case to be adequately substantiated. It appears obvious to me that they cannot. If Sterling has a reasonable basis for a claim that Vanquish provides superior pain relief to aspirin, it cannot have a reasonable basis for a claim that Bayer aspirin relieves pain just as well as all OTC internal analgesics. Conversely, if Sterling has reasonable basis for a claim that aspirin relieves pain just as effectively as all OTC internal analgesics, it cannot have a reasonable basis for a claim that Vanquish relieves pain better than aspirin. Where as advertiser makes an objective and verifiable claim that its product performs better than any other product, adequate substantiation for that claim necessarily precludes the advertiser from having a reasonable basis for a claim that another product works better than, or as well as, the one advertised.

The Commission seems troubled, however, by the application of an "inconsistent contemporaneous claims" theory. It notes the apparent discrepancy between the case where a single advertiser is held liable for making inconsistent claims, and the case where the same claims are made separately by two different advertisers and the Commission finds each adequately substantiated. In fact, such a result would not be anomalous. Indeed, it would be perfectly consistent with the reasonable basis doctrine, which takes into account not only the sufficiency of the evidence on which an advertiser relies but also "the reasonableness of the advertiser's action and his good faith." *National Dynamics Corp.*, 82 F.T.C. 488, 553 (1973). In considering an advertiser's reasonableness, the Commission routinely considers information in the advertiser's possession which might give the advertiser reason to question the evidence relied upon to substantiate a claim. Clearly, an advertiser possessing data which directly contradicts a claim cannot have a reasonable belief in the truth of that claim. On the other hand, if the contradictory evidence exists but the advertiser is unaware of it and would have no reason to know about it, the advertiser would not be precluded from making the claim. In other words, whether or not there is liability depends, at least in part, on the advertiser's knowledge. The application of the inconsistent contemporaneous claims theory simply is one example of the effect of this standard, and accordingly reflects no deviation from the established reasonable basis doctrine.

It is true, as the majority notes, that we could have proceeded to determine which of Sterling's claims was the one that lacked a reasonable basis. But where the conclusion is inescapable, as it is here, that one claim or the other lacked a reasonable basis, it seems like a waste of resources to require both sides to go through the full panoply of evidentiary exchanges just to find out which claim was the one to violate Section 5. Accordingly, I would have sustained the allegations of the complaint with respect to the making of contemporaneous inconsistent claims.

Issued July 5, 1983.

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16 CFR Parts 801, 802, and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rules.

SUMMARY: These rules amend the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Department of Justice and to wait a specified period of time before consummating such transactions. These reporting and waiting period requirements enable the antitrust enforcement agencies to determine whether a proposed merger or acquisition might violate the antitrust laws and, if necessary, to seek a preliminary injunction in federal court before the transaction is consummated. On the basis of its experience with the premerger notification rules issued in 1978, the Commission is promulgating these amendments to increase the clarity, reduce the burden and improve the effectiveness of the rules and the Notification and Report Form.

EFFECTIVE DATE: August 29, 1983.

FOR FURTHER INFORMATION CONTACT: John M. Sipple, Jr., Senior Attorney, Premerger Notification Office, or Roberta S. Baruch, Deputy Assistant Director for Evaluation, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580. Telephone: (202) 523-3894.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

These amendments to the Hart-Scott-Rodino premerger notification rules are largely technical, designed to resolve confusion and reduce unnecessary reporting. They do not materially expand the coverage of the premerger notification rules, nor do they have any significant economic impact upon any entities affected by the rules. Therefore, pursuant to section 605(b) of the Administrative Procedure Act, 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96-354 (September 19, 1980) the Federal Trade Commission has certified that these rules will not have a significant economic impact on a substantial number of small entities. Section 603 of the Administrative Procedure Act, 5 U.S.C. 603, requiring a final regulatory flexibility analysis of these rules, is therefore inapplicable.

Background

Section 7A of the Clayton Act ("the Act"), 15 U.S.C. 18a, as added by sections 201 and 202 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain acquisitions of assets or voting securities to give advance notice to 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") and to wait certain designated periods before the consummation of such acquisitions. The transactions to which the advance notice requirement is applicable and the length of the waiting period required are set out respectively in subsections (a) and (b) of section 7A. The Hart-Scott-Rodino amendment to the Clayton Act does not change the standards used in determining the legality of mergers and acquisitions under the antitrust laws.

The legislative history suggests several purposes underlying the Act. First, Congress clearly intended to eliminate the large "midnight merger," which is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Second, Congress wanted to assure that large acquisitions were subjected to meaningful scrutiny under the antitrust laws prior to consummation. Third, Congress provided an opportunity for the enforcement agencies to seek a court order enjoining the completion of those transactions which the agencies deemed to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy where a challenge by one of the enforcement agencies proved successful. Thus the Act requires that the agencies received prior notification of significant acquisitions, provides certain tools to facilitate a prompt, thorough investigation, and assures an opportunity to seek a preliminary injunction before the parties are legally free to complete the transaction, eliminating the problem of unscrambling

the assets after the transaction has taken place.

Subsection 7A(d)(1) of the 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 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 Act, (B) to exempt additional persons or transactions from the Act's notification 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 15, 1976, the Commission issued proposed rules and a proposed Notification and Report Form to implement the Act. This proposed rulemaking was published in the **Federal Register** of December 20, 1976, 41 FR 55488. Because of the volume of public comment, it became clear to the Commission that some substantial revisions would have to be made in the original rules. On July 25, 1977, the Commission determined that additional public comment on the rules would be desirable and approved revised proposed rules and a revised proposed Notification and Report Form. The revised rules and Form were published in the **Federal Register** of August 1, 1977, 42 FR 39040. Additional changes in the revised rules and Form were made after the close of the comment period. The Commission formally promulgated the final rules and Form and issued an accompanying Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The final rules and Form and the Statement of Basis and Purpose were published in the **Federal Register** of July 31, 1978, 43 FR 33451, and became effective on September 5, 1978.

The rules are divided into three parts which appear at 16 CFR Parts 801, 802, and 803. Part 801 defines a number of the terms used in the Act and rules, and explains which acquisitions are subject to the reporting and waiting period requirements. Part 802 contains a number of exemptions from these requirements. Part 803 explains the procedures for complying with the Act. The Notification and Report Form, which is completed by persons required to file notification, is an appendix to Part 803 of the rules.

Two changes have been made in the premerger notification rules since they were first promulgated. The first was an increase in the minimum dollar value exemption contained in § 802.20 of the rules. This amendment was proposed in the **Federal Register** of August 10, 1979, 44 FR 47099, and was published in final form in the **Federal Register** of November 21, 1979, 44 FR 60781. The second amendment replaced the requirement that certain revenue data for the year 1972 be provided in the Notification and Report Form with a requirement that comparable data be provided for the year 1977. This change was made because total revenues for the year 1977 broken down by Standard Industrial Classification (SIC) codes became available from the Bureau of the Census. The amendment appeared in the **Federal Register** of March 5, 1980, 45 FR 14205, and was effective May 3, 1980.

In addition, the Notification and Report Form has been revised twice. The new versions were approved by the Office of Management and Budget on December 29, 1981, and February 23, 1983, respectively.

Comments

These rules were proposed for comment in the **Federal Register** of July 29, 1981, 46 FR 38710, and the comment period ended September 28, 1981. The following comments were received in response to this proposal:

No.	Date of letter	Organization
1.	9-24-81	Atlantic Richfield Company.
2.	9-25-81	Shearman & Sterling.
3.	9-28-81	Sullivan & Cromwell.
4.	9-28-81	Howrey & Simon (William J. Boyd, Esq.).
5.	9-28-81	Covington & Burling (Edwin M. Zimmerman, Esq.).
6.	9-28-81	Skadden, Arps, Slate, Meagher & Flom (Stephen M. Axinn, Esq.).

List of Subjects

16 CFR Parts 801 and 802

Antitrust.

16 CFR Part 803

Antitrust, Reporting and recordkeeping requirements.

Statement of Basis and Purpose for the Commission's Revised Premerger Notification Rules

Authority: The Federal Trade Commission promulgates these amendments to the premerger notification rules pursuant to section 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

Note:—The orginal premerger notification rules affected by these changes were promulgated on July 31, 1978. Those rules or sections thereof will be referred to as "the 1978 rules," "1978 § " and so forth.

1. Section 801.1(a)(2): Deletion of "Other Group Organized for Any Purpose" from the Definition of the Term "Entity"; Insertion of "Estate of a Deceased Natural Person"

Section 801.1(a) of the rules defines a "person" as an ultimate parent entity and all entities which it controls. The term "entity," which does not appear in the Act, is used throughout the rules and in the Notification and Report Form to refer to the component parts of the person to which the provisions of the Act and rules apply.

Section 801.1(a)(2) defines "entity" by setting forth a list of the types of organizational units which are included within that term. Section 801.1(a)(2) has been amended in two respects. First, the phrase "or other group organized for any purpose" has been deleted. The phrase was included in the definition to capture organizational units other than those specifically mentioned which might participate in acquisitions subject to the Act. Informal contacts between the Commission staff and persons wishing to determine the reportability of particular transactions indicate that the concept of "group" is a source of considerable uncertainty and concern. This concern is caused in part by the fact that the Securities and Exchange Commission ("SEC") also requires reporting by entities called groups. The SEC's definition of "group," however, which is geared to securities regulation, is too broad for purposes of the rules. Yet the presence of the term "group" in the rules has led to uncertainty whether the SEC's definition was intended to be applied. Moreover, experience with the rules and the Act has demonstrated that the concept of "group" is unnecessary for applying the rules; the other organizational units named in the definition have adequately covered situations raising antitrust concerns.

Second, the Commission has added "estate of a deceased natural person" to the list of organizational units which may be entities. This change will eliminate any confusion that may have existed previously over whether an estate can be a person under the Act.

The Commission has also changed §§ 801.11(d) and 803.6(a) to specify how

the estate of a deceased natural person will be treated in the rules. Section 801.11 explains the method for determining the assets of a person for purposes of the size-of-person test. New paragraph 801.11 (d) provides that, as in the case of a natural person, no assets other than investment assets, voting securities, and other income-producing property shall be included in determining the size of an estate of a deceased natural person. Section 803.6(a) lists, for various categories of reporting persons, who may certify the Notification and Report Form on behalf of the person filing notification. New subparagraph (5) stipulates that any duly authorized legal representative may certify the filing where the person filing notification is the estate of a deceased natural person. The scope of the term "duly authorized legal representative" includes such commonly used designations as "administrator," "administratrix," "executor," and "executrix," as well as any less commonly used terms for individuals who may serve the same function.

