[16 CFR Part 802]

Premerger Notification Rules, Regulations, Statements, and Interpretations Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976; Minimum Dollar Value

AGENCY: Federal Trade Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice of proposed rulemaking explains the Commission's proposal to amend § 802.20 of the Commission's premerger notification rules, by raising certain minimum dollar value figures which define exemptions from the reporting requirements of the Act. This proposed amendment will eliminate the requirement that Premerger Notification and Report Forms be filed with the Federal Trade Commission and the Antitrust Division of the Department of Justice with respect to certain relatively small transactions.

DATES: Comments must be received on or before September 10, 1979.

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 3208, Washington, D.C. 20530.

FOR FURTHER INFORMATION CONTACT: Malcolm R. Pfunder, Assistant Director for Evaluation, 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 (Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976), requires that persons contemplating certain acquisitions or mergers file Notification and Report Forms with the Federal Trade Commission and the Department of Justice and wait designated periods of time before consummating the transactions. Specifically, transactions between persons with $100 million or more in sales or assets, and persons with $10 million or more in sales or assets, are reportable to both agencies, if as a result of the transaction, the acquiring person would hold 15% or more of the assets or voting securities of the acquired person or if the acquiring person would hold an aggregate total amount of the assets and securities of the acquired person in excess of $15 million. See Clayton Act, section 7A(a)(3).

With the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Justice Department, the Commission has the authority to "exempt, from the requirements of (the Act), classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws * * *." Section 7A(d)(2)(B). The Commission is also authorized to "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of the Act. Section 7A(d)(2)(C). Accordingly, in promulgating the original rules pursuant to that authority, the Commission included § 802.20 of the premerger notification rules, the minimum dollar value rule, after determining that:

> Certain relatively small transactions (frequently involving only a portion of the stock or assets of the acquired person) that might be reportable under the act are sufficiently unlikely to have a significant anticompetitive impact that imposition of the act's requirements would not represent an appropriate use of public resources. Statement of Basis and Purpose to the Commission's Premerger Notification Rules. 43 FR 33490 (1978).

Section 802.20, as it presently reads, applies only to those transactions where 15% or more of the assets or voting securities of a person are acquired, but where the aggregate total amount of the assets and securities held as a result of the acquisition is not valued in excess of $15 million. The rule presently provides three exemptions with regard to these relatively small transactions. First, § 802.20(a) exempts from the reporting and waiting requirements those assets acquisitions where at least 15% of the acquired person will be held as a result of the transaction, if those assets are valued at $10 million or less. Second, subsection (b) exempts acquisitions of 50% or more of the voting securities of an issuer, if the issuer has both sales and assets of less than $10 million and the resulting holdings of voting securities are valued at $15 million or less. Finally, an acquisition of less than 50% of the voting securities of an issuer is exempt without regard to the size of the issuer's sales or assets, so long as the value of the holdings resulting from the acquisition is $15 million or less.

Upon reviewing the forms submitted during the first nine months of the program, the Commission found that the majority of transactions in which either agency issued second requests pursuant to section 7A(e) of the Act were relatively large transactions. On the other hand, a significant number of transactions in which neither agency issued second requests were—even given the exemption provided in § 802.20—relatively small. The Commission has therefore concluded that the minimum dollar value of $10 million used in § 802.20 could be increased somewhat so as to increase the number of exempted transactions, without impairing the effectiveness of the premerger program. At the same time, this change would reduce the burden associated with preparing and processing the filings for the public and the agencies. The resulting reduction in the number of filings received will enable the agencies to allocate their resources more effectively.

Specifically, the Commission proposes to raise the minimum dollar value exemption in the case of an assets acquisition covered by subsection (a) from $10 million to $15 million. In the case of an acquisition of 50% or more of the voting securities of an issuer covered by subsection (b), the Commission proposes to raise the minimum dollar value exemption figure for sales and assets of the issuer from $10 million to $25 million.

The proposed rule will change the first two exemptions provided by § 802.20. First, acquisition resulting in the acquiring person holding 15% or more of the assets of an acquired person would be exempt if the assets held as a result of the acquisition are valued at $15 million or less. Under the new subsection (b), acquisitions of 50% or more of the voting securities of an issuer with both sales and assets of less than $25 million would be exempt if the voting securities held as a result of the acquisitions are valued at $15 million or less. The third exemption in the present version of § 802.20 would not change. The acquisition of less than 50% of the voting securities of an issuer will continue to be exempt, as long as the holdings resulting from the acquisition are valued at $15 million or less.

The Commission hereby formally proposes to amend § 802.20 of Title 16, Chapter I of the Code of Federal Regulations to read as follows:

§ 802.20 Minimum dollar value.

An acquisition which would be subject to the requirements of the act and which satisfies section 7A(a)(3)(A), but which does not satisfy section 7A(a)(3)(B), shall be exempt from the requirements of the act if as a result of the acquisition the acquiring person would not hold:

(a) Assets of the acquired person valued at more than $15 million; or

(b) Voting securities which confer control of an issuer, which together with all entities it controls, has annual net sales or total assets of $25 million.

