisition also constituted consideration for such previous tender offer; and

(c) (1) The percentage of the class of voting securities to be held or acquired by the acquiring person as a result of such acquisition does not exceed the percentage to be held or acquired pursuant to the previous tender offer; or

(2) The acquisition of any voting securities in excess of the amount to be held or acquired pursuant to such previous tender offer would be exempt un-

der § 802.21 or subsection (c) (3) had the acquisition of voting securities pursuant to the previous tender offer been consummated.

Examples: 1. Acquiring person A makes a tender offer for voting securities of B, and files notification. Before A makes any acquisitions, person C makes a competing tender offer for B's voting securities. In response to C's offer, A amends its offer to raise its price, or if its offer has expired, makes a second tender offer at a higher price. A need not file a second, notification, or observe any waiting period, by reason of its amendment or the renewal of its tender offer, provided that the acquisition is to be consummated within 180 calendar days of the earlier notification.

2. In example No. 1, if A's original tender offer had offered only cash as consideration, and its subsequent tender offer offers both cash and voting securities of A as consideration, the acquisition of voting securities of B would not be exempt under this rule.

3. If in example No. 1 A's original notification had stated its intention to acquire 30 percent of the outstanding voting securities of B by a tender offer, under this rule A may acquire any amount up to 50 percent of the voting securities of B, if paragraphs (a) and (b) of the rule are satisfied. The reason is that if A had acquired 30 percent of B's voting securities as a result of the tender offer described in the earlier notification, § 802.21(b) (1) (B) would exempt acquisitions not raising A's holdings to or above 50 percent. The result is the same whether or not A actually acquired any shares in response to its earlier tender offer.

§ 802.30 Repurchase of own voting securities.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition by a corporation of its own voting securities, including redemption and retirement of such voting securities, shall be exempt from the requirements of this section.

§ 802.31 Conversion of voting securities.

Pursuant to subsections (c) (12) and (d) (2) (B), the conversion of voting securities not presently entitled to vote into voting securities entitled to vote shall be exempt from the requirements of this section.

Example: Acquiring person A previously acquired convertible debentures of issuer B. If the debentures may be converted into securities presently entitled to vote without the payment of additional consideration, then the debentures are voting securities, see § 801.1(f), and their conversion would be exempt under this rule. If, however, A must pay additional consideration to convert these securities, then the debentures are not "voting securities," as defined, and their conversion is not exempt under this rule. The exercise of options or warrants is not exempt under this rule.

§ 802.32 Intra-enterprise transactions.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition (other than in connection with the formation of a joint venture) to which only entities included within the same person by reason of holdings of voting securities are party, or of voting securities of a new corporation which at the time of the acquisition will hold only assets or voting securities acquired from the acquir-

ing person, shall be exempt from the requirements of this section.

Examples: 1. Corporation A merges its two wholly-owned subsidiaries S1 and S2. The transaction is exempt under this rule.

2. Corporation B creates a new wholly-owned subsidiary which it furnishes with \$50 million of assets of B. The transaction is exempt under this rule.

3. Corporation A, which controls corporation B by a contract giving A the power to name a majority of B's directors, proposes to acquire a majority of B's voting securities. The transaction is not exempt under this rule.

§ 802.40 Exempt joint ventures.

Pursuant to subsections (c) (12) and (d) (2) (B), acquisitions in connection with the formation of a joint venture shall be exempt from the requirements of this section if the joint venture will be not for profit within the meaning of sections 501 (c) (1)–(4), (6)–(15), (17)–(20) or (d) of the Internal Revenue Code.

§ 802.41 Joint ventures at time of formation.

Pursuant to subsections (c) (12) and (d) (2) (B), whenever any person(s) contributing to the formation of a joint venture are subject to the requirements of this section by reason of the formation of the joint venture, the joint venture need not file the notification required by this section and § 803.1 with respect to the acquisition of its voting securities by any such persons or its acquisition of assets or voting securities from any of them, in the transaction forming the joint venture.

Examples: 1. Corporations A and B, each having sales in commerce of \$100 million, each propose to contribute \$10 million in cash in exchange for 50 percent of the voting securities of a joint venture, V, which will also engage in commerce. V need not file notification under this section, although both A and B must do so prior to receiving any voting securities of V.

2. In addition to the facts in example #1 above, A and B have agreed that upon creation, V will purchase 100 percent of the voting securities of corporation C for \$15 million. Because C is not a contributor to the formation of V, V must file with respect to the proposed acquisition of C and must observe the waiting period. Note that C would be required to comply with this section and these rules in any event.

§ 802.50 Acquisitions of foreign assets or of voting securities of a foreign issuer.

(a) **Assets.** Pursuant to subsections (c) (12) and (d) (2) (B), in a transaction in which assets located outside the United States are being acquired:

(1) The acquisition of assets located outside the United States, to which no sales in or into the United States are attributable, shall be exempt from the requirements of this section; and

(2) The acquisition of assets located outside the United States, to which sales in or into the United States are attributable, shall be exempt from the requirements of this section unless as a result of the acquisition the acquiring person would hold assets of the acquired person

to which such sales aggregating \$10 million or more in the most recent calendar or fiscal year were attributable.

Examples: 1. A and B are both United States corporations, and the requirements of subsection (a) are satisfied. A proposes selling to B a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled \$8 million in the most recent calendar or fiscal year. The transaction is exempt under this paragraph.

2. Sixty days after the transaction in example #1, A proposes to sell B a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled \$5 million in the most recent calendar or fiscal year. Since B would be acquiring the second plant within 180 days of the first plant, both plants considered assets of A now held by B. See § 801.13(b) (2) (C). Since the total sales in or into the United States of \$13 million exceeds \$10 million, the acquisition of the second plant would not be exempt under this paragraph.

(b) *Voting securities.* Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition of voting securities of an issuer domiciled outside the United States shall be exempt from the requirements of this section unless the issuer (including all entities controlled by the issuer) either:

(1) Holds assets located in the United States (other than assets held solely for investment purposes) having an aggregate book value of \$10 million or more; or

(2) Made aggregate sales in or into the United States of \$10 million or more in the most recent calendar or fiscal year.

Example: A, a United States corporation, acquires the voting securities of C, a foreign corporation, and the criteria of subsection (a) are satisfied. C has no assets in the United States, but made aggregate sales into the United States of \$12 million in the most recent calendar year. The transaction is not exempt under this rule.

§ 802.51 Acquisitions involving only foreign persons.

(a) Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition by a person not domiciled in the United States from another person also not domiciled in the United States shall be exempt from the requirements of this section unless:

(1) The aggregate annual sales of the acquiring and acquired persons in or into the United States or the aggregate total assets of the acquiring and acquired persons located in the United States (other than assets held solely for investment purposes) exceed \$1.0 million; and

(2) Either \$10 million or more of assets located in the United States (other than assets held solely for investment purposes) or \$10 million or more of voting securities of an issuer domiciled in the United States (other than voting securities held solely for investment purposes) will be acquired directly or indirectly.