PARTS 801 AND 803—[AMENDED]

Section 801.1 is amended by revising paragraph (a)(2), § 801.11 is amended by revising paragraph (d), and § 803.6 is amended by adding paragraph (a)(5) to read as follows:

§ 801.1 Definitions.

* * * * *

(a) * * *

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

* * * * *

§ 801.11 Annual net sales and total assets.

* * * * *

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

§ 803.6 Certification.

(a) * * *

(5) In the case of the estate of a deceased natural person, by any duly authorized legal representative of such estate.

* * * * *

2. Section 801.1(f): Conversion

The definition of "conversion" in § 801.1(f)(3) of the rules has been broadened. The 1978 § 801.1(f)(3) defined conversion as the exchange, without the payment of additional consideration, of voting securities, as defined in § 801.1(f)(1), which do not presently give the owner or holder the right to vote for directors of the issuer, for securities which entitle the owner or holder to vote.

This definition proved to be too narrow in that it covered only exchanges of voting securities which do not give the owner or holder a present right to vote for directors, for voting securities which do carry a present right to vote. Occasionally, voting securities are created which entitle the owner or holder to vote for directors but which are also convertible into other securities with different voting rights. Under the original definition, an exchange of this type of security was not a conversion, because before the exchange the securities to be exchanged had voting rights. As a result, such exchanges did not fall within § 801.30 and its special provisions. Section 801.30 applies to certain transactions, including conversions, in which the acquired person may be hostile or indifferent to the acquisition. To prevent the acquired person from blocking the transaction by refusing to comply with the Act's filing requirements, this section provides that the waiting period begins when the acquiring person files.

The amended definition makes no reference to the voting rights of the securities before the exchange takes place. Whether a transaction is a conversion turns on whether it is the exercise of a right inherent in the ownership of any securities to exchange them for other securities which have present voting rights. The use of the word "exercise" in the definition is intended to distinguish conversion from the automatic maturation of an inchoate right, such as, for example, if preferred shares become entitled to vote because dividends are not paid. The new definition also eliminates as unnecessary all references to the "payment of additional consideration."

Conversions under the amended definition which do not increase directly or indirectly the acquiring persons per centum share of outstanding voting securities of the issuer are, of course, exempt from the notification and waiting period requirements under section 7A(c)(10) of the Act.

Comment 6 criticizes the amended definition because it does not apply to exchanges of securities issued by one person which are convertible into voting securities of an issuer included within a different person. For example, suppose A (included in person "A") wishes to dispose of its minority interest in the voting securities of B (included in person "B") and A issues non-voting debentures which may be exchanged for the underlying B shares. The comment asserts that since such an exchange is not a conversion (because B is not an entity included within A) it would not be covered by § 801.30, and B could block the transfer by refusing to file. The comment proposes that "conversion" be defined as the exercise of a right to exchange securities for other securities which give the holder the right to vote for directors of any issuer.

The Commission has determined that the suggested modification is unnecessary. In the example above, the holder of the non-voting debentures issued by A may make a reportable acquisition of B's voting securities when it exchanges the debentures for the voting securities of B held by A. Such an exchange is covered by § 801.30(a)(5) because it is an acquisition of voting securities from a holder other than the issuer. A hostile issuer in such a transaction will therefore be in no better position to interfere with such an exchange than if the transaction was considered a conversion. It should be noted also that if the A debentures give the owner or holder the right to vote the underlying B shares prior to conversion, any person proposing to acquire these debentures may be required to observe the filing and waiting period requirements of the Act before doing so. See the staff formal interpretation, June 2, 1981.

Section 801.1 is amended by revising paragraph (f)(3) and examples 1 and 2 which follow paragraph (f)(3) and by adding example 3 to read as follows:

§ 801.1 Definitions.

* * * * *

(f) * * *

(3) *Conversion.* The term "conversion" means the exercise of a right inherent in the ownership or holding of particular voting securities to exchange such securities for securities which presently entitle the owner or holder to vote for directors of the issuer or of any entity included within the same person as the issuer.

Examples: 1. The acquisition of convertible debentures which are convertible into common stock is an acquisition of "voting securities." However, § 802.31 exempts the acquisition of such securities from the requirements of the act, provided that they have no present voting rights.

2. Options and warrants are also "voting securities" for purposes of the act, because they can be exchanged for securities with present voting rights. Section 802.31 exempts the acquisition of options and warrants as well, since they do not themselves have present voting rights and hence are convertible voting securities. Notification may be required prior to exercising options and warrants, however.

3. Assume that X has issued preferred shares which presently entitle the holder to vote for directors of X, and that these shares are convertible into common shares of X. Because the preferred shares confer a present right to vote for dirctors of X, they are "voting securities." (See § 801.1(f)(1).) They are not "convertible voting securities," however, because the definition of that term excludes securities which confer a present right to vote for directors of any entity. (See § 801.1(f)(2).) Thus, an acquisition of these preferred shares issued by X would not be exempt as an acquisition of "convertible voting securities." (See § 802.31.) If the criteria in § 7A(a) are met, an acquisition of X's preferred shares would be subject to the reporting and waiting period requirements of the Act. Moreover, the conversion of these preferred shares into common shares of X would also be potentially reportable, since the holder would be exercising a right to exchange particular voting securities for different voting securities having a present right to vote for directors of the issuer. Because this exchange would be a "conversion," § 801.30 would apply. (See § 801.30(a)(6).)

* * * * *

3. Section 801.2: Acquiring and Acquired Persons in Mergers and Consolidations

Two of the most basic concepts in the Act and the rules are those of acquiring and acquired person. For example, the size-of-transaction test in section 7A(a)(3) of the Act, which determines whether a transaction is of a reportable size, provides that an acquisition will be reportable if the acquiring person will hold (a) 15% 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 million. Similarly, many of the rules depend for their application on whether the filing party is an acquiring or acquired person. In order to apply the provisions of the Act and of the rules and to complete the Notification and Report Form properly, therefore, a filing party must determine whether it is an acquiring or an acquired person, or both.

The terms acquiring and acquired person are defined, respectively, in paragraphs (a) and (b) of § 801.2. An acquiring person is "[any] person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly. . . ." and, for most purposes, an acquired person is the one "within which the entity whose assets or voting securities are being acquired is included. . . . " Paragraphs (c), (d), and (e) of § 801.2 concern the application of these concepts in specific circumstances.

Amended paragraph 801.2(c) provides that a person may be both an acquiring and an acquired person in a single transaction. The amendment makes clear that a person is both an acquiring and an acquired person in a transaction when it occupies both roles in separate parts of the transaction. The example following the paragraph illustrates such a situation: "Corporation A (an entity within the person "A") plans to transfer certain of its assets to corporation B (an entity within person "B") in return for voting securities of B." With respect to the transfer of assets, "B" is an acquiring person and "A" is an acquired person; with respect to the transfer of voting securities, "A" is an acquiring person and "B" is an acquired person. In the transaction as a whole, therefore, "A" and "B" are both acquiring and acquired persons.

It should be noted that for purposes of this section new § 801.2(c) distinguishes between an acquisition and a transaction. An acquisition is characterized by the presence of only one acquiring and one acquired person. A transaction, as the word is used in this section, is a set of one or more related acquisitions which are considered together for reporting purposes. This distinction clarifies paragraph (c) and its relationship to paragraphs (a) and (b) of § 801.2.

New § 801.2(d) changes and clarifies the treatment of mergers and consolidations under the rules. The amended paragraph is also more consistent with other provisions of the rules. The 1978 § 801.2(d) designated the parties to all mergers and consolidations as both acquiring and acquired persons. This provision proved to be a significant source of confusion since it called for quite different treatment for similar transactions. It also caused some unnecessary reporting.

New paragraph (d)(1)(i) of § 801.2 states that mergers and consolidations are subject to the Act and are to be treated as acquisitions of voting securities. Mergers and consolidations have aspects of both acquisitions of assets and acquisitions of voting securities. The new rule eliminates the ambiguity in the present treatment of mergers and consolidations by opting to treat mergers and consolidations in all cases as involving an acquisition of voting securities.

New paragraph (d)(1)(ii) sets up a mechanism for determining the acquiring party in mergers. Mergers are governed by state corporate law. One feature common to most, if not all, state statutes is that documents which must be filed with state authorities to effectuate a merger will specify, among other things, the participating corporation which will survive the transaction. This is the basis for determining the acquiring party. In a merger, the acquiring party is the person, as defined by § 801.1(a), which after consummation will include the corporation designated the survivor in filings made in accordance with state law. Paragraph (d)(1)(ii) also provides that the party so identified will be deemed to have made an acquisition of voting securities.

Paragraph (d)(2) completes the analysis of mergers and consolidations by enabling the parties to all such transactions to determine whether they are acquiring or acquired persons, or both. A party is an acquiring person under paragraph (d)(2)(i) if, as a result of the transaction, it will hold assets or voting securities it did not hold previously. The acquiring party in a merger, determined in accordance with paragraph (d)(1)(ii) of this section, is therefore the acquiring person in an acquisition of voting securities. All other parties to that acquisition are acquired persons under paragraph (d)(2)(ii) because, as a result of the acquisition, the assets or voting securities of entities included within them will be held by another person.

The transfer of the consideration in the acquisition just described is analyzed separately and may itself constitute a reportable acquisition. In this acquisition, the acquiring and acquired persons exchange roles. Depending on the nature and amount of this consideration, its acquisition may or may not be reportable and may be an acquisition of assets or of voting securities. The analysis of the reporting obligations of the parties with respect to the acquisition of voting securities, and the analysis of their obligation with

respect to the acquisition involved in the transfer of the consideration will determine for the transaction taken as a whole whether the parties must report as acquiring persons, acquired persons, or both. The analysis of mergers under new § 801.2(d) will thus have the same result as that of any other transaction under § 801.2(c).