The Federal Trade Commission invites and encourages the submission of written comments on the proposed rule. In particular, any party recommending this or any alternative amount to which the minimum dollar value might be changed should accompany its recommendations with a justification for the specific level supported. Written comments on the proposal by an interested person should carry the subject "Premerger Notification." Written comments should be submitted to both addresses listed at the beginning of this notice. All written comments received on or before September 10, 1979, will be considered. Comments and other written materials with respect to the proposed rule will be available for examination by interested persons during normal business hours in the Public Reference Branch, Room 130, Federal Trade Commission, 6th Street at Pennsylvania Avenue, NW., Washington, D.C., and will be considered by the FTC 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 rule. All interested persons are urged to express their approval or disapproval of the proposed rule, or to recommend specific versions, and to give a full statement of their views thereon.

Issued July 30, 1979.

By direction of the Commission.

Carol M. Thomas,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[17 CFR Part 270]

[Release IC-10809, File No. S7-795]

Exemptions for Certain Investment Advisers and Principal Underwriters of Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Investment Company Act of 1940 requires, in part, that an investment advisory contract or an underwriting contract with an investment company shall provide that it will terminate upon its assignment. However, in many circumstances such events, while norminally assignments, do not cause a change of actual control or management of the investment adviser or underwriter. Accordingly, the Commission is proposing a rule which states that a transaction which does not result in a change of actual control or management of an investment adviser or principal underwriter of an investment company would not be deemed such an assignment.

Moreover, the Investment Company Act of 1940 also provides that a person may not act under an investment advisory contract unless it has been approved by a majority of the investment company's voting securities. Consequently, an unavoidable lapse of time may occur between the date of an unforeseeable assignment of an investment advisory contract by an investment adviser or its termination by an investment company and the date on which an investment adviser may act pursuant to a subsequent contract which has been approved by the investment company's shareholders. Accordingly, the Commission is also proposing a rule to permit a person temporarily to act, under specified circumstances, as investment adviser to an investment company without the shareholders' prior approval of the investment advisory contract.

DATE: Comments must be received by October 5, 1979.

ADDRESSES: Send comments in triplicate to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, 500 N. Capitol Street, Washington, D.C. 20549. (Refer to File NO. S7-795.) All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 1100 L Street, NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Mark B. Goldfus, Special Counsel, Investment Company Act Study Group or Susan G. Loitherstein, Law Clerk, Division of Investment Management, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549, (202) 755-0230.

SUPPLEMENTARY INFORMATION: The Commission today is publishing for public comment proposed rule 2a-6 [17 CFR 270.2a-6] under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] ("Act"), which would deem certain transactions not to involve the assignment of an investment advisory contract or an underwriting contract for purposes of section 15(a) and section 15(b) of the Act [15 U.S.C. 80a-15(a) and (b)] where there is no actual change of control or management of an investment adviser or the principal underwriter. The Commission today also is publishing for public comment proposed rule 15a-4 [17 CFR 270.15a-4] which would permit a successor investment adviser to serve a maximum of 90 days prior to receiving a vote of the investment company's shareholders when certain events cause the termination of a previous investment advisory contract. This proposed rule would, in effect, provide a temporary exemption from the requirement that an investment advisory contract must be approved by the investment company's shareholders. Both proposed rules were prepared by the Division of Investment Management's Investment Company Act Study Group in the context of its re-examination of the regulation of investment companies.

Background

Section 15(a) of the Act, in part, prohibits a person from acting as an investment adviser to an investment company, except pursuant to a written contract which has been approved by the vote of a majority of that company's outstanding voting securities.[1] This provision, in part, also requires that the contract provide, in substance, that it (1) may be terminated without penalty at any time by the directors or by a majority of the outstanding voting securities of the investment company on not more than 60 days' written notice, and (2) will be automatically terminated in the event of its assignment.

Section 15(b) of the Act [15 U.S.C. 80a-15(b)] similarly requires that any underwriting contract between an open-end investment company and its principal underwriter must provide, in substance, for its automatic termination in the event of its assignment.

These statutory provisions in section 15(a) were designed to inhibit trafficking in investment advisory or underwriting contracts.[2] Moreover, Congress specifically declared in section 1(b)(6) of the Act [15 U.S.C. 80a-1(b)(6)] that "the national interest and the interest of investors are adversely affected . . . when the control or management [of investment companies]

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[1] Section 2(a)(20) of the Act [15 U.S.C. 80a-2(a)(20)], in part, excludes from the definition under the Act of the term "investment adviser" a company which furnishes such services at cost to one or more investment companies, insurance companies or other financial institutions. This exclusion refers to a company which is in the *business* of providing such services at cost—such as a company which is owned by, and provides services exclusively to, such financial institutions. It was not intended to provide an exclusion for investment advisers who provide services temporarily at cost to particular clients only. See American Law Institute, Federal Securities Code, § 250A, comment (3)(c) (Tentative Draft No. 6, April 1, 1977).

[2] See Hearings on S. 3580 before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 253 (statement of David Schenker, Chief Counsel, Investment Trust Study).