

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies**

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 22, 1997.

**A. Federal Reserve Bank of Minneapolis** (Karen L. Grandstrand, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480-2171:

1. *First Security Bank of Havre Profit Sharing Plan and Trust*, Havre, Montana; to acquire an additional 2.1 percent, for a total of 11.6 percent, of the voting shares of Montana Security, Inc., Havre, Montana, and thereby indirectly acquire First Security Bank of Havre, Havre, Montana.

Board of Governors of the Federal Reserve System, April 2, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-8902 Filed 4-7-97; 8:45 am]

BILLING CODE 6210-01-F

become bank holding companies by acquiring 100 percent of the voting shares of Bonham State Bank, Bonham, Texas.

Comments on this application must be received by April 25, 1997.

Board of Governors of the Federal Reserve System, April 2, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-8901 Filed 4-7-97; 8:45 am]

BILLING CODE 6210-01-F

**FEDERAL RESERVE SYSTEM****Sunshine Act Meeting**

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 11:00 a.m., Monday, April 14, 1997.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: April 4, 1997.

**Jennifer J. Johnson,**

*Deputy Secretary of the Board.*

[FR Doc. 97-9157 Filed 4-4-97; 2:47 pm]

BILLING CODE 6210-01-P

These policy statements implement requirements of the Small Business Regulatory Enforcement Fairness Act of 1996. The first policy statement discusses the variety of mechanisms available for small entities to obtain advice about their obligations under statutes and rules enforced by the Commission. The second policy statement describes the Commission's approach to reduction or waiver of civil penalties for small entities in various mitigating circumstances.

Although these statements reflect policies that are already in effect, the Commission is soliciting comments about them from interested persons. If, after considering any comments, the Commission determines to revise either policy, it will publish a revised policy statement.

**DATES:** The policy statements were effective on March 28, 1997. Comments will be received until May 12, 1997.

**ADDRESSES:** Comments should be identified as Small Business Policy Comments, and sent to: Secretary, FTC, Room H-159, Sixth and Pennsylvania Ave., N.W., Washington, D.C. 20580.

Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. to 5 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Mary K. Engle, 202-326-3161, Enforcement Division, Bureau of Consumer Protection; or Neil W. Averitt, 202-326-2885, Office of Policy and Evaluation, Bureau of Competition.

**SUPPLEMENTARY INFORMATION:** Part A, the statement of the Small Entity Compliance Assistance Policy, is intended to explain to small businesses and other small entities what assistance is available to them from the Commission and its staff to help them understand and comply with obligations imposed by the statutes and rules enforced by the Commission. Part B, the statement of the Civil Penalty Leniency Policy, discusses how the Commission expects to consider mitigating factors in matters where small entities are subject to civil penalties. These statements are issued in implementation of sections 213 and 223 of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 104-121, enacted March 29, 1996.

These policy statements provide guidance and information only, and do not create any rights, duties, obligations, or defenses, implied or otherwise. The Commission specifically retains its discretion for determining how to proceed in particular cases. Also, while the statements are drafted specifically with respect to small entities in order to

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction**

This notice corrects a notice (FR Doc. 97-8135) published on page 15518 of the issue for Tuesday, April 1, 1997.

On page 15519, under the Federal Reserve Bank of Dallas heading, the entry for BonState Bancshares, Inc., Bonham, Texas, is revised to read as follows:

**A. Federal Reserve Bank of Dallas** (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *BonState Bancshares, Inc.*, Bonham, Texas, and Bonham Financial Services, Inc., Dover, Delaware; to

**FEDERAL TRADE COMMISSION****Notice and Request for Comment Regarding Compliance Assistance and Civil Penalty Leniency Policies for Small Entities**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of policies and request for comment.

**SUMMARY:** The Federal Trade Commission is issuing two statements describing its policies for assisting small businesses and other small entities.

provide clear information to those entities about the applicable policies, comparable methods of providing compliance assistance, and comparable factors for selecting civil penalty amounts (as applied to the individual facts), may be used for larger entities as appropriate.