(b) For purposes of this rule, the domicile of a person shall be the domicile of the pre-acquisition ultimate parent entity. If under these rules more than one entity controls a person, this rule

shall not apply unless each such controlling entity is domiciled outside the United States.

Examples: 1. A and B are both corporations domiciled in a foreign country. A's aggregate annual sales into the United States are \$80 million, B's aggregate annual sales into the United States are \$50 million. If A acquires B, and no assets in the United States or voting securities of an issuer domiciled in the United States will be acquired, the transaction is exempt under this rule.

2. In example 1, assume that B has a subsidiary C domiciled in the United States, and that voting securities of C (held by B) are valued at \$12 million. The transaction is not exempt under this rule.

§ 802.52 Acquisitions by or from foreign governmental corporations.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition shall be exempt from the requirements of this section if:

(a) Either the acquiring person or the acquired person is a corporation more than half the voting securities of which are held by a foreign state, foreign government, or agency thereof, and

(b) The acquisition is solely of assets located within that foreign state or of voting securities of an issuer domiciled in that state.

Examples: 1. 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 United States corporation, and the criteria of subsection (a) are satisfied. Regardless of the aggregate annual sales in or into the United States attributable to the assets of B, the transaction is exempt under this rule. (If such aggregate annual sales were less than \$10 million, the transaction would also be exempt under § 802.50.)

2. In example No. 1, the assets of corporation B are located in part in foreign country Y. The transaction is not exempt under this rule.

§ 802.60 Acquisitions by agents.

An acquisition by an agent on behalf of and at the specific direction of another person shall be deemed an acquisition by such other person. Pursuant to subsections (c) (12), (d) (2) (B) and (d) (2) (C), such agent shall be exempt from the requirements of this section as to such acquisition. Nothing in this paragraph shall exempt the person on whose behalf the acquisition is made from any requirement under this section, with respect to any acquisition attributed to such person by this section and this rule. For purposes of this rule the term "agent" shall be deemed to include brokers and dealers in securities, trustees, and fiduciaries.

Example: Broker B purchases \$15 million of the voting securities of X for the account of C at C's specific direction. The acquisition is to be held in "street name" by B. If C and X otherwise satisfy the criteria of subsection (a), notification must be filed by C and X, but not by B.

§ 802.61 Acquisitions in escrow.

Pursuant to subsections (c) (12) and (d) (2) (B):

(a) An acquisition in escrow by an escrow agent pursuant to a written escrow

agreement shall be exempt from the requirements of this section. Except as provided in paragraph (b) of this section, nothing in this rule shall exempt any acquisition from an escrow agent from any requirements under this section.

(b) If, pursuant to a written escrow agreement, the same voting securities or assets revert from the escrow agent to the original holder, such acquisition shall be exempt from the requirements of this section.

Example: In the example to § 802.60, broker B may acquire the voting securities of X in the capacity of an escrow agent, pursuant to a written escrow agreement. The voting securities of X may be transferred to the benefit of C (whether in C's name or B's "street name") upon notification by C and X and expiration of the waiting period.

§ 802.62 Acquisitions by underwriters.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition of voting securities by a person acting as an underwriter, in the normal course of business and solely for investment purposes, for its own account and in the process of underwriting, shall be exempt from the requirements of this section.

§ 802.63 Certain acquisitions by creditors and insurers.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition shall be exempt from the requirements of this section if made:

(a) By a creditor in a bona fide credit transaction entered into in the ordinary course of the creditor's business, of collateral, or in foreclosure, or upon default; or

(b) By an insurer in the ordinary course of business, pursuant to a suretyship contract or in the exercise of a right of subrogation.

Examples: 1. A bank makes a loan and acquires collateral in any form. The bank's receipt or holding of collateral is not subject to the requirements of this section. If upon default on the loan, the bank takes legal title to the collateral, the transaction is also exempt.

2. The rule exempts only the acquisition by the creditor or insurer, and not the subsequent disposition of the assets or voting securities. If a creditor or insurer sells voting securities that have come into its possession through foreclosure or subrogation, the requirements of this section may apply. Assuming that all other criteria of this section are met, the acquiring person and issuer of the voting securities must file notification prior to the transaction. The creditor or insurer, however, would not be required to file notification. See § 801.30.

§ 802.64 Acquisitions of voting securities by certain institutional investors and others.

(a) *Institutional investor.* For purposes of this rule, the term "institutional investor" shall include any bank, banking association, savings and loan company or association, trust company, insurance company, mutual fund, investment company registered with the United States Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), finance company, broker or dealer in se-

curities, trust (including a pension or benefit plan qualified under section 401 (a) of the Internal Revenue Code), foundation, or non-profit entity within the meaning of sections 501(c), (1)-(4), (6)-(15), (17)-(20) or (d) of the Internal Revenue Code.

(b) *Exemption.* Pursuant to subsections (c) (12), (d) (2) (B) and (d) (2) (C), an acquisition of voting securities shall be exempt from the requirements of this section, except as provided in paragraph (c) of this section, if:

(1) Made by an institutional investor;

(2) Made in the ordinary course of business;

(3) Made solely for investment purposes;

(4) As a result of the acquisition the acquiring person would not control the issuer; and

(5) As a result of the acquisition the acquiring person would hold either:

(i) Less than 15 percent of the outstanding voting securities of the issuer; or

(ii) Voting securities of the issuer valued at less than \$25 million.

(c) *Exception to exemption.* Notwithstanding paragraph (b) of this section:

(1) No acquisition or indirect acquisition of voting securities of an institutional investor shall be exempt under this rule; and

(2) No acquisition by an institutional investor which is controlled directly or indirectly by an entity other than an institutional investor shall be exempt under this rule.

Examples: 1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this rule, that X is not, and that the conditions set forth in subparagraphs (2), (3) and (4) of paragraph (b) of this rule are satisfied. Either A or B may acquire voting securities of X worth in excess of \$25 million as long as the amount held as a result of the acquisition does not equal or exceed 15 percent of X's outstanding voting securities. If the holdings would exceed 15 percent, B may acquire no more than \$25 million worth without being subject to the requirements of this section.

2. In example No. 1, assume that B plans to make the acquisition, and that corporation B's parent, corporation A, is not an institutional investor. Acquisitions by B can never be exempt under this rule. The exemption does not apply to acquisitions by institutional investors controlled by entities which are not themselves institutional investors.

3. In example No. 1, assume that A is an institutional investor and that B plans to make the acquisition. Corporation B must also be an institutional investor in order for the exemption to apply. The fact that B is controlled by an institutional investor is insufficient. The acquiring entity must satisfy the conditions set forth in paragraph (b)(1).

4. In example No. 1, the exemption does not apply if X is also an institutional investor.

§ 802.64a Acquisitions of voting securities by certain institutional investors and others—Alternate Rule.