In a consolidation, the participants all lose their preacquisition identities and the resulting entity is new. Since acquiring and acquired persons cannot readily be identified in such transactions, new § 801.2(d)(2)(iii) designates all parties both acquiring and acquired persons and new § 801.2(d)(1) makes clear that such transactions shall be treated as acquisitions of voting securities. Under revised § 801.2(d), then, a party is designated both an acquiring and an acquired person only if it occupies both roles in reportable acquisitions involved in a merger or if it is a party to a consolidation.

The examples following revised § 801.2(d) illustrate its application. Example 1 illustrates a "triangular" merger in which corporation A proposes to acquire Y, a subsidiary of corporation B, by merging Y into A's own subsidiary, X, which will survive. The consideration for the acquired corporation is cash and the voting securities of an unrelated issuer, C. Since "A" (the person of which A is the ultimate parent entity) will include the surviving corporation, X, after the consummation of the transaction, it is the acquiring person in an acquisition of voting securities. Since "B" is the person whose assets or voting securities will be acquired, it is an acquired person. But, since cash and the securities of another person are not considered assets of the person from which they are acquired (see § 801.21), the acquisition by B of the consideration for Y from A is not separately reportable. In the transaction as a whole, therefore, "A" is an acquiring person only and "B" an acquired person only. "B" may have a separate reporting obligation with respect to its acquisition of the voting securities of C, however.

Example 2 illustrates the analysis of similar transaction in which the consideration for Y includes the voting securities of the acquiring party, A. For the same reasons, "A" is an acquiring person and "B" is an acquired person. In addition, "A" is an acquired person, because its voting securities will be held by another person as a result of the transaction, and "B" is an acquiring person with respect to those voting securities. Since these voting securities are less than 15% of the outstanding voting securities of A and are worth less than $15 million, however, the acquisition of them is not reportable. "A" therefore still reports as an acquiring person only and "B" as an acquired person only. Example 3 shows that the result is the same when B's acquisition of the consideration for Y is exempt. Example 4 shows a case in which the consideration for Y is assets the receipt of which is also a reportable acquisition. In this transaction, "A" is an acquiring and "B" an acquired person in an acquisition of voting securities, and "B" is an acquiring and "A" an acquired person in an acquisition of assets. Both will therefore report in both capacities. Finally, example 5 illustrates a consolidation in which all parties will lose their separate legal identities as a result of the transaction. In these circumstances, all persons party to the transaction report as both acquiring and acquired persons.

Comment 3 points out that some State corporate statutes permit a merger to be effectuated by the filing of a certificate of merger. See *e.g., Del. Code Ann. tit.* 8, § 251(c). The comment suggests that the words "or certificate" be inserted in § 801.2(d)(1)(ii). Comment 6 suggests that example 1 make clear that "B" may have a separate reporting obligation with respect to the voting securities of C, which form part of the consideration for A's acquisition of Y. The Commission has adopted both suggestions.

Amended § 801.2(e) makes clear that when the shareholder of an acquired person acquires assets or voting securities in exchange for its shares in an acquired issuer, the acquisition is separately subject to the Act.

Section 801.2 is amended by revising paragraphs (c), (d), and (e) and by adding examples 1–5 which follow paragraph (d) to read as follows:

§ 801.2 Acquiring and acquired persons.

* * * * *

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with respect to separate acquisitions which comprise a single transaction.

(d)(1)(i) Mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities.

(ii) In a merger, the person which, after consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan, agreement, or certificate of merger required to be filed with state authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2)(i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities shall be both acquiring and acquired persons.

Examples: 1. Corporation A (the ultimate parent entity included within person "A") proposes to acquire Y, a wholly-owned subsidiary of B (the ultimate parent entity included within person "B"). The transaction is to be carried out by merging Y into X, a wholly-owned subsidiary of A, with X surviving, and by distributing the assets of X to B, the only shareholder of Y. The assets of X consist solely of cash and the voting securities of C, an entity unrelated to "A" or "B". Since X is designated the surviving corporation in the plan or agreement of merger or consolidation and since X will be included in "A" after consummation of the transaction, "A" will be deemed to have made an acquisition of voting securities. In this acquisition, "A" is an acquiring person because it will hold assets or voting securities it did not hold prior to the transaction, and "B" is an acquired person because the assets or the voting securities of an entity previously included within it will be held by A as a result of the acquisition. B will hold the cash and voting securities of C as a result of the transaction, but since § 801.21 applies, this acquisition is not reportable. "A" is therefore an acquiring person only, and "B" is an acquired person only. "B" may, however, have a separate reporting obligation as an acquiring person in a separate transaction involving the voting securities of C.

2. In the above example, suppose the consideration for Y consists of $8 million worth of the voting securities of A, constituting less than 15% of A's outstanding voting securities. With regard to the transfer of this consideration, "B" is an acquiring person because it will hold voting securities it did not previously hold, and "A" is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than $15 million and constitute less than 15% of the outstanding voting securities of A, however, the acquisition of these securities is not reportable. "A" will therefore report as an acquiring person only and "B" as an acquired person only.

3. In the above example, suppose the consideration for Y is 50% of the voting securities of Z, a wholly-owned subsidiary of A which, together with all entities it controls,

has annual net sales and total assets of less then $25 million. Suppose also that the value of these securities is less than $15 million. Since the acquisition of the voting securities of Z is exempt under the minimum dollar value exemption in § 802.20, "A" will report in this transaction as an acquiring person only and "B" as an acquired person only.

4. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at $16 million. "B" is thus an acquiring person and "A" an acquired person in a reportable acquisition of assets. "A" and "B" will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

5. Corporations A (the ultimate parent entity in person "A") and B (the ultimate parent entity in person "B") propose to consolidate into C, a newly formed corporation. All shareholders of A and B will receive shares of C, and both A and B will lose their separate pre-acquisition identities. "A" and "B" are both acquiring and acquired persons because they are parties to a transaction in which all parties lose their separate pre-acquisition identities.

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act.

* * * * *

4. Section 801.4: Secondary Acquisitions in Tender Offers and in Mergers and Consolidations

The term "secondary acquisition" is defined in § 801.4(a) of the rules as an acquisition in which the acquiring person, by obtaining control of an issuer holding voting securities of another issuer which it does not control, becomes the holder of the latter issuer's voting securities.

The 1978 § 801.4 did not make special provisions for cases where the primary acquisition is a tender offer. Since such transactions have different waiting period requirements under the Act and rules, the presence of a secondary acquisition could interfere with the consummation of the primary transaction under the old rule where the latter was a tender offer. New § 801.4(c) provides that when a tender offer results in a reportable secondary acquisition, the same waiting period requirements applicable to the primary acquisition shall also be applicable to the secondary acquisition. For example, if the primary acquisition is a cash tender offer which has a 15-day waiting period, the waiting period for a secondary acquisition will also be 15 days. If second requests are issued in connection with the secondary acquisition when the primary acquisition is a cash tender offer, the waiting period for the secondary acquisition will expire 10 days after the response of the acquiring person has been received, the same as if requests had been issued in connection with the cash tender offer. Thus, when the primary acquisition is a tender offer and one or more requests for additional information are made in connection with the resulting secondary acquisition, a response by the acquiring person will cause the waiting period for the secondary acquisition to begin running again. A second request directed to the acquired person in such a secondary acquisition will not affect the running of the waiting period in that transaction.

In many instances, this change will eliminate the possibility that a reportable secondary acquisition will interfere with the consummation of the primary transaction. In some cases, however, interference could still occur. Under new § 801.4(c), the end of the waiting period for a secondary acquisition will coincide with that of the primary acquisition only if the acquiring person files for both at the same time. The presence of a secondary acquisition can thus still affect consummation of the primary acquisition if, for example, the acquiring person only learns that it will be making a reportable secondary acquisition after it has filed for the primary transaction.

Because of this possibility, the acquired firm in a hostile takeover may be able to exercise favoritism among potential suitors. The hostile target may be able to confer an advantage on one acquiror by informing it of all potential secondary acquisitions while withholding the information from other suitors.

Comment 4 suggests two ways of dealing with these problems. First, the comment recommends that acquired persons in acquisitions covered by § 801.30, *i.e.*, those in which the target may be hostile, be required to disclose potential secondary acquisitions to each acquiring person. Alternatively, the comment suggests that if the acquiring person discovers unknown, reportable secondary acquisitions it be allowed to consummate the primary acquisition, provided that the acquiring person exercises no control over the stock involved in the secondary acquisition and immediately puts it into escrow until all waiting periods relating to the secondary acquisition have expired.

Although these proposals may have merit, the Commission cannot endorse them without further analysis and comment. The notice by the acquired person of potential secondary acquisitions, for example, may in practice be burdensome on acquired persons and may not always be workable. The structure of any escrow provision will also have to be worked out very carefully. In addition, it would be desirable to subject any additional change in this sensitive area to public comment. For these reasons, the Commission has decided to promulgate the original change at this time, while it continues to consider the appropriateness of further revisions.

Since the application of the rule covering secondary acquisitions in the area of mergers and consolidations is somewhat complex, the Commission has added examples 4, 5, and 6 to § 801.4 to illustrate the treatment of secondary acquisitions in these contexts. Example 4 shows that when the acquiring person in a merger is an acquiring person only, it may have to report minority holdings of the acquired issuer as secondary acquisitions. Even when both parties to a merger are both acquiring and acquired persons, example 5 illustrates that each acquiring person must consider only the minority holdings of issuers it will control as a result of the transaction as potential secondary acquisitions. Finally, example 6 indicates that in a consolidation each party must regard minority holdings of all other parties as potential secondary acquisitions.

Section 801.4 is amended by adding examples 4, 5, and 6 following paragraph (b) and by adding paragraph (c) to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: * * *

4. In the previous examples, assume A's acquisition of B is accomplished by merging B into A's subsidiary, S, and S is designated the surviving corporation. B's voting securities are cancelled, and B's shareholders are to receive cash in return. Since S is designated the surviving corporation and A will control S and also hold assets or voting securities it did not hold previously, "A" is an acquiring person in an acquisition of voting securities by virtue of §§ 801.2 (d)(1)(ii) and (d)(2)(i). A will be deemed to have acquired control of B, and A's resulting acquisition of the voting securities of X is a secondary acquisition. Since cash, the only consideration paid for the voting securities of B, is not considered an asset of the person from which it is acquired, by virtue of § 801.2(d)(2) "A" is an acquiring person only. The acquisition of the minority holding of B in X is therefore a secondary acquisition by "A," but since "B" is an acquired person only, "B" is not deemed to make any secondary acquisition in this transaction.