### Part A—Small Business Compliance Assistance Policy

Under Section 213 of SBREFA, agencies regulating the activities of small entities must establish a program to answer small entities' inquiries and provide information and advice on compliance in particular circumstances, when appropriate. Section 213 provides as follows: Whenever appropriate in the interest of administering statutes and regulations within the jurisdiction of an agency which regulates small entities, it shall be the practice of the agency to answer inquiries by small entities concerning information on, and advice about, compliance with such statutes and regulations, interpreting and applying the law to specific sets of facts supplied by the small entity. In any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against such small entity.

As discussed below, the Commission offers a comprehensive array of services, involving both general guidance and individualized advice, to help small entities understand their obligations under the laws and regulations administered by the Commission.

#### (1) General Guidance

The Commission offers general information in a variety of forms to address issues and questions that small entities frequently encounter. Such guidance frequently will satisfy the needs of small entities for guidance as to their own obligations. For example:

(i) The Commission has issued a brochure, entitled "A Guide to the Federal Trade Commission," that includes brief descriptions of the principal antitrust statutes and consumer protection laws enforced by the agency.

(ii) The Commission also issues many types of publications designed to explain how small entities and others can conduct their affairs in compliance with the laws and regulations administered by the FTC.<sup>1</sup> These

include materials specifically directed to businesses, such as:

(a) Business compliance guides explaining the requirements of specific Commission rules in a non-technical manner;<sup>2</sup>

(b) Industry guides addressing common compliance issues under the Federal Trade Commission Act, as applied to particular industries or particular practices;<sup>3</sup> and

(c) Guidelines and policy statements explaining the application of antitrust laws to particular practices or industries.<sup>4</sup>

The Commission's industry guides and other guidelines frequently contain specific examples and illustrative fact patterns that show how the agency would apply the law to a particular set of facts.<sup>5</sup>

(iii) The Commission also produces and disseminates over 175 print and broadcast materials that, while directed to consumers, can benefit small businesses by identifying the practices that generate consumer protection issues between businesses and their customers.<sup>6</sup>

(iv) All these materials are readily available to small businesses and other small entities through a variety of sources, including:

(a) Directly from the Commission. Materials on both competition and consumer protection issues can be obtained by writing Public Reference, Room 130, Federal Trade Commission, Washington, DC 20580, or by telephoning the Public Reference Room at (202) 326-2222.

(b) Most Commission items are available through the Internet, at the

<sup>2</sup> The Commission has published compliance guides for many of its Rules affecting small businesses, including the Franchise Rule, Funeral Rule, Telemarketing Sales Rule, Telephone Disclosure and Dispute Resolution ("900" Number) Rule, and Used Car Rule.

<sup>3</sup> Over 20 such guides are available, including guides for the use of environmental marketing claims, the feather and down products industry, the household furniture industry, and the jewelry industry.

<sup>4</sup> The Commission, jointly with the Department of Justice ("DOJ"), has issued guidance on such issues as health care, international operations, licensing of intellectual property, and horizontal mergers. The Commission has separately issued guidelines on promotional allowances and services.

<sup>5</sup> For example, in the area of medicine and health care, the FTC and DOJ have jointly issued guidelines discussing nine frequently encountered subjects, such as physician network joint ventures, and hospital joint ventures involving specialized clinical or other expensive health care services.

<sup>6</sup> For example, in fiscal year 1996 the Commission distributed 3,970,828 copies of its print materials. Also, small businesses are frequently consumers themselves; in particular, materials on such topics as disclosures to prospective franchisees and office supply scams that ship and bill for unordered merchandise can help small businesses avoid problems.

Commission's website at <http://www.ftc.gov>. The Commission is in the process of making all of its business compliance guides and its antitrust guidelines and policy statements, as well as its consumer materials, available on the Internet. Industry guides, as well as Commission Rules, published in the Code of Federal Regulations are available at the U.S. House of Representatives Internet Law Library's website at <http://law.house.gov/cfr.htm>.