(a) *Institutional investor.* For purposes of this rule, the term "institutional investor" shall include any bank, banking association, savings and loan company or association, trust company, in-

surance company, mutual fund, investment company registered with the United States Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), finance company, broker or dealer in securities, trust (including a pension or benefit plan qualified under section 401(a) of the Internal Revenue Code), foundation, or non-profit entity within the meaning of sections 501(c) (1)-(4), (6)-(15), (17)-(20) or (d) of the Internal Revenue Code.

(b) *Exemption.* Pursuant to subsections (c) (12), (d) (2) (B) and (d) (2) (C), an acquisition of voting securities shall be exempt from the requirements of this section, except as provided in paragraph (c) of this rule, if:

(1) Made by an institutional investor;

(2) Made in the ordinary course of business;

(3) Made solely for investment purposes;

(4) As a result of the acquisition the acquiring person would not control the issuer; and

(5) The acquiring person files with the Federal Trade Commission and Assistant Attorney General, within sixty days after the end of its fiscal year, a report containing the following information:

(i) The ending date of the fiscal year covered by the report;

(ii) The identity of the issuer and class of voting security for which exemption is claimed;

(iii) The aggregate total number of each such class of voting security (a) held at the beginning of the fiscal year; (b) acquired during the fiscal year; (c) disposed of during the fiscal year; and (d) held at the end of the fiscal year;

(iv) A statement that all such voting securities, whenever held during the fiscal year, were held solely for investment purposes; and

(v) A certification in the same form as that appearing in the Notification and Report Form, completed in accordance with § 803.5.

(c) *Exception to exemption.* Notwithstanding paragraph (b) of this section:

(1) No acquisition or indirect acquisition of voting securities of an institutional investor shall be exempt under this rule; and

(2) No acquisition by an institutional investor which is controlled directly or indirectly by an entity other than an institutional investor shall be exempt under this rule.

Example: In example #1 to § 802.64, the acquisition would be exempt regardless of the amount of voting securities acquired (short of control), so long as the annual report required by subparagraph (b) (5) is filed. Examples #2, #3, and #4 to § 802.64 remain applicable.

§ 802.70 Acquisition subject to order.

Pursuant to subsections (c) (12) and (d) (2) (B), an acquisition shall be exempt from the requirements of this section if:

(a) The voting securities or assets are to be acquired from a person ordered to divest such voting securities or assets by order of the Federal Trade Commission or of any federal court in an action

brought by the Federal Trade Commission or the Department of Justice; or

(b) The acquiring person is subject to an order of the Federal Trade Commission or of any federal court requiring prior approval of such acquisition by the Federal Trade Commission, such court, or the Department of Justice, and such approval has been obtained.

§ 802.71 Acquisitions by gift, succession, or devise.

Pursuant to subsections (c) (12) and (d) (2) (B), acquisitions resulting from gifts, intestate succession, or testamentary devise shall be exempt from the requirements of this section.

PART 803—TRANSMITTAL RULES

Sec.	
803.1	Notification and Report Form.
803.2	Instructions applicable to Notification and Report Form.
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§ 803.1 Notification and Report Form.

(a) *All acquisitions.* Except as provided in paragraphs (b) and (c) of this section, the notification required by this section shall be the Notification and Report Form promulgated by the Federal Trade Commission, as amended from time to time. All persons required to file notification by this section and these rules shall do so by completing and filing the Notification and Report Form, or a photostatic or other equivalent reproduction thereof, in accordance with the instructions thereon and these rules. Copies of the Notification and Report Form may be obtained by hand from the Public Reference Branch, Room 130, Federal Trade Commission, Sixth Street and Pennsylvania Avenue NW., Washington, D.C., or by writing to the Pre-merger Notification Office, Room 301, Federal Trade Commission, Washington, D.C. 20580.

(b) *Certain grocery acquisitions.* Persons required to file the notification required by this section who are to acquire voting securities or assets of a person engaged in whole or in part in wholesale or retail grocery distribution (SIC Groups 514 and 541, respectively) shall, in addition to the notification required by paragraph (a) of this section, simultaneously file FTC Forms 1859 A and B, completed in accordance with the instructions thereon. The requirement of this paragraph shall not constitute a request for additional information within the meaning of subsection (e) and § 803.20.

(c) *Certain milk products acquisitions.* Persons required to file the notification required by this section who are to acquire voting securities or assets of a person engaged in whole or in part in the processing or distribution of Class I milk products (SIC product classes 20262 and

20264) shall, in addition to the notification required by paragraph (a) of this section, simultaneously file FTC Special Report on Acquisitions and Mergers by Corporations in the Fluid Milk Products Industry, completed in accordance with the instructions thereon. The requirement of this paragraph shall not constitute a request for additional information within the meaning of subsection (e) and § 803.20.

§ 803.2 Instructions applicable to Notification and Report Form.

(a) The notification required by this section shall be filed by the pre-acquisition ultimate parent entity, or by any entity included within such person authorized by such pre-acquisition ultimate parent entity to file notification on its behalf. If under these rules more than one entity controls a person, all such entities must file notification. In the case of a natural person required by this section to file notification, such notification shall be filed by such natural person, or by his or her guardian or conservator: *Provided, however,* That notification with respect to an acquisition of voting securities in trust for one or more natural persons shall be filed either by such natural persons or by the trustee(s) for such natural persons.

(b) Except as provided in paragraph (c) of this section, items 5-7 and the Appendix to the Notification and Report Form must be completed—

(1) By acquiring persons, with respect to all entities included within the acquiring person;

(2) By acquired persons, in the case of an acquisition of assets, only with respect to the assets to be acquired;

(3) By acquired persons, in the case of an acquisition of voting securities, only with respect to the issuer whose voting securities are being acquired, and all entities controlled by such issuer;

(4) By persons who are both acquiring and acquired persons, separately in the manner that would be required of acquiring and acquired persons under this paragraph, if different.

(c) In response to items 5-7 and the Appendix to the Notification and Report Form—

(1) Information shall be supplied only with respect to operations conducted within the United States; and

(2) Information need not be supplied with respect to assets or voting securities to be acquired, the acquisition, of which is exempt from the requirements of this section under this section or these rules.

(d) The term "dollar revenues," as used in the Notification and Report Form, means value of shipments for manufacturing operations, and sales, receipts, revenues, or other appropriate dollar value measure for operations other than manufacturing, f.o.b. the plant or establishment less returns, after discounts and allowances and excluding freight charges and excise taxes. Dollar revenues including delivery may be supplied if delivery is an integral part of the sales price. Dollar revenues include interplant transfers.

§ 803.3 Statement of reasons for non-compliance.

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to subsection (e) and § 803.20. Whenever a complete response cannot be supplied, the person filing notification shall provide for each item for which less than a complete response has been supplied a statement of reasons for noncompliance which includes at least the following information:

(a) Why a complete response could not be given;

(b) What information would have been required for a complete response;

(c) Who, if anyone, has the required information.

§ 803.4 Affidavits required.