5. In example 4 above, suppose the consideration paid by A for the acquisition of B is $20 million worth of the voting securities of A. By virtue of § 801.2(d)(2), "A" and "B"

are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although "B" is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

6. Assume that A and B propose through consolidation to create a new corporation, C, and that both A and B will lose their corporate identities as a result. Since no participating corporation in existence prior to consummation is the designated surviving corporation, "A" and "B" are each both acquiring and acquired persons by virtue of § 801.2(d)(2)(iii). The acquisition of the minority holdings of entities within each are therefore potential secondary acquisitions by the other.

(c) Where the primary acquisition is—(1) a cash tender offer, the waiting period procedures established for cash tender offers pursuant to sections 7A(a) and 7A(e) of the act shall be applicable to both the primary acquisition and the secondary acquisition; (2) a non-cash tender offer, the waiting period procedures established for tender offers pursuant to section 7A(e)(2) of the act shall be applicable to both the primary acquisition and the secondary acquisition.

5. Section 801.33: Acceptance for Payment Is the Consummation of an Acquisition

New § 801.33 states that the acceptance for payment of voting securities tendered in a tender offer is the consummation of an acquisition under the Act. The term "acceptance for payment" denotes the final stage in a tender offer. At this point, the offeror decides whether to accept any, some, or all of the tendered shares and obtains an unconditional right to the accepted shares while becoming legally committed to pay the tendering shareholders for them. When a tender offer is of a reportable size and the offer ends during the waiting period, it might appear that the offeror could accept some or all tendered shares for payment without violating the Act on the premise that the acquisition would not be consummated if the shares were left in the depository until the waiting period ends or is terminated. By stating that acceptance for payment is the consummation of an acquisition, the new rule makes clear that the offeror cannot, either during or after expiration of the offer, accept for payment shares which will trigger the requirements of the Act unless the reporting and waiting period requirements have already been complied with.

The offeror may, of course, accept any tendered shares for payment, without complying with the Act, so long as these shares, when added to its prior holdings, do not reach or exceed a new reporting threshold. (See § 801.1(h).) As pointed out by comment 6, the offeror may also accept shares for payment, the acquisition of which is exempt under the Act or these rules.

Section 801.33 is added to read as follows:

§ 801.33 Consummation of an acquisition by acceptance of tendered shares of payment.

The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act.

6. Section 801.40: Determination of the Assets of a Joint Venture or Other Corporation for the Purpose of Applying Certain Exemptions

Amended § 801.40(c) clarifies the application of certain exemptions to the formation of a joint venture or other new corporation. Section 801.40 establishes the manner in which the reporting requirements of the Act will be applied to the formation of a joint venture or other corporation. This section analyzes the transaction by which a joint venture or other corporation is formed as acquisitions of the voting securities of the new corporation by two or more contributors. To be reportable, the acquisition by a particular contributor must meet the size criteria of the Act. The assets of the joint venture or other corporation (the acquired person) for purposes of the size of person test are determined in accordance with a special assets test set out in § 801.40(c). This test requires the inclusion of not only those assets which would appear on a balance sheet but also assets which any person contributing to the formation of the joint venture corporation has agreed to transfer or for which agreements have been obtained by the joint venture to acquire at any time. The assets of the joint venture corporation at the time of its formation also include any amount of credit which any contributor has agreed to extend and any obligation of the joint venture corporation which any contributor has agreed to guarantee.

Three exemptions, §§ 802.20(b), 802.50(b)(1), and 802.51(b), depend for their application on a test which is similar to the size-of-person test. Section 802.20(b) exempts certain transactions in which the acquiring person would not acquire control of an issuer with annual net sales or total assets of $25 million or more. Section 802.50(b)(1) exempts an acquisition of voting securities of a foreign issuer if the issuer does not hold assets located in the United States valued at $15 million or more. Section 802.51(b) exempts an acquisition of voting securities by a foreign person if the acquisition will not confer control of an issuer with United States assets valued at $15 million or more or a United States issuer with annual net sales or total assets of $25 million or more. Amended § 801.40(c) makes explicit that its provisions are to be used in determining the assets of a joint venture or other corporation for purposes of determining whether these exemptions apply to its formation. This proposed change incorporates into the language of the rule the position already taken by the Commission in the Statement of Basis and Purpose to 1978 § 802.20, which says that § 801.40(c) is used to apply the minimum dollar value exemption in these contexts. See 43 FR 33491.

Comment 5 suggests that the language of the proposed change is too broad and, as a result, could produce undesirable consequences. In particular, Section 802.50(b)(1) exempts acquisitions by a United States person of voting securities of a foreign issuer which does not hold assets located in the United States (exclusive of investment assets and the voting and non-voting securities of a person) valued at $15 million or more. The comment points out that § 801.40(c) as amended could lead to the conclusion that the formation of a foreign joint venture corporation is reportable if it has a loan guarantee by a United States contributor and this is its only contact with United States commerce. This result follows because the loan guarantee is an asset of the joint venture corporation according to § 801.40(c) and is arguably located in the United States.

This problem arises because commitments of credit and loan guarantees are counted as assets only in the special circumstances of the formation of a new joint venture corporation. They would not ordinarily appear as assets on a person's balance sheet, and so would not affect the applicability of the exemptions in §§ 802.50 and 802.51. While loan commitments and loan guarantees are important for determining the size of the newly formed corporation, they are not relevant to that corporation's nexus with United States commerce, which is a significant element of the exemptions provided in §§ 802.50 and 802.51. The Commission has therefore amended §§ 802.50 and 802.51 to eliminate loan

commitments and loan guarantees from the assets to be included in applying those exemptions. These changes are set forth in item 10 below, with other changes in §§ 802.50 and 802.51.

Section 801.40 is amended by revising paragraph (c) to read as follows:

§ 801.40 Formation of a joint venture or other corporation.

* * * * *

(c) For purposes of paragraph (b) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

* * * * *

7. Section 802.6: Exemption for Transactions Requiring Approval by the Civil Aeronautics Board

Certain transactions involving the acquisition or consolidation of control of air carriers or persons substantially engaged in the business of aeronuatics require approval by the Civil Aeronautics Board ("CAB") prior to consummation. 49 U.S.C. 1378. New § 802.6(b) would provide a partial exemption for these acquisitions, since the enforcement agencies can evaluate the aeronautical aspects of these transactions in proceedings before the CAB. The Justice Department has authority to intervene in cases before the CAB and may also take other legal action independent of the proceedings before the Board. While the Commission does not have independent jurisdiction over regulated air carriers, it is also authorized to intervene before the Board. As intervenors, both agencies can avail themselves of the discovery procedures provided by the Board's rules of practice to obtain the information necessary to perform an antitrust analysis of the aeronautical aspects of an acquisition. With respect to these aspects, therefore, the agencies do not need the waiting periods or the full reporting requirements of the Act.

New § 802.6(b) exempts those portions of CAB approved transactions involving the businesses of aeronautics or air transportation so long as the parties provide the Federal Trade Commission and the Department of Justice with copies of all information and documentary materials submitted to the CAB. In the original proposal, notice to the Commission was not required because the Commission lacks jurisdiction over regulated air carriers. However, the Commission can intervene before the CAB and present its views on the competitive significance of the proposed merger. Further, the Commission has a statutory obligation to administer the premerger notification program and to monitor compliance with the Act. These responsibilities cannot be carried out adequately unless the Commission receives filings for all transactions required to be reported under the Act. Since the burden of supplying the Commission with a duplicate filing is small, the rule has been changed to require filings with both the Assistant Attorney General and the Commission, as is required for all other filings.

Where the acquired person is involved in both aeronautic and non-aeronautic businesses the entire transaction may not be exempt if the value of the non-aeronautic business which is acquired meets the size of transaction test and the acquisition is not otherwise exempt. In particular, under new § 802.6(b)(2), if the transaction is an acquisition of assets, the non-aeronautic portion of the transaction must be reported if that portion is not exempt under the other provisions of the Act and rules. Similarly, if the transaction is an acquisition of voting securities, or is treated as such under the rules, the non-aeronautic portion of the transaction must be reported if the value of the voting securities exceeds $15 million and if the non-aeronautic portion of the transaction is not exempt under the other provisions of the Act and rules. These limitations are necessary because the CAB has jurisdiction over only that part of the transaction involving air transportation or aeronautics. The antitrust agencies must still review the non-aeronautic part of the transaction if it is not otherwise exempt.

As originally porposed, new § 802.6(b) provided no exemption at all for transactions involving both aeronautic and non-aeronautic businesses if both parties to the transaction had non-aeronautic sales or revenues greater than $10 million. Comment 3 suggests that the $10 million threshold for non-aeronautic businesses is too low, since, according to the comment, a competitive overlap this small is insignificant for substantive antitrust purposes. The comment recommends that the proposed rule simply follow the approach taken in the other exemptions in the rules. While the Commission does not believe that a competitive overlap of this size is generally insignificant, the Commission agrees this exemption should parallel the other exemptions in the rules. Accordingly, the Commission has restyled the rule so that the non-aeronautic part of the transaction will essentially be treated as a separate acquisition, with all existing exemptions applicable to that part of the transaction.

To accomplish this, the rule has been divided into two subsections—(b)(1) and (b)(2)—and subsection (b)(1) has been added to the exemptions listed in § 801.15(a)(2).

Subsection (b)(1) generally retains the language of the original proposal. Thus, subject to the provisions of subsection (b)(2), if a merger is subject to CAB approval it is exempt if copies of all information and documentary material filed with the CAB are contemporaneously filed with both agencies.

Subsection (b)(2) treats mergers involving air carriers with one or more non-aeronautics businesses differently than the original proposal. Under new subsection (b)(2), the acquired person's non-aeronautics business or businesses are treated as assets to be purchased by the acquiring person. If the purchase of these assets is not exempt under some other provision of the rules it must be reported. Where the transaction is structured as a merger, consolidation or acquisition of voting securities the parties must still treat the acquisition of the acquired person's non-aeronautic business or businesses as an acquisition of assets. To determine the value of the assets to be acquired see § 801.10(b). Since all acquisitions of non-aeronautic businesses are deemed acquisitions of assets, the aggregation rule set forth in §801.13(b) will apply to successive acquisitions between the same acquiring and acquired persons. For the same reason, the rule for aggregating acquisitions of voting securities and acquisitions of assets set forth in § 801.14 would not apply.

Where a transaction requiring CAB approval is an acquisition of voting securities, or is treated as such under the rules, new § 802.6(b)(2)(ii) eliminates any reporting obligation with respect to the non-aeronautic part of the transaction if the value of the voting securities acquired is less than $15 million. Conversely, if the acquiring person will hold voting securities of the acquired person valued at $15 million or more, § 802.6(b)(2)(ii) requires the

acquiring person to treat the entire non-aeronautic business or businesses of the acquired issuer (and all entities it controls) as assets held as a result of the acquisition. The acquisition will then be reportable (assuming no other exemption applies) if the non-aeronautic business or businesses acquired are valued at $15 million or more.

Comment 6 states that the CAB has no jurisdiction over acquisitions of less than 10% of the voting securities of a person engaged in aeronautics and air-transportation. It is thus possible for an acquisition of less than 10% to be subject to the reporting and waiting period requirements of the Act, while a larger acquisition would be exempt. The comment finds this result anomalous and proposes an exemption for acquisitions of less than 10% of such a person. The Commission believes that such an exemption would be inappropriate. The new exemption in § 802.6(b) for CAB-reviewed acquisitions is justified by the fact that both the CAB and the antitrust agencies can review the antitrust implications of such acquisitions without premerger filings. To exempt acquisitions not so reviewed and not covered by any other exemptions would be contrary to the purposes of the Act.

Transactions subject to new § 802.6(b) should be reported to the antitrust agencies as follows. If some or all of the transaction is exempt under § 802.6(b)(1), and no part of the transaction is reportable because of § 802.6(b)(2), then to secure the exemption under §802.6(b)(1), all copies of the materials filed with the CAB must be contemporaneously filed with both antitrust agencies. If part of the transaction is exempt under § 802.6(b)(1), but part must be reported because of § 802.6(b)(2), then parties must still provide copies of all information and documentary material filed with the CAB. In addition, however, under §803.2(c)(2) they may respond to certain parts of the Form (items 5, 7, 8 and 9 and the appendix) by providing information only with respect to their non-aeronautic business or businesses.

Existing § 802.6 has been redesignated as §802.6(a) and new § 802.6(b) and an example following paragraph (b) have been added as follows. In addition, in § 802.53 the reference to "§ 802.6" is changed to read "§ 802.6(a) and § 801.15 is amended by revising paragraph (a)(2) to read as follows:

§ 802.6 Federal agency approval.

* * * * *

(b) (1) Except as provided in § 802.6(b)(2), any transaction which requires approval by the Civil Aeronautics Board prior to consummation, pursuant to section 408 of the Federal Aviation Act, 49 U.S.C. 1378, shall be exempt from the requirements of the act if copies of all information and documentary material filed with the Civil Aeronautics Board are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General.

(2) The following will be considered assets held as a result of an acquisition requiring approval by the Civil Aeronautics Board pursuant to section 408 of the Federal Aviation Act, and such assets will not be exempt under § 802.6(b)(1):

(i) if the transaction is an acquisition of assets, the assets which are engaged in a business or businesses other than aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301;

(ii) if the transaction is an acquisition of voting securities, or is treated under the rules as an acquisition of voting securities, and the acquiring person will, as a result of the acquisition, hold voting securities of the acquired person valued in excess of $15 million, the business or businesses of the acquired issuer (and all entities which it controls) which are not engaged in aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301.

Example: Assume that A (an entity included within person "A") proposes to acquire voting securities of B (an entity included within person "B") for $100 million. A and B are both air carriers who meet the size-of-person test, but B also owns a commercial data processing business located in the United States with a value of $30 million. Assume that this transaction requires CAB approval under 49 U.S.C. 1378. Since the acquired person has a business other than aeronautics or air transportation, the parties must report under § 802.6(b)(2) because the parties meet the size-of-person test, no other exemption applies to the acquisition of the data processing business, and the acquisition of the non-aeronautic business is deemed to be an acquisition of assets valued at $30 million.

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

* * * * *

(a) * * *

(2) Sections 802.6(b)(1), 802.8, 802.31, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

* * * * *

8. Section 802.8: Exemption for Acquisitions Involving Insured Banks or Other Financial Institutions

New § 802.8(b) exempts acquisitions subject to the approval of federal regulatory agencies pursuant to the Change in Bank Control Act and the Change in Savings and Loan Control Act if copies of all information and documentary material filed with the regulatory agency are filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the transaction.

Section 7A(c)(7) of the Act completely exempts from reporting and waiting period requirements "transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842)." Subsequent to passage of the Act and the promulgation of the original rules, Congress passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3683, Titles VI and VII, which are known respectively as the Change in Bank Control Act and the Change in Savings and Loan Control Act. These Acts apply to other transactions involving regulated financial institutions and thus broaden the approval requirements imposed on banks and savings and loan holding companies by the statutes cited in section 7A(c)(7). Under these Acts, *all persons* contemplating acquisitions of banks or savings and loans must now notify the appropriate regulatory agency 60 days prior to consummation and provide it with specified information. *See* 12 U.S.C. 1817(j)(6); 12 U.S.C. 1730(q)(6).

The exemption provided for this broader category of transactions by § 802.8(b) is a qualified one, however, patterned after the exemption provided in section 7A(c)(8). As originally proposed, it would have allowed the submission of an index of documents in lieu of copies of all documents, as permitted by § 802.6. Experience with procedures under the new regulatory statutes covered by § 802.8(b), however, has shown that the appropriate regulatory agency cannot always forward the material submitted quickly enough to the Department of Justice to allow adequate opportunity for review. Therefore, the new rule does not permit an index to be submitted in lieu of copies. In addition, the rule as proposed would have required parties to file copies of documents with the Department of Justice only. No notice to

the Commission was required because the Commission lacks jurisdiction over banks and savings and loan associations. The Commission, however, has a statutory obligation to administer the premerger notification program and to monitor compliance with the Act. These responsibilities cannot be carried out adequately unless the Commission receives filings for all transactions required to be reported under the Act. Since the burden of supplying a duplicate filing to the Commission is small, the rule has been changed to require filings with both the Assistant Attorney General and the Commission, as is required for all other filings.

New § 802.8(b)(2) exempts a covered acquisition from all requirements of the Act, including the filing requirements, if the appropriate regulatory agency finds that its approval is necessary to prevent the failure of one of the financial institutions involved. This provision is designed to cover situations in which the approving agency must act quickly to prevent the collapse of a bank or other institution, and mirrors a provision in 1978 § 802.8 (redesignated § 802.8(a)).

Section 802.8 is redesignated § 802.8 (a) and paragraph (b) is added to read as follows:

§ 802.8 Certain supervisory acquisitions.

* * * * *

(b)(1) A merger, consolidation, purchase of assets, or acquisition which requires agency approval under 12 U.S.C. 1817(j) or 12 U.S.C. 1730(q) shall be exempt from the requirements of the act if copies of all information and documentary materials 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 acquisition.

(2) A transaction described in paragraph (b)(1) of this section shall be exempt from the requirements of the act, including specifically the filing requirement, if the agency whose approval is required finds that approval of such transaction is necessary to prevent the probable failure of one of the institutions involved.

9. Section 802.42: Partial Exemption for Acquisitions in Connection With the Formation of Certain Joint Ventures or Other Corporations

New § 802.42 partially exempts contributors to the formation of joint venture corporations in cases where other contributors are entirely exempt under section 7A(c)(8) of the Act. Under § 801.40 of the rules, the formation of a joint venture or other corporation is analyzed as an acquisition of the voting securities of the newly-formed corporation by each contributor, and each contributor must determine whether its acquistion is reportable under the Act. In the case of the formation of a joint venture corporation in which one participant is exempt under section 7A(c)(8) but another participant is not, the non-exempt participant was required to file under the 1978 rules if its acquisition of the voting securities of the joint venture corporation met the size criteria of the Act and was not otherwise exempt. Since contributors exempted by section 7A(c)(8) submit information and documents relating to the formation of a joint venture corporation to the enforcement agencies, the Commission has determined that other participants need not be required to make an initial premerger notification filing.

This exemption is limited to the filing of a Notification and Report Form. In addition, in lieu of the Form, § 802.42(a) requires the party to submit an affidavit claiming this exemption and attesting to a good faith intention of going forward with the transaction. Section 802.42(b) states that the party remains subject to all other provisions of the Act and the rules. The submission of the affidavit thus initiates a 30-day waiting period. During this period, the Commission or the Assistant Attorney General may issue a request for additional information or documentary material to any non-exempt party to the acquisition, and such a request will extend the waiting period until 20 days after a response is received.

Comment 2 expresses a concern that the exemption from filing created by § 802.42 may negate the exemption in § 802.41 for the joint venture or other corporation at the time of its formation. If the exemption in § 802.41 were conditioned on filing being made by one or more contributors to the formation of the joint venture corporation, an exemption for contributors might imply a filing obligation for the joint venture corporation. The exemption for the joint venture or other corporation at the time of its formation is not so conditioned, however, and is unaffected by whether or not any of the contributors are subject to a filing requirement.

Section 802.42 is added to read as follows:

§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.

(a) Whenever one or more of the contributors in the formation of a joint venture or other corporation which otherwise would be subject to the requirements of the act by reason of § 801.40 are exempt from these requirements under section 7A(c)(8), any other contributor in the formation which is subject to the act and not exempt under section 7A(c)(8) need not file a Notification and Report Form, provided that no less than 30 days prior to the date of consummation any such contributor claiming this exemption has submitted an affidavit to the Federal Trade Commission and to the Assistant Attorney General stating its good faith intention to make the proposed acquisition and asserting the applicability of this exemption.

(b) Persons relieved of the requirement to file a Notification and Report Form pursuant to paragraph (a) of this section remain subject to all other provisions of the act and these rules.

10. Sections 802.50 and 802.51: Acquisitions of and by Foreign Persons

Two changes have been made in §§ 802.50 and 802.51 which exempt, respectively, certain acquisitions of and by foreign persons. First, the minimum amount of contact with United States commerce necessary for a transaction to be reportable has been raised. These amounts now coincide with those in amended § 802.20. See 44 FR 60781 (November 21, 1979). Specifically, § 802.50(a) now exempts acquisitions by a United States person of foreign assets unless sales in or into the United States of $25 million or more are attributable to such assets. New § 802.50(b) exempts acquisitions by a United States person of a foreign issuer unless the foreign issuer (or an entity controlled by it) holds assets located in the United States with an aggregate book value of $15 million or more, or had sales in or into the United States of $25 million or more in its most recent fiscal year. Amended § 802.51(b) exempts an acquisition by a foreign person of a foreign issuer which does not confer control of an issuer with assets located in the United States with an aggregate book value of $15 million or more, or confer control of a United States issuer with annual net sales or total assets of $25 million or more. Finally, new § 802.51(c) exempts acquisitions by a foreign person of assets located in the United States valued at less than $15 million. Three of the examples to §§ 802.50 and 802.51 have been changed to reflect these new levels.

The second change has been to amend §§ 802.51 (b)(1) and (d) to exclude from the determination of the dollar amount of assets located in the United States, in addition to "investment assets," the

value of any voting or nonvoting securities of another person held by the acquired person. The 1978 § 802.50(b) excluded from the value of assets located in the United States the value of "investment assets and voting or nonvoting securities of another person" but 1978 § 802.51 referred only to investment assets. Investment assets are defined in § 801.1(i)(2) of the rules as "cash, deposits in financial institutions, other money market instruments, and instruments evidencing government obligations." The Statement of Basis and Purpose to § 802.50 states that the purpose of disregarding these assets is "[t]o exclude assets that do not reflect a substantial business presence in the United States and generally have little competitive significance." 43 FR 33497 (July 31, 1978). Since this rationale applies equally to acquisitions by foreign persons, the provisions of § 802.51 have been made to coincide with those of § 802.50.

In determining whether an acquisition is exempt under § 802.51(c), one need not include the value of any voting or nonvoting securities of another person which are to be acquired because § 801.21(b) must be applied in the determination of the value of such assets. That section excludes such securities from the determination of the value of assets when acquired. Section 802.51(c) has not, therefore, been amended, since it is already consistent with § 802.50(b)(1).

Loan commitments and loan guarantees counted among the assets of a newly-formed joint venture corporation pursuant to § 801.40(c)(2), like investment assets and securities of another person, do not reflect a substantial business presence or competitive significance in the United States. The changes to § 801.40(c) make clear that the assets of a joint venture corporation as determined in accordance with that section are to be used for purposes of applying exemptions provided by the rules including §§ 802.50 and 802.51. Comment 5 points out that the formation of a foreign joint venture with no assets in the United States other than a loan guarantee by a United States corporation would not be exempt under the proposed language of §§ 801.40(c) and 802.51(b), although this result is clearly unintended and undesirable. The Commission has therefore added to the kinds of assets to be excluded when applying §§ 802.50(b)(1), 802.51(b)(2), and 802.51(d), "assets included pursuant to § 801.40(c)(2)."

Two comments address the raising of the reporting floor in §§ 802.50 and 802.51. Comment 3 asserts that the increases are far too small. The comment argues that considerations of comity are particularly important and that foreign governments are especially resentful of the intrusion of United States antitrust law into predominantly foreign transactions. The comment suggests that the minimum threshold be at least $75 million. The Commission does not agree with this suggestion. The present changes in §§ 802.50 and 802.51 are designed to make the reporting floor for transactions involving foreign persons coincide with those for transactions between United States persons as formulated in the minimum dollar value exemption of § 802.20. This change is justified by the Commission's determination when § 802.20 was amended that transactions with less impact on United States commerce are unlikely to violate the antitrust laws. If additional experience shows that transactions with still greater effects on commerce are unlikely to violate the antitrust laws, these thresholds can be raised again.

Comment 6 contends that these changes have introduced a contradiction into § 802.51(b). The comment cites the example of an acquisition by a foreign person of another foreign person having one United States subsidiary all of whose assets are located in the United States and are valued at $20 million and which had $20 million in sales. The acquiring person is acquiring control of an issuer which holds assets located in the United States valued at more than $15 million, and the comment contends that according to § 802.51(b)(1) the transaction is reportable. But, since the acquiring person is gaining control of a United States issuer with less than $25 million in annual net sales and total assets, § 802.51(b)(2) makes it exempt. This comment does not take into consideration the precise wording of §§ 802.50 and 802.51. The provisions of these sections are stated in the alternative. If any one (or more) of the paragraphs is satisfied, the transaction is exempt. See Statement of Basis and Purpose to § 802.51, 43 FR 33498 (July 31, 1978). There is thus no contradiction in new § 802.51(b); since § 802.51(b)(2) is satisfied, the transaction is exempt.

Section 802.50 is amended by revising paragraphs (a)(2), (b)(1), and (b)(2, example 2 which follows paragraph (a), and the example which follows paragraph (b) and § 802.51 is amended by revising paragraphs (b)(1), (b)(2), (c), and (d) and example 2 which follows paragraph (d) to read as follows:

§ 802.50 Acquisitions of foreign assets or of voting securities of a foreign issuer by United States persons.

(a) *Assets.* * * *

* * * * *

(2) The acquisition of assets located outside the United States, to which sales in or into the United States are attributable, shall be exempt from the requirements of the act unless as a result of the acquisition the acquiring person would hold assets of the acquired person to which such sales aggregating $25 million or more during the acquired person's most recent fiscal year were attributable.

Examples: * * *

2. Sixty days after the transaction in example 1, "A" proposes to sell to "B" a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled $20 million in the most recent fiscal year. Since "B" would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of "A" now held by "B". See § 801.13(b)(2). Since the total annual sales in or into the United States exceed $215 million, the acquisition of the second plant would not be exempt under this paragraph.

(b) *Voting Securities.* * * *

(1) Holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate book value of $15 million or more; or

(2) Made aggregate sales in or into the United States of $25 million or more in its most recent fiscal year.

Example: "A," a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of $27 million in the most recent fiscal year. The transaction is not exempt under this section.

§ 802.51 Acquisitions by foreign persons.

* * * * *

(b) * * *

(1) An issuer which holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate book value of $15 million or more, or

(2) A U.S. issuer with annual net sales or total assets of $25 million or more;

(c) The acquisition is of less than $15 million of assets located in the United States (other than investment assests); or

(d) The acquired person is also a foreign person, the aggregate annual sales of the acquiring and acquired persons in or into the United States are less than $110 million, and the aggregate total assets of the acquiring and

acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) are less than $110 million.

Examples: * * *

2. In example 1, assume that "A" is acquiring "B's" stock and that included within "B" is issuer C, a U.S. issuer whose total assets are valued at $27 million. Since C's voting securities will be acquired indirectly, and since "A" thus will be acquiring control of a U.S. issuer with total assets of more than $25 million, the acquisition cannot be exempt under this section.

* * * * *

11. Section 802.70: Acquisitions Requiring the Approval of a Federal Court in a Bankruptcy Proceeding

Paragraph (b) of § 802.70 has been amended to make clear that acquisitions exempted thereunder are limited to those subject to an order and requiring prior approval in connection with actions initiated by the Commission or the Department of Justice. The Commission has made this change specifically to exclude from this exemption acquisitions subject to prior approval of a federal court because they are of, by, or from a corporation in bankruptcy. In bankruptcy proceedings, the court will generally not consider antitrust issues in deciding whether to approve an acquisition. Therefore, such acquisitions should not generally be exempted from the requirements of the Act.

No comments addressed this rule.

Section 802.70 is amended by revising paragraph (b) to read as follows:

§ 802.70 Acquisitions subject to order.

* * * * *

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

12. Section 803.2: Incorporation by Reference

This new provision incorporates into the rules the circumstances under which incorporation by reference has been permitted by the staff in formal interpretations issued on April 7, 1981, and April 10, 1979. New paragraph (e) permits a person filing notification to incorporate by reference in item 4(a) of the Notification and Report Form any SEC documents submitted by that person with an earlier filing which remain current and are called for in a later filing. Of course, the person would still be required to submit any documents called for by item 4(a) that were not previously submitted. A reporting person may thus incorporate by reference a Form 10-K from a filing made six months earlier (provided that no Form 10-K has been filed more recently with the SEC) but will be required to submit any more recent Forms 10-Q or 8-K not submitted with an earlier filing. In addition, when the same parties file for a higher notification threshold, (see § 801.1(b)) no more than 90 days after having filed for a lower threshold, they may incorporate by reference any documents or information submitted with the earlier filing provided that the documents and information are the most recent available.

Comment 6 suggests that incorporation by reference also be permitted for documents called for by item 4(b) of the Notification and Report Form; that is, annual reports, annual audit reports, and regularly prepared balance sheets. The Commission has decided to adopt part of this suggestion. New paragraph (e) has been expanded to permit a person filing notification to incorporate by reference in item 4(b) of the Notification and Report Form any annual reports submitted with an earlier filing which remain current and are called for in the later filing. This expansion is feasible because the Commission has recently enlarged its record-keeping system to include annual reports. This change was made in large part because the Securities and Exchange Commission now permits companies to attach annual reports to their Form 10-K's and incorporate by reference into their Form 10-K's information contained in their annual report. As a result, many of the Form 10-K's in the Commission's files already included copies of the annual report.

Since the Commission's record-keeping system does not now include other documents called for by item 4(b), such an annual audit reports and regularly prepared balance sheets, the Commission cannot permit further incorporation by reference at this time. However, the Commission is currently exploring how additional incorporation by reference could be allowed without significantly increasing the cost or reducing the effectiveness of the premerger notification program.

Section 803.2 is amended by adding paragraph (e) to read as follows:

§ 803.2 Instructions applicable to notification and report form.

* * * * *

(e) A person filing notification may incorporate by reference only documentary materials required to be filed in response to item 4(a) of the Notification and Report Form and annual reports required to be filed in response to item 4(b), which were previously submitted with a filing by the same person and which are the most recent versions available; except that when the same parties file for a higher notification threshold no more than 90 days after having made filings with respect to a lower threshold, each party may incorporate by reference in the subsequent filing any documents or information in its earlier filing provided that the documents and information are the most recent available.

13. Section 803.3: Statement of Reasons for Noncompliance

Section 803.3, which sets forth the information which must be contained in a statement of reasons for noncompliance, has been revised to require a more detailed explanation of the filing person's noncompliance. This greater detail is necessary because past statements of noncompliance have not always provided the enforcement agencies with sufficient information to determine whether substantial compliance has been achieved. Section 7A(b)(1)(A) of the Act provides that the waiting period shall begin on the date of receipt by the Commission and the Assistant Attorney General of completed notification or, if such notification is not completed, on the date of receipt of the notification to the extent completed and a statement of the reasons for noncompliance. Section 7A(e)(2) of the Act similarly provides, with respect to a response to a request for additional information, that the waiting period shall begin to run again on the date of receipt of either a completed response or the response to the extent completed accompanied by a statement of reasons for noncompliance.

In the new rule, the introductory paragraph has been revised to emphasize that a statement of reasons for noncompliance must contain all the information relied upon to explain the noncompliance, since the information specifically requested in the rule may not provide an adequate explanation in all cases. Paragraph (a), which is unchanged from the 1978 rule, calls for an explanation of why the person is unable to respond completely. Paragraph (b) calls for an explanation of the information which would have been

necessary for a complete response. In the new rule, persons are required to specify which documents or classes of documents would have provided the requested information. Paragraph (c) is intended to enable the enforcement agencies to evaluate the adequacy of the search for responsive information or documents. The reporting person is required to identify persons having the required information, to describe efforts to obtain it and list the names of persons who searched for such information and, if no effort was made, to explain why. Finally, paragraph (d) specifies the information which must be provided where noncompliance is based on a claim of privilege.

Comment 1 objects to the requirement in revised § 803.3(c) that the identity of persons who searched for responsive documents be disclosed on the grounds that such persons would often be legal counsel and disclosure of their names would violate the "work product" exemption from discovery. The Commission believes that this provision of the rule is necessary to allow the investigative staff to evaluate the adequacy of a search for documents. Since the rule does not require the disclosure of any information relating to an attorney's legal analysis or strategy in pending litigation, this requirement presents no threat to the rights the "work product" exemption is intended to protect.

Section 803.3 is revised to read as follows:

§ 803.3 Statement of reasons for noncompliance.

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to section 7A(e) and § 803.20. Whenever the person filing notification is unable to supply a complete response, that person shall provide, for each item for which less than a complete response has been supplied, a statement of reasons for noncompliance. The statement of reasons for noncompliance shall contain all information upon which a person relies in explanation of its noncompliance and shall include at least the following:

(a) Why the person is unable to supply a complete response;

(b) What information, and what specific documents or categories of documents, would have been required for a complete response;

(c) Who, if anyone, has the required information, and specific documents or categories of documents; and a description of all efforts made to obtain such information and documents, including the names of persons who searched for required information and documents, and where the search was conducted. If no such efforts were made, provide an explanation of the reasons why, and a description of all efforts necessary to obtain required information and documents;

(d) Where noncompliance is based on a claim of privilege, a statement of the claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, addressee, date, subject matter, all recipients of the original and of any copies, its present location, and who has control of it.

14. Section 803.5: Affidavits Submitted With the Notification and Report Form

Two revisions have been made in § 803.5 which sets forth the requirements for the affidavits that must be submitted with the Notification and Report Form. First, new paragraph (3) has been added to § 803.5(a) requiring acquiring persons in transactions covered by § 801.30 to include in their premerger notification filing a copy of the notice served on the acquired person pursuant to § 803.5(a)(1).

Second, a requirement that the parties attest to a good faith intention to consummate the transaction has been included in paragraph (b) of § 805.5, which applies to transactions not covered by § 801.30. Such a requirement already appears in paragraph (a) and has been inserted here to increase the enforcement agencies' assurance that the intention to complete the transaction is current as of the time of filing.

Comment 3 asserts that the new requirement that a copy of the notice transmitted to the acquired person be attached to the acquiring person's affidavit will not solve the problem of assuring that the acquired person receives actual notice of the proposed acquisition. The comment suggests instead that the acquiring person be charged with the responsibility of delivering the notice to the chief executive officer of the acquired person. While the proposal may have merit, the Commission has not had any indications that acquired persons are not actually receiving the notice required. The suggestion was therefore not pursued. The purpose of requiring that a copy of the notice be submitted with the acquiring person's filing is not to assure that the acquired person has received the notice but to enable the enforcement agencies to determine whether the substance of the notice is adequate under the rules.

Comment 3 also argues that it is unnecessary to require the parties to a consensual transaction to attest to a good faith intention to consummate the transaction, since a lack of good faith is never the reason for the failure of such a transaction to be completed. The Commission believes, however, that the additional assurance that at the time of filing the parties intend to go through with the transaction justifies the minimal additional effort to comply with this requirement.

Section 803.5 is amended by adding paragraph (a)(3) and by revising paragraph (b) to read as follows:

§ 803.5 Affidavits required.

(a) * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 does not apply, the notification required by the act shall contain an affidavit, attached to the front of the notification, attesting that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction.

15. Section 803.8: English Versions of Foreign Language Documents

New § 803.8 sets out the circumstances in which persons submitting foreign language documents are required to provide the same information in English as well. Paragraph 803.8(a) requires that, whenever an "English language version" of any foreign language information or documentary material exists at the time of submission of the Notification and Report Form both the foreign and English language versions shall be submitted. An English language version is an English language outline, summary, extract, or verbatim translation of a foreign language document. Paragraph § 803.8(b) requires that persons submitting foreign language documents or information in response to a request for additional information or documentary material provide verbatim English translations or existing English language versions or both to the extent specified in the request.

Four comments (1, 2, 3, and 6) addressed the new rule. None criticized the requirement that existing English versions of foreign-language documents be submitted with the initial filing. All objected to the requirement that verbatim translations be submitted as required by a request for additional

information. Comments 1, 2, and 6 suggest that the provision conflicts with the intent of Congress and gives the enforcement agencies what amounts to an "automatic stay" of acquisitions involving foreign persons. Several comments expressed concern that the enforcement agencies would automatically require translation of all documents requested from a foreign person, unduly delaying consummation. In addition, three comments asserted that the power to impose such a burden is beyond the agencies' authority and will have a detrimental effect on foreign investment in this country.

Two comments suggest alternatives. Comment 1 proposes that the agencies be able to require translations only of documents which would be called for by item 4(c) of the Form, that is, documents analyzing the proposed acquisition in terms of markets and competition. Comment 3 suggests two approaches. One is to allow the recipient of the request to translate selected documents after foreign language versions have been submitted and the waiting period has resumed. Alternatively, the comment proposes that the filing of English summaries should start the waiting period, but that it would be suspended after ten days unless translations of selected documents were submitted.

The Commission does not agree that a request for translations of foreign language documents is beyond the scope of the information-gathering authority granted by Congress when it created the premerger review program. The enforcement agencies are not limited to requesting existing documents and previously compiled information, but are authorized to "require the submission of additional information or documentary material relevant to the proposed acquisition . . . ." 15 U.S.C. 18a(e)(1). Congress could have exempted transactions involving foreign firms from the requirements of the Act or placed limitations on the enforcement agencies' powers to investigate them. That Congress did not do so is a clear indication that it intended the agencies to scrutinize these transactions as thoroughly as any others. This obligation to investigate acquisitions with foreign participants requires that the agencies have access to the same information about the foreign person as they have about a United States person. While the Commission recognizes the delay and expense that may be imposed by a request for English language translations, the tight statutory time limits during which the enforcement agencies must assess the competitive effects of a transaction and take any necessary enforcement action do not include any special extensions for translating essential documents. The only way to assure that the agencies will have the full time period mandated by Congress to analyze the antitrust significance of a transaction is to require that the information necessary be provided in a form that is immediately usable.

The alternatives proposed in the comments appear unsatisfactory for several reasons. First, the suggestion that authority to require translations be limited to particular categories of documents or information could often deprive the enforcement agencies of the information necessary to evaluate the competitive effects of a particular acquisition. The suggestion that the waiting period resume when the foreign language documents are received, with the parties submitting selected translations while the time is running, would prevent the enforcement agencies from using the full, mandated time period to review the information and make a decision about the need for enforcement action. Finally, the proposal to suspend the waiting period a second time until selected verbatim translations are provided would still significantly shorten the agencies' time to review necessary information. In addition, this proposal is inconsistent with the time schedules provided by the Act, and may be beyond the Commission's authority.

While it does not appear possible to limit translations to a specific category of documents or information in all transactions, or to create a special waiting period based on the submission of English language summaries and descriptions of documents, the enforcement agencies have often found it possible to limit requests for translations in particular cases. Two approaches are available. First, representatives of the parties are encouraged to meet with investigating attorneys at the Department of Justice or the Commission before a request for additional information is prepared. Such meetings often provide information helpful in narrowing the scope of a request, limiting the categories of documents for which verbatim translations are required, and identifying categories of documents for which English language summaries are adequate. Even after a request for additional information has been delivered, the investigating attorneys at both enforcement agencies have authority to reduce or modify specifications or requirements for translation in particular cases. Particularly where a person preparing a response to a request believes that a large number of documents are responsive but appear unrelated to the antitrust analysis, the parties should contact the requesting agency to discuss the actual nature of the responsive documents, what points the investigating attorneys anticipated would be elucidated by the documents requested, and whether some or all of the responsive documents should be exempted entirely or not translated.

The enforcement agencies remain aware of the burden placed on recipients of requests for additional information by the requirement that they provide verbatim translations, and will continue to be sensitive to minimizing this burden when such requests are issued. Translations of foreign language documents will be required to the least extent consistent with the agencies' fulfilling their law enforcement obligations. The determination of when translations are necessary must be made on a case-by-case basis, however, and any general limitation on when translation can be required would be inconsistent with the goals of the Act.

Section 803.8 is added to read as follows:

§ 803.8 Foreign language documents.

(a) Whenever at the time of filing a Notification and Report Form there is an English language outline, summary, extract or verbatim translation of any information or of all or portions of any documentary materials in a foreign language required to be submitted by the act or these rules, all such English language versions shall be filed along with the foreign language information or materials.

(b) Documentary materials or information in a foreign language required to be submitted in responses to a request for additional information or documentary material shall be submitted with verbatim English language translations, or all existing English language versions, or both, as specified in such request.

16. Section 803.20(a): Response to Second Requests: Where Submitted

Section 803.20 establishes procedures governing requests for additional information or documentary material ("second requests") by the antitrust enforcement agencies. These requests have the effect of extending the waiting period. Consummation of the proposed acquisition normally cannot occur until 20 days (10 days in the case of a cash tender offer) after completed responses

to the request(s) are received by the requesting agency. Section 803.20(a)(2) originally provided that responses to second requests were returnable "at the office designated in § 803.10(c)"—that is, at the headquarters offices of the antitrust enforcement agencies in Washington, D.C. To make procedures for return of responses more flexible, this provision has been revised to make responses to second requests returnable at the location designated in the request or, if no location is designated, at the offices designated in § 803.10(c).

No comments addressed this revision.

Section 803.20 is amended by revising paragraph (a)(2) to read as follows:

§ 803.20 Requests for additional information or documentary material.

(a) * * *

(2) All the information and documentary material required to be submitted pursuant to a request under paragraph (a)(1) of this section shall be supplied to the Commission or to the Assistant Attorney General, whichever made such request, at such location as may be designated in the request, or, if no such location is designated, at the office designated in § 803.10(c). If such request is not fully complied with, a statement of reasons for noncompliance pursuant to § 803.3 shall be provided for each item or portion of such request which is not full complied with.

* * * * *

17. Section 803.20(b): Additional Notification Procedures Regarding Issuance of Second Requests

Section 803.20(b)(2) of the rules specifies when a second request shall be effective. Previously, a second request in writing was effective upon receipt or upon communication (*i.e.*, reading the full text) either in person or by telephone, where such communication was followed by written confirmation mailed within the waiting period. The Commission's experience has been that parties receiving second requests usually prefer to waive communication by telephone and to send an agent to obtain a written copy of it. To provide for this procedure in the rules, the Commission has amended § 803.20(b)(2)(ii).

The amended subsection specifies that a request is effective when notice of its issuance is given to the person to whom the request is issued, provided that written confirmation (*i.e.*, a copy) of the request is mailed to that person before the expiration of the initial waiting period. Such notice may be given by telephone or in person. To assure that a party to whom a second request is issued learns of the contents of the request as soon as possible, the rule also provides that, upon request of the individual receiving notice, the entire contents of the second request will be read.

Section 803.20(b)(2)(ii) requires that persons filing notification keep a designated individual available during normal business hours for purposes of receiving requests for clarification or amplification, requests for additional information or documentary material, or notice of the issuance of such requests. New subsection (iii) has been added to address a particular problem which arises when the individual so designated is not located in this country. The new subsection requires that when a reporting person designates an individual located outside the United States pursuant to subsection (ii), at least one individual located within the United States and accessible by telephone also be designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. This change is designed to facilitate communications between the requesting agency and the receipient of the request.

Comment 6 urges the Commission to make two additional changes in the procedures governing the issuance of second requests. First, to give the recipient knowledge of the contents of the request as soon as possible, the comment suggests requiring the issuing agency to have a written copy of the request available at its Washington, D.C., office on the day the request is issued to be picked up by the recipient. Second, when the last day of the waiting period falls on a holiday or weekend the comment proposes that notice of a request be required to be given by close of business (*i.e.*, 5:00 p.m. Washington, D.C., time) on the last business day prior to the expiration of the waiting period.

The Commission has decided not to adopt these suggestions. In practice, the staffs of the enforcement agencies when issuing second requests normally employ the procedures which Comment 6 recommends. A written copy of the request is always made available to the recipient at the Washington, D.C., office of the requesting agency so that the recipient may obtain it as quickly and conveniently as possible. Regarding the second suggestion, the requirement to give notice of the issuance of a second request usually means that notice is given during the regular business hours of the recipient. However, the circumstances in which a second request is issued sometimes vary from this pattern. Requiring by rule that these procedures be observed could, in unusual cases, hamper the enforcement agencies in carrying out their responsibilities under the Act. Moreover, the comment gives no reason why incorporating these procedures in the rules is unnecessary.

Section 803.20 is amended by revising paragraph (b)(2)(ii) and adding paragraph (b)(2)(iii). The introductory text of paragraph (b)(2) is republished for the information of the reader.

§ 803.20 Requests for additional information or documentary material.

* * * * *

(b) * * *

(2) *When request effective.* A request for additional information or documentary material shall be effective—

* * * * *

(ii) In the case of a written request, upon notice of the issuance of such request to the person to which it is directed within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides), provided that written confirmation of the request is mailed to the person to which the request is directed within the original 30-day (or, in the case of a cash tender offer, 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides). Notice to the person to which the request is directed may be given by telephone or in person. The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period through the telephone number supplied on the certification page of the Notification and Report Form. Notice of a request for additional information or documentary material need be given by telephone only to that individual or to the individual designated in accordance with subparagraph (iii) below. Upon the request of the individual receiving notice of the issuance of such a request, the full text of the request will be read. The written confirmation of the request shall be mailed to the ultimate parent entity of the person filing notification, or if another entity within the person filed notification pursuant to § 803.2(a), then to such entity.

(iii) When the individual designated in accordance with paragraph (b)(2)(ii) above is not located in the United States, the person filing notification shall designate an additional individual located within the United States to be reasonably available during normal business hours throughout the waiting

period through a telephone number supplied on the certification page of the Notification and Report Form. This individual shall be designated for the limited purpose of receiving notification of the issuance of requests for additional information or documentary material in accordance with the procedure described in paragraph (b)(2)(ii) above.

* * * * *

In addition to the comments addressed above, the Commission received comments which were outside the scope of the notice of proposed rulemaking. Some of these comments proposed additional changes in the premerger notification rules. The Commission will retain these comments and consider them as it explores additional changes in the rules.

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 83-20641 Filed 7-28-83; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket No. RM81-21-000; Order No. 320]

Recovery of Alaska Natural Gas Transportation System Charges

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Federal Energy Regulatory Commission (Commission) is amending its rules by adding provisions establishing a cost-recovery mechanism for the shippers of Alaska natural gas through the Alaska Natural Gas Transportation System (ANGTS). The final rule establishes the conditions for a permanent tariff provision by which a shipper may flow through to its jurisdictional customers ("track") the jurisdictional portion of changes in its ANGTS charges by means of periodic rate adjustment filings less comprehensive than general rate change filings under section 4(e) of the Natural Gas Act. A shipper may also recover the jurisdictional portion of these charges through a cost-of-service tariff approved by the Commission. The rule also establishes the mechanism for shipper tracking of any charges the sponsors are permitted to impose prior to the flow of gas through the ANGTS ("pre-delivery charges").

DATES: Notice of the effective date of this rule will be published later in the **Federal Register.** This rule will be effective on the latest of the following dates: (1) If rehearing is granted, on the date on which a Commission order on rehearing becomes effective, (2) if rehearing is requested but deemed denied in accordance with 18 CFR 385.713, on the date on which it is deemed denied, (3) if rehearing is not requested, by August 29, 1983, or (4) the date on which the Commission publishes in the **Federal Register** OMB's approval under the Paperwork Reduction Act and the OMB control number.

FOR FURTHER INFORMATION CONTACT: Jan Macpherson, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington 20426; (202) 357-8033)

Issued: July 25, 1983.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations by establishing procedures under which a shipper of Alaska natural gas may recover from its jurisdictional customers charges incurred by the shipper for the use of the Alaska Natural Gas Transportation System (ANGTS). These sections (sections 154.201 through 154.213) establish the terms and conditions for a permanent tariff provision that a shipper may propose in order to adjust its rates semiannually to "track" or flow through to its jurisdictional customers the jurisdictional portion of changes in its ANGTS charges. Alternatively, a shipper may recover the jurisdictional portion of these charges through a cost-of-service tariff approved by the Commission. Without this rule, a shipper would be required to make a general rate change filing under section 4(e) of the Natural Gas Act (NGA) every time the shipper wanted to adjust its rates to reflect any changes in its ANGTS charges; in addition, the Commission would have to institute a proceeding under section 5 of the NGA to reduce the shipper's rates to reflect decreases in the shipper's ANGTS charges. Tracking such changes through a permanent tariff provision will enable a shipper to adjust its rates by means of filings less comprehensive than section 4(e) general rate change filings. In these tracking filings, the Commission's review will extend only to the matters essential to permit a finding that the adjusted rates are "just and reasonable." The rule is designed to assure matching of a shipper's ANGTS charges and amounts collected over time to prevent over- or under-collection by the shipper.

As a prerequisite to tracking, a shipper must file a section 4(e) general rate change to establish a Base Tariff Rate, which is subject to periodic review and to which the tracking adjustments will be made. It must also file an ANGTS Charges Recovery Clause (ACR Clause) in its tariff containing provisions to implement the tracking mechanism set forth in this rule. As an alternative, the shipper may seek approval of a cost-of-service tariff. A shipper must decide every three years whether to continue to use the tracking mechanism or a cost-of-service tariff or to recover such charges through general rate change filings. A decision to discontinue tracking or a cost-of-service tariff is subject to Commission approval.

This rulemaking also establishes the procedures by which a shipper may adjust its rates to recover ANGTS charges incurred before the actual delivery of Alaska natural gas (predelivery charges), if any, to the extent that such charges are approved by the Commission or the National Energy Board of Canada (NEB) and to the extent that recovery of Canadian ANGTS charges is consistent with the President's *Findings and Proposed Waiver of Law* (October 15, 1981) (*Waiver*), approved by Joint Resoultion of Congress, S.J. Res. 115, Pub. L. 97-93, 95 Stat. 1204 (1981).

After considering the comments submitted in response to the proposed rule, the Commission finds that the availability of this tracking mechanism is in the public interest because it will facilitate financing and progress on the ANGTS and thereby assist in making available in the contiguous 48 states the large reserves of Alaskan natural gas. The tracking mechanism set forth in this rule will provide incentives for shippers to use the ANGTS and may improve the availability and terms of financing for the ANGTS while assuring a timely flow-through from a shipper to its customers of decreases in ANGTS charges as the initial investment in the ANGTS is depreciated. The Canadian Government also has found that tracking is essential for the financing of the Canadian segment. Accordingly, the Commission finds that issuance of this rule is necessary and related to the construction and intitial operation of the ANGTS within the operation of the ANGTS within the meaning of section 9 of the Alaska Natural Gas Transportation System Act (ANGTA), 15 U.S.C. 719-7190.