(c) Materials also are available for distribution from the Small Business Administration regional centers, and the Consumer Information Center in Pueblo, Colorado.

(d) The BusinessLine section of the Commission's website provides online access to all of the Commission's business education publications.

Similarly, the Commission's ConsumerLine provides online access to all of the Commission's consumer education publications, as well as the business education publications. In addition to being accessible through personal computers, the ConsumerLine may be reached from online services provided to the public at the offices of the Small Business Administration and the U.S. Department of Commerce.

(e) Materials are made available to state agencies, the military, schools and libraries, financial institutions, the media, and consumer and non-profit organizations.

(f) Materials are made available to industry trade associations and other business organizations. Frequently, business publications obtain and publish Commission guidance, such as advisory opinion letters (discussed below), in order to make the compliance information readily available to industry members.

(g) Commission guidance can often be found in commercial publications describing the Commission and its enforcement activities. For example, the Statements of Antitrust Enforcement Policy in Health Care are published at 4 CCH Trade Regulation Reporter ¶ 13,153.

(v) Other sources of information about the Commission and its policies include staff and Commission advisory opinions, proposed Commission consent agreements, final orders, and other formal documents. These are available in the Commission's Public Reference Room or by mail from Public Reference. Many are available from the Commission's Internet website as well.

(vi) Commissioners and Commission staff members frequently give speeches to business groups, and conduct programs geared to explaining statutory and regulatory requirements and to

<sup>1</sup> Currently, more than 50 such publications are available.

answering attendees' questions. Where the topics are of particular interest to small business, these speeches may involve appearances before groups representing small-business interests. Small business groups may request speakers by contacting directly the office at the Commission that specializes in the subject matter of interest. Business groups may also request speakers by contacting the Commission's Bureau of Competition, (202) 326-3300, or Bureau of Consumer Protection, (202) 326-3238. Copies of major speeches are available from the Office of Public Affairs, (202) 326-2180, and also on the Internet at the Commission's website.

(2) *Individual Advice*

(i) Small entities may also ask specific questions of the Commission or its staff. Each substantive area under the Commission's laws and regulations has one or more staff members who are responsible for responding to compliance inquiries. A staff member may determine that the agency's published material provides the assistance sought and send that material to the inquirer. Where the sources of general information are insufficient to provide the needed guidance or assistance, the staff member may provide specific, informal advice or arrange for a more formal response.

(ii) Small entities may make inquiries of the Commission by telephone, letter, fax, or e-mail. Inquiry by telephone rather than in writing is encouraged, since it is the agency's experience that the give-and-take of a conversation facilitates understanding an issue. If it appears that more detailed or complex information is needed to address an issue, the FTC staff may then ask the caller to provide a supplementary letter.

(a) Telephone inquiries regarding competition issues may be made to the general inquiries number of the Bureau of Competition, at (202) 326-3300; and calls regarding consumer protection issues may be made to the Bureau of Consumer Protection, at (202) 326-3238. From these contact points, calls will be forwarded to the staff member best able to address the particular issues presented.

(b) Written questions or comments regarding competition matters may be mailed to the Office of Policy and Evaluation, Bureau of Competition, Federal Trade Commission, Washington, DC 20580. Inquiries may be sent by fax to (202) 326-2884.

(c) Written questions or comments regarding consumer protection matters may be mailed to the Bureau of Consumer Protection, Federal Trade

Commission, Washington, D.C. 20580. Inquiries may be sent by fax to (202) 326-3799.

(d) Persons who are uncertain which of these offices to contact may write or call the Office of the Secretary, Federal Trade Commission, Washington, D.C. 20580, (202) 326-2515. Inquiries may be sent by fax to (202) 326-2496.

(e) Inquiries can also be sent by e-mail to the address of "webmaster@ftc.gov," where they will be reviewed and forwarded to the appropriate staff person. E-mail requests for advice should include the inquiring party's telephone number, again because it is the agency's experience that a telephone conversation is often needed to resolve an issue.