(a) *Tender offers and other acquisitions of voting securities from third parties.* (1) The notification required by this section from the acquiring person(s) shall contain an affidavit, attached to the front of the notification, attesting that the issuer whose voting securities are sought to be acquired has been or is being contemporaneously served, in writing by any means permitted under rule 4(d) of the Federal Rules of Civil Procedure, at its principal executive offices, with a written statement containing the following information:

(i) The identity of the acquiring person;

(ii) The fact that the acquiring person intends to acquire voting securities of the issuer;

(iii) The specific classes of voting and nonvoting securities of the issuer, and the number of such securities of each class sought to be acquired;

(iv) The fact that the acquisition may be subject to this section, and that the acquiring person will file notification under this section with the Federal Trade Commission and Assistant Attorney General;

(v) The anticipated date of receipt of such notification under § 803.10(a) (1) of these rules; and

(vi) The fact that the issuer may be required to file notification under this section.

(2) In the case of a tender offer the affidavit required by this paragraph must also state the good faith intention of the person filing notification to make the acquisition, and that the intention to make the tender offer has been publicly announced.

(b) *Other acquisitions, mergers or consolidations, and joint ventures.* The notification required by this section shall contain an affidavit, attached to the front of the notification, attesting that a contract or an agreement in principle to merge or acquire has been executed.

Examples: 1. Subparagraph (a) (2) of this rule permits the tender offeror to file notification at any time after the intention to make the tender offer has been publicly announced.

2. In the example to § 801.20, corporation A signs a contract to make the same sequence of acquisitions. Although A need

only file notification with respect to the fourth acquisition, it may do so at any time after executing its contract.

§ 803.5 Certification.

(a) The notification required by this section shall be certified:

(1) In the case of a partnership, by any general partner thereof;

(2) In the case of a corporation, by any officer or director thereof;

(3) In the case of persons lacking officers, directors, or partners, by any individual exercising similar functions;

(4) In the case of a natural person, or trustee(s) for natural persons pursuant to § 803.2(a), by such natural person or trustee(s).

(b) In all cases, the certifying individual must possess actual authority to make the certification on behalf of the person filing notification.

§ 803.10 Running of time.

(a) *Beginning of waiting period.* (1) The waiting period required by this section shall begin on the date of receipt by both designated offices (Premerger Notification Office, Room 301, Federal Trade Commission, Washington, D.C. 20580, and Director of Operations, Antitrust Division, Department of Justice, Washington, D.C. 20530) of the notification required by this section, in the manner provided by these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such non-compliance in accordance with § 803.3) from:

(i) In the case of acquisitions from third parties, other than mergers or consolidations, but including tender offers, the acquiring person;

(ii) In the case of all other acquisitions, all persons required by this section and these rules to file notification.

The date of receipt shall be the date on which delivery is effected to the designated offices during normal business hours. Delivery effected after 3 p.m. eastern time on a regular business day, or at any time on any day other than a regular business day, shall be deemed effected on the next following regular business day. If delivery of all required notifications to the two offices is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected. Delivery should be effected directly to the designated offices, either by hand or by certified or registered mail.

(2) Any additional waiting period, pursuant to subsection (e) and § 803.20(c) (2), shall begin on the date of receipt of the additional information or documentary material requested (or, if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in subparagraph (1) of this paragraph. The

date of receipt shall be the date on which delivery is effected to the designated office during normal business hours. Delivery effected after normal business hours, or at any time on any day other than a regular business day, shall be deemed effected on the next following regular business day. Delivery should be effected directly to the designated office, either by hand or by certified or registered mail.

(b) *Expiration of waiting period.* (1) For purposes of subsection (b) (1) (B), the waiting period shall expire at 5 p.m. eastern time on the thirtieth (or in the case of a cash tender offer, the fifteenth) calendar day after the date of receipt as defined in this rule, unless extended pursuant to subsection (e) and § 803.20, or subsection (g) (2), or unless terminated pursuant to subsection (b) (2) and § 803.11.

(2) Any additional waiting period, pursuant to subsection (e) (2) and § 803.20, shall expire at 5 p.m. eastern time on the date to which extended pursuant to § 803.20(c), unless further extended pursuant to subsection (g) (2), or terminated pursuant to §§ 803.20(c) (4) and 803.11.

§ 803.11 Termination of waiting period.

(a) The waiting period required by this section, and any extension thereof pursuant to subsection (e) and § 803.20, shall not be terminated before its expiration date pursuant to subsection (b) (2) or § 803.20(c) (4), unless at least one person required to file notification under this section submits the following documents to both designated offices listed in § 803.10(a), or, in the case of an extension of the waiting period pursuant to subsection (e) and § 803.20, only to the designated office of the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material:

(1) A written request for termination of the waiting period, signed by an individual authorized to do so by the requesting person; and

(2) An affidavit, attesting that copies of the request have been or are being contemporaneously served, by any means permitted under rule 4(d) of the Federal Rules of Civil Procedure or by registered or certified mail, upon all other persons required to file notification under this section, including, in the case of acquisitions from third parties (including tender offers), the issuer whose voting securities are sought to be acquired, and in addition, in the case of joint ventures, all other acquiring persons, whether or not filing notification. The request shall be served upon such persons at their principal executive offices, and the affidavit shall list all such persons and the address at which each was served.

A request for termination of the waiting period and its accompanying affidavit may be filed with the notification or at any time during the waiting period.

(b) In any case in which the Federal Trade Commission and Assistant Attorney General authorize the termination of the waiting period before its expiration date, the Federal Trade Commission and Assistant Attorney General, or their designee, shall:

(1) As promptly as possible so notify by telephone each individual identified pursuant to § 803.20(b) (2) (B);

(2) Confirm in writing notice of such termination to each person listed in the affidavit required by paragraph (a) (2) of this section, at the address listed in the affidavit; and

(3) Publish a notice in the FEDERAL REGISTER in accordance with subsection (b) (2).

The termination of the waiting period shall be effective as to each acquiring person upon communication by telephone pursuant to subparagraph (1) of this paragraph.

§ 803.20 Requests for additional information or documentary material.

(a) *Persons subject to request.* Pursuant to subsection (e) (1), the submission of additional information or documentary material relevant to the acquisition may be required from any person filing notification, or from any officer, director, partner, agent, or employee thereof, or from more than one of the foregoing if so required by the same request.

Example: A request for additional information may require a corporation and, in addition, a named officer or employee to provide certain information or documents, if both the corporation and the officer or employee are named in the same request.

(b) *When request effective—(1) Who may require submission.* A person filing notification, or an officer, director, partner, agent, or employee thereof, may be required to submit additional information or documentary material with respect to an acquisition by the Federal Trade Commission or its designee, or by the Assistant Attorney General or his or her designee, but not by both.

Example: If the Federal Trade Commission issues a request for additional information or documentary material to a person, the Assistant Attorney General may not thereafter issue another such request with respect to the same acquisition to that person, or to any officer, director, partner, agent, or employee of that person.

