Sunshine Act Meetings

Federal Register
Vol. 52, No. 44
Friday, March 6, 1987

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: 2:00 p.m. (eastern time), Monday, March 16, 1987.

PLACE: Clarence M. Mitchell, Jr., Conference Room No. 200–C on the 2nd Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open

1. Announcement of Notation Vote(s)
2. Report on Commission Operations
3. Pre-Complaint Counseling and Complaint Processing Report for FY 1985
4. Proposed Compliance Manual, Section 630, Volume II, Unions

Closed

1. Litigation Authorization; General Counsel Recommendations
2. Proposed Commission Decision

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.

Please telephone (202) 634–6748 at all times for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Executive Officer at (202) 634–6748.

Date: March 4, 1987

Cynthia C. Matthews,

Executive Secretariat.

This Notice Issued March 4, 1987.

[FR Doc. 87–4878 Filed 3–4–87; 2:57 pm]

BILLING CODE 6750–06–M

FEDERAL MARITIME COMMISSION

TIME AND DATE: 10:00 a.m., March 11, 1987.

PLACE: Hearing Room One, 1100 L Street, NW., Washington, DC 20573.

STATUS: Closed.

MATTER TO BE CONSIDERED:

1. Peru Cargo Preference Law—Supreme Decree 009–86–TC—Section 19 Status Report.

CONTACT PERSON FOR MORE INFORMATION: Tony P. Kominoth, Assistant Secretary (202) 523–5725

Tony P. Kominoth,

Assistant Secretary.

[FR Doc. 87–4859 Filed 3–4–87; 12:34 pm]

BILLING CODE 6730–01–M

Corrections

Federal Register
Vol. 52, No. 44
Friday, March 6, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ACTION

VISTA Literacy Corps Guidelines

Correction

In notice document 87–4236 beginning on page 6028 in the issue of Friday, February 27, 1987, make the following correction:

On page 6029, in the third column, under the heading "Programmatic Goals and Direction", in the sixth line, "Assistant" should read "Assist".

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 3

[Federal Acquisition Regulation Circular 84–24]

Federal Acquisition Regulation; Anti-Kickback Act of 1986

Correction

In rule document 87–4219 beginning on page 6120 in the issue of Friday, February 27, 1987, make the following correction:

PART 3—[CORRECTED]

On page 6121, in the first column, amendatory instruction 2 should read "Section 3.502 is revised and §§ 3.502–1 through 3.502–3 are added to read as follows:"

BILLING CODE 1505-01-D

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act

Correction

In rule document 87–3769 beginning on page 5738 in the issue of Thursday, February 26, 1987, make the following corrections:

1. On page 5750, in the second column, in amendatory instruction 2, in the last line, the number one should be the letter "l".

§ 214.2 [Corrected]

2. On page 5753, in § 214.2(l)(3)(i), in the first column, in the second line, remove "(4)".

BILLING CODE 1505-01-D

federal register

Friday
March 6, 1987

Part II

Federal Trade Commission

16 CFR Parts 801, 802, and 803

Premerger Notification; Reporting and Waiting Period Requirements; Final Rule and Notice of Proposed Rulemaking

FEDERAL TRADE COMMISSION

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 Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition might violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. During the seven years the rules have been in effect, the Federal Trade Commission, with the concurrence of the Assistant Attorney General for Antitrust, has amended the premerger notification rules several times in order to improve the program's effectiveness and to lessen the burden of complying with the rules. These revisions are intended to reduce further the cost to the public of complying with the rules and to improve the program's effectiveness.

EFFECTIVE DATE: April 10, 1987.

FOR FURTHER INFORMATION CONTACT: John M. Sipple, Jr., Senior Attorney, Premerger Notification Office, Bureau of Competition, Room 301, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326-3100.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

These amendments to the Hart-Scott-Rodino premerger notification rules are largely technical or designed to reduce the burden to the public of reporting. The Commission has determined that none of the proposed rules is a major rule, as that term is defined in Executive Order 12291. The amendments will not result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments expands the coverage of the premerger notification rules in a way that would affect small business. 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.

Paperwork Reduction Act

The Hart-Scott-Rodino Premerger Notification rules and report form contain information collection requirements as defined by the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.* These requirements have been reviewed and approved by the Office of Management and Budget (OMB Control No. 3084-0005). Because these amendments will affect the information collection requirements of the premerger notification program, they were submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act. They were approved by OMB on September 30, 1985.

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. This 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 Commission and the Assistant Attorney General (who are sometimes hereafter referred to collectively as the "antitrust agencies" or the "enforcement agencies") to seek a court order enjoining the completion of those transactions that the agencies deem to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy when a challenge by one of the enforcement agencies proved successful. Thus the act requires that the agencies receive 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, which eliminates 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, 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, 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 ("the 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. 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, which were published in the **Federal Register** of August 1, 1977, 42 FR 39040.

Additional changes 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.

Changes of a substantive nature have been made in the premerger notification rules or Form on four occasions 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.

The third set of changes was published by the Federal Trade Commission as proposed rules changes in the **Federal Register** of July 29, 1981, 46 FR 38710. These revisions were designed to clarify and improve the effectiveness of the rules and of the Notification and Report Form as well as to reduce the burden of filing notification. Several comments on the proposed changes were received during the comment period. Final rules, which adopted some of the suggestions received during the comment period but which were substantially the same as the proposed rules, were published in the **Federal Register** on July 29, 1983, 48 FR 34427, and became effective on August 29, 1983. The fourth change, replacing the requirement to provide 1977 revenue data with a requirement to provide 1982 data on the Form, was published in the **Federal Register** on March 26, 1986, 51 FR 10368.

In addition, the Notification and Report Form, found in 16 CFR 803 (Appendix), has undergone minor revisions on two other occasions. The new versions were approved by the Office of Management and Budget on December 29, 1981, and February 23, 1983, respectively. Since that time, the current version of the Notification and Report Form has been approved by the Office of Management and Budget. The most recent approval came on September 30, 1985; it is valid for a period of three years. This form was published in 50 FR 46633 (November 12, 1985).

The current set of changes to the premerger notification rules grows out of a continuing effort by the Commission to reduce the burden of filing premerger notifications. This effort was the focus of a Notice of Request for Comments that the Commission published in the **Federal Register** on July 2, 1982, 47 FR 29182. The Request for Comments outlined four approaches to reducing the burden of the notification program: Narrowing the coverage of the rules by raising the dollar thresholds that determine which acquisitions must be reported; allowing persons filing notifications to reference information and documents filed in previous notifications, rather than requiring them to resubmit those materials; setting separate higher dollar reporting thresholds for acquisitions in some industries; and eliminating one or more of the successive reporting requirements for additional acquisitions of voting securities.

On September 24, 1985, the Commission published in the **Federal Register**, 50 FR 38742, thirteen proposed amendments accompanied by a proposed Statement of Basis and Purpose. All but two of the proposals were based on the burden reduction efforts that began in 1982. The Commission has decided to adopt nine of the proposals, to reject one proposal for budgetary reasons, and temporarily to defer action on the other three. Since one of the two proposals that do not involve burden reduction is also one of the three being deferred for later consideration, all but one of these final rules are based on the 1982 Request for Comments and related burden reduction efforts. The amendments seek to reduce the burden on filing parties by narrowing the types of acquisitions that must be reported, reducing the volume of documents or information that must be filed, and clarifying the meaning of the notification rules. The only change that did not originate from the burden reduction efforts would eliminate the reporting exemption in § 802.70(b) for acquisitions subject to the approval of the Commission or a federal court. It is intended to solve an infrequently occurring administrative problem.

The Commission has deferred final action on: The proposal to require reporting by owners of interests in "acquisition vehicles" (Proposal 1 of the September 24, 1985, proposed amendments); the proposed exemption of certain asset acquisitions, including the acquisition of current supplies, new durable goods, and some types of real estate (Proposal 5); and the proposed increase in the "controlled issuer" threshold that would have expanded the exemption for transactions valued at $15 million or less in § 802.20(b) and for certain foreign transactions described in § 802.50 and § 802.51 (Proposal 6).

The Commission has decided to adopt two approaches to narrow the coverage of the rules. Section 802.35 will exempt the acquisition of an employer's voting securities by certain employee trusts. Also, the aggregation rules of § 801.13 have been modified to reduce the number of successive asset acquisitions involving the same parties that are reportable.

In the September 24, 1985, proposed amendments, the Commission also proposed as a burden reduction measure expanding the permitted scope of incorporation by reference in response to items on the Form. Proposed rule § 803.9, which would have replaced § 803.2(e), would have expanded the ability to incorporate by reference. The implementation of this proposal would entail significant start up costs and require an ongoing commitment of resources to assure that filings could be fully reviewed within the statutory time periods. In view of the existing permission to incorporate by reference and given current budgetary stringencies, the Commission believes it is not appropriate at this time to undertake the kind of new program envisaged by the proposed rule. Although the proposal to expand incorporation by reference is not being adopted, the Commission has adopted several other proposals that have the effect of reducing the burden of filing the Notification and Report Form by both decreasing the amount of information required and narrowing the scope of the search for that information.

As noted when these amendments were proposed, the Commission has not found a basis for establishing separate reporting thresholds for different industries. However, Proposal 5, one of the three on which final action is deferred, would have established a higher threshold for, or exempted entirely, the acquisition of certain kinds of assets. The Commission is continuing to consider what kinds of asset acquisitions can receive separate treatment.

The Commission also has not proposed eliminating any of the sequential thresholds for reporting increased holdings of voting securities. The Commission continues to find that an increase in the percentage of securities held by a person may have competitive significance.

In addition to expanding reporting exemptions and reducing the information required by the Form, the Commission has also decided to reduce the burden of the notification program by adopting several amendments that clarify the meaning of the rules. These largely codify formal or informal interpretations of the Commission staff. These amendments include: A method of calculating the assets of an entity without a regularly prepared balance sheet; a method of calculating the percentage of voting securities a person holds; the requirements for giving notice to an acquired person; the time when the statutory waiting period begins for the formation of joint ventures; and a series of changes to examples in the rules to reflect prior amendments to the rules.

As mentioned above, the Commission has also addressed one matter in these amendments that is unrelated to burden reduction. The Commission has adopted a proposed amendment that deletes the exemption from reporting in § 802.70(b) for acquisitions subject to the prior approval of the Commission or a Federal court. This change will facilitate the administration of the premerger notification program and is expected to increase the volume of notifications only marginally. This proposal did not draw any adverse comment.

Three comments proposed that the Commission provide additional exemptions. One of the comments, comment 22, urged that the size-of-transaction test in § 802.20 of the rules be amended to exempt all acquisitions of less than 50 million. The 1982 Request for Comments had discussed raising the statutory $15 million minimum size-of-transaction criteria of section 7A(a)(3)(B) to $25 million. This discussion was premised in part on statistics from transactions filed in 1981 showing the enforcement agencies had demonstrated a lower level of interest in transactions of less than $25 million. It became clear from statistics covering 1982 and 1983, however, that the pattern of lower enforcement interest did not persist in subsequent years. Consequently, the Commission has not pursued that approach. Comment 14 suggested that § 802.6 be amended to exempt acquisitions of less than 10% of the shares of an air carrier, even though acquisitions at that level do not require the prior approval of the Department of Transportation. Comment 20 suggested more generally that the Commission exempt all acquisitions of less than 5% of the voting securities of an issuer. The Commission will consider whether these suggestions are justified. The Commission welcomes these and any other suggestions about the administration of the program.

Comments

The comment period for these rules was originally scheduled to end on October 24, 1985, but was extended by Commission action to November 29, 1985. The following comments were received:

No.	Date of letter	Organization
1	10-21-85	The RREEF Funds.
2	10-23-85	Anderson, Raymond & Lowenthal.
3	10-23-85	California Federal Savings and Loan Association.
4	10-23-85	Debevoise & Plimpton.
5	10-31-85	National Association of Manufacturers.
6	11-07-85	Shell Oil Company.
7	11-18-85	Association of the Bar of the City of New York, Committee on Antitrust and Trade Regulation.
8	11-19-85	Coldwell Banker Commercial Group, Inc.
9	11-22-85	Aetna Companies.
10	11-26-85	Exxon Corporation.
11	11-27-85	American Council of Life Insurance.
12	11-26-85	National Realty Committee.
13	11-26-85	State Teachers Retirement System of Ohio.
14	11-27-85	Texas Air Corporation.
15	11-27-85	Ropes & Gray.
16	11-28-85	American Bar Association, Section of Antitrust Law.
17	11-26-85	International Council of Shopping Centers.
18	11-29-85	Sullivan & Cromwell.
19	11-29-85	Weil, Gotshal & Manges.
20[1]	11-29-85	Akin, Gump, Strauss, Hauer & Feld.
21[1]	11-25-85	Trammell Crow Company.[2]
22[1]	12-09-85	ITT Corporation.
23[1]	01-13-86	Zaremba Corporation.
24[1]	02-13-86	Exxon Corporation.
25[1]	03-17-86	Pension Real Estate Association.
26[1]	04-21-86	American Council of Life Insurance.
27[1]	08-22-86	International Council of Shopping Centers.

[1] These comments were received after the close of the extended comment period. The Commission has, however, considered the issues raised by these comments in formulating these final rules.

[2] The Commission received several comments from individuals at the Trammell Crow Company.

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

Authority: The Federal Trade Commission, with the concurrence of the Assistant Attorney General, 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.

1. Section 801.11(e): Total Assets of a Person Without a Regularly Prepared Balance Sheet

Amended § 801.11 codifies a longstanding informal position of the Commission staff that a person without a regularly prepared balance sheet generally should not include funds used to make an acquisition in determining its size. This issue arises primarily in connection with newly-formed entities, not controlled by any other entity, that have not yet drawn up a balance sheet. Under this rule, if such an entity's only assets are cash that will be used to make an acquisition and securities of the entity it is acquiring, it generally will not have to file for that acquisition because it will be deemed too small to meet the act's size-of-person test. This rule is intended to limit the coverage of the premerger rules to those situations when an antitrust violation is most likely to be present, that is, when one business entity of a substantial size acquires another business entity of a substantial size. The basic rule is explained below. The rule also contains an exception when the entity acquires assets or voting securities of more than one person.

The Purpose of the Rule

A notification must be filed prior to an acquisition only if the acquiring and acquired persons meet the minimum size criteria of section 7A(a)(2) of the act. In general, the act requires one of the

parties to have annual net sales or total assets of at least $10 million and the other annual net sales or total assets of at least $100 million. Section 801.11 establishes the procedure by which the parties to an acquisition must determine their size. Section 801.11(c) provides that the annual net sales of a person shall be as stated on its last regularly prepared income statement, and its total assets shall be as stated on its last regularly prepared balance sheet. It does not directly address the question of how to calculate the total assets of a person that does not have a regularly prepared balance sheet. However, in instances in which a party has no regulary prepared balance sheet and does not have an income statement demonstrating that the act's size criteria for annual sales is met, the 1978 Statement of Basis and Purpose states a balance sheet must be prepared to determine whether the act applies. See 43 FR 33474 (July 31, 1978).

In advising such persons of their obligation to prepare balance sheets, the Commission staff has for some time stated that acquiring persons should not include as assets cash or loans that will be used to make an acquisition. The Commission now adopts this staff position and incorporates it in § 801.11(e). The new rule does not alter the manner in which firms with regularly prepared balance sheets determine whether they meet the act's size-of-person criteria; as provided in § 801.11(a) through (d), they continue to be governed by those regularly prepared statements, which may or may not include such cash or loans.

The distinction between the calculation of assets for business entities with regularly prepared balance sheets and those without them is based on the difference in their competitive significance and on the certainty and simplicity of the 1978 balance sheet rule. First, the size of an acquiring person can provide some measure of its competitive importance, and the act reflects Congress's conclusion that the amount of sales and assets are useful measurements of size. These size criteria can be misleading, however, when applied to entities without regularly prepared balance sheets, which are generally either newly-formed entities or shell corporations being used to make an acquisition. Such entities typically have had no sales and frequently have no assets other than the cash or loans used to make the acquisition. Thus, when they are not controlled by any other entity, the acquiring person has no competitive presence. In such instances the acquisition does not combine businesses but merely changes the ownership of a single ongoing business; it therefore cannot reduce competition. Accordingly, the Commission has concluded that no purpose is served by requiring such acquisitions to be reported.

Similarly, when an entity that is not an operating company acquires voting securities of one person in several sequential transactions, its prior possession of other securities of that person generally does not enhance the anticompetitive potential of the transaction. The already acquired securities do not constitute an independent business that, when combined with additional securities of that issuer, could lessen competition. Only one business is being bought. However, if the acquiring entity purchases assets or voting securities of more than one person, an anticompetitive combination could result. For that reason, § 801.11(e) includes an exception that requires counting cash, loans, and securities in those circumstances.

Although it might be argued that operating companies with regular balance sheets should also be directed to deduct from their total assets any cash or loans earmarked for making the acquisition and any securities issued by the acquired person, the Commission does not believe it advisable to do so. First, to direct that such deductions be made would require many persons to prepare a new balance sheet to determine the reportability of acquisitions. Rules explaining how to prepare that balance sheet would introduce needless complexity into the process of complying with the rules, a problem that the Commission largely obviated when it promulgated the existing financial statements rule of § 801.11 (see 43 FR 33473–33474 (July 31, 1978)).

Second, in most instances, the application of § 801.11(a) through (d) automatically reaches the same result for ongoing companies as § 801.11(e) does for newly-formed and other nonoperating companies. Loans made to ongoing businesses for the purpose of making an acquisition are normally made just prior to consummation of the acquisition and are therefore not reflected on the person's last regularly prepared balance sheet. Thus, under paragraphs (a) through (d), such loans usually are not included when calculating an acquiring person's total assets.

Finally, the Commission regards the predictability and convenience of the balance sheet approach as valuable even if it results in small inconsistencies in measuring a person's size. The approach allows the vast majority of firms to rely on their balance sheets to determine whether they have an obligation to file notification. Businesses can quickly determine from existing records whether they must file and that determination can be reviewed quickly and objectively by the enforcement agencies. This convenience outweighs the value of trying to make more precise or more uniform calculations of the dollar size criteria, which are at best only very preliminary measures of competitive significance. Accordingly, the Commission will continue to require ongoing businesses to determine their size on the basis of regularly prepared balance sheets.