(f) In addition to the above sources of information, the Commission's ten regional offices, which are listed below, also may be contacted for information and materials regarding consumer protection or competition issues:

Atlanta Regional Office, Suite 5M35, Midrise Building, 60 Forsyth St., S.W., Atlanta, GA 30303, (404) 656-1390 FAX: (404) 656-1379

Boston Regional Office, 101 Merrimac St., Suite 810, Boston, MA 02114-4719, (617) 424-5960 FAX: (617) 424-5998

Chicago Regional Office, 55 E. Monroe St., Suite 1860, Chicago, IL 60603, (312) 353-8156 FAX: (312) 353-4438

Cleveland Regional Office, 668 Euclid Ave., Suite 520-A, Cleveland, OH 44114, (216) 522-4210 FAX: (216) 522-7239

Dallas Regional Office, 1999 Bryan St., Suite 2150, Dallas, TX 75201, (214) 979-9350 FAX: (214) 953-3079

Denver Regional Office, 1961 Stout St., Suite 1523, Denver, CO 80294-0101, (303) 844-2272 FAX: (303) 844-3599

Los Angeles Regional Office, 11000 Wilshire Blvd., Suite 13209, Los Angeles, CA 90024, (310) 235-4040 FAX: (310) 235-7976

New York Regional Office, 150 William St., 13th Floor, New York, NY 10038, (212) 264-8290 FAX: (212) 264-0459

San Francisco Regional Office, 901 Market St., Suite 570, San Francisco, CA 94103, (415) 356-5284 FAX: (415) 356-5284

Seattle Regional Office, 915 Second Ave., Suite 2896, Seattle, WA 98174, (206) 220-6366 FAX: (206) 220-6366

(iii) The FTC's Bureau of Competition has a special program to provide advice to firms that must give premerger notification pursuant to the terms of the Hart-Scott-Rodino Act. While premerger notification is generally required only for larger transactions valued at more than \$15 million, some parties to such

transactions may still come within the definition of "small businesses." Any firm required to give notification (or that thinks it might be required to give notification) may receive guidance on the proper procedures from the Premerger Notification Office, in writing or by telephone, at (202) 326-3100. Interested firms may also obtain from the Premerger Notification Office a set of written guides describing the program and explaining how to determine whether a particular firm must file.

(iv) The Commission also has a special procedure to provide advice to small entities and other persons who are subject to an order of the Commission. The Compliance Division of the Bureau of Competition and the Enforcement Division of the Bureau of Consumer Protection are responsible for overseeing enforcement of and compliance with the competition and consumer protection administrative orders of the Commission. The Commission's general practice is to send a letter to each person subject to an order shortly after the order becomes effective. In addition to describing the requirements of the order in general terms, the letter also identifies and provides the telephone number for a specific staff person who has responsibilities for the matter. Staff of the Compliance and Enforcement Divisions are available to handle telephone and written inquiries concerning outstanding orders. For any small entity uncertain of which staff person is responsible for its order, questions concerning the requirements or scope of a competition order may be sent to: Compliance Division, Bureau of Competition, Federal Trade Commission, Washington, D.C. 20580, and questions regarding a consumer protection order to: Enforcement Division, Bureau of Consumer Protection, Washington, D.C. 20580. Telephone inquiries may be made to the Bureau of Competition Compliance Division at (202) 326-2687, and to the Bureau of Consumer Protection Enforcement Division at (202) 326-2996.

(v) If the above sources of advice are insufficient for the inquirer's purpose, the Commission has procedures for providing, where appropriate, either a Commission advisory opinion or, more commonly, a staff advisory opinion.<sup>7</sup>

(a) Advisory opinions are intended to clarify the law applicable to a course of action that the inquiring firm proposes to undertake, and ordinarily are not appropriate where the requester is already engaged in that course of action.

<sup>7</sup> 16 CFR 1.1-1.4.

(b) An advisory opinion from the Commission may be appropriate where the matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or the subject matter of the request and consequent publication of Commission advice is of significant public interest. Otherwise, the staff will provide a staff advisory opinion where practicable and appropriate.