(2) *When request effective: Person.* A request that a person (other than a natural person) submit additional information or documentary material shall be effective—

(i) Upon receipt of a written request, by the person to which the request is directed, within the original thirty-day (or, in the case of cash tender offers, fifteen-day) waiting period; or

(ii) When communicated in person, or by telephone and a written request is mailed, within the original thirty-day (or, in the case of cash tender offers, fifteen-day) waiting period. The person filing notification shall keep a delegated individual reasonably available during normal working hours throughout the

waiting period through the telephone number supplied on the certification page of the Notification and Report Form. A request for additional information or documentary material need be communicated only to that individual.

(3) *When request effective: Individual.*

A request that an individual submit additional information or documentary material shall be effective upon receipt of a written request within the original thirty-day (or, in the case of cash tender offers, fifteen-day) waiting period. The request shall be served upon the individual by any means permitted under rule 4(d) of the Federal Rules of Civil Procedure, or by registered or certified mail at his or her home or business address.

(c) *Waiting period extended.* (1) During the time period when a request for additional information or documentary material remains outstanding to any person other than, in the case of a tender offer, the person whose voting securities are sought to be acquired (or any officer, director, partner, agent, or employee thereof), the waiting period shall remain in effect, even though the original thirty days (or, in the case of a cash tender offer, fifteen days) or more may have elapsed from the date of receipt of the original notification.

(2) Pursuant to subsection (e) (2), a request for additional information or documentary material to any person other than, in the case of a tender offer, the person whose voting securities are being acquired (or any officer, director, partner, agent, or employee thereof) shall in every instance extend the waiting period for an additional period of twenty (or, in the case of cash tender offers, ten) calendar days from the beginning of such additional waiting period pursuant to § 803.10(a) (2).

Example: Assume that a request for additional information is issued to a person (in a transaction other than a tender offer) on the twentieth day of the waiting period, and that that person supplies the response to the request fifteen days later. The waiting period remains in effect from the thirty-first to the thirty-fifth day, and is extended twenty days beyond the thirty-fifth day.

(3) If more than one request for additional information or documentary material has been issued with respect to an acquisition, the waiting period shall not expire until the latest date to which it is extended under subparagraph (2) of this paragraph.

Example: In the example to subparagraph (c) (2), if a request for additional information had also been issued to another person filing notification, and if that person did not supply the additional information until the thirty-eighth day, then the waiting period would be extended for twenty days beyond the thirty-eighth day.

(4) Pursuant to subsection (d) (2) (C), any extension of the waiting period pursuant to this paragraph may be terminated by the Federal Trade Commission or Assistant Attorney General, whichever required the submission of additional information or documentary material, or by the designee of whichever required the submission, in the manner prescribed by § 803.11.

(d) *Request for clarification.* No request for clarification or amplification of any response to any item on the Notification and Report Form, whether communicated in writing, in person, or by telephone, shall be considered a request for additional information or documentary material within the meaning of subsection (e), unless specifically so identified and transmitted in accordance with this rule.

§ 803.30 Formal interpretations of requirements under this section.

Formal interpretations as to the obligations under this section of, or application of these rules to, any party to or participant in an acquisition, or to the acquisition itself, may be obtained upon application to the Federal Trade Commission. The application shall be made by submission to the offices designated in § 803.10(a), and shall state the

reasons why the requirements of this section are or may be applicable and state the question or questions that the applicant wishes resolved. The Federal Trade Commission, with the concurrence of the Assistant Attorney General, may inform the applicant of its views as to the questions raised and publish a summary thereof in the FEDERAL REGISTER, or may decline to render a formal interpretation.

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM
FOR CERTAIN MERGERS AND ACQUISITIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person who, by reason of a proposed merger, consolidation or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18A, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, P.L. 94-435, and rules promulgated thereunder (hereinafter referred to as "the rules"). The statute and rules are set forth in the Federal Register at page _____; the rules may also be found at 16 C.F.R. Parts 801-03. Failure to file this Notification and Report Form, and to observe the required waiting period before consummating the transaction, in accordance with the applicable provisions of 15 U.S.C. § 18A and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than \$10,000 for each day during which such person is in violation of 15 U.S.C. § 18A.

All information and documentary material filed in or with this form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

Complete and return two notarized copies (with one set of documentary attachments) of this Notification and Report Form to Premerger Notification Office, Bureau of Competition, Room 301, Federal Trade Commission, Washington, D.C. 20580, and three notarized copies (with one set of documentary attachments) to Director of Operations, Antitrust Division, Department of Justice, Washington, D.C. 20530. The central office for information and assistance with respect to matters in connection with this Notification and Report Form is Room 301, Federal Trade Commission, Washington, D.C. 20580, phone (202) 523-3894.

AFFIDAVIT

Be sure that the affidavit required by § 803.4 of the rules is attached to this page.

CASH TENDER OFFERS

If this transaction is a cash tender offer, check:

DEFINITIONS

The definitions and other provisions governing this Form are set forth in the rules, 16 C.F.R. Parts 801-03.

Notification and Report Form Continued

NAME AND DATE

Enter the name of the pre-acquisition ultimate parent entity of the person filing notification and the date on which this Notification and Report Form is being completed:

Name _____ Date _____

In addition, enter the above name and date at the top of each page of this Form, at the top of any additional sheets attached to complete the response to any item, and at the top of the first or cover page of each documentary attachment.

If this Form is being filed on behalf of the above entity by another entity authorized by it to file notification on its behalf pursuant to § 803.2(a) of the rules, give the name of the entity preparing and filing this form.

Name _____

Notification and Report Form Continued

INSTRUCTIONS

Each answer should identify the item to which it is addressed. Attach separate additional sheets as necessary in answering each item; each additional sheet should identify the item to which it is addressed. If unable to answer any item fully, give such information as is available and explain why the answer is incomplete, as provided by § 303.3 of the rules. If books and records which provide accurate answers are not available, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All financial information should be rounded to the nearest thousand dollars.

All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels. All persons must submit certain data at the 4-digit (SIC code) industry level (establishment basis). To the extent that dollar revenues are derived from manufacturing operations (SIC major groups 20-39), data must also be submitted at the 5-digit product class and 7-digit product levels (SIC-based codes). In reporting by "4-digit (SIC code) industry (establishment basis)" you should refer to the 1972 edition of the Standard Industrial Classification Manual published by the Executive Office of the President, Office of Management and Budget. In reporting information by "5-digit (SIC-based code) product class," and by "7-digit (SIC-based code) product," you should refer to one or both of the following reference publications published by the U.S. Bureau of the Census: (a) Numerical List of Manufactured Products, 1972 Census of Manufactures (MC72-1.2) (New 1972 SIC basis); (b) Volume II, "Industry Statistics," 1972 Census of Manufactures. In reporting information by "5-digit (SIC-based code) product class" you may also refer to the code appearing in the "Product Class Reference List" shown in the Instruction Manual for the Annual Survey of Manufactures. In reporting information by "7-digit (SIC-based code) product" you may also refer to the applicable "Product Reference Lists" appearing in the Instruction Manual of the various Current Industrial Reports surveys (monthly, quarterly, or annual) conducted by the U.S. Bureau of the Census. For product codes ending in 00, submit information by product as listed in Appendix A to the Numerical List of Manufactured Products cited above.

In responding to items 5-7 and the Appendix --

- supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. See §§ 801.1(k), 803.2(c) of the rules;
- information need not be supplied with respect to assets or voting securities currently being acquired, the acquisition of which is exempt under the statute or rules. See § 803.2(c) of the rules;
- limited or separate responses may be required of a person filing notification. See § 803.2(b) of the rules.

Notification and Report Form Continued

Name _____ Date _____

1.(a) Check whether the transaction is (check all boxes that apply to the person filing notification):

- an acquisition of assets
- an acquisition of voting securities
- a merger or consolidation (see § 801.2(d) of the rules)
- a tender offer or acquisition from third parties (see § 801.30 of the rules)
- formation of a joint venture (see § 801.40 of the rules)
- other (specify)

(b) Check whether the person filing notification is:

- acquiring person
- acquired person
- both an acquiring and an acquired person (see § 801.2 of the rules)

(c) Name of ultimate parent entity of person filing notification: _____
Address of headquarters office: _____

(d) Check whether entity in item 1(c) is a:

corporation partnership other (specify)

If Corporation: State of incorporation _____

Date of incorporation _____

If partnership or other: Jurisdiction under which formed: _____

Date of formation: _____

Notification and Report Form Continued

Name _____ Date _____

-
- (e) Check whether data furnished by: calendar year fiscal year
If fiscal year, specify period: from _____ (month/day) to _____ (month/day).
- (f) If the person filing notification is an acquiring person, and if the entity making the the acquisition is different from the entity listed in item 1(c) above, provide the information requested below with respect to the entity making the acquisition.
If the person filing notification is an acquired person, and if the entity whose assets or voting securities are being acquired is different from the entity listed in item 1(c) above, provide the information requested below with respect to the entity whose assets or voting securities are being acquired.
- (i) Name and mailing address of its headquarters office;
 - (ii) If a corporation, the date and date of incorporation;
 - (iii) The percentage of its voting securities held by the entity named in item 1(c) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected; see § 801.1(b) of the rules.)
- (g) If the person filing notification is an acquiring person, supply the following information for each of its affiliates (as defined in § 801.1(d) of the rules) which presently holds assets or voting securities of the acquired person (see § 801.13 of the rules), or which, to the knowledge and belief of the person filing notification, derived dollar revenues of \$1 million or more in the most recent calendar or fiscal year in any 4-digit (SIC code) industry in which the acquired person also derived dollar revenues of \$1 million or more in the most recent year:
- (i) name of affiliate;
 - (ii) mailing address of headquarters office;
 - (iii) if a corporation, state and date of incorporation;
 - (iv) if the affiliate holds voting securities of the ultimate parent entity of the person filing notification, the aggregate percentage held;
 - (v) if the person filing notification holds voting securities of the ultimate parent entity of the affiliate, the aggregate percentage held;
 - (vi) supply the 4-digit code and description for each industry in which the affiliate and the acquired person each derived dollar revenues of \$1 million or more in the most recent year.

Notification and Report Form Continued

Name _____

Date _____

-
- 2(a) Description of transaction. List the name and mailing address of each person which is party to the transaction, whether or not required to file notification, and briefly describe the voting securities or assets to be acquired by, and/or the consideration to be received by, each. If voting securities are to be acquired from a holder other than the issuer (or an entity included within the same person as the issuer, or any agent or broker for the issuer or any such entity), separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons in tender offer transactions should describe the terms of the tender offer.
- 2(b) State the scheduled consummation date of the transaction.
- 2(c) Describe the manner in which the transaction is to be carried out. The description should include the expected dates of any major events required in order to consummate the transaction, such as stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers, etc.
- 2(d)(i) Description of assets to be held. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction, with approximate dollar value thereof, including, if the transaction is the formation of a joint venture, assets to be acquired by the joint venture. Examples of general classes of assets other than cash and securities are land, merchandise inventory, manufacturing inventory, manufacturing plants (specify location and products produced), retail stores, etc. For each general class of assets, indicate the page and/or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.
- 2(d)(ii) Description of assets held by acquiring person or affiliates. If the person filing notification is an acquiring person, and if assets of the acquired person (see § 801.13 of the rules) are presently held by the person filing notification or by affiliates of the person filing notification, (see § 801.1(d) of the rules), furnish a description of each general class of assets in the manner requested by item 2(d)(i), the name of the affiliate if held by an affiliate, and the dollar value at the time they were acquired.

Notification and Report Form Continued

Name _____

Date _____

-
- 2(e)(i) Description of voting securities to be acquired. Furnish the following information separately for each issuer whose voting securities will be acquired in the transaction:
- A. List each class of voting security which will be outstanding after the transaction has been completed; also list each class of non-voting security which will be acquired in the transaction; 1/
 - B. Total number of each class of security listed under part (A) above which will be outstanding after the transaction has been completed;
 - C. Total number of each class of security listed under part (A) above which will be acquired in this transaction; 2/
 - D. Identity of each person acquiring any securities of any class listed under part (A) above; 2/
 - E. Dollar value of securities of each class listed under part (A) above to be acquired in this transaction (see § 801.10 of the rules); 2/
 - F. Total number of each class of security listed under part (A) above which will be held by acquiring person(s) (excluding holdings of affiliates) after the transaction has been completed; 2/ and
 - G. Percentage of each class of security listed under part (F) above which will be held by acquiring person(s) after the transaction has been completed (see § 801.12(b) of the rules). 2/
- 2(e)(ii) Description of voting securities held by affiliates. If the person filing notification is an acquiring person, and if voting securities of the acquired person are presently held by affiliates (as defined by § 801.1(d) of the rules) of the person filing notification, for each such affiliate furnish the name of the affiliate, the class(es) of voting securities, the number and percentage of each class held, and the dollar value (see § 801.13(a) of the rules) of the holding.

-
- 1/ If there is more than one class of voting security, include a description of the voting rights of each class.
- 2/ If there is more than one acquiring person for any class of security, show data separately for each acquiring person.

Notification and Report Form Continued

Name _____ Date _____

-
- 2(f)(i) Contract. Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired.
- 2(f)(ii) Index to ancillary documents. Furnish an index containing a brief description sufficient to identify each ancillary document or class of documents related to this agreement, such as those relating to personnel matters (union contracts, employment agreements, etc.); third-party financing agreements; leases, subleases and other documents relating to the transfer of realty, etc.
- 3(a) Percentage holdings to be held by acquiring persons.
 State: (i) the percentage of the assets;
 (ii) the percentage of the voting securities; and
 (iii) the aggregate total dollar amount of voting securities and assets
 of the acquired person to be held by each acquiring person, excluding holdings of affiliates, as a result of the transaction. (See §§ 801.12, 801.15 of the rules.)
- 3(b) Percentage holdings held by affiliates. If the person filing notification is an acquiring person, state the aggregate:
 (i) percentage of assets;
 (ii) percentage of voting securities; and
 (iii) the aggregate total dollar amount of voting securities and assets
 of the acquired person presently held by all affiliates of the person filing notification. (See § 801.14 of the rules.)

Notification and Report Form Continued

Name _____

Date _____

4. Documents prepared by person filing notification. Furnish one copy of each of the following documents of the person filing notification. For each entity named in item 1(f) which has prepared its own such documents different from those furnished by the person filing notification, furnish in addition one copy of each document from each such other entity. Furnish copies of:

(a) all of the following filed (or to be filed in connection with this transaction) with the United States Securities and Exchange Commission within three years prior to the date of filing of this notification: all registration statements, the most recent proxy statement, most recent Form 10-K, all Forms 10-Q and 8-K filed since the date of the most recent Form 10-K, and, if the transaction is a tender offer, Form 13D (or Form 14D-1 if then in effect);

(b) the most recent annual reports and most recent annual audit reports of the person filing notification and of each unconsolidated entity included within such person;

(c) all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation and the name and title of the person who prepared each such document;

(d) a narrative description of the person's (and, if applicable, the entity's) planning process, and individuals responsible for planning, insofar as pertaining to possible entry into any type of products or geographic areas in which any other party to the transaction is known or likely to be engaged. Such narrative description should identify, and describe the role of, individuals, committees or other offices, and direct supervisors thereof by job titles, that are, or have been during the past three years, responsible for analysis of market shares, competition, competitors, markets, potential for sales growth or the expansion into such types of products or geographic areas. If the transaction is the formation of a joint venture, furnish the description only with respect to types of products and geographic areas in which the joint venture will engage.

PROPOSED RULES

39067

Notification and Report Form Continued

Name _____

Date _____

5(a)

Dollar revenues by industry. Provide the following information on the aggregate operations of the person filing notification for 1972 for each 4-digit (SIC code) industry in which the person engaged. Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit SIC major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; and holding and other investment offices (2-digit SIC major groups 61, 62, and 67) and real estate companies (2-digit SIC major group 65) should identify or explain the dollar revenues reported.

4-DIGIT (SIC CODE) INDUSTRY1972 TOTAL DOLLAR REVENUESINDUSTRY CODEDESCRIPTION

Notification and Report Form Continued

Name _____

Date _____

5(b)(i) Dollar revenues by manufactured product. Provide the following information on the aggregate operations of the person filing notification for 1972 for each 7-digit (SIC-based code) product of the person within 2-digit SIC major groups 20-39 (manufacturing industries):

7-DIGIT (SIC-BASED CODE) PRODUCT1972 TOTAL DOLLAR REVENUESPRODUCT CODEDESCRIPTION

5(b)(ii) Identify each type of product of the person filing notification within 2-digit SIC major groups 20-39 (manufacturing industries) added or deleted subsequent to 1972, indicate the year of deletion or addition, and give total dollar revenues for the most recent year for each product that has been added.

Notification and Report Form Continued

Name _____ Date _____

5(b)(iii) Dollar revenues by manufactured product class. Provide the following information on the aggregate operations of the person filing notification for the most recent year for each 5-digit (SIC-based) product class of the person within SIC major groups 20-39 (manufacturing industries). If such data have not been compiled for the most recent year, estimates of dollar revenues by 5-digit product class may be provided if a statement describing the method of estimation is furnished.

5-DIGIT (SIC-BASED) PRODUCT CLASS

TOTAL DOLLAR REVENUES (SPECIFY YEAR: _____)

PRODUCT CLASS CODE

DESCRIPTION

Notification and Report Form Continued

Name _____ Date _____

5(c) Dollar revenues by non-manufacturing industry. Provide the following information on the aggregate operations of the person filing notification for the most recent year for each 4-digit (SIC code) industry in SIC major groups other than 20-39 in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 4-digit industry may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within SIC major group 63, and, if voting securities of an insurance carrier are being acquired directly or indirectly (see § 801.4 of the rules), should complete the Appendix to this Form. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; and holding and other investment offices (2-digit SIC major group 61, 62, and 67) and real estate companies (2-digit SIC major group 65) should identify or explain the dollar revenues reported.

4-DIGIT (SIC CODE) INDUSTRY

TOTAL DOLLAR REVENUES (SPECIFY YEAR: _____)

INDUSTRY CODE DESCRIPTION

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PROPOSED RULES

39071

Notification and Report Form Continued

Name _____ Date _____

- 5(d) Holdings of institutional investors. For each institutional investor, as defined in § 802.64(a) of the rules, included within the person filing notification, provide the following information:
- (i) name and address of headquarters office;
 - (ii) principal business (i.e., bank, insurer, etc.);
 - (iii) percent of voting securities held by ultimate parent entity, or, if control is effected by means other than the direct holding of the institutional investor's voting securities, describe the intermediaries or the contract through which control is effected; and
 - (iv) for each issuer the voting securities of which are held by the institutional investor, list (A) the name of the issuer; (B) the class of voting security held; and (C) the number held. Holdings of voting securities should be listed as of the close of business on the last business day of the week prior to the filing of this notification. Holdings in issuers which the person filing notification controls, see § 801.1(b) of the rules, must be omitted; holdings of less than five percent of the outstanding voting securities of an issuer may be omitted.

Notification and Report Form Continued

Name _____ Date _____

5(e) Supply the following information only if the transaction is the formation of a joint venture.

- (i) List the name and mailing address of the joint venture, and specify whether the joint venture is to be a corporation, partnership, etc.
- (ii) (A) List the contributions that each joint venturer has agreed to make to the joint venture, specifying when each contribution is to be made and the value of the contribution as agreed by the joint venturers.
 - (B) Describe any contracts or agreements whereby the joint venture will obtain assets or capital from sources other than the joint venturers.
 - (C) Specify whether and in what amount the joint venturers have agreed to guarantee the credit or obligations of the joint venture.
 - (D) Describe fully the consideration which each joint venturer will receive from the joint venture in exchange for its contribution(s).
- (iii) Describe generally the business in which the joint venture will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business; its principal types of products or activities; and the geographic areas in which the joint venture will do business.
- (iv) Identify each 4-digit (SIC code) industry in which the joint venture will derive dollar revenues. If the joint venture will be engaged in manufacturing, also specify each 5-digit (SIC-based) product class in which the joint venture will derive dollar revenues.

Notification and Report Form Continued

Name _____

Date _____

6. If, to the knowledge or belief of the person filing notification, the person filing notification derived dollar revenues from operations in any 4-digit (SIC code) industries in which any other person party to the transaction also derived dollar revenues in the most recent year (or in which a joint venture will derive dollar revenues), for each such 4-digit (SIC code) industry:

- (a) supply the 4-digit code and description for the industry;
- (b) provide the address of each establishment from which dollar revenues were derived in the most recent year by the person filing notification (or from which a joint venture will derive dollar revenues); and
- (c) (i) for each 4-digit industry within SIC major groups 20-39 (manufacturing industries) listed in item 6(a) above, list the states or portions thereof in which the products produced in each of the establishments listed in item 6(b) above are sold in substantially the same form, whether by the person filing notification or by others to whom such products have been sold or resold;
- (ii) for each 4-digit industry within SIC major groups 01-17 and 40-49 (agriculture, forestry and fishing; mining; construction; transportation, communications, electric, gas and sanitary services) listed in item 6(a) above, list the states or portions thereof in which the person filing notification conducts such operations;
- (iii) for each 4-digit industry within SIC major groups 50-51 (wholesale trade) listed in item 6(a) above, list the states or portions thereof in which the customers of each establishment listed in item 6(b) above are located; and
- (iv) for each 4-digit industry within SIC major group 63 (insurance) listed in item 6(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

Notification and Report Form Continued

Name _____

Date _____

- 7: Did the acquired person and the acquiring person maintain a vendor-vendee relationship during the most recent year with respect to any manufactured product (or, if the transaction is the formation of a joint venture, will the joint venture supply to any of the joint venturers any manufactured product which such joint venturer purchased from another joint venturer during the most recent year) which the vendee either resells or consumes in or incorporates into the manufacture of any product? If so, persons filing notification which are vendees of such product(s) should list each product purchased, identify the vendor from which it was purchased, and state the dollar amount of each such product purchased from that vendor during the most recent year.

Manufactured products are those within 2-digit SIC major groups 20-39. Any product purchased from the vendor in an aggregate annual amount not exceeding \$1 million, or the manufacture of which is not attributable to the assets to be acquired, or to the issuer whose voting securities are to be acquired (including entities controlled by the issuer), may be omitted.

Notification and Report Form Continued

Name _____ Date _____

8. If the person filing notification is an acquiring person, list all domestic and foreign mergers and acquisitions made by the person filing notification in the ten years prior to the date of the filing of this notification, of persons engaged at the time of acquisition in any 4-digit (SIC code) industry in which, to the knowledge or belief of the person filing notification, dollar revenues of \$1 million or more in the most recent year were derived by both the acquiring person and the issuer being acquired (including all entities controlled by the issuer) in this transaction, or, if assets are being acquired, such dollar revenues were attributable to such assets. Report only mergers or acquisitions of more than 50 percent of the voting securities or assets of a person with sales or assets greater than \$10 million in the year prior to the acquisition or merger.

(a)	(b)	(c)	(d)	(e)	(f)	(g)
NAME OF ENTITY ACQUIRED	ADDRESS OF HEADQUARTERS PRIOR TO ACQUISITION	INDICATE WHETHER SECURITIES OR ASSETS WERE ACQUIRED	CONSUMPTION DATE	TOTAL SALES OR REVENUES OF ACQUIRED ENTITY FOR YEAR PRIOR TO ACQUISITION	TOTAL ASSETS OF ACQUIRED ENTITY FOR YEAR PRIOR TO ACQUISITION	4-DIGIT INDUSTRIES
(1)						
(2)						
(3)						
(4)						
(5)						

PROPOSED RULES

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Notification and Report Form Continued

Name _____ Date _____

9. Print or type the name and title, address, and telephone number of the person to contact regarding this Notification and Report Form. See § 803.20(b)(2)(B) of the rules.

(Name and Title)

(Business Address)

(Business Telephone Number)

CERTIFICATION

This Notification and Report Form, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

(TYPE OR PRINT NAME AND TITLE)

(Signature)

(Date)

Subscribed and sworn to before me at the City of _____, State of _____

this _____ day of _____, 19____, _____

(Notary Public)

My Commission Expires _____

Notification and Report Form Continued

APPENDIX TO NOTIFICATION AND REPORT FORM: INSURANCE

Insurance carriers (2-digit SIC major group 63) are required to complete this Appendix if voting securities of an insurance carrier are being acquired directly or indirectly (see § 801.4 of the rules).

1. Life Insurance

- A. Provide for the most recent year the amount of premium receipts (calculated on an accrual basis) for each of the following lines:
1. Life Insurance:
 - a. Ordinary life insurance;
 - b. Group life insurance (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance);
 - c. Industrial life insurance;
 - d. Credit life insurance;
 2. Annuity Considerations:
 - a. Individual annuity considerations;
 - b. Group annuity considerations;
 3. Health Insurance:
 - a. Individual health insurance;
 - b. Group health insurance.
- B. Provide for the most recent year the amount of new life insurance business issued in the United States during the calendar year (exclusive of revivals, increases, dividend additions and reinsurance ceded) for each of the following lines:
1. Ordinary life insurance;
 2. Group life insurance (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance);
 3. Industrial life insurance;
 4. Credit life insurance.

Notification and Report Form Continued

2. Property Liability Insurance

- A. Provide for the most recent year the amount of direct premiums written during the calendar year in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.
- B. Provide for the most recent year the amount of net premiums written during the calendar year in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

3. Title Insurance

- A. Provide for the most recent year the amount of net direct title insurance premiums written in the United States during the calendar year.
- B. Provide for the most recent year the amount of direct title insurance premiums earned in the United States during the calendar year.

The Federal Trade Commission and the Assistant Attorney General invite and encourage the filing of written comments upon the proposed notification form and proposed rules in order to assure that the final versions thereof will satisfy the law enforcement concerns of the two agencies while, at the same time, not being unduly cumbersome or burdensome. Written comments on the proposal by an interested person could carry the subject "Title II—Premerger Notification." Written comments should be submitted to both addresses listed at the beginning of this notice. All written comments received on or before August 31, 1977, will be considered. Comments and other written

materials with respect to the proposed notification form and proposed rules will be available for examination by interested persons in Room 130 of the Public Reference Branch, Federal Trade Commission, 6th Street at Pennsylvania Avenue NW., Washington, D.C., and will be considered by the Federal Trade Commission and the Assistant Attorney General in the Commission's determination (with the concurrence of the Assistant Attorney General) to issue a final version of the notification form and rules. All interested persons are urged to express their approval or disapproval of the proposed notification form and proposed rules, or to recommend specific revisions, and to give a full statement

of their views thereon. Comments previously submitted in response to the proposed rules published in the FEDERAL REGISTER of December 20, 1976, will be considered by the Commission and the Assistant Attorney General in connection with the promulgation of final rules. Thus the content of these earlier comments need not be repeated or resubmitted.

Issued July 25, 1977.

By the direction of the Commission.

CAROL M. THOMAS,
Secretary.

[FR Doc.77-21767 Filed 7-29-77;8:45 am]