Section 801.11(e)

General rule. Section 801.11(e) states that it applies only when the person does not have a regularly prepared balance sheet. This section applies only to entities not controlled by any other entity, and as a practical matter, it applies primarily to newly formed entities that have not yet drawn up balance sheets. Persons with regularly prepared balance sheets are still required to calculate their size in accordance with paragraphs (a) through (d) of § 801.11. Section 801.11(e) also does not alter the method set forth in § 801.40(c) for determining the size of a joint venture in its formation transaction. Subsection (e)(1) sets forth the general rule that assets including cash or securities are always included on a person's balance sheet, except for cash that will be used to make an acquisition, securities issued by the acquired person (or an entity within the acquired person), and expenses incidental to the acquisition.

This exclusion continues until the acquiring person has a regularly prepared balance sheet. For example, if a newly-formed person buys voting securities of a single acquired person in a series of acquisitions, that series of acquisitions will be treated the same as a single acquisition of those voting securities. Neither the cash to be used to acquire additional voting securities nor any securities of the same acquired person already held by the acquiring person are counted as assets until the acquiring person prepares its first regularly prepared balance sheet. Thus, even if an acquiring person without a regularly prepared balance sheet accumulated $200 million in voting securities of one person in a four-month period, it would not meet the size-of-person test in acquisitions of that acquired person's voting securities as a

result of holding those $200 million of voting securities until it had a regularly prepared balance sheet.

In contrast, the rule treats sequential asset acquisitions differently. Assets must be reflected on the acquiring entity's balance sheet as soon as they are acquired. The acquisition of assets by a previously non-operating entity, unlike the infusion of cash into such an entity and unlike its acquisition of a portion of a person's voting securities, can represent the establishment of an operating business. Further purchases of assets, even from the prior owner, can thus be tantamount to the combination of discrete businesses.

The first two examples illustrate the general way in which § 801.11(e) measures size. Example 1 illustrates the application of paragraph (e) when only cash is used in the acquisition. Example 2 illustrates the application of the rule when the acquiring person has non-cash assets.

Exception to the general rule. As explained above, the exclusion provided in § 801.11(e) is appropriate because transactions that may pose an antitrust concern are those in which two or more entities of significant size combine. When an entity without a regularly-prepared balance sheet acquires assets or voting securities of two or more persons, two or more entities of significant size may be combined; therefore § 801.11(e)(1) requires separate size calculations by the acquiring entity "for acquisitions of each acquired person." This means that if the entity will acquire assets or voting securities of person A and of person B, then, in determining whether it is large enough to have to report the acquisition of A, it must include as part of its total assets the cash it will use to acquire B and any securities of B it may hold. Similarly, in measuring its size to determine whether it must report the acquisition of B, the entity must include the cash it will use to acquire A and any securities of A it may hold. Example 4 illustrates the calculation of total assets when the acquiring entity will make two (or more) acquisitions.

Acquired persons without regularly prepared balance sheets. In most circumstances, newly-formed or other non-operating entities without regularly prepared balance sheets are not created or used for the purpose of becoming acquired persons, and the Commission is unaware of any need to give special treatment to such entities when the situation arises. The one exception of which the Commission is aware occurs in connection with the formation of joint venture corporations under § 801.40. Under § 801.40(a), the newly-formed joint venture is considered an acquired person, and § 801.40(c) sets forth a special rule that is used in calculating its size in the formation transaction. This calculation includes, *inter alia*, all assets contributed or to be contributed to the venture plus any credit that any person contributing to the joint venture has agreed to extend and any obligation of the joint venture firm that any contributor has agreed to guarantee. Unlike the calculation in § 801.11(e)(1), this test does not exclude cash.

Accordingly, § 801.11(e)(2) provides that the assets of an acquired person without a regularly prepared balance sheet ordinarily include all assets held, and that in the formation of a joint venture or other corporation, the special size test of § 801.40(c) governs. In either case, the exclusion of cash and voting securities provided in § 801.11(e)(1) does not apply to acquired persons. The text of § 801.11(e) has been altered in the final version of the rule to reflect the relationship of the new rule to § 801.40.

Modifications of the proposed rule. The Commission has made two other modifications of the proposed version of § 801.11(e). The final rule has been changed to make clear that funds used to pay expenses incidental to the acquisition are not included in calculating the acquiring entity's size. Incidental expenses are payments or fees for services rendered in connection with the acquisition, such as bank commitment fees, loan origination fees, investment banking fees, and counsel fees. This expansion of the exemption is a further application of its underlying rationale. Because the cash used to pay these expenses is exhausted by the acquisition, it cannot be combined with the newly-acquired entity to create a competitive problem. Example 3 illustrates the exclusion of acquisition-related expenses. The language of subparagraph (e)(1)(ii) of the rule has also been changed slightly for the sake of clarity.

Comments. Several comments made explicit or implicit reference to proposed § 801.11(e). No comments objected to the general purpose of the rule, and some (16, 18) specifically endorsed the approach taken in the rule. Therefore, the Commission has promulgated § 801.11(e) in substantially the same form as proposed.

Most of the comments dealing with § 801.11(e) revolved around its relationship with proposed § 801.5, the "acquisition vehicle" rule. Comment 2 expressed the view that taking the opposite approach, *i.e.*, counting cash and securities in these circumstances, could eliminate the need for a rule like proposed § 801.5. As stated above, the Commission is continuing to examine the best way to deal with the problems the "acquisition vehicle" proposal was intended to address. While reversal of the approach taken in § 801.11(e) would address these problems and has not been ruled out as a possible solution, the Commission does not believe it is likely that it will ultimately adopt an acquisition vehicle rule that will require acquiring companies without balance sheets to include cash as an asset.

Comment 16 suggested that the term "financial statements" that appeared in the proposed rule be changed to "balance sheet." The comment noted that the rule deals only with balance sheets and has no effect on a person's statement of annual income and expense. The Commission has adopted this suggestion.

2. Section 801.12(b): Calculating Percentage of Voting Securities To Be Held or Acquired

Section 801.12(b) sets out a formula by which persons are to calculate the percentage of voting securities of an issuer that they hold or will hold as a result of an acquisition. This amendment, which codifies an informal interpretation by the Commission staff, modifies the formula to reflect more accurately the amount of voting influence one person has over another where the acquired person has issued separate classes of voting securities with different voting rights.

The voting strength formula is important to the administration of the premerger notification program. Several key concepts in the rules and in the act turn on the percentage of a particular company's voting securities another person holds. For instance, a person is deemed to control a corporation when it holds at least 50 percent of that corporation's voting securities (§ 801.1(b)); the proper notification threshold is usually determined by the percentage of voting securities held (§ 801.1(h)); and the "investment only" exemption is available only for voting securities holdings of 10 percent or less (section 7A(c)(9) of the act and § 802.9). Accordingly, it is important that determinations of the percentage of voting securities held reflect the actual power of the person holding the shares and be made on an objective and readily ascertainable basis.

The formula in § 801.12(b) of the original rules directed an acquiring person to divide the number of votes for directors that it may cast after the acquisition by the total number of votes for directors that anyone may cast after the acquisition. In many cases the

resulting ratio accurately portrayed the amount of influence the buyer had over the acquired firm. In some instances, however, the literal application of this formula significantly misrepresented the voting power of the buyer. This discrepancy occurred when there were several classes of voting securities, and one class of voting stock had voting power disproportionate to another class. In such instances, the Commission staff had responded to inquiries by advising persons filing notifications to weigh the number of votes that each class of stock may cast by the number of directors that each class may elect. In this amendment to § 801.12(b), the Commission has adopted that formula, which recognizes both that different classes of stock may exist and that each class may elect different numbers of directors.

The following example illustrates the problem with the literal application of the language in the original rule. Assume Company X has two classes of voting stock, A and B. Class A has 1,000 shares outstanding and elects four of company X's ten directors. Each share of class A stock has one vote in each of these elections. Class B has 100 shares outstanding and elects six of company X's ten directors. Each share of class B stock has one vote in each of these elections. Company Y proposes to acquire all class B shares. Under the language of original § 801.12(b), since Y can only cast 100 votes for directors, the percentage of X's voting securities held by Y after the acquisition would have been 100 divided by 1,100 (the total number of votes for directors that may be cast) or about 9 percent. Using that formula, Y's acquisition would not have crossed the 15 percent threshold; furthermore, the acquisition would be below the threshold for the "solely for the purpose of investment" exemption of section (c)(9) of the act since it would not have exceeded 10 percent of X's voting securities. And since Y would not have held 50 percent or more of X's voting securities, the conclusive presumption of control in § 801.1(b)(1) would not have applied.

Revised § 801.12(b)(1) calculates, more realistically, that company Y holds 60 percent of the voting securities of company X. It reflects Y's influence more accurately by adopting a new formula that first determines Y's voting power within each individual class of stock, and then determines Y's total voting power by summing the ratios calculated for each individual class of stock. Moreover, since the number of directors each class elects can be different, the individual ratios are calculated by weighting Y's voting power over each class by the proportion of the total number of directors that each class may elect. In the example above, the percentage of voting securities held by Y would then be determined by the following formula:

Number of votes of class A stock held by Y divided by Total votes of class A stock times Directors elected by class A stock divided by Total number of directors

Plus

Number of votes of class B stock held by Y divided by Total votes of class B stock times Directors elected by class B stock divided by Total number of directors

Example 1 following new § 801.12(b)(1) applies this formula to that hypothetical acquisition.

The 1978 version of § 801.12(b)(i) referred to voting securities that "presently" entitle the holder to vote for directors. This terminology was intended to make clear that convertible voting securities were not included in the computations in that section. Since the Commission is not changing the treatment of convertible voting securities, the term, which had been inadvertently deleted in the proposed rule, has been restored to the final rule.

Although the revision in § 801.12(b) is a major improvement in many situations, the Commission recognizes that it does not always describe fully the degree of influence over a corporation's affairs that may result from the acquisition or holding of voting securities. For example, holdings of voting securities can be subject to constraints that increase or decrease the actual or potential influence of the holder. These may include staggered elections of corporate directors, cumulative voting rights, voting trusts or agreements, supermajority provisions, and convertible securities.

The Commission has, however, found no objective and administrable criteria that will accurately reflect a holder's degree of influence over a corporation's affairs in all situations. The Commission has been unable to translate these myriad factors into a single proportional measure of voting power. While even after this revision of § 801.12(b), voting power may be measured only roughly in some circumstances, the rule sets forth objective criteria that are quickly ascertainable in most instances. Such certainty of application was an essential consideration in the formulation of the premerger notification rules, which rely primarily and in the first instance on business entities being able to identify for themselves whether they have an obligation to file notification.

The Commission solicited suggestions of a more exact method for calculating the degree of control stemming from holdings of voting securities, but no comments addressed the point. The only comment (16) that mentioned the issue at all simply endorsed this revision of § 801.12(b) as proposed. The Commission thus has concluded that this revision is preferable to an alternative that might measure voting power more precisely in some instances but would be much more difficult to apply. The Commission has promulgated this amendment in the same form as proposed.

3. Section 801.13: Aggregation of Assets and Voting Securities

Sections 801.13 and 801.14 state the circumstances under which parties must aggregate their purchases of voting securities and assets from the same person to determine their obligations under the act and rules. The purpose of aggregation is to treat acquisitions that are split into separate transactions the same as acquisitions that are consummated in a single transaction. The 1978 aggregation rules sometimes required repeated and burdensome reporting of even small asset acquisitions that had no anticompetitive potential. For example, the 1978 rules required the aggregation of two asset purchases from the same person if the purchases occurred within 180 days of each other, even though the first purchase had already been reported and the second was very small. A similar problem arose when a small purchase of assets followed a reportable acquisition of voting securities. To reduce this problem, amended § 801.13 eliminates aggregation when the later acquisition is an asset purchase, as long as the earlier acquisition (whether of assets or voting securities) was reported.

The previous version of § 801.13(b) required a person acquiring assets to add the value of any assets acquired within the past 180 days from the same seller to determine whether the present purchase was reportable. The rule worked well, for example, in requiring notification when a person acquired $10 million worth of assets following a $10 million purchase from the same person the previous month. Similarly, if the original acquisition was of voting securities and the present acquisition was of assets, § 801.14 operated to require aggregation, although in this case without the 180-day time limit. For example, a person that had previously acquired $8 million of a company's stock and a year later planned to purchase $8 million of assets from the same company had to file notification prior to the asset purchase (assuming that the

acquisition was otherwise reportable). These results are not altered by this amendment to § 801.13.

The 1978 aggregation rules did not, however, work well in other circumstances. They could, for example, cause acquiring and acquired persons to file multiple notifications for tiny transactions. Once a person made a reportable acquisition by buying more than $15 million of another person's voting securities or assets, the aggregation requirement (which required the inclusion of the prior transaction) often meant that any additional asset purchase, however small, would also satisfy the act's size-of-transaction criteria. Consequently the transaction would again be subject to the notification and waiting requirements of the act (unless otherwise exempted). The Commission recognizes that repeated filings could be quite burdensome to the parties in such transactions, and that little antitrust purpose was served by receiving the subsequent report for the small transaction.

The new rule alleviates this burden by creating a separate reporting obligation for each cluster of transactions that amounts to an aggregate $15 million. Thus, after one acquisition has been reported, the parties are not required to report subsequent asset acquisitions until they again amount to $15 million in the aggregate. With this modification, the small subsequent transactions are no longer reportable.

The aggregation problem does not arise when the later transaction is an acquisition of voting securities only. Under § 801.13(b)(2), an earlier acquisition of assets is only aggregated with a subsequent asset acquisition, not with a later acquisition of voting securities. In addition, in a series of acquisitions involving only voting securities, § 802.21 exempts from the reporting requirements all acquisitions except those that meet or exceed the notification thresholds defined in § 801.1(h).

No comments objected to the Commission's proposal to amend § 801.13, and the Commission is promulgating the rule in substantially the same form as proposed. One comment (16) suggested three technical changes. First, the comment suggests that § 801.13 explicitly require that the earlier acquisition was in fact reported, not merely "subject to the filing and waiting requirements of the act." This change would require a person to continue to aggregate prior asset purchases if they had been reportable under the act but were not actually reported. This suggestion seems sound, and the Commission has adopted it.

The second suggestion is that new § 801.13(a)(3)(ii) explicitly reference § 802.21 (exemption for subsequent acquisitions of voting securities that do not exceed a higher threshold). The Commission believes that the relationship with § 802.21 is clear. Nevertheless, to avoid any possible confusion, explicit reference to the exemption has been added to § 801.13(a)(3)(ii).

The third point raised by the comment is outside the scope of this rulemaking. The comment asserts that the 1978 language of § 801.13 falls "short of [its] goal" of requiring aggregation of all asset acquisitions between the same parties occurring within 180 days of each other. The comment suggests changes intended to make § 801.13 more consistent with its stated goal. Since the point raised in the comment appears to be a useful suggestion, the Commission will study it and will, if appropriate, propose a change in § 801.13 in the future.

4. Section 802.35: Acquisitions by Employee Trusts

New § 802.35 exempts from the act's reporting provisions acquisitions of an employer's voting securities by an employee trust pursuant to an Employee Stock Ownership Plan ("ESOP"). Frequently a pension plan, profit sharing plan, or bonus plan that an employer organizes as an ESOP acquires shares of employer's stock on behalf of its employees. The plan typically holds the shares in trust for the employees. The original rules did not exempt such acquisitions of the employer's voting securities even in the case of an ESOP that the employer controlled by having the contractual right to designate its trustee or trustees. This new rule provides such an exemption. It does not exempt acquisitions by ESOPs of voting securities of persons other than the employer.

Under the 1978 rules, acquisitions of an employer's securities pursuant to an ESOP were likely to be subject to the notification requirements of the act. Such acquisitions are often large enough to satisfy the $15 million size-of-transaction criterion of section 7A(a)(3)(B). Furthermore, the ESOP trust is likely to meet the $10 million size-of-person criterion of section 7A(a)(2) because the trust is ordinarily considered to be controlled by the employer and must, pursuant to § 801.1(a)(1), include the total assets and annual net sales of the employer in determining its size. The intraperson exemption in § 802.30 does not apply, however, because the ESOP is not within the same person as the employer "by reason of holdings of voting securities." No other exemption applied under the original rules.

The conclusion that some ESOP transactions should be exempt is based on the distinctive characteristics of ESOP trusts. If complete ownership of voting securities, rather than just voting rights, were attributed to the individual employee beneficiaries of the ESOP, such acquisitions almost certainly would be too small to meet the $10 million size-of-person and $15 million size-of-transaction criteria of the act. If the securities were held by an entity that was controlled by the employer "by reason of holding voting securities" rather than appointing trustees, then the transaction would be exempted by § 802.30 as an intraperson transaction. The rationales for not requiring small acquisitions to be reported and for exempting intraperson transactions both apply to an ESOP trust's acquisition of an employer's voting securities. The Commission has therefore created a new exemption for such acquisitions based on the mixture of stock ownership characteristics of ESOP trusts discussed below.

Acquisitions of an employer's securities pursuant to an ESOP represent an inexpensive source of financing for the employer because the ESOP is accorded advantageous tax treatment when the securities are acquired with borrowed money. See generally 26 U.S.C. 401 *et seq.* For this reason, the employer, not its employees, generally initiates the formation of an ESOP. In doing so, the employer typically retains the power to appoint and remove the trustee who manages the assets of an ESOP trust, although the trustee may have the authority to appoint a co-trustee as the custodian for the voting securities. Once a trust is established by a publicly held corporation, the employees, not the trustees, vote the employer securities held by the trust that are allocated to their account. 26 U.S.C. 409A(e)(2). The trustees, however, often retain the power to purchase and sell the employer securities.

Under § 801.1(c)(3), the ESOP trust, like any trust, is deemed to hold the employer securities. For most irrevocable trusts, this result serves to guard against a possible antitrust problem because trustees usually have certain indicia of beneficial ownership, including the right to vote and the authority to dispose of all securities. From an antitrust viewpoint, therefore, competition would be threatened if a

non-ESOP trust acquired substantial blocks of voting securities of the employer and of a competing firm. If an ESOP trust were to hold securities of both the employer and a competing company, however, the two sets of securities would not necessarily be voted by the ESOP trust. In a publicly held company, the employees would typically vote the securities of their employer. Consequently, one usual situation that causes antitrust concern—the possibility that one entity might control two competing firms—is unlikely to pose a problem when an ESOP holds the shares of both the employer and of a competing firm.

Nevertheless, an acquisition by an ESOP trust of a competing firm's voting securities could restrain competition in other ways. For example, an employer that controls the trust by retaining the power to appoint and remove trustees might cause the trust to acquire a competitor. The existing premerger rules recognize the possibility of exercising influence through the power to appoint trustees. Section 801.1(b) declares that a person controls an entity if it has the right to "designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions" (*e.g.*, trustees). Accordingly, when an employer controls the trust, the employer is considered the acquiring person and must report the trust's acquisition of shares in another firm. Because this provision ensures that the competitive implications of acquiring another firm's voting securities will continue to be reviewed, the Commission does not believe that it is also necessary to make the acquisition by the ESOP of an employer's securities reportable.

The provisions of the new rule take into account these distinctive features of ESOP trusts. Subsection: (a) Of the rule explicitly limits the exemption to trusts that are part of qualified stock bonus, pension, or profit sharing plans as defined in the Internal Revenue Code. These plans are most likely to make acquisitions large enough to be reportable. Subsection (b) limits the exemption to those trusts in which the employer has the right to appoint and remove the trustees or which the employer otherwise controls under § 801.1(b). Subsection (c) provides further that the exemption applies only to acquisitions of voting securities issued by the employer (or by entities it controls).

The examples emphasize that the ESOP exemption applies only to the acquisition of an employer's voting securities. In example 1 the acquisition illustrates that voting securities issued by more than one entity (but not more than one person) can qualify for the exemption. The acquisition in example 2 is not exempt because the issuer is neither the employer nor an entity within the person of the employer.

The Commission considered as alternatives means of exempting employee trust acquisitions either expanding the intraperson exemption in § 802.30 or changing the definition of "hold" in § 801.1(e). The Commission rejected both approaches for the reasons stated in the Notice of Proposed Rulemaking published on September 24, 1985, 50 FR 38760–38761.

Comment 16, the only one that dealt with this proposal, pointed out certain difficulties that may arise in determining whether an ESOP trust is controlled by the employer. The comment noted that some ESOP agreements provide that the collective bargaining representative of the employee-beneficiaries of the trust may have a veto over the employer's appointment or removal of the trustee(s). Whether this type of veto dilutes the employer's influence over the trust so as to negate the element of control of § 801.1(b) is a factual issue that will need to be determined in each instance. The comment also pointed out that some ESOP trustees appoint a custodian, sometimes designated as a trustee or co-trustee, for the voting securities held by the trust. Again, the question of control under these circumstances is a factual one that will require individual analysis.

Because all acquisitions of employer voting securities by ESOPs are exempt, it would not be appropriate to aggregate such acquisitions in the calculations under § 801.13. Such aggregation can be avoided by listing § 802.35 in § 801.15(a)(2), and that section has been amended accordingly.

5. Section 802.70(b): Acquisitions Subject to Prior Approval

The Commission has deleted paragraph (b) of § 802.70, which had exempted from the notification and waiting requirements of the act certain acquisitions that require prior approval by the Federal Trade Commission or by a federal court. The Commission has concluded that although the principle of this rule—to eliminate duplicative notification requirements—was sound, the rule could well have troublesome practical effects for both the enforcement agencies and the parties subject to an order. The Commission wants to assure that the rule, which exempted only a few transactions each year, does not create a barrier to voluntary settlements of antitrust actions by unnecessarily requiring public disclosures of information about acquisitions. As a consequence, the Commission has concluded that the administration of the premerger program would be better served by eliminating the exemption.

Previously, § 802.70(b) exempted an entire acquisition from the requirements of the act if, pursuant to an order entered in an action brought by the Commission or the Department of Justice, the acquiring person was required to obtain approval of the Commission or a federal court prior to making an acquisition. For example, a diversified company engaged in both the lumber and the cement businesses might, as a result of an acquisition of a cement firm, have become subject to a prior approval order requiring it to submit all future cement acquisitions for review. The company, when contemplating a subsequent cement and lumber acquisition, would have been required to submit both the cement and lumber portions of the acquisition for approval under the order.

When the § 802.70(b) exemption existed, the enforcement agencies were required to insist upon their right to review under a prior approval order all portions of a transaction, not merely those portions relevant to the order. However, this position could, in some instances, become an obstacle to obtaining consensual orders with companies because of the public disclosure procedures that are a part of prior approval orders. In contrast to the confidentiality required by section 7A(h) of the act for filings under the normal premerger notification program, review under an order typically requires the person requesting approval to place on the public record business information demonstrating that the acquisition is not anticompetitive. Thus, in the example from the previous paragraph, the diversified company would be required to disclose information about the lumber, as well as the cement, business. The Commission is concerned that the prospect of such broad disclosures of business information might unnecessarily provoke a company to resist an order settling an antitrust matter.

The Commission considered two approaches to this problem: (1) To require concurrent prior notifications under the order and the premerger notification program, or (2) to require separate notifications for different portions of an acquisition—those that will be reviewed within the terms of the order and those that will be reviewed

under the normal premerger notification procedures. The latter resolution, although logically superior, could require extremely complex definitions to include all transactions that might be relevant to the order. Such definitions could result in some transactions being placed in the wrong category and quite possibly would result in others not being adequately reported under either procedure.

Accordingly, the Commission has decided to eliminate the exemption. This change will not significantly increase the number of filings (fewer than a dozen transactions were exempted under § 802.70(b) in 1984), nor the burden of compliance, since a firm would in any case have compiled much of the information required for its premerger filing in order to comply with the prior approval order. The Commission has decided that on balance, the administration of the premerger notification program and the enforcement of the antitrust laws will be enhanced by eliminating the exemption contained in § 802.70(b). No comments addressed this proposal.

The considerations underlying this rules change do not apply to divestitures subject to prior approval because in those orders the Commission or a federal court will have identified the transfers of assets that are relevant to those orders. There is, therefore, no reason to delete the exemption in § 802.70(a) for divestitures pursuant to orders.

6. Section 803.5: Affidavit Obligations of the Acquiring Person

Section 803.5(a) requires that the acquiring person give notice to the acquired person in certain transactions. The Commission has modified this rule (1) to permit the notice to state the notification threshold the acquiring person will meet or exceed in lieu of the number of shares to be acquired and (2) to require the person to state, where applicable, the total number of shares to be held as a result of the acquisition.

This rule requires an acquiring person in transactions subject to § 801.30 (tender offers, open market purchases and other acquisitions of stock from persons other than the issuer) to submit with its Notification and Report Form an affidavit attesting that the issuer has received the notice required by § 803.5(a). The notice procedure serves two related purposes: To inform the issuer of its obligation to file the notification required by the act, and to provide the issuer and the antitrust agencies with evidence that the acquiring person seriously intends to consummate the transaction.

When first promulgated, § 803.5(a) required the acquiring person to disclose in the notice to the issuer, among other things, the identity of the acquiring person and the number of securities of each class to be acquired. Because some acquiring persons could not state their intentions in terms of numbers of securities to be acquired, the Commission, by formal interpretation on December 28, 1978, permitted such persons to state instead which of the reporting thresholds of § 801.1(h) they intended to meet or exceed.

This interpretation did not, however, address a different problem in the 1978 version of § 803.5(a). That rule required the acquiring person to state only the number of securities to be acquired and not the number that would be held as a result of an acquisition. Since § 801.13(a) requires the acquiring person to aggregate the voting securities it plans to acquire with all voting securities of the issuer that it already holds, it is this total number of shares that would give rise to a filing obligation. If the acquiring person had substantial holdings in the issuer before the acquisition, merely stating the number of shares it would acquire would not always make clear to the issuer that the acquisition was reportable.

This amendment both codifies the 1978 formal interpretation on notification thresholds and amends the rule to require the acquiring person to state, in instances in which the number of voting securities is specified, the number of voting securities that would be held as a result of the acquisition.

Notice to the acquired issuer. These changes will assist in fulfilling the principal purpose of § 803.5(a)—to inform the acquired person of its obligation to file a Notification and Report Form with the antitrust enforcement agencies. In the transactions covered oy this rule, the issuer may have no reason to know that some or all of its shares are being acquired, because the voting securities are to be acquired from persons other than the issuer or an entity within the same person as the issuer. Section 803.5(a) cures this potential problem by requiring the acquiring person to serve the notice before filing its notification.

These amendments refine that process. By requiring that the notice state either the notification threshold the acquiring person will meet or exceed or the total number of voting securities to be held as a result of an acquisition, the amendments insure that the acquired person will receive notice of the acquiring person's intention to make an acquisition that meets or exceeds the $15 million, or the 15, 25 or 50 percent of voting securities thresholds of § 801.1(h). From this statement and from knowledge about its own voting securities, the acquired person will have a basis for determining whether it has a notification obligation.

The requirement that the notice include nonvoting securities has been deleted because they do not affect the notification obligation.

Credibility of the acquisition plan. This amendment will also aid in fulfilling the second objective of § 803.5(a)—to provide evidence of the seriousness of the acquiring person's plan of action. The antitrust screening process initiated by the acquiring person requires the expenditure of significant resources by the issuer and the antitrust agencies. The rule therefore requires that the acquiring person provide evidence that it intends to make a reportable transaction and is not merely considering the possibility of making one. The evidence required falls into three categories:

(1) The statement that the acquiring person has a "good faith intention . . . to make [an] acquisition" (§ 803.5(a)(2));

(2) The statement of the specific number of securities that the person intends to hold or the filing threshold it intends to meet or exceed (§ 803.5(a)(1)(iii)); and

(3) The communication of these and other facts to the acquired person (§ 803.5(a)(1)).

The statement of "good faith" intent is but one part of the evidence the rules require to establish that an acquiring person intends to make a reportable acquisition. That general statement gains greater credibility when the acquiring person declares the exact number of securities it intends to buy or the filing threshold it intends to cross. The greater specificity suggests that a plan has developed beyond the conceptual stage at least to the point where it could be implemented. In requiring a definite written declaration of a plan to acquire shares, this provision parallels the requirements that agreements to merge be executed (§ 803.5(b)) and that tender offers be publicly announced (§ 803.5(a)(2)) before filing notification.

Because the acquired person and the enforcement agencies are entitled to be reasonably certain that a reportable acquisition will be made, § 803.5(a)(1)(iii) requires the acquiring person to state in the notice a present intention to make such a reportable acquisition of voting securities. Accordingly, the Commission does not accept a statement in a notice, for

instance, that the acquiring person intends to make an acquisition that "may exceed" a reporting threshold, because that statement does not specify either a threshold that the person intends to meet or a current intention to acquire any shares. See Example 4. Similarly, the Commission does not accept a statement that a person will acquire "up to" a certain percentage or number of shares, since such a statement does not clearly express a present intent to acquire a percentage or number of shares that is reportable. See Example 5.

The Commission had proposed requiring a statement of the specific present intent to meet or exceed a higher notification threshold once the person had established an intent to make a reportable acquisition. The effect of such an extension would have been, for example, to treat a filing in which the acquiring person states in its notice to the acquired person an intention "that it will acquire more than 15% of the acquired person's voting securities and it may acquire more than 50% of those voting securities" as a filing solely for the 15% threshold. This proposal drew a mixed response from commenters. Comments 7 and 16 objected to the proposal, arguing that requiring a subsequent filing prior to crossing the 25 or 50 percent thresholds would be unnecessary and burdensome. Comment 18, in contrast, supported the proposal, noting that because the percentage of voting securities acquired can be relevant to antitrust analysis, multiple filings can conserve Commission resources and permit smaller acquisitions that otherwise might be blocked if the transaction were analyzed at the 50 percent level.

While the Commission agrees on balance with Comment 18 and does not believe this aspect of its original proposal would have imposed a major burden, it concedes that some additional burden would have resulted. Moreover, since the current practice, which treats the above language as a filing for the 50% threshold, has not created substantial antitrust enforcement problems, the Commission has decided not to adopt this change.

The Commission will thus continue its policy that requires the notice affidavit to demonstrate a firm intention to make a reportable acquisition, but allows filing for a higher threshold even when the intention to make that additional acquisition has not yet become fixed. Example 3 illustrates that when a person files for a threshold it plans to meet or exceed, it may also designate a higher threshold. The less stringent standard for designating the filing threshold accommodates the interest of the parties to a transaction and the antitrust agencies in most circumstances. Once the premerger review process is undertaken, the additional burden on the acquired person and the enforcement agencies occasioned by a review of a transaction at a higher threshold is usually relatively minor in comparison with the burden of conducting a completely separate review based on a subsequent filing by the acquiring person for that higher threshold.

It should be noted, however, that it is unlikely to be advantageous for acquiring persons to file for a higher threshold if they do not expect to cross it within the period provided by § 803.7. As comment 18 noted, there are circumstances in which the antitrust agencies would permit a smaller holding of voting securities, but would challenge larger holdings. By filing for the higher threshold in such a transaction, the acquiring person might make it necessary for one of the agencies to seek to enjoin an acquisition based on the designated threshold, even though the immediate transaction contemplated would not have been challenged.

Comment 2 noted that in many acquisitions to which § 801.30 applies the acquiring and acquired persons have executed an agreement in principle or a letter of intent to merge or acquire. It argues that in such instances it is pointless and burdensome to also require the acquiring person to deliver to the acquired person the notice required by § 803.5(a). While the Commission agrees that the notice can be redundant, it does not agree that delivery of the notice is a substantial burden or unnecessary. Acquisitions to which § 801.30 applies are by definition acquisitions of voting securities from persons other than the acquired person. Consequently, even if the agreement lapses for some reason, the rules still permit the acquiring person to proceed with the acquisition. In such circumstances, since the agreement is no longer in force, the acquired person might not be aware of its continuing responsibility to file. The Commission believes that the current notice requirement makes clear that the acquired person's responsibility to file is based on the acquiring person's intent to make a reportable acquisition and is independent of any agreement. Accordingly, it has not adopted the suggestion.

7. Section 803.10(a): Running of Time in § 801.40 Transactions

The Commission has amended § 803.10(a) in order to clarify when the waiting period begins in connection with the formation of a joint venture or other corporation (hereinafter "joint venture") subject to § 801.40 of the rules. The amendment makes explicit that the waiting period does not begin until all venturers who are required to file have done so. This is consistent with the Commission staff's interpretation of the 1978 version of § 803.10(a).

Before this amendment to § 803.10(a), it was possible to read the rule to provide for a separate waiting period for each individual venturer that began when each filed its notification. The Commission has amended the rule to eliminate this possible misinterpretation, which it believes would preclude effective review by the antitrust agencies of the formation of joint ventures. Separate waiting periods for individual venturers would mean that in some instances one venturer's waiting period could expire before another venturer's filing alerted the antitrust agencies to the need to issue requests for additional information to all venturers. To eliminate any possible ambiguity, the Commission has amended § 803.10(a) to state explicitly that in the case of acquisitions covered by § 801.40, the waiting period begins when all venturers required to file a notification have done so.

Although the Commission is adopting this amendment as proposed, it believes that the staff's prior position correctly interpreted previous § 803.10. Old § 803.10 provided, in relevant part, that the waiting period for all acquisitions, other than those subject to § 801.30, began on the "date of receipt of the notification . . . from: . . . all persons required by the act and these rules to file notification." In other words, the waiting period began only when all venturers required to file had done so. It was, however, possible to argue that the "all persons" language of § 803.10 refers only to those persons required to file notification in connection with a particular "acquisition" and that § 801.40 was intended to treat each individual venturer's acquisition of stock of the joint venture corporation as a discrete acquisition. Since in each such "acquisition" only the venturer is required to file (the joint venture itself need not file), the result would be that the "all persons" requirement would be satisfied whenever an individual venturer filed notification. Thus, according to the argument, each

venturer would have a separate waiting period beginning as soon as it filed its notification.

While this argument had support in some language of the rules, it was not consistent with the antitrust enforcement agencies' need to conduct an analysis of the competitive relationships among the persons forming the joint venture corporation. As the Statement of Basis and Purpose to § 802.41 notes, "it is the combination of the persons that form the new entity (and not the new entity standing alone) that presents antitrust issues when a new corporation is formed . . . ." 43 FR 33496 (July 31, 1978). Accordingly, to ensure that the enforcement agencies have the opportunity to evaluate the competitive relationships among all the venturers required to file, the agencies must be able to review all their notifications at the same time. It was on this basis that the Commission staff interpreted the language of the 1978 version of § 803.10(a) to mean that the waiting period for acquisitions subject to § 801.40 began when all acquiring persons that were required to report had done so. To avoid any possible ambiguity, however, the rule has been amended to state this requirement explicitly.

The relationship between this amendment and § 803.10(b), (explaining when the waiting period ends) and § 803.20(c) (setting out the rules for an extended waiting period) is as follows: in acquisitions subject to § 801.40 in which a request for additional information is issued, the extended waiting period begins on the date the additional information or documentary material requested is received from all contributors to the joint venture corporation who received a request.

Comment 16, the only comment to discuss this proposal, suggested that item 5(d) instead be revised to require the participants in the joint venture to identify the other persons participating. However, as discussed below in connection with the changes in the Form, the agencies have not had difficulty in ascertaining the identity of joint venture parties. Rather, the problem is that without having the filings of all the participants available at one time, the agencies might fail to notice possible anticompetitive consequences of the venture that would justify a second request. The Commission regards this amendment as an adequate resolution of the problem and believes no further changes are necessary at this time.

8. Changes in Examples To Conform With Prior Amendments to the Rules

On November 21, 1979 and July 29, 1983, the Commission published several changes in the premerger rules. See 44 FR 66781 *et seq.* and 48 FR 34427 *et seq.* Our experience with those changes has indicated that it would be helpful to make several amendments to the examples appearing elsewhere in the premerger rules. The affected examples are example 1 to § 801.4, example 4 to § 801.15, example 3 to § 801.30, the example to § 801.40, and example 1 to § 802.41. These amendments elicited no comments.

9. The Premerger Notification and Report Form

The Commission has promulgated eight changes designed to clarify or simplify the Premerger Notification and Report Form. Seven of the changes were proposed in the **Federal Register** in September 1985; six of these appear in substantially the same form as they were proposed, and one has been reworded for the sake of clarity. One additional change, a clarification of an existing requirement, is a product of the staff's recent experience. The Form and its instructions have been revised to reflect these changes, and the revised version appears in this **Federal Register** Notice.

The eight changes to the Form are discussed in paragraphs a–h below. Some of the changes are based on comments received by the Commission in response to its July 1982 **Federal Register** Notice. These comments are referred to as "earlier comments" or "prior comments." Comments received in response to the 1985 rules change proposals are designated by number.

Following paragraph h, sections 1–4 address new issues that were raised in comments received pursuant to the 1985 proposals. These comments did not specifically address the present changes to the Form but instead suggested further changes in the Form or raised other issues about the Form.

Changes in the Report Form

a. General Instructions.

The general instructions to the Form detail the proper procedures for complying with the notification requirements. Some filing parties have misinterpreted one aspect of these instructions: when making a narrative response to an informational item in the Form on attachment pages, parties have sometimes failed to submit one set of those attachment pages with each copy of their Form. The Commission has therefore changed the general instructions to make clear that each filing person must submit two complete copies of the Form to the Commission and three complete copies of the Form to the Department of Justice and that each copy of the Form must have its own set of attachment pages.

This provision does not apply to "documentary attachments," which, as defined in the instructions to the Form, are the documents, usually prepared by the parties for purposes unrelated to the Form, that are submitted pursuant to item 2(d) (formerly 2(f)(i)), item 4, and §§ 803.1(b) and 803.11. The instructions require multiple submissions to each agency of narrative responses to items on the Form, but only a single copy per agency of each "documentary attachment."

This change in the general Form instructions makes clear that when parties choose to make their narrative responses on separate attachment pages, these responses are not "documentary attachments," and multiple copies of these pages must still be supplied to each agency. Some filing parties had incorrectly treated these pages as "documentary attachments" and had submitted only one copy per agency. Such omissions hamper review by the agencies and could cause a filing to be deemed deficient.

b. Description of Transaction

The Commission has consolidated into one question the three items, formerly items 2(a), 2(b), and 2(c), that request a description of the transaction. Item 2(a) had asked for the names and addresses of the parties to the acquisition, a description of the assets or voting securities to be acquired, the consideration to be received from each party, and, if the acquisition involved a tender offer, the terms of the offer. Item 2(b) had called for the scheduled consummation date, and item 2(c) had required a description of the manner in which the transaction was to be carried out, including scheduled major events such as stockholders' meetings, other requests for government approval or tender offer dates. Parties had often repeated information when responding to these items; the Commission has therefore eliminated this redundancy by combining them into one question.

Comment 22 pointed out that the proposed version of item 2(a) and the 1978 version of item 2(d), which has been redesignated as item 2(b) but which is otherwise being retained unchanged, both asked for a description of the assets to be acquired. The Commission has further revised item 2(a) in response to this comment so that

it no longer requires a description of the assets or voting securities. Instead, item 2(a) simply asks whether assets or voting securities (or both) are being acquired. The detailed description of assets to be acquired is required by item 2(b) (formerly 2(d)) and the description of the voting securities to be acquired is found in item 2(c) (formerly 2(e)).

c. Description of Voting Securities To Be Acquired

The Commission has changed item 2(c) (which had been 2(e) but which has been redesignated) to allow persons who intend to acquire 100 percent of the acquired person's voting securities to respond by stating that intent and providing the dollar value of the acquisition. Item 2(c) requires responses to eight subsections that elicit information about separate classes of voting securities and the amount of each that will be held by each acquiring person following the transaction. As the 1978 Statement of Basis and Purpose pointed out, the purpose of the detailed breakdown is to enable the agencies to assess the degree of control resulting from the acquisition. 43 FR 33522 (July 31, 1978). The Commission recognizes that detailed responses are likely to be unnecessary when a person is acquiring 100 percent of the voting securities of a company. In that case, the acquiring person will presumably have complete control of the acquired person. The same is true when two companies are merging or consolidating to form a new company. In these instances, therefore, the Commission has eliminated the detailed responses required by item 2(c). Item 2(c) now permits parties simply to state that 100% of the voting securities are being acquired.

However, to enable the Commission to monitor compliance with the act with regard to previous acquisitions between the parties, parties must still give full responses to item 2(c) if, prior to the acquisition, the acquiring person held 15 percent or more than $15 million of the acquired person's voting securities. Since holdings of this magnitude normally require a filing, disclosure of this information in item 2(c) will permit the agencies to inquire whether the prior acquisition was exempt from the act. For the sake of clarity, the wording of item 2(c) has been altered from the form in which it was proposed.

d. Index to Ancillary Documents

The Commission has deleted item 2(f)(ii), which had asked for an index of ancillary documents related to the acquisition agreement, such as those relating to personnel matters (*e.g.*, union contracts and employment agreements), third-party financing agreements, leases, subleases and documents related to the transfer of realty. The 1978 Statement of Basis and Purpose stated that the index "will permit the agencies to identify particular documents in a second request." 43 FR 33523 (July 31, 1978). In the Commission's experience, however, this index has not been particularly helpful. Second requests do not usually focus on issues related to third-party agreements, subleases, union contracts or other documents listed in the index. If this type of information is needed, the agencies can ask for it descriptively in the second request even without an index of the documents. Since the index can be lengthy and time-consuming to prepare, the Commission has dropped this item from the Form.

e. Shareholders and Holdings of Persons Filing Notification

The Commission has changed the instructions to item 6 to specifically permit parties to identify where responses to this item can be found in a "documentary attachment" to the Form. The Commission does not object to parties responding to these items by referencing "documentary attachments" submitted with a filing as long as they indicate the relevant pages in the attachments and as long as the information provided in the attachments is complete, up-to-date, and accurate. If the information contained in the attachments is not complete, up-to-date, and accurate, the filing will not be deemed substantially compliant and the waiting period will not begin until the correct materials are filed with both agencies.

As revised, item 6(a) asks for a list of the filing person's subsidiaries, except for subsidiaries with total assets of less than $10 million. Item 6(b) asks for a list of shareholders of each entity included within the person filing notification. Holders of 5 percent or more of the voting securities of any entity included within the person must be listed unless the entity has total assets of less than $10 million. Item 6(c) requires parties to list their minority holdings. Parties may omit holdings of less than 5 percent and holdings of issuers with total assets of less than $10 million.

One prior comment stated that the Commission should permit parties to respond to these items by referencing a "documentary attachment" to the Form rather than including a response on the Form itself. The Commission is of the view that a response that references a "documentary attachment" is adequate so long as the specific pages of each attachment are indicated for each item.

f. List of Subsidiaries

The Commission has changed item 6(a) so that parties may omit subsidiaries with total assets of less than $10 million. Item 6(a) requires persons filing notification to provide the name and headquarters mailing address of each entity included within the person filing notification. The 1978 instructions gave parties the option of not listing entities with total assets of less than $1 million. Prior comments questioned whether a list of subsidiaries was helpful to the agencies' antitrust review and especially whether the names of relatively small subsidiaries were necessary.

To conduct their review, the agencies must be able to determine the names and addresses of all significant entities included within the parties to the acquisition. In many instances, the names of these subsidiaries can give the agencies a better understanding of the acquisition and can enable them to seek information from public sources, most of which is only available by company (subsidiary) name. The need for subsidiaries' names is particularly compelling when the subsidiaries are foreign entities, since the SIC code information contained in item 5 is limited to U.S. operations. See § 803.2. Without the name of the foreign subsidiary, information about the person's foreign operations is not readily obtainable. However, the Commission has recognized that some subsidiaries may be so small that even their names are unlikely to produce information relevant to the agencies' antitrust review. The Commission has therefore raised the $1 million cut-off provided in original item 6(a) to $10 million. This change was based in part on the fact that items 6(b) and 6(c) have always been subject to a $10 million cut-off and that these cut-off levels do not appear to have adversely affected the agencies' ability to conduct their antitrust review.

g. Geographic Information in Overlapping SIC Codes

The Commission has changed the level of specificity with which parties must provide certain geographic information. When an overlap occurred in certain SIC codes, the Commission had previously required that each party provide the address, arranged by the state, county, and city or town, of its establishments that derived revenue in the overlapping code. Now, for some of these codes, parties may provide only the state or states in which they derive revenue.

Item 7(a) of the Form requires the filing person to identify 4-digit industry SIC codes in which it has knowledge or belief that it and any other person which is a party to the acquisition also derives revenue (usually referred to as "the overlapping code" or "a four-digit overlap"). Item 7(c) requires the filing person to identify the geographic areas in which it derives revenue in overlapping codes. For most overlapping codes the filing person lists the states in which it derives revenue. In the 1978 version of Item 7(c)(iv), parties were required to provide more detailed geographic information for overlaps in all SIC major groups 52–62 and 64–89.

In most of these major groups, the agencies must determine the precise geographic areas in which the parties operate. For instance, acquisitions involving food stores, gasoline service stations, hospitals, apparel and accessory stores, and banks require a detailed breakdown of geographic information, since the relevant geographic market is often a local area rather than an entire state or region. However, some of the SIC major groups identified in 1978 as requiring the more detailed breakdown have proved in fact not to require such detailed breakdowns in the initial Hart-Scott-Rodino filing. For instance, acquisitions involving securities brokers, insurance agents, investment offices and certain other businesses falling within these codes can be adequately reviewed without the initial filing providing such detailed information. Acquisitions involving overlaps in these codes either do not involve local markets or, if they do involve local markets, can still be adequately reviewed if the parties specify in their initial filings only the states in which they derive revenue. Therefore, the Commission has changed item 7(c) to require only state-by-state information for overlaps occurring in SIC major groups 62, 64–67, 72, 73, 76, 79, and 81–89. The SIC major groups that still require the parties to give the address, arranged by state, county, and city or town, of establishments where they derive revenue are listed in Attachment A.

h. Prior Acquisitions

The Commission has changed item 9 of the Form to require the acquiring person to provide information about acquisitions made within five years of filing rather than the ten years that had been required.

If both the acquiring person and the acquired issuer or the acquired assets had attributable to them $1 million or more in revenue in the same 4-digit SIC code, the acquiring person must list in item 9 its past acquisitions of other persons that also derived revenue in that 4-digit SIC code. Only acquisitions of more than 50 percent of the voting securities or assets of entities that had annual net sales or total assets greater than $10 million in the year prior to the acquisition need be listed. In the original version of item 9 parties were required to list all such acquisitions that had taken place in the past ten years. The Commission has changed item 9 so that it now applies only to acquisitions in the past five years.

The purpose of item 9 is to assist the agencies in identifying prior acquisitions by the acquiring person that may suggest a pattern of acquisitions in a particular industry by that person. See 43 FR 33534 (July 31, 1978). Several earlier comments suggested modifications of item 9. One such comment suggested raising to $10 million the present $1 million cut-off for the overlap in the acquisition that is the subject of the notification. This suggestion was rejected because the agencies sometimes find overlaps of less than $10 million in a given 4-digit SIC code to be of competitive significance. This is particularly true when the parties compete in a small geographic area or when one of the parties has an extremely large share of a market.

Another prior comment suggested that the ten-year period be reduced to five years. The Commission has adopted this suggestion. It believes that this change can be made without harming the agencies' ability to conduct a thorough antitrust review since an account of the acquiring person's acquisitions over the past five years will give adequate notice of possible trends toward concentration. This change should significantly reduce the burden of this item because it will cut in half the number of years that parties will have to search for information about prior acquisitions and because it should be easier for companies to identify more recent acquisitions.

Other Comments

In addition to the comments discussed in paragraphs (a) through (h) above, comment 16 specifically endorsed the changes as proposed, and no comment objected to them. Several other comments suggested additional changes in the Form, requested clarification of existing items, or otherwise made observations about the Form's reporting requirements. The Commission takes this opportunity to respond to the issues raised in these comments.

1. Comments about SIC code revenue required by the Form. Several comments made observations about the existing Report Form's SIC code requirements. Comment 2 said it is difficult for companies to classify information in the correct code since some companies have internal bookkeeping inconsistencies and their SIC code classifications vary from year to year. The comment stated that this problem is especially acute when the classifications are highly detailed. Although compiling SIC-based information may occasionally be difficult, the Commission has found it the most workable way to determine whether and to what extent companies produce competing products.

Similarly, comment 2 stated that it is difficult to provide the detailed breakdown required for 7-digit codes ending in "00." If a 7-digit code ends in "00," the instructions require a further breakdown by codes listed in Appendix B of the *Numerical List of Manufactured Products.* Again, notwithstanding this possible difficulty, the Commission needs this detailed information for its antitrust review.

The same comment also stated that SIC code information on interplant transfers as is required by § 803.2 is difficult to assemble, and that providing such information can result in some double counting. Here as well, despite the possible difficulty of gathering the information, the Commission believes that interplant transfers are relevant to antitrust review since internally consumed products must sometimes be considered in the market along with products sold externally. Furthermore, the Commission has not found the double counting problem insurmountable. Although the inclusion of interplant transfers means that the sum of SIC code revenues may slightly exceed the sales listed on the company's most recent income statement, the agencies can take this possibility into account in performing their antitrust review.

Comment 2 also observed that it is difficult to compile SIC code revenue, especially the more detailed 7-digit information, for recently acquired entities. This problem is more likely to occur if the recent acquisition was not reportable, since in a reported acquisition the acquired entity would already have compiled its SIC code information to fulfill its filing requirements. Again, even if the information has not been previously compiled and may be difficult to compile, it must be compiled in connection with the filing since the agencies' antitrust review depends on it.

Comment 22 objected to item 5(b)(ii)'s requirement that current 7-digit information be provided for products

added since the base year. The comment pointed out that this item required companies to annually update 7-digit information for products they have recently added. The comment suggested that the information be supplied only for the year following the addition.

The Commission needs SIC code information on all aspects of a person's business, including recently commenced operations. This information must be as detailed as practicable. In this particular item, the Commission already permits parties the option of providing the information based on 7-digit SIC codes "or in the manner ordinarily used by the person filing notification." It would not be workable, however, to permit parties to provide the information only for the year following its addition. If this were permitted, the parties to an acquisition would be providing dollar revenues for dissimilar years for added products, since any number of different intervening years would appear in addition to the base year and the most recent year. This would make it difficult for the Commission to compare the parties' revenues. Moreover, if parties only provided revenues for new products for the year after the product was introduced, the Commission would often be unable to determine the present level of that person's presence in the market. The new product may have generated very little revenue when it was introduced, but may have since gained a significant presence in the market.

2. Suggested reduction in reporting requirements. Most of the observations about difficulties in complying with filing requirements centered around the need to provide SIC code information. Comment 22, however, also suggested two changes in the Form unrelated to SIC code data: Deletion of the requirement that persons submit an affidavit with the Form and deletion of the requirement that filing persons certify the Form.

The Commission believes that these two requirements impose at most a minimal burden on the parties to an acquisition. The Commission needs to know that the acquisition that is the subject of the filing is actually planned and not hypothetical; this is the goal of the affidavit requirement. The Commission also needs to be certain that the information contained in the Form is accurate. The current certification requirement gives the Commission added assurance that a specific individual has taken responsibility for the accuracy of the information contained in the Form. The Commission believes that the small burden imposed by these requirements is outweighed by the importance of the requirements. If interested persons believe the burden imposed by these requirements is more substantial, the Commission would appreciate submissions describing the extent of the burden.

3. Requests for clarification of Report Form instructions. Comment 2 requested clarification of the instructions for two items on the Form: Item 5(b)(ii) and item 8. The Commission believes that the instructions are adequate and therefore does not propose to change them at this time.

Item 5(b)(ii) requests information about products that have been added or deleted subsequent to 1982. The instruction to this item permits parties to identify added or deleted products either by 7-digit code or "in the manner ordinarily used by the person filing notification." The instruction does not expressly define the term "products added or deleted." Most filing persons have correctly read the instructions to require only additions or deletions of products that comprise a 7-digit product code. In other words, for purposes of this item, parties should define the term "product" to mean all items that are classified in a single 7-digit code. For example, assume all widgets are classified in a single 7-digit code. If a person has always made blue and yellow widgets, and one year it begins production of red widgets, it need not list red widgets in item 5(b)(ii). Similarly, if the person stops making blue widgets, it need not list them as a deleted product. In both instances the addition and deletion took place within a existing or ongoing 7-digit code in which the person derived revenue in 1982.

Comment 2 requested a similar change in the instruction to item 8, which asks for information about any vendor-vendee relationship between the parties to the acquisition. To complete this item, each vendee must list the "products" it purchased from other parties to the acquisition. Only aggregate purchases of "products" of more than $1 million must be listed. To determine whether the $1 million figure applies, most parties have correctly read the existing instructions as defining the term "product" to mean a 7-digit SIC code. Thus, in our example above, if $750,000 worth of red widgets and $750,000 worth of blue widgets were purchased in the most recent year, the person should list widgets in item 8. If, however, blue and red widgets were properly classified in separate 7-digit codes, then in our example widgets would not be listed in item 8 since the $1 million level would not be met for any given "product."

4. Comments regarding joint venture filings. Two comments (7, 16) expressed the concern that the Notification and Report Form did not provide the Commission with enough information to determine whether all the parties to the formation of a joint venture or other corporation had fulfilled their filing requirements. These comments arose in the context of the proposal to change rule 803.10(a), which codifies the Commission's policy of starting joint venture waiting periods after all parties to the venture with a reporting obligation have filed. The comments asserted that the Commission would not be able to determine which parties to the acquisition were required to file and therefore the agencies would not know when to start the applicable waiting period. The Commission believes that the Form already requires enough information to allow the agencies to determine which joint venturers are required to file.

The Form requires certain information about the parties to a joint venture. For instance, item 1(c) requires each party to "[g]ive the names of *all* ultimate parent entities of acquiring ... persons which are parties to the acquisition *whether or not they are required to file notification.*" (emphasis supplied) In the joint venture context, this item requires the name of each person that will acquire any voting securities of the venture, even if the parties do not believe that some of those persons will ultimately have a reporting obligation. Similarly the subparts of item 2(c) (formerly 2(e)) require detailed information about the amount and dollar value of the voting securities to be acquired by each person. Each joint venturer that files must supply this information for each person acquiring securities of a joint venture corporation.

Item 5(d) requires detailed information about all contributions to the joint venture or other corporation. Item 5(d)(ii)(A) requires a list of contributions from each person forming the venture and item 5(d)(ii)(D) requires a full description of the consideration to be received by each person forming the joint venture. Neither item is limited to persons required to file. Therefore each person that files for a joint venture must disclose this information for itself and every other person forming the venture.

These items, when read together, give the Commission considerable information about each venturer. The Commission will know the names of each contributor, the amount and value

of the securities each venturer will receive and the contributions made by each venturer. Once the first venturer files, the Commission can readily determine from that filing which other venturers will meet the act's size-of-transaction test. Furthermore, the names of the other venturers will likely permit the Commission to determine from public sources which of the other venturers appear to meet the commerce and size-of-person tests.

Comments 7 and 16 suggested that parties be specifically required to state which other parties to the joint venture are required to file. The Commission agrees that this would not be particularly burdensome and that it would provide further confirmation of the Commission's independent evaluation of who must file. Nevertheless, the Commission has not adopted the suggestion at this time since it has not in the past had difficulty determining which venturers must file. If in the future the Commission experiences difficulty determining which joint venturers must file (particularly if filing persons resist the Commission's attempts to determine this information informally), the Commission will propose a change suitable to remedy the problem.

Attachment A

SIC major groups in which parties are required to provide the address, arranged by state, county, and city or town, of each establishment from which they derive dollar revenues.

Division G. Retail Trade

Major Group 52. Building materials, hardware, garden supply, and mobile home dealers.
Major Group 53. General merchandise stores.
Major Group 54. Food stores.
Major Group 55. Automotive dealers and gasoline service stations.
Major Group 56. Apparel and accessory stores.
Major Group 57. Furniture, home furnishings, and equipment stores.
Major Group 58. Eating and drinking places.
Major Group 59. Miscellaneous retail.

Division H. Finance, Insurance and Real Estate

Major Group 60. Banking.
Major Group 61. Credit Agencies other than banks.

Division I. Services

Major Group 70. Hotels, rooming houses, camps, and other lodging places.
Major Group 75. Automotive repair, services, and garages.
Major Group 78. Motion pictures.
Major Group 80. Health services.

List of Subjects

16 CFR Parts 801 and 802

Antitrust.

16 CFR Part 803

Antitrust, Reporting and recordkeeping requirements.

Accordingly, 16 CFR Parts 801, 802 and 803 are amended as follows:

A. The authority for Parts 801, 802 and 803 continues to read as follows:

Authority: Sec. 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390.

PART 801—COVERAGE RULES

B. Example 1 to § 801.4(b) is revised to read as set forth below.

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: 1. Assume that acquiring person "A" proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by "A." Thus, if B holds more than $15 million of the voting securities of corporation X (but does not control X), and "A" and "X" satisfy sections 7A (a)(1) and (a)(2), "A" must file notification separately with respect to its secondary acquisition of voting securities of X. "X" must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after "A" files, pursuant to § 801.30.

* * * * *

C. Section 801.11(a) is revised and a new § 801.11(e) is added to read as set forth below.

§ 801.11 Annual net sales and total assets.

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

* * * * *

(e) Subject to the limitations of paragraph (d) of this section, the total assets of:

(1) An acquiring person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be, for acquisitions of each acquired person:

(i) All assets held by the acquiring person at the time of the acquisition,

(ii) Less all cash that will be used by the acquiring person as consideration in an acquisition of assets from, or in an acquisition of voting securities issued by, that acquired person (or an entity within that acquired person) and less all cash that will be used for expenses incidental to the acquisition, and less all securities of the acquired person (or an entity within that acquired person); and

(2) An acquired person that does not have the regularly prepared balance sheet described in paragraph (c)(2) of this section shall be either

(i) All assets held by the acquired person at the time of the acquisition, or

(ii) Where applicable, its assets as determined in accordance with § 801.40(c).

Examples: For examples 1–4, assume that A is a newly-formed company which is not controlled by any other entity. Assume also that A has no sales and does not have the balance sheet described in paragraph (c)(2) of this section.

1. A will borrow $105 million in cash and will purchase assets from B for $100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $105 million that A will have at the time of the acquisition. Therefore, A has total assets of $5 million and does not meet the size-of-person test of section 7A(a)(2).

2. Assume that A will acquire assets from B and that, at the time it acquires B's assets, A will have $85 million in cash and a factory valued at $20 million. A will exchange the factory and $80 million cash for B's assets. To determine A's total assets, A should subtract from the $85 million cash the $80 million that will be used to acquire assets from B and add the remainder to the value of the factory. Thus, A has total assets of $25 million. Even though A will use the factory as part of the consideration for the acquisition, the value of the factory must still be included in A's total assets.

Note that A and B may also have to report the acquisition by B of A's non-cash assets (i.e., the factory). For that acquisition, the value of the cash A will use to buy B's assets is not excluded from A's total assets. Thus, in the acquisition by B, A's total assets are $105 million.

3. Assume that company A will make a $200 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $211 million. A does not meet the size-of-person test in section 7A(a)(2) because its total assets are less than $10 million. $200 million is excluded because it will be consideration for the acquisition and $5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a $6 million person.

4. Assume that A borrows $150 million to acquire $100 million of assets from person B and $45 million of voting securities of person C. To determine its size for purposes of its acquisition from person B, A subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $50 million for purposes of its acquisition from B. To determine its size with respect to its acquisition from person C, A subtracts the $45 million that will be paid for C's voting

securities. Thus, for purposes of its acquisition from C, A has total assets of $105 million. In the first acquisition A meets the $10 million size-of-person test and in the second acquisition A meets the $100 million size-of-person test of section 7A(a)(2).

D. Section 801.12(b)(1) is revised to read as set forth below.

§ 801.12 Calculating percentage of voting securities or assets.

* * * * *

(b) *Percentage of voting securities.* (1) Whenever the act or these rules require calculation of the percentage of voting securities of an issuer to be held or acquired, the percentage shall be the sum of the separate ratios for each class of voting securities, expressed as a percentage. The ratio for each class of voting securities equals:

(i)(A) The number of votes for directors of the issuer which the holder of a class of voting securities is presently entitled to cast, and as a result of the acquisition, will become entitled to cast, divided by,

(B) The total number of votes for directors of the issuer which presently may be cast by that class, and which will be entitled to be cast by that class after the acquisition, multiplied by,

(ii)(A) The number of directors that class is entitled to elect, divided by (B) the total number of directors.

Examples: In each of the following examples company X has two classes of voting securities, class A, consisting of 1000 shares with each share having one vote, and class B, consisting of 100 shares with each share having one vote. The class A shares elect four of the ten directors and the class B shares elect six of the ten directors.

In this situation, § 801.12(b) requires calculations of the percentage of voting securities held to be made according to the following formula:

Number of votes of class A held divided by Total votes of class A times Directors elected by class A stock divided by Total number of directors

Plus

Number of votes of class B held divided by Total votes of class B times Directors elected by class B stock divided by Total number of directors

1. Assume that company Y holds all 100 shares of class B stock and no shares of class A stock. By virtue of its class B holdings, Y has all 100 of the votes which may be cast by class B stock and can elect six of company X's ten directors. Applying the formula which results from the rule, Y calculates that it holds 100/100 x 6/10 or 60 percent of the voting securities of company X because of its holdings of class B stock and no additional percentage derived from holdings of class A stock. Consequently, Y holds a total of 60 percent of the voting securities of company X.

2. Assume that company Y holds 500 shares of class A stock and no shares of class B stock. By virtue of its class A holdings, Y has 500 of the 1000 votes which may be cast by class A to elect four of company X's ten directors. Applying the formula, Y calculates that it holds 500/1000 x 4/10 or 20 percent of the voting securities of company X from its holdings of class A stock and no additional percentage derived from holdings of class B stock. Consequently, Y holds a total of 20 percent of the voting securities of company X.

3. Assume that company Y holds 500 shares of class A stock and 60 shares of class B stock. Y calculates that it holds 20 percent of the voting securities of company X because of its holdings of class A stock (see example 2). Additionally, as a result of its class B holdings Y has 60 of the 100 votes which may be cast by class B stock to elect six of company X's ten directors. Applying the formula, Y calculates that it holds 60/100 x 6/10 or 36 percent of the voting securities of company X because of its holdings of class B stock. Since the formula requires that a person that holds different classes of voting securities of the same issuer add together the separate percentages calculated for each class, Y holds a total of 56 percent (20 percent plus 36 percent) of the voting securities of company X.

* * * * *

E. Section 801.13(a)(1) is revised, a new § 801.13(a)(3) and a new example 4 following § 801.13 (a)(2)(ii) are added, and § 801.13(b)(2)(ii) excluding the example, is revised to read as set forth below.

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

(a) *Voting securities.* (1) Subject to the provisions of § 801.15, and paragraph (a)(3) of this section, all voting securities of the issuer which will be held by the acquiring person after the consummation of an acquisition shall be deemed voting securities held as a result of the acquisition. The value of such voting securities shall be the sum of the value of the voting securities to be acquired, determined in accordance with § 801.10(a), and the value of the voting securities held by the acquiring person prior to the acquisition, determined in accordance with paragraph (a)(2) of this section.

(2) * * *

Examples: * * *

4. On January 1, Company A acquired $30 million of voting securities of Company B. "A" and "B" filed notification and observed the waiting period for that acquisition.

Company A plans to acquire $1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), "A" and "B" do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is $1 million and it is not reportable.

(3) Voting securities held by the acquiring person prior to an acquisition shall not be deemed voting securities held as a result of that subsequent acquisition if:

(i) The acquiring person is, in the subsequent acquisition, acquiring only assets; and

(ii) The acquisition of the previously acquired voting securities was subject to the filing and waiting requirements of the act (and such requirements were observed) or was exempt pursuant to § 802.21.

(b) *Assets.* * * *

(2) * * *

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired from the acquired person within the 180 calendar days preceding the signing of such agreement any assets which are presently held by the acquiring person, and the acquisition of which was not previously subject to the requirements of the act or the acquisition of which was subject to the requirements of the act but they were not observed, then only for purposes of section 7A(a)(3)(B) and § 801.1(h)(1), both the acquiring and the acquired persons shall treat such assets as though they had not previously been acquired and are being acquired as part of the present acquisition. The value of any assets previously acquired which are subject to this subparagraph shall be determined in accordance with § 801.10(b) as of the time of their prior acquisition.

* * * * *

F. Section 801.15(a)(2) is revised to read as set forth below.

§ 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, 802.35, 802.50(a)(1), 802.51(a), 802.52, 802.53, 802.63, and 802.70;

* * * * *

G. Example 4 to § 801.15(c) is revised to read as set forth below.

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

* * * * *

(c) * * *

Examples: * * *

4. Assume that acquiring person "B," a United States person, acquired from corporation X two mines located abroad, and assume that the acquisition price was $40 million. In the most recent year, sales in the United States attributable to the mines were $15 million, and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, "B" seeks to acquire a third mine from X, to which United States sales of $12 million were attributable in the

most recent year. Since under § 801.13(b)(2), as a result of the acquisition, "B" would hold all three mines of X, and the $25 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, "B" would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, "B" would hold assets of X exceeding $15 million, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act before consummating the acquisition.

H. Example 3 to § 801.30(b) is revised to read as set forth below.

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

* * * * *

(b) * * *

Examples: * * *

3. Suppose that acquiring person "A" proposes to acquire 50 percent of the voting securities of corporation B which in turn owns 30 percent of the voting securities of corporation C. Thus "A's" acquisition of C's voting securities is a secondary acquisition (see § 801.4) to which this section applies because "A" is acquiring C's voting securities from a third party (B). Therefore, the waiting period with respect to "A's" acquisition of C's voting securities begins when "A" files its separate Notification and Report Form with respect to C, and "C" must file within 15 days (or in the case of a cash tender offer, 10 days) thereafter. "A's" primary and secondary acquisitions of the voting securities of B and C are subject to separate waiting periods; see § 801.4.

I. The example to § 801.40 is revised to read as set forth below.

§ 801.40 Formation of joint venture or other corporations.

* * * * *

Example: Persons "A," "B," and "C" agree to create new corporation N, a joint venture. "A," "B," and "C" will each hold one third of the shares of N. "A" has more than $100 million in annual net sales. "B" has more than $10 million in total assets but less than $100 million in annual net sales and total assets. Both "C"'s total assets and its annual net sales are less than $10 million. "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of $6 million in assets and each to make additional contributions of $6 million in each of the next three years. Under paragraph (c), the assets of the new corporation are $60 million. Under paragraph (b), only "A" must file notification. Note that "A" also meets the criterion of section 7A(a)(3) since it will be acquiring one third of the voting securities of the new entity for $20 million. N need not file notification; see § 802.41.

PART 802—EXEMPTION RULES

J. Section 802.35 is added to read as set forth below.

§ 802.35 Acquisitions by employee trusts.

An acquisition of voting securities shall be exempt from the notification requirements of the act if:

(a) The securities are acquired by a trust that meets the qualifications of section 401 of the Internal Revenue Code;

(b) The trust is controlled by a person that employs the beneficiaries and,

(c) The voting securities acquired are those of that person or an entity within that person.

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

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

K. Example 1 to § 802.41 is revised to read as set forth below.

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

* * * * *

Examples: 1. Corporations A and B, each having sales of $100 million, each propose to contribute $20 million in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both "A" and "B" must do so and observe the waiting period prior to receiving any voting securities of N.

* * * * *

L. Section 802.70 is revised to read as set forth below.

§ 802.70 Acquisitions subject to order.

An acquisition shall be exempt from the requirements of the act if the voting securities or assets are to be acquired from an entity ordered to divest such voting securities or assets by order of the Federal Trade Commission or of any Federal court in an action brought by the Federal Trade Commission or the Department of Justice.

PART 803—TRANSMITTAL RULES

M. Section 803.5, is amended by revising paragraph (a)(1)(iii), by adding examples 2, 3, 4, and 5 to paragraph (a)(2), and by designating the unnumbered example as example 1, as set forth below.

§ 803.5 Affidavits required.

(a) (1) * * *

(iii) The specific classes of voting securities of the issuer sought to be acquired; and if known, the number of securities of each such class that would be held by the acquiring person as a result of the acquisition or, if the number is not known, the specific notification threshold that the acquiring person intends to meet or exceed; and, if designated by the acquiring person, a higher threshold for additional voting securities it may hold in the year following the expiration of the waiting period;

* * * * *

(2) * * *

Examples: * * *

In examples 2–5 assume that one percent of B's shares are valued at $15 million.

2. "A" holds 100,000 shares of the voting securities of Company B. "A" has a good faith intention to acquire an additional 900,000 shares of Company B's voting securities. "A" states in its notice to B, inter alia, that as a result of the acquisition it will hold 1,000,000 shares. If 1,000,000 shares of Company B represents 20 percent of Company B's outstanding voting securities, the statement will be deemed by the enforcement agencies a notification for the 15 percent threshold.

3. Company A intends to acquire voting securities of Company B. "A" does not know exactly how many shares it will acquire, but it knows it will definitely acquire 15 percent and may acquire 50 percent of Company B's shares. "A"'s notice to the acquired person would meet the requirements of § 803.5(a)(1)(iii) if it states, inter alia, either: "Company A has a present good faith intention to acquire 15 percent of the outstanding voting securities of Company B, and depending on market conditions, may acquire more of the voting securities of Company B and thus designates the 50 percent threshold" or "Company A has a present good faith intention to acquire 15 percent of the outstanding voting securities of Company B, and depending on market conditions may acquire 50 percent or more of the voting securities of Company B." The Commission would deem either of these statements as intending to give notice for the 50 percent threshold.

4. "A" states, inter alia, that, "depending on market conditions, it may acquire 100 percent of the shares of B." "A"'s notice does not comply with § 803.5 because it does not state an intent to meet or exceed any notification threshold. "A"'s filing will be considered deficient within the meaning of § 803.10(c)(2).

5. "A" states, inter alia, that it has commenced a tender offer for "up to 55 percent of the outstanding voting securities of Company B." "A"'s notice does not comply with § 803.5 because use of the term "up to" does not state an intent to meet or exceed any notification threshold. The filing will

therefore be considered deficient within the meaning of § 803.10 (c)(2).

* * * * *

N. Section 803.10(a) is amended by redesignating paragraph (a)(2) as (a)(3) and by adding a new paragraph (a)(2) to read as set forth below.

§ 803.10 Running of time.

(a) * * *

(2) In the case of the formation of a joint venture or other corporation covered by § 801.40, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

* * * * *

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

O. The following amendments are made in the Premerger Notification and Report Form that appears as an appendix to Part 803 of the rules. The revised form is set forth below.

1. A new third paragraph is added to the General Instructions to the Form. The new paragraph appears immediately before the paragraph that defines the term "documentary attachments".

2. Items 2(b) and 2(c) are removed from the instructions and the form, items 2(d)–2(f)(i) are renumbered accordingly, and the instruction for item 2(a) is revised.

3. The instruction for item 2(e), which has been redesignated as item 2(c), is revised.

4. Item 2(f)(ii) is removed in the instructions and the Form.

5. The introductory language in the instructions under item 6 is revised.

6. The instruction for item 6(a) is revised.

7. The instruction for item 7(c)(iv) is revised.

8. Item 7(c)(v) is redesignated as item 7(c)(vi) and new instruction for item 7(c)(v) is added.

9. The instruction for item 9 is revised.

BILLING CODE 6750-01-M

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-16) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filing persons need not, however, record their responses on the Form.

These Instructions specify the information which must be provided in response to the Items on the Answer Sheets. *Only* the completed Answer Sheets, together with all documentary attachments are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on answer sheets must submit a complete set of attachment pages with *each* copy of the Form.

The term "documentary attachments" refers to materials supplied in responses to Item 2(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.

Information—The central office for information and assistance concerning the rules, 16 CFR Parts 801-803, and the Form is Room 303, Federal Trade Commission, 6th St. & Pa. Ave., N.W., Washington, D.C. 20580, phone (202) 326-3100.

Definitions—The definitions and other provisions governing this Form are set forth in the rules, 16 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) and 48 FR 34427 (July 29, 1983).

Affidavit—Attach the affidavit required by § 803.5 to page 1 of the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 801.5(a).)

Responses—*Each answer* should identify the **Item** to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each Item. Each additional sheet should identify at the top of the page the Item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be so identified.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any Item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any Item fully, give such information as is available and provide a statement of reasons for noncompliance as required by § 803.3. If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

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

SIC Data—This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) *All persons* must submit certain data at the 4-digit (SIC code) *industry* level. To the extent that dollar revenues are derived from *manufactured operations* (SIC major groups 20-39), data must also be submitted at the *5-digit product class* and *7-digit product levels* (SIC based codes).

The term "dollar revenues" is defined in § 803.2(d).

References— In reporting information by "*4-digit (SIC code) industry*" refer to the 1972 edition of the *Standard Industrial Classification Manual* and its 1977 supplement published by the Executive Office of the President, Office of Management and Budget.

In reporting information by "*5-digit product class*" and "*7-digit product*" refer to one or both of the following reference publications published by the U.S. Bureau of the Census:

(a) Numerical List of Manufactured and Mineral Products, *1982 Census of Manufactures and Census of Mineral Industries* (MC82-R-1). Make sure that the Numerical List you use has MC82-R-1 printed on the cover.

Note: Submit information using the codes in the columns labeled "Product code published." Do not submit information using the codes in the columns labeled "Product code collected".

(b) "Industry Series," (MC82-I Pamphlets 20A2-39D), *1982 Census of Manufactures*. (GPO Order No. 803-018-00000-6.)

Note: Do not submit information by product codes ending in 00 if the Numerical List of Manufactured and Mineral Products listed above contains a further breakdown. Furthermore, when the Numerical List refers to Appendix C for detail collected in a specified Current Industrial Report ("CIR") for the following SIC code industries, you should provide revenue information using the 7-digit product codes listed in the CIR in the columns labeled "Published."

SIC 2392 (CIR MQ-23X)	SIC 3261 (CIR MQ-34E)
SIC 3312, 3315, 3316 and 3317 (CIR MA-33B)	
SIC 3357 (CIR MQ-33L)	SIC 3431 (CIR MQ-34E)

Privacy Act Statement - Section 18a(s) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws. Furnishing the information on this Form is voluntary.

Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $10,000 per day.

FTC Form C 4 (rev. 2/87)

Items 5, 7, 8, 9 and the Insurance Appendix —Supply information *only* with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. (See §§ 801.1(k), 803.2(c)(1).)

Information need *not* be supplied regarding assets or voting securities currently being acquired, when the acquisition is exempt under the statute or rules. (See § 803.2(c)(2).)

Limited or separate responses may be required from the person filing notification. (See § 803.2(b).)

Filing—Complete and return two notarized copies (with *one set* of documentary attachments) of this Notification and Report Form to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, and *three* notarized copies (with *one* set of documentary attachments) to Director of Operations, Antitrust Division, Department of Justice, Room 3218, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530.

ITEM BY ITEM

Affidavit—Attach the affidavit required by § 803.5 to page 1 of the Answer Sheets. Acquiring persons in transactions covered by § 801.30 are required to also submit a copy of the notice served on the acquired person pursuant to § 803.5 (a)(1). (See § 803.5(a)(3).)

Cash Tender Offer—Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Early Termination —Put an X in the yes box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by § 7A(b)(2) of the Clayton Act.

ITEM 1

Item 1(a)—Give the name and headquarters address of the person filing notification. The name of the person is the name of the ultimate parent entity included within that person.

Item 1(b) —Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.)

Item 1(c)—Give the names of all ultimate parent entities of acquiring and acquired persons which are parties to the acquisition whether or not they are required to file notification.

Item 1(d)—Put an X in all the boxes that apply to this acquisition.

Item 1(e)—*Acquiring* persons put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $15 million, 15%, 25%, or 50%.

Item 1(f)—All persons state the value of voting securities held as a result of the acquisition and/or the value of assets held as a result of the acquisition. (Insert responses to Item 3(c).)

Item 1(g)—Put an X in the appropriate box to indicate whether the entity in Item 1(a) is a corporation, partnership, or other (specify).

Item 1(h)—Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(i)—Put an X in the appropriate box to indicate if this Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if this Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) on the Form.

Item 1(j)—If an entity within the person filing notification other than the ultimate parent entity listed in Item 1(a) is the entity which is making the acquisition, or if the assets or voting securities of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see § 801.1(b)).

ITEM 2

Item 2(a)—*Description of acquisition.* Briefly describe the transaction. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification. Indicate for each party whether assets or voting securities (or both) are to be acquired. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction.

If the voting securities are to be acquired from a holder other than the issuer (or an entity within the same person as the issuer) separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons in tender offers should describe the terms of the offer.

Item 2(b)(i)—*Assets to be acquired.* This Item is to be completed only to the extent that the transaction is an acquisition of assets. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction giving approximate dollar values thereof. If the transaction is the formation of a joint venture or other corporation (see § 801.40), include assets to be acquired by the joint venture or other corporation.

Give the approximate total value or estimated total value of the assets to be acquired in this transaction.

Examples of general classes of assets other than cash and securities are land, merchandising inventory, manufacturing plants (specify location and products produced), and

retail stores. For each general class of assets, indicate the page or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.

Item 2(b)(ii)—*Assets held by acquiring person.* (To be completed by acquiring persons.) If assets of the acquired person (see § 801.13) are presently held by the person filing notification, furnish a description of each general class of such assets in the manner required by Item 2(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 2(c)—*Voting securities to be acquired.* Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition: (If, as a result of the acquisition, the acquiring person will hold 100 percent of the voting securities of the acquired issuer or if the acquisition is a merger or consolidation (see § 801.2(d)), the parties may so state and provide the total dollar value of the transaction instead of responding to items 2(c)(i) - 2(c)(viii). However, this procedure may not be used if the acquiring person currently holds 15 percent or more than $15 million worth of the voting securities of the acquired person or of any entity included within the acquired person.)

Item 2(c)(i)—List each class of voting securities (including convertible voting securities) which will be outstanding after the acquisition has been completed. If there is more than one class of voting securities, include a description of the voting rights of each class. Also list each class of non-voting securities which will be acquired in the acquisition;

Item 2(c)(ii)—Total number of shares of each class of securities listed on page 3 which will be outstanding after the acquisition has been completed;

Item 2(c)(iii)—Total number of shares of each class of securities listed on page 3 which will be acquired in this acquisition. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 2(c)(iv)—Identity of each person acquiring any securities of any class listed on page 3. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 2(c)(v)—Dollar value of securities of each class listed on page 3 to be acquired in this transaction (see § 801.10). If there is more than one acquiring person of any class of securities, show data separately for each acquiring person; (If the exact dollar value cannot be determined at the time of filing, provide an estimated value and indicate the basis on which the estimate was made.)

Item 2(c)(vi)—Total number of each class of securities listed on page 3 which will be held by acquiring person(s) after the acquisition has been accomplished. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 2(c)(vii)—Percentage of each class of securities listed under 2(c)(vi) above which will be held by the acquiring person(s) after the acquisition has been completed (see § 801.12(b)). If there is more than one acquiring person for any class of security, show data separately for each acquiring person;

Item 2(c)(viii)—Dollar value (or estimated dollar value) of securities to be held as a result of the acquisition (see § 801.13).

Item 2(d)—Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired. (Do not attach these documents to page 4 of the Answer Sheets.)

ITEM 3

Assets and voting securities held as a result of the acquisition (to be completed by both acquiring and acquired persons). State:

Item 3(a)- the percentage of the assets;

Item 3(b)- the percentage of the voting securities;

Item 3(c)- the aggregate total dollar amount of voting securities and assets of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§ 801.12, 801.13, and 801.14).

ITEM 4

Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification, furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(a)—all of the following documents which have been filed with the United States Securities and Exchange Commission (or are to be filed contemporaneously in connection with this acquisition): the most recent proxy statement and Form 10-K, each dated not more than three years prior to the date of this Notification and Report Form; all Forms 10-Q and 8-K filed since the end of the period reflected by the Form 10-K being supplied; any registration statement filed in connection with the transaction for which notification is being filed; if the acquisition is a tender offer, Schedule 14D-1. Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

NOTE: In response to Item 4(a), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in § 803.2(e).

Item 4(b)—the most recent annual reports and most recent annual audit reports (of person filing notification and of each unconsolidated United States issuer included within such person) and, if different, the most recent regularly prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person;

Item 4(c)—all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 on page 5 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

* * *

ITEMS 5 through 9 and the Appendix

NOTE: *For Items 5 through 9 and the Appendix limited or separate responses may be required of the person filing notification. (See § 803.2(b) and (c).)*

ITEM 5

ITEMS 5(a) — 5(c): These items request information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 4-digit (SIC code) *industry* level. To the extent that dollar revenues are derived from *manufacturing operations* (SIC major groups 20-39), data must also be submitted at the 5-digit *product class* and 7-digit *product levels* (SIC based codes).

Note: See the "References" listed in the General Instructions to the Form. Refer to the 1972 edition of the *Standard Industrial Classification Manual* and its 1977 supplement for the 4-digit (SIC code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, *1982 Census of Manufactures and Census of Mineral Industries* (MC82-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code published." Do not report revenues using the columns labeled "Product code collected."

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; holding and other investment offices, and real estate companies (2-digit SIC major groups 61, 62, 67 and 65) should identify or explain the revenues reported (e.g., dollar sales, receipts).

Persons filing notification should include the total dollar revenues for 1982 derived by all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 1982). For example, if the person filing notification acquired an entity in 1984, it must include that entity's 1982 revenues in Items 5(a) and 5(b)(i).

Item 5(a)—*Dollar revenues by industry.* Provide aggregate 4-digit (SIC code) *industry* data for 1982.

Item 5(b)(i)—*Dollar revenues by manufactured product.* Provide the following information on the aggregate operations of the person filing notification for 1982 for each 7-digit product of the person in 2-digit SIC major groups 20-39 (manufacturing industries).

Do not provide 7-digit data for product codes ending in 00 if the Numerical List of Manufactured and Mineral Products contains a further breakdown. See also the 'NOTE' on page I of the these instructions concerning required references to Appendix C of the Numerical List.

Item 5(b)(ii)—*Products added or deleted.* Within 2-digit SIC major groups 20-39 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1982, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 7-digit product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1982 by reason of mergers or acquisitions occurring since 1982. Dollar revenues derived from such products should be included in response to Item 5(b)(i). However, if an entity acquired since 1982 by the person filing notification (and now included within the person) itself has added any products since 1982, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets or voting securities since 1982 should also be listed here.

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

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

NOTE: *This million dollar minimum is applicable only to Item 5(c).*

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within SIC major group 63, and, if voting securities of an insurance carrier are being acquired directly or indirectly should complete the Insurance Appendix to this Form.

JOINT VENTURE OR OTHER CORPORATIONS

Item 5(d)—Supply the following information only if the acquisition is the formation of a joint venture or other corporation. (See § 801.40.)

Item 5(d)(i)—List the name and mailing address of the joint venture or other corporation.

Item 5(d)(ii)(A)—List contributions that each person forming the joint venture or other corporation has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(d)(ii)(B)—Describe any contracts or agreements whereby the joint venture or other corporation will obtain assets or capital from sources other than the persons forming it.

Item 5(d)(ii)(C)—Specify whether and in what amount the persons forming the joint venture or other corporation have agreed to guarantee its credit or obligations.

Item 5(d)(ii)(D)—Describe fully the consideration which each person forming the joint venture or other corporation will receive in exchange for its contribution(s).

Item 5(d)(iii)—Describe generally the business in which the joint venture or other corporation will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(d)(iv)—Identify each 4-digit (SIC code) *industry* in which the joint venture or other corporation will derive dollar revenues. If the joint venture or other corporation will be engaged in manufacturing, also specify each 5-digit *product class* in which it will derive dollar revenues.

ITEM 6

This Item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "documentary attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each Item the specific page(s) of the document that are responsive to that Item.

Item 6(a)—*Entities within person filing notification.* List the name and headquarters mailing address of each entity included within the person filing notification. Entities with total assets of less than $10 million may be omitted.

Item 6(b)—*Shareholders of person filing notification.* For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (see § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds five percent or more of the outstanding voting securities of the class, and the number and percentage held by that person. Holders need not be listed for entities with total assets of less than $10 million.

Item 6(c)—*Holdings of person filing notification.* If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage held, and (optionally) the entity within the person filing notification which holds the securities. Holdings of less than five percent of the outstanding voting securities of any issuers, and holdings of issuers with total assets of less than $10 million, may be omitted.

ITEM 7

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

Item 7(a)—supply the 4-digit SIC code and description for the industry;

Item 7(b)—list the name of each person which is a party to the acquisition which also derived dollar revenues in the 4-digit industry;

Item 7(c)—*Geographic market information:*

Item 7(c)(i)—for each 4-digit industry within SIC major groups 20-39 (manufacturing industries) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which, to the knowledge or belief of the person filing notification, the products in that 4-digit industry produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(ii)—for each 4-digit industry within SIC major groups 01-17 and 40-49 (agriculture, forestry and fishing, mining, construction, transportation, communications, electric, gas and sanitary services) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which the person filing notification conducts such operations;

Item 7(c)(iii)—for each 4-digit industry within SIC major groups 50-51 (wholesale trade) listed in Item 7(a) above, list the states, (or, if desired, portions thereof) in which the customers of the person filing notification are located;

Item 7(c)(iv)—for each 4-digit industry within SIC major groups 52-61, 70, 75, 78, and 80 (retail trade, banking, and certain services) listed in Item 7(a) above, provide the address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification;

Item 7(c)(v)—for each 4-digit industry within SIC major group 62, 64-67, 72, 73, 75, 79, and 81-89 (certain finance, insurance and real estate groups and certain services) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which establishments were located from which the person filing notification derived revenues in the most recent year; and

Item 7 (c)(vi)— for each 4-digit industry within SIC 63 (insurance) listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those SIC major industry groups mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

ITEM 8

Item 8—Put an X in the appropriate box to indicate if the acquired person and an acquiring person maintained a vendor-vendee relationship during the most recent year with respect to any manufactured product (or, if the acquisition is the formation of a joint venture or other corporation (see § 801.40), if the joint venture or other corporation will supply to any of the persons forming it any manufactured product which such person purchased from another such person during the most recent year) which the vendee either resells or consumes in or incorporates into the manufacture of any product. Persons filing notification which are *vendees* of such product(s) should list each product purchased, identify each vendor which is a party to the acquisition from which the product was purchased and state the dollar amount of the product purchased from that vendor during the most recent year.

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

ITEM 9

Item 9—*Previous acquisitions* (to be completed by acquiring persons). Determine each 4-digit (SIC code) industry listed in Item 7(a) above, in which the person filing notification derived dollar revenues of $1 million or more in the most recent year and in which either the acquired issuer derived revenues of $1 million or more in the most recent year, (or in which, in the case of the formation of a joint venture or other corporation, the joint venture or other corporation reasonably can be expected to derive dollar revenues of $1 million or more), or revenues of $1 million or more in the most recent year were attributable to the acquired assets.

For each such 4-digit industry, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 4-digit industry. List only acquisitions of more than 50 percent of the voting securities or assets of entities which had annual net sales or total assets greater than $10 million in the year prior to the acquisition.

For each such acquisition, supply:

(a) the name of the entity acquired;

(b) the headquarters address of the entity prior to the acquisition;

(c) whether securities or assets were acquired;

(d) the consummation date of the acquisition;

(e) the annual net sales of the acquired entity for the year prior to the acquisition;

(f) the total assets of the acquired entity in the year prior to the acquisition; and

(g) the 4-digit (SIC code) industries (by number and description) identified above in which the acquired entity derived dollar revenues.

ITEM 10

Item 10(a)—Print or type the name and title, firm name, address, and telephone number of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 10(b)—Foreign filing persons print or type the name and title, firm name, address, and telephone number of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii).)

Certification—(See § 803.6.)

APPENDIX TO NOTIFICATION AND REPORT FORM: INSURANCE

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

ITEM 1

Item 1(A)—*Life Insurance.* Provide for the most recent year the amount of premium receipts (calulated on the accrual basis) for each of the lines of insurance listed on page 16 of the Answer Sheets.

Item 1(B)—*New Business.* Provide for the most recent year the amount of new life insurance business issued in the United States (exclusive of revivals, increases, dividend additions and reinsurance ceded) for each of the lines of insurance listed on page 16 of the Answer Sheets.

ITEM 2

Item 2(A)—*Property Liability Insurance.* Provide for the most recent year the amount of direct premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

Item 2(B)—Provide for the most recent year the amount of net premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

ITEM 3

Item 3(A)—*Title Insurance.* Provide for the most recent year the amount of net direct title insurance premiums written in the United States.

Item 3(B)—Provide for the most recent year the amount of direct title insurance premiums earned in the United States.

DATE

PERSON FILING NOTIFICATION

BEING ACQUIRED IF DIFFERENT FROM

16 C.F.R. Part 803 - Appendix

NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
3084-0005
Expires 9-30-88

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

FOR OFFICE USE ONLY
TRANSACTION NUMBER

➡ Attach the Affidavit required by § 803.5 to this page.

☐ CTO ☐ ETR

Is this Acquisition a CASH TENDER OFFER? ☐ YES ☐ NO

Do you request Early Termination of the Waiting Period? ☐ YES ☐ NO
(Grants of early termination are published in the Federal Register.)

ITEM 1

1(a) NAME AND HEADQUARTERS ADDRESS OF PERSON FILING NOTIFICATION *(ultimate parent entity)*

1(b) PERSON FILING NOTIFICATION IS
☐ an acquiring person ☐ an acquired person ☐ both

1(c) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

1(d) THIS ACQUISITION IS *(put an X in all the boxes that apply)*
☐ an acquisition of assets
☐ a merger (see § 801.2)
☐ an acquisition subject to § 801.2(e)
☐ formation of a joint venture or other corporation (see § 801.40)
☐ an acquisition subject to § 801.30 *(specify type)*: _____
☐ other *(specify)*: _____
☐ a consolidation (see § 801.2)
☐ an acquisition of voting securities
☐ a secondary acquisition
☐ an acquisition subject to § 801.31

1(e) INDICATE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED *(acquiring person only)*
☐ $ 15 million ☐ 15% ☐ 25% ☐ 50%

1(f) VALUE OF VOTING SECURITIES	VALUE OF ASSETS

1(g) PUT AN X IN THE APPROPRIATE BOX TO DESCRIBE ENTITY FILING NOTIFICATION
☐ corporation ☐ partnership ☐ other *(specify)*: _____

1(h) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)*: _____ *(mm/dd/yy)* TO _____ *(mm/dd/yy)*

1(i) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION *(if other than ultimate parent entity)*
☐ NA ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME OF ENTITY FILING NOTIFICATION	ADDRESS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition, in accordance with the applicable provisions of 15 U.S.C. § 18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $10,000 for each day during which such person is in violation of 15 U.S.C. § 18a.

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

Complete and return *two* notarized copies (with *one set* of documentary attachments) of this **Notification and Report Form** to Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, D.C. 20580, and *three* notarized copies (with *one set* of documentary attachments) to Director of Operations, Antitrust Division, Room 3218, Department of Justice, Washington, D.C. 20530. The central office for information and assistance with respect to matters in connection with this **Notification and Report Form** is Room 303, Federal Trade Commission, Washington, D.C. 20580, phone (202) 326-3100.

FTC Form C 4 (rev. 2/87)

NAME OF PERSON FILING NOTIFICATION | DATE

1(j) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS OR VOTING SECURITIES ARE BEING ACQUIRED IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

PERCENT OF VOTING SECURITIES HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

ITEM 2

2(a) DESCRIPTION OF ACQUISITION

NAME OF PERSON FILING NOTIFICATION | DATE

2(b)(i) ASSETS TO BE ACQUIRED *(to be completed only for asset acquisitions)*

2(b)(ii) ASSETS HELD BY ACQUIRING PERSON

2(c) VOTING SECURITIES TO BE ACQUIRED

(c)(i) LIST AND DESCRIPTION OF VOTING SECURITIES AND LIST OF NON-VOTING SECURITIES

(c)(ii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY

(c)(iii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY BEING ACQUIRED

(Item 2(c) continued on next page)

NAME OF PERSON FILING NOTIFICATION | DATE

(c)(iv) IDENTITY OF PERSONS ACQUIRING SECURITIES

(c)(v) DOLLAR VALUE OF SECURITIES IN EACH CLASS BEING ACQUIRED

(c)(vi) TOTAL NUMBER OF EACH CLASS OF SECURITIES HELD BY ACQUIRING PERSON AS A RESULT OF THE ACQUISITION

(c)(vii) PERCENTAGE OF EACH CLASS OF SECURITIES HELD BY ACQUIRING PERSON AS A RESULT OF THE ACQUISITION

(c)(viii) DOLLAR VALUE OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION

(d) SUBMIT A COPY OF THE MOST RECENT VERSION OF CONTRACT OR AGREEMENT *(or letter of intent to merge or acquire)*

DO NOT ATTACH THIS DOCUMENT TO THIS PAGE. ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGGREEMENT _____

DATE

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 3
ASSETS AND VOTING SECURITIES HELD AS A RESULT OF THE ACQUISITION

(a) PERCENTAGE OF ASSETS _____

(b) PERCENTAGE OF VOTING SECURITIES _____

(c) AGGREGATE TOTAL VALUE _____

ITEM 4 PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (SEE ITEM BY ITEM INSTRUCTIONS). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

(a) DOCUMENTS FILED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION — ATTACHMENT OR REFERENCE NUMBER

(b) ANNUAL REPORTS, ANNUAL AUDIT REPORTS, AND REGULARLY PREPARED BALANCE SHEETS — ATTACHMENT OR REFERENCE NUMBER

(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS — ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 5 (See the "References" listed in the General Instructions to the Form. Refer to the 1972 edition of the *Standard Industrial Classification Manual* and its 1977 Supplement for the 4-digit (SIC Code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, *1982 Census of Manufactures and Census of Mineral Industries* (MC82-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code published." Do not report revenues using codes in the columns labeled "Product code Collected.")

5(a) DOLLAR REVENUES BY INDUSTRY

4-DIGIT INDUSTRY CODE *Product code published*	DESCRIPTION	1982 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 5(b)(i) DOLLAR REVENUES BY MANUFACTURED PRODUCTS

7-DIGIT PRODUCT CODE *Product code published*	DESCRIPTION	1982 TOTAL DOLLAR REVENUES

7

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 5(b)(ii) PRODUCTS ADDED OR DELETED

DESCRIPTION (7-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS

5-DIGIT PRODUCT CLASS CODE *Product code published*	DESCRIPTION	YEAR TOTAL DOLLAR REVENUES
	(Item 5(b)(iii) continued on page 9)	

8

NAME OF PERSON FILING NOTIFICATION | DATE

NAME OF PERSON FILING NOTIFICATION | DATE

6(a)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS CONTINUED

5-DIGIT PRODUCT CLASS CODE	DESCRIPTION	YEAR / TOTAL DOLLAR REVENUES

6(a)(iv) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY

4-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR / TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION | DATE

6(d) COMPLETE ONLY IF ACQUISITION IS THE FORMATION OF A JOINT VENTURE OR OTHER CORPORATION

6(d)(i) NAME AND ADDRESS OF THE JOINT VENTURE OR OTHER CORPORATION

6(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION HAS AGREED TO MAKE

(B) DESCRIPTION OF ANY CONTRACTS OR AGREEMENTS

(C) DESCRIPTION OF ANY CREDIT GUARANTEES OR OBLIGATIONS

(D) DESCRIPTION OF CONSIDERATION WHICH EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION WILL RECEIVE

6(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE OR OTHER CORPORATION WILL ENGAGE

6(d)(iv) SOURCE OF DOLLAR REVENUES BY 4-DIGIT SIC CODE (non-manufacturing) AND BY 5-DIGIT PRODUCT CLASS (manufacturing)

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 6
6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) SHAREHOLDERS OF PERSON FILING NOTIFICATION

11

NAME OF PERSON FILING NOTIFICATION | DATE

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

ITEM 7 DOLLAR REVENUES
7(a) 4-DIGIT SIC CODE AND DESCRIPTION

7(b) NAME OF EACH PERSON WHICH ALSO DERIVED DOLLAR REVENUES

12

DATE

NAME OF PERSON FILING NOTIFICATION | DATE

7(c) GEOGRAPHIC MARKET INFORMATION

NAME OF PERSON FILING NOTIFICATION | DATE

ITEM 8 VENDOR-VENDEE RELATIONSHIP

☐ NO ☐ YES (*If yes and you are the vendee, complete the following*)

PRODUCT PURCHASES	VENDOR	DOLLAR AMOUNT

ITEM 9 PRIOR ACQUISITIONS (*to be completed by acquiring person only*)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 10 IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

10(a) NAME OF CONTACT PERSON	TITLE OF CONTACT PERSON
FIRM NAME AND BUSINESS ADDRESS	BUSINESS TELEPHONE NUMBER

10(b) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS. (See § 803.20(b)(2)(iii))

NAME	TITLE
ADDRESS	BUSINESS TELEPHONE NUMBER

CERTIFICATION

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

NAME (*Please print or type*)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the

City of _____, State of _____

this _____ day of _____, 19____.

Signature _____

My Commission expires _____

[SEAL]

NAME OF PERSON FILING NOTIFICATION	DATE

APPENDIX: INSURANCE

ITEM 1 YEAR _____

	AMOUNT
A PREMIUM RECEIPTS	
1 LIFE INSURANCE	
1a. ORDINARY LIFE INSURANCE	
1b. GROUP LIFE INSURANCE (including Federal Employees' Group Life Insurance and Servicemen's Group Life Insurance, but excluding credit life insurance)	
1c. INDUSTRIAL LIFE INSURANCE	
1d. CREDIT LIFE INSURANCE	
2 ANNUITY CONSIDERATIONS	
2a. INDIVIDUAL ANNUITY CONSIDERATIONS	
2b. GROUP ANNUITY CONSIDERATIONS	
3 HEALTH INSURANCE	
3a. INDIVIDUAL HEALTH INSURANCE	
3b. GROUP HEALTH INSURANCE	
TOTAL	

YEAR _____

B NEW BUSINESS	AMOUNT
1 ORDINARY LIFE INSURANCE	
2 GROUP LIFE INSURANCE	
3 INDUSTRIAL LIFE INSURANCE	
4 CREDIT LIFE INSURANCE	
TOTAL	

ITEM 2 PROPERTY LIABILITY INSURANCE YEAR _____

LINE OF INSURANCE	A. DIRECT PREMIUMS	B. NET PREMIUMS

ITEM 3 TITLE INSURANCE YEAR _____

A. NET DIRECT PREMIUMS WRITTEN	B. DIRECT PREMIUMS EARNED

By direction of the Commission.

Emily H. Rock,

Secretary.

[FR Doc. 87–4370 Filed 3–5–87; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: These proposed rules would amend the premerger notification rules that require the parties to certain mergers or acquisitions to file reports with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition might violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. During the eight years the rules have been in effect, the Federal Trade Commission, with the concurrence of the Assistant Attorney General for Antitrust, has amended the premerger notification rules several times in order to improve the program's effectiveness and to lessen the burden of complying with the rules. These proposed revisions are intended to improve the program's effectiveness by amending the definition of the term "control" as it applies to partnerships and other entities that do not have outstanding voting securities.

DATE: Comments must be received on or before April 6, 1987.

ADDRESSES: Written comments should be submitted to both (1) the Secretary, Federal Trade Commission, Room 136, Washington, DC 20580, and (2) the Assistant Attorney General, Antitrust Division, Department of Justice, Room 3214, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Davidson, Attorney, Evaluation Office, Bureau of Competition, Room 394, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326-3300.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

The proposed amendments to the Hart-Scott-Rodino premerger notification rules are designed to improve the effectiveness of the premerger notification program. They alter the approach to rulemaking proposed on September 24, 1985 (50 FR 38742, see Proposal 1) by narrowing the types of transactions that would have been made reportable by the previously proposed rules. The Commission has determined that none of the proposed rules is a major rule, as that term is defined in Executive Order 12291. The proposed rules will not result in: An annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic market. None of the amendments would expand the coverage of the premerger notification rules in a way that would affect small business. 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 certifies 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 some rules, is therefore inapplicable.

Paperwork Reduction Act

The Hart-Scott-Rodino Premerger Notification rules and report form contain information collection requirements as defined by the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.* These requirements have been reviewed and approved by the Office of Management and Budget (OMB Control No. 3084-0005). Because the proposed amendments would affect the information collection requirements of the premerger notification program, the proposed amendments have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act. Comments on that submission may be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Don Arbuckle, Desk Officer for the Federal Trade Commission.

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. This 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. Congress wanted to assure that large acquisitions were subjected to meaningful scrutiny under the antitrust laws prior to consummation. To this end, 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. Congress also provided an opportunity for the Commission or the Assistant Attorney General (who are sometimes hereafter referred to collectively as the "antitrust agencies" or the "enforcement agencies") to seek a court order enjoining the completion of those transactions that the agencies deem to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy when a challenge by one of the enforcement agencies proved successful. Thus, the act requires that the antitrust agencies receive prior notification of significant acquisitions, provides certain tools to facilitate a prompt, thorough investigation of the competitive implications of these acquisitions, and assures the enforcement agencies an opportunity to seek a preliminary injunction before the parties to an acquisition are legally free to consummate it, reducing 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, 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, 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 ("the 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.

Changes of a substantive nature have been made in the premerger notification rules or Form on five occasions 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.

The third set of changes was published by the Federal Trade Commission as proposed rules changes in the **Federal Register** of July 29, 1981, 46 FR 38710. These revisions were designed to clarify and improve the effectiveness of the rules and of the Notification and Report Form as well as to reduce the burden of filing notification. Several comments on the proposed changes were received during the comment period. Final rules, which adopted some of the suggestions received during the comment period but which were substantially the same as the proposed rules, were published in the **Federal Register** of July 29, 1983, 48 FR 34427, and became effective on August 29, 1983. The fourth change, replacing the requirement to provide 1977 revenue data with a requirement to provide 1982 data on the Form, was published in the **Federal Register** of March 26, 1986, 51 FR 10368.

In addition, the Notification and Report Form, found in 16 CFR 803 (Appendix), has undergone minor revisions on two other occasions. The new versions were approved by the Office of Management and Budget on December 29, 1981, and February 23, 1983, respectively. Most recently, the information collection requirements of the Notification and Report Form were approved by the Office of Management and Budget on September 30, 1985, for a period of three years.

The fifth set of changes to the rules and the Notification and Report Form was published by the Federal Trade Commission as proposed rule changes in the **Federal Register** of September 24, 1985, 50 FR 38742. Those thirteen proposed revisions were designed to reduce the cost to the public of complying with the rules and to improve the program's effectiveness. Numerous comments were received on the thirteen proposals. The Commission decided to adopt nine of the proposals (one in significantly modified form), to reject one proposal for budgetary reasons, and to defer action on the other three: The proposal to require reporting by owners of "acquisition vehicles" (Proposal 1 of the September 24, 1985, proposed amendments); the proposed exemption of certain asset acquisitions, including the acquisitions of current supplies, new durable goods, and some types of real estate (Proposal 5); and, the proposal to increase the "controlled issuer" threshold that would have expanded the exemption for transactions valued at $15 million or less in § 802.20(b) and for certain foreign transactions described in § 802.50 and § 802.51 (Proposal 6). Final rules, which adopted some of the suggestions received from public comments, were published this day in the **Federal Register** and will become effective on April 10, 1987. These changes included further revisions to the Notification and Report Form.

The current set of proposals to change the premerger notification rules grows out of the comments to Proposal 1 of the September 24, 1985, **Federal Register** notice, the proposed "acquisition vehicle" rules. The underreporting problem that the "acquisition vehicle" approach was designed to solve is extensively discussed in that notice of proposed rulemaking. It explains both how in some circumstances an acquisition made by a partnership is not subject to the reporting and waiting obligations of the act, and how in similar circumstances an acquisition made by a newly formed corporation that has no controlling owner is not subject to the obligations of the act. The proposed rules would have required both types of transactions to be reported.

The proposed "acquisition vehicle" rules received the second largest number of public comments. They were discussed by comments 2, 4, 7, 15, 16, 18, and 19. While the comments differed on numerous points, and not all were critical, three significant points emerged: First, it is likely the proposed rules would generate a large number of notification filings; second, the rules might be subject to evasion by relatively simple expedients; and finally, there are less inclusive approaches that could accomplish the primary objective of the "acquisition vehicle" proposal.

Because of the importance of these issues to the effectiveness of the premerger program, the Commission has reconsidered its proposal and developed a new approach that applies only to partnerships and other entities that do not issue voting securities. While not based directly on suggestions from the public comments, the Commission believes its new proposal is responsive to the concerns raised in those comments.

The Commission invites interested persons to submit comments on the nature and scope of the problems described in the Proposed Statement of Basis and Purpose, as well as on the

appropriateness of the proposed amendments to the rules as solutions to those problems.

The Commission also invites responses to the following specific questions:

1. Does the partnership control proposal sufficiently decrease the possibility that a competitively significant transaction might occur without being reportable under the premerger notification program?

2. The American Bar Association ("ABA"), in its comments on the "acquisition vehicle" rules, proposed to amend the definition of control in a manner similar to the partnership control approach. The ABA suggested that the rules include an alternative definition of control that would apply to all acquiring persons that do not otherwise meet the act's section 7A(a)(2) size-of-person test. With respect to such persons, control would be ascribed to that "owner" holding the largest interest in the acquiring person equal to or greater than 25 percent, regardless of whether such person was otherwise exempt from reporting. The percentage ownership interest would be determined in accordance with the method proposed by the Commission in the "acquisition vehicle" rules and retained in the partnership control rule. Is the ABA proposal, or some other variant, a preferable alternative to the partnership control rule?

3. What are the costs and benefits of the partnership control proposal?

4. What are the costs and benefits of the ABA proposal?

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

Section 801.1(b) Control

Having considered the comments received concerning the proposed "acquisition vehicle" rules published on September 24, 1985, 50 FR 38742, the Commission has decided to propose a different and less inclusive regulation. It appears that the "acquisition vehicle" approach would have required filings in connection with numerous competitively insignificant transactions, such as management buyouts. Since the Commission is not aware of any transaction to date that violated the antitrust laws but was not reported under the premerger notification program because the acquisition vehicle was not a controlled entity, it seems inappropriate to employ an approach that is likely to require notifications for a host of competitively insignificant transactions.

The Commission remains concerned, however, about the possibility under the existing rules that an anticompetitive transaction might occur without being reported under the premerger notification program. For example, there have been a number of unreportable transactions involving firms in the same industry. The Commission therefore proposes to expand the definition of "control" for purposes of the rules. This change, together with § 801.90 (which provides that the use of any particular acquisition vehicle "for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act . . . to the substance of the transaction") should insure that competitively significant transactions of this type will be reported under the premerger notification program. If, however, the proposed rule becomes effective and unreportable acquisitions raising competitive concerns occur, the Commission will promptly consider returning to the approach underlying its previously proposed "acquisition vehicle" rules.

The Commission is proposing a rule that would expand the definition of control to include persons owning 50 percent or more of partnerships or other entities that do not issue voting securities. They would be required to report acquisitions by the entities they own, just as persons must currently report acquisitions by corporations if they own 50 percent or more of the outstanding voting securities of those corporations. Unlike the previously proposed "acquisition vehicle" rules, this proposal would not require minority owners to report acquisitions.

The Commission is also proposing to change the existing alternative definition of control, which is based on the contractual power to designate members of an entity's board of directors or analogous body. The proposed change—from the power to designate a majority to the power to designate 50 percent—will result in a uniform 50 percent criterion for all three definitions of control in the rule.

Before discussing the operation of the proposed partnership control rule, it should be helpful to examine some of the considerations that led the Commission to move from an "acquisition vehicle" approach to the new "control of partnership" approach. First, the drafting of an acquisition vehicle rule has certain inherent problems. That approach tends to be overinclusive and, at least arguably, might not deter a person determined to avoid the notification obligation. Second, further examination of the kinds of potentially significant acquisitions that are not reported under the current rules indicates they are likely to be acquisitions by partnerships dominated by one person. While unreported takeovers by corporations and other business entities in which ownership is fragmented are theoretically possible, they do not yet appear to have been sources of competitive problems. Accordingly, because it is possible to draft a less complex rule that would make acquisitions by persons who control partnerships reportable, the Commission has decided it is more appropriate to determine whether existing underreporting problems can be adequately addressed by adopting this more limited approach.

Problems With the Acquisition Vehicle Approach

The overinclusiveness of the acquisition vehicle approach is derived from its structure. It disregards, for purposes of determining reporting obligations, the existence of the acquiring entity. Thus, that approach could require a notification from every person who, through its holdings of voting securities in an acquisition vehicle, was deemed to be acquiring more than a $15 millon interest in a target. With the recent proliferation of large leveraged management buyouts, this approach would likely have generated a large number of filings concerning transactions that have little or no competitive significance.

Leveraged buyouts are commonly made by shell corporations formed for the purpose of making the acquisition. As the Commission stated today in this **Federal Register** in the statement of basis and purpose describing § 801.11(e), shell corporations "typically have had no sales and frequently have no assets other than the cash or loans used to make the acquisition. Thus, when they are not controlled by any other entity, the acquiring person has no competitive presence. In such instances the acquisition does not combine businesses but merely changes the ownership of a single ongoing business; it therefore cannot reduce competition. Accordingly, the Commission has concluded that no purpose is served by requiring such acquisitions to be reported." Similarly, because management buyouts usually do not combine businesses, no purpose is served by requiring such transactions to be reported, as would an acquisition vehicle rule.

Of course, an acquisition vehicle (whether heavily leveraged or not) might include among its owners competitors or

potential competitors of the acquired entity. In such instances there would be a reason to require reporting. Unfortunately, it is difficult to formulate a criterion that would exempt competitively insignificant groups but would not also exempt competitively significant groups. As a result, there is a strong tendency in the acquisition vehicle approach, exacerbated by the growing popularity of management buyouts, to require a substantial number of unnecessary additional filings.

The proposed "acquisition vehicle" rules sought to solve underreporting problems for both known and theoretically possible means of avoiding the obligations of the act. The comprehensive scope of those proposed rules is, in part, responsible for the substantial problems of overinclusiveness and enforceability. The Commission now believes it is more appropriate initially to direct its rulemaking at persons who make acquisitions through partnerships they dominate. Until now, the most significant unreported transactions of which the Commission is aware were all acquisitions by partnerships that were dominated by one person. Consequently, the Commission believes it need not require any reporting by minority shareholders of corporate acquisition vehicles.

Should the Commission find persuasive evidence that this form of transaction appears to be omitting from the premerger notification system competitively significant transactions, it would reexamine the acquisition vehicle approach.

Control of Partnerships and Other Entities That Have Not Issued Voting Securities

There have been widely publicized instances in which acquisitions were structured to be made by partnerships rather than corporations, and were not reported under the act, even though the partnerships were owned and operated principally by one person, and that person was a competitor of the acquired person. That result is inconsistent with the treatment of corporations that are dominated by one person, and with the objectives of the act and the rules.

Acquisitions by partnerships can avoid premerger review as a result of two principles of premerger reporting: one, a formal rule for calculating assets of an entity, 16 CFR 801.11(e), and the other, a Premerger Notification Office informal interpretation that a partnership is its own "ultimate parent entity" (that is, a partnership is not controlled by its partners). Section 801.11(e) directs that an entity without a balance sheet not include, in determining its size, any assets that are contributed to the entity for the purpose of making an acquisition. Thus, for example, if a partnership is formed to buy a $1 billion company and the partners contribute $1 billion in cash, the acquisition of the company by the partnership is not reportable. The partnership does not meet the $10 million minimum size criterion of section 7A(a)(2) of the act because § 801.11(e) directs the partnership not to count the $1 billion that will be used to pay for the acquisition. The informal interpretation deems the acquisition to have been made by the partnership itself, which has no other assets, rather than its partners, who may well have other assets.

Of course, if the partnership were employed in the acquisition "for the purpose of avoiding the obligations to comply with the requirements of the act," its existence would be disregarded and the obligations of the act would be determined by applying the act and the rules to the substance of the transaction. 16 CFR 801.90. For example, some persons might be tempted to make an acquisition through a partnership for the purpose of delaying their premerger notifications to the antitrust agencies until they were required by the Federal securities laws to announce their acquisition publicly. If a partnership were used for the purpose of delaying or avoiding reporting, § 801.90 would attribute the acquisitions to the partners individually. They would be required to comply with the obligations of the act personally prior to consummating the transaction.

The Commission now proposes to require partners, rather than partnerships, to report transactions in certain other circumstances. It proposes to accomplish this result by amending the rule defining control, § 801.1(b), to provide that a partnership or other unincorporated entity will be deemed to be controlled by any person who owns 50 percent or more of the entity. Thus, a partner who met the statutory $10 million minimum size criterion and owned 50 percent or more of the partnership would be required to report acquisitions made by the partnership. The rule would be analogous to the circumstances in which a corporation is deemed to be controlled by one or more of its shareholders. It would thereby abolish the overly general presumption that partnerships are always independent entities.

This change would mean, in the example of the acquisition of the $1 billion company discussed above, the transaction could be reportable if one of the partners was entitled to fifty percent or more of the firm's profits (or, upon dissolution, of its assets), and that partner's total assets or net annual sales were $10 million or more. That controlling partner, or its parent, would become the "ultimate parent entity" pursuant to § 801.1(a)(3). It would therefore be deemed to be the person making the acquisition.

This proposed attribution of control to persons owning such large economic interests in entities that do not issue voting securities seems to be a more appropriate way to apply the premerger notification procedures. As matters currently stand, for example, a person can make a purchase through a limited partnership in which it is the general partner and 95 percent beneficial owner. If, pursuant to § 801.11(e), the partnership does not meet the size-of-person criteria of section 7A(a)(2), and the partnership was not created for the purpose of avoiding compliance with the act, the transaction would not be reportable because the partnership is deemed to be its own ultimate parent entity. It seems more appropriate for such transactions to be reportable by any person that dominates the acquiring entity. That is what the proposed rule seeks to do.

In the past, the Premerger Notification Office has not deemed partnerships to be controlled. Section 801.1(b) provides, in part, that control exists if one person can "designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions." The Commission staff has declined to equate partners with "individuals exercising similar functions" to "directors of a corporation." This interpretation was adopted principally because the variable structure of partnerships made it too difficult to specify an objective set of criteria by which to attribute control. For example, partnerships can provide for equal operating authority for all partners or can restrict those rights in any of a number of ways. However, in formulating the acquisition vehicle proposal, the Commission developed the concept of attributing control of unincorporated entities on the basis of beneficial interests. See, for example, proposed § 801.5(b)(2), 50 FR 38748. While not perfect, this concept, which relies on the entitlement to profits or to assets in the event of dissolution, seems an adequate indicator of control where one person has a right to 50 percent or more of the profits or is entitled to 50 percent or more of the assets upon dissolution. At the very least, it seems unlikely that such an entity would be

permitted to continue its existence if it operated in any way that was adverse to the wishes of the 50 percent owner. Consequently, quite apart from any concern about intentional avoidance of the act's obligations, the Commission considers this proposal to be an appropriate supplement to its existing definition of control.

The 50 percent beneficial ownership requirement would parallel in important respects the treatment of corporations under the existing control rule. Although effective or working control of a corporation can exist as a practical matter with a smaller percentage of shares, § 801.1(b) deems a corporation to be a controlled entity only if one person owns "50 percent or more of the outstanding voting securities" or has a right "presently to designate a majority of the board of directors." While this 50 percent requirement understates actual control of many corporations, the rule is clear and easily determinable. It is also arguably overinclusive because one corporation with two 50 percent owners is deemed to have two ultimate parent entities. Nevertheless, this arguable overinclusiveness correctly reflects the joint control that generally exists in such circumstances. In the Commission's experience, this requirement that both controlling entities file has not prevented persons from fulfilling the premerger notification requirements.

The 50 percent ownership criterion would serve similar functions for determining control of unincorporated entities. It would be an objective and predictable standard. Moreover, the degree of ownership should be sufficient to assure in almost all instances that the entities and those deemed to be controlling owners will act in concert to comply with the act's obligations.

In formulating the 50 percent ownership criterion, consideration was given to whether other indicators of control should be included. For example, the Commission might have proposed treating the sole general partner of a limited partnership as controlling the partnership. While the Commission did not doubt its authority to attribute control on this and on other criteria, the Commission declined to utilize that authority at this time because it might require many unnecessary filings. For example, limited partnerships with sole general partners are common entities whose investments often have little competitive significance. Moreover, if a rule required sole general partners to file notifications, some might attempt to avoid it by appointing a second or third general partner. At present, a rule requiring all general partners to file seems unnecessary and therefore unduly burdensome, but the Commission reserves the option of promulgating such a rule should underreporting of significant acquisitions occur under the currently proposed rule.

Finally, some consideration was given to adopting a rule that would attribute assets of unincorporated entities to all owners, even if they held only a minority interest. This would have been similar to the coverage of the previously proposed acquisition vehicle rule. The Commission does not feel such a proposal is warranted at this time. In the Commission's experience, partnership vehicles that had any potential for anticompetitive consequences have been dominated by a single person or by two persons holding equal rights. Accordingly, the Commission believes it is sufficient at present to extend the scope of the premerger notification program to an unincorporated entity only if at least one person is entitled to either 50 percent of its profits or, upon dissolution, of its assets. However, should competitively significant transactions escape reporting obligations under the proposed new rule because no person controlled the partnerships undertaking those acquisitions, the Commission would reconsider the acquisition vehicle approach.

Changing the Majority Control Criterion

Under the existing rules, an entity is deemed controlled by a person that has a contractual power to designate a majority of the entity's board of directors. Both the current and the proposed rules reflect the Commission's belief that such a person should be deemed by the rules to control the entity whether or not that entity also is deemed to be controlled according to other criteria. Thus, a single entity may be deemed controlled by one person that holds 50 percent of the outstanding voting securities of the entity and also by another person who has a contractual right to appoint a majority of that entity's board of directors (or of individuals exercising similar functions). The Commission has concluded, however, that no purpose is served and some confusion has been generated by inferring control of a board of directors only when one person may appoint more than 50 percent of the directors. It therefore proposes to revise this criterion to parallel the other control concepts based on 50 percent ownership. Under this proposed amendment, an entity would be deemed to be controlled by a person with the right to appoint as few as 50 percent of the entity's directors.

The basis of this decision is illustrated by the following example. Consider a nonprofit joint venture corporation created by two persons that is not subject to proposed § 801.1(b)(1) because it does not issue voting securities, it will not distribute profits and it would disburse assets widely in the event of dissolution. If the power to appoint directors of this venture is split evenly between the two persons forming the entity, such an entity can be deemed controlled solely as a result of the contractual right to appoint directors. There is no reason to treat the control of this corporation differently from a corporation in which the voting shares are split evenly. Both rights are likely to result in an evenly divided board of directors. Accordingly, the proposed rule would deem an entity to be controlled by a person that had a contractual right to appoint half or more of the "directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions."

As noted in the discussion above, the Commission has experienced no problems administering its "50 percent or more of the outstanding voting securities" criterion. Even though that requires in appropriate circumstances more than one person to file as the ultimate parent entity of a single issuer, all persons required to file have been able to supply the information required. This experience appears to confirm the Commission's premise that if one person owns 50 percent of an entity it is at least in joint control of the entity. In the case of a person controlling 50 percent of a board of directors (or individuals exercising similar functions), it is even clearer that the entity cannot act without that person's assent. The Commission therefore proposes to infer control if a person has the contractual right to appoint 50 percent or more of the board of directors (or of individuals exercising similar functions).

This proposal would modify a Commission staff informal interpretation of § 801.1(b). Currently, the Premerger Notification Office deems a corporation controlled if a person can designate a *majority* of the board as a result of both holding voting securities and having a contractual power to designate directors. In other words, in determining whether an entity is controlled pursuant to § 801.1(b)(2), the staff adds directors elected to the board as a result of holding voting securities to directors designated as a result of a contractual power. Under the proposed amendments, the staff would deem the entity controlled by a person who, as a result of such combined rights, had the

power to designate 50 percent or more of the directors.

Operation of the Proposed Rule

The Commission proposes to amend its rules by adding to the definition of the term "control" in § 801.1(b). The amendment, proposed new § 801.1(b)(1)(ii), would deem an entity to be controlled by a person entitled to 50 percent or more of the entity's profits, or by a person entitled, upon dissolution, to 50 percent or more of the entity's assets. The amendment would not apply if the entity had outstanding voting securities. The amendment thus creates two systems for determining control: one for entities that issue voting securities, and another for all other entities.

These non-overlapping rules for determining control are each supplemented by the alternate—contractual power to designate—control concept. In other words, proposed § 801.1(b)(1) would not deem an entity to be controlled both under paragraph (b)(1)(i) by a person that holds 50 percent of the voting securities issued by the entity and under proposed paragraph (b)(1)(ii) by another person that has a right to 50 percent of the entity's profits. Because the entity had issued voting securities, proposed paragraph (b)(1)(ii) would not apply; thus the entity would not be controlled on the basis of a right to profits or to assets upon dissolution. In contrast, under proposed paragraph (b)(2) the entity deemed controlled under (b)(1)(i) as a result of voting securities held by one person would be deemed also controlled under proposed paragraph (b)(2) by another person that had a contractual right to appoint 50 percent or more of the entity's board of directors.

Similarly, an entity that was deemed controlled under proposed paragraph (b)(1)(ii), because a person had a right to 50 percent of its profits or assets, would also be deemed controlled under proposed (b)(2) if another person had the right to appoint at least 50 percent of that entity's board of directors (or analogous body). This overlap would be quite rare, however. As explained above, the Commission staff has not deemed partnerships to possess "individuals exercising similar functions" to directors; therefore, proposed paragraph (b)(2) will apply only to other entities that do not issue voting securities.

In addition, the 50 percent or more criteria in paragraph (b)(1)(i), proposed paragraph (b)(1)(ii) and proposed paragraph (b)(2) means that under each paragraph two persons can be deemed to control an entity. It is, thus, theoretically possible that as many as six persons could be deemed to control one entity. However, it would be extraordinary for an entity to allocate those incidents of ownership in such different percentages.

As described above, proposed paragraph (b)(1)(ii) is intended to apply only in circumstances in which paragraph (b)(1)(i) does not apply, that is, it applies only to entities that have not issued voting securities. Typically, this means paragraph (b)(1)(i) will apply to corporations and proposed paragraph (b)(1)(ii) will apply to non-corporate entities. It should be noted, however, that some corporations (for example, entities incorporated under not-for-profit statutes that do not issue voting securities) would be subject to proposed paragraph (b)(1)(ii). Similarly, some unincorporated entities (for example, joint stock companies) issue voting securities. For them, control would continue to be determined by paragraph (b)(1)(i).

For purposes of these rules, the fact that an entity issues securities that have some voting rights is not sufficient to deem them voting securities. Limited partnerships commonly issue certificates subject to the Securities Act of 1933 to limited partners. These partnership shares may be transferable and may entitle their holders to vote on a variety of matters, but typically the entities would not be subject to paragraph (b)(1)(i). The definition of "voting security" in § 801.1(f)(1) states the holder of the security must be entitled "to vote for the election of directors of the issuer, or with respect to unincorporated entities, individuals exercising similar functions." Because most unincorporated entities do not have bodies analogous to boards of directors or do not elect the membership of such bodies, the securities are not "voting securities" within the meaning of the rules.

The rights to profits and to assets, upon dissolution, described in proposed paragraph (b)(1)(ii) are ownership rights and not creditor rights. Thus, the right to assets, upon dissolution, means after all debt obligations have been satisfied. The right to profits would be calculated after payment of any royalty, franchise fee or other expense based on income.

As is the case with other control provisions, a person deemed to control an entity under proposed paragraph (b)(1)(ii) is attributed all the assets of the controlled entity. See § 801.1(c)(8). Thus if "A" controls pursuant to proposed paragraph (b)(1)(ii) a partnership B (because "A" is entitled to 50 percent of B's profits, or 50 percent of B's assets upon dissolution), "A" must include the value of all of B's assets in determining A's total assets. "A" must include all of B's assets to determine whether it meets the minimum size criteria of section 7A(a)(2) of the act, even though "A" does not have a right to the other 50 percent of B's profits or assets. Furthermore, if B is entitled to 50 percent of the profits of partnership C, "A" will be deemed to control C also and also must include all the assets of C in determining the size of "A."

List of Subjects in 16 CFR Part 801

Antitrust, Reporting and recordkeeping requirements.

The Commission proposes to amend Title 16, Chapter I, Subchapter H, the code of Federal Regulations as follows:

Accordingly the Commission proposes the amendments set out below.

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

Authority: Sec. 7A(d) of the Clayton Act, 15 U.S.C. 18a(d), as added by sec. 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390.

2. The Commission proposes to amend § 801.1 by revising the introductory text of paragraph (b), paragraphs (b) (1) and (2) and by designating the existing example as example (1), and adding new examples (2) through (4), as set forth below. New language is indicated by arrows: (►new language◄). Deleted language is indicated by brackets: ([deleted language]).

PART 801—COVERAGE RULES

§ 801.1 Definitions.

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(b) *Control.* The term "control" (as used in the terms "control(s)," "controlling," "controlled by" and "under common control with") means►:

(1—◄ Either

►(i)◄ [(1)] Holding 50 percent or more of the outstanding voting securities of an issuer [;] ►,◄ or

►(ii) In the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or, having the right in the event of dissolution to 50 percent or more of the assets of the entity; or◄

(2) Having the contractual power presently to designate [a majority] ►50 percent or more◄ of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

Example ►s◄ : ►1.◄ * * *

►2. A statutory limited partnership agreement provides as follows: The general partner "A" is entitled to 50 percent of the partnership profits, "B" is entitled to 40 percent of the profits and "C" is entitled to 10

percent of the profits. Upon dissolution, "B" is entitled to 75 percent of the partnership assets and "C" is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by paragraph (b)(1)(ii) of this section. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate "director" or "an individual exercising similar functions" as required by § 801.1 (f)(1), and thus are not subject to either paragraph (b) (1)(i) or (2) of this section. Consequently, "A" is deemed to control the partnership because of its right to 50 percent of the partnership's profits. "B" is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

3. "A" is a nonprofit charitable foundation that enters into a partnership joint venture with "B", a nonprofit university, to establish C, a nonprofit hospital corporation that does not issue voting securities. Pursuant to its charter all surplus revenue from the hospital in excess of expenses and necessary capital investments is to be disbursed evenly to "A" and "B". In the event of dissolution of the hospital corporation, the assets of the hospital are to be contributed to a local charitable medical facility then in need of financial assistance. Notwithstanding the hospital's designation of its disbursement funds as surplus rather than profits to maintain its charitable image, "A" and "B" would each be deemed to control C, pursuant to § 801.1(b)(1)(ii), because each is entitled to 50 percent of the excess of the hospital's revenues over expenditures.

4. "A" is entitled to 50 percent of the profits of partnership B and 50 percent of the profits of partnership C. B and C form a partnership E with "D" in which each entity has a right to one-third of the profits. When E acquires company X, "A" must report the transaction (assuming it is otherwise reportable). Pursuant to § 801.1(b)(1)(ii), E is deemed to be controlled by "A", even though A ultimately will receive only one-third of E's profits. Because B and C are considered as part of "A", the rules attribute all profits to which B and C are entitled (two thirds of E's profits in this example) to "A."◄

By direction of the Commission.

Emily H. Rock,

Secretary.

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