(c) An advisory opinion, whether from staff or the Commission, will ordinarily be considered inappropriate if the same or substantially the same course of action is already under investigation or is or has been the subject of current governmental proceedings; or an informed opinion cannot be made, or could be made only after extensive investigation, clinical study, testing, or collateral inquiry. Advisory opinions do not answer hypothetical questions.<sup>8</sup>

(d) The Commission may at any time reconsider the questions involved and rescind any advice it gives in a Commission advisory opinion. Nevertheless, the Commission will not proceed against the requester of the advice respecting an action taken in good faith reliance on the advice, so long as the requester presented all relevant facts fully and accurately and discontinues the action promptly upon notification that the advice has been rescinded. Advice rendered in a staff advisory opinion does not bar the Commission from rescinding it and, where appropriate, initiating an enforcement action.

(e) The advice given to a small entity may be considered in an enforcement action as evidence of the reasonableness or appropriateness of any proposed fine, penalty, or damages sought against that small entity.

(f) It is often most efficient to make a telephone inquiry to the staff person responsible for the relevant area, as described above, before deciding whether to seek a formal advisory opinion. Persons wishing to request an advisory opinion should submit a statement identifying the requester and stating the question, the relevant provision of law, and all material facts. The request and two copies should be submitted to the Office of the Secretary, Federal Trade Commission, Washington D.C. 20580. For further information, that office may be reached by telephone at (202) 326-2515.

(g) For inquiries involving most types of issues under the Health Care

Guidelines, the agency has committed itself to preparing advisory opinions within 90 days of the time that all necessary information has been submitted.<sup>9</sup> For matters on other topics, the time for reply will depend on the complexity and novelty of the issues raised.

These wide-ranging programs are provided by the Commission to assist small entities in understanding their obligations under the laws and regulations administered by the Commission.

#### **Part B—Civil Penalty Leniency Program**

Under Section 223 of SBREFA, agencies regulating the activities of small entities must establish, by March 29, 1997, a policy or program for "the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity." The statute suggests that "[u]nder appropriate circumstances, an agency may consider ability to pay in determining penalty assessments." The statute further provides that the policy or program shall contain conditions or exclusions, which may include, but shall not be limited to:

(1) Requiring the small entity to correct the violation within a reasonable correction period;

(2) Limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a State;

(3) Excluding from the program small entities that have been subject to multiple enforcement actions by the agency;

(4) Excluding violations involving willful or criminal conduct;

(5) Excluding violations that pose serious health, safety, or environmental threats; and

(6) Requiring a good-faith effort to comply with the law.

Section 223 provides that the policy or program is "[s]ubject to the requirements of other statutes," and thus does not supersede existing law on penalties. Also, because the leniency policy is prescribed only for civil penalties for violations of a statutory or regulatory requirement, it does not apply to Commission cease and desist orders, federal court injunctions, affirmative requirements for fencing-in or redress contained in Commission orders, or civil penalty actions under

Section 5(l), 15 U.S.C. 45(l), for violations of Commission orders.

None of the statutes or rules enforced by the Commission provide for the mandatory imposition of non-discretionary penalties. In most instances, as discussed below, the Commission is not authorized to assess civil penalties itself, but rather selects a civil penalty amount to be sought in a federal court action brought by the Department of Justice. In developing a policy statement that describes generally how the Commission will exercise its discretion in selecting penalty amounts for small entities, the Commission considered that it already exercises its discretion in a wide variety of contexts to consider mitigating factors when selecting penalty amounts. The Commission believes that this experience suggests a list of factors suitable for selecting the penalties appropriate to small entities.

First, Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), authorizes the Commission to seek, in federal district courts, up to \$11,000 per violation of certain Commission rules.<sup>10</sup> Such a civil penalty is assessable only if the defendant knew or should have known that its acts violated the rule. In determining the appropriate amount of a penalty, the courts are directed by Section 5(m)(1)(C), 15 U.S.C. 45(m)(1)(C), to take into account the degree of culpability; any history of prior such conduct; ability to pay; effect on ability to continue to do business; and such other matters as justice may require. The Commission also evaluates these factors to determine appropriate penalties in cases that are not litigated.

Second, one Commission rule has a separate enforcement mechanism. Under the Energy Policy and Conservation Act, 42 U.S.C. 6303(a), the Commission has authority to assess administrative civil penalties, up to \$110 per violation, for violations of its Appliance Labeling Rule, 16 CFR Part 305. The Commission's Rules of Practice provide that factors to be considered in determining the amount of penalty include the respondent's size and ability to pay; the respondent's good faith; any history of previous violations; the deterrent effect of the penalty action; the length of time involved before the Commission was made aware of the violation; the gravity of the violation, including the amount of harm to

<sup>10</sup>The Commission recently issued a rule implementing the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) by making inflation adjustments in the dollar amounts prescribed for each type of violation established by the statutory civil penalty provisions within the FTC's jurisdiction. See 61 FR 54548 (Oct. 21, 1996).

<sup>8</sup>As previously noted, Commission staff on an informal basis provide advice or guidance in response to inquiries.

<sup>9</sup>See Introduction, Statements of Antitrust Enforcement Policy in Health Care, 4 CCH Trade Reg. Rep. ¶ 13,153 at p. 20,800.

consumers and the public caused by the violation; and such other matters as justice may require.<sup>11</sup>

Third, civil penalties may also be imposed for violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a ("HSR Act"). Under the HSR Act, acquisitions above a certain size,<sup>12</sup> involving entities above certain sizes,<sup>13</sup> cannot be consummated unless certain information is filed with the Commission and with the Department of Justice and certain waiting periods are observed. By statute, civil penalties of up to \$11,000 for each day a person is in violation of the HSR Act may be imposed in a federal court action brought by DOJ. The Commission is charged with administering the premerger notification program established by the HSR Act, and recommends actions and penalty amounts to DOJ. The Commission generally will consider the firm's ability to pay when recommending appropriate penalties. The Commission generally will not seek an enforcement action for a violation of the HSR Act that appears to be truly inadvertent and where the filing is made promptly after discovery of the oversight. If the violation is the firm's first, and is not the result of gross negligence or a reckless disregard for the filing obligation, the Commission staff generally sends a letter calling attention to the filing obligation but indicating that no further action will be taken if the filing requirement is promptly met.

Fourth, judicial opinions interpreting Section 5(l) of the FTC Act, which provides for civil penalties of up to \$11,000 per violation of FTC administrative orders, are instructive.<sup>14</sup> The statute does not set forth criteria for assessing specific penalties for Section 5(l) violations, but the Third Circuit Court of Appeals in *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982), set out five factors bearing on the

selection of an appropriate civil penalty or remedy: the good or bad faith of the respondent; the injury to the public; the respondent's ability to pay; the desire to eliminate the benefits derived from the violations; and the necessity of vindicating the Commission's authority. In each penalty case, the Commission selects an appropriate penalty amount after weighing the above factors, along with the litigation risks and penalties imposed in similar cases.

Finally, the Commission has undertaken an innovative approach to achieve compliance with one of its rules. In early 1996, the Commission approved a new program to increase compliance with its Funeral Industry Practices Rule, 16 CFR Part 453, which, among other things, requires funeral homes to give consumers a list of prices for various goods and services offered. The Funeral Rule Offenders Program, implemented jointly by the Commission and the National Funeral Directors Association ("NFDA"), offers to certain businesses that appear to have violated the Rule an alternative to a federal court enforcement action. Funeral firms entering the alternative program make a voluntary payment to the U.S. Treasury in an amount lower than would be sought in a civil penalty action. The NFDA then will review the firm's practices, revise those practices to comply with the Rule, and conduct on-site training and testing for all licensed employees. The NFDA also will provide follow-up training, and conduct testing each year for five years.

In light of the Commission's experience exercising its discretion to consider mitigating factors when selecting appropriate penalty amounts, the innovative approach taken to achieve compliance with one rule, and the factors suggested in SBREFA itself, the Commission adopts the following policy for reducing, or in appropriate circumstances waiving, civil penalties for violations of a statutory or regulatory requirement by a small entity.

When the Commission identifies a small entity as not being in compliance with a statutory or regulatory requirement within the Commission's jurisdiction, the Commission will consider the propriety of penalty waiver or reduction. The following factors will weigh in favor of leniency:

1. The small entity reported the violation to the Commission promptly after discovering it.
2. The small entity corrected the violation within a reasonable time, if feasible.
3. The small entity had a low degree of culpability. The degree of culpability reflects the efforts taken by the entity to

determine and meet its legal obligations. These efforts are judged in light of such factors as the size of the business; the sophistication and experience of its owners, officers, and managers; the length of time it has been in operation; the availability of relevant compliance information; the clarity of its legal obligations; and any active attempts to clarify any uncertainties regarding its obligations.

4. The small entity is financially unable to pay the usual penalty, or the usual penalty would impair the small entity's ability to do business or to compete effectively.

5. The small entity has not been subject to any previous enforcement action by the Commission or other federal, state, or local law enforcement jurisdiction for the same or similar conduct for which the small entity is being considered for leniency. Where there have been prior enforcement actions, however, the Commission may take into consideration, as possible mitigating factors, when the previous enforcement action occurred, and whether the small entity's management has changed since the previous enforcement action.

6. The small entity's violations did not involve willful or criminal conduct.

7. The violations did not pose a serious health, safety, environmental, or economic threat to consumers or the public.

Each factor need not necessarily be present for a small entity to qualify for leniency, and, depending upon the particular circumstances, some factors may be weighed more heavily than others. Also, any other factors relevant in particular circumstances will be considered, as appropriate.

The above criteria include most of the factors suggested in SBREFA. The one suggested factor that the Commission is not including is one that would limit the penalty reduction policy or program to violations discovered by the small entity through participation in an agency-run or state-run compliance assistance or audit program. The Commission does not have formal compliance assistance or audit programs. Given the variety and scope of the rules and statutes that the Commission enforces, imposing some parallel requirement, such as a self-auditing program, would unnecessarily restrict the availability of penalty waiver or reduction.

In addition, the Commission has expanded somewhat the scope of two of the factors suggested in SBREFA. First, SBREFA suggests excluding entities that have been subject to multiple enforcement actions by the agency. The

<sup>10</sup>The criteria for assessing penalties for violations of the Appliance Labeling Rule are set forth in Subpart K of Part 1 of the Commission's Rules of Practice, 16 CFR 1.92-1.97.

<sup>12</sup>Generally, at least \$15 million.

<sup>13</sup>Generally, one of the entities must have sales or assets above \$100 million and the other must have sales or assets above \$10 million. Because of the "size of person" and "size of transaction" thresholds, many small businesses are not subject to the premerger notification reporting requirements of the HSR Act.

<sup>14</sup>The Commission's order enforcement cases are not included in the SBREFA civil penalty leniency program because, as noted above, SBREFA only refers to entities accused of violating statutes and rules, not orders. Moreover, Section 5(l) defendants are, by definition, allegedly repeat offenders, and therefore are unlikely to be good candidates for leniency. (As in all cases, however, the agency would consider individual facts that may affect the penalty to be sought in each particular case.)

Commission has broadened this category to include entities that have been subject to actions for the same or similar conduct by other federal agencies or state or local agencies. The law violations prosecuted by the Commission are frequently very similar to violations prosecuted by other federal, state, and local law enforcement agencies.<sup>15</sup> It is therefore appropriate, in considering whether to exclude entities from lenient treatment, to consider whether similar conduct has been subject to enforcement efforts by such agencies.

Second, SBREFA also suggests excluding violations that pose serious health, safety, or environmental threats. The Commission will, in addition to such risks, also consider serious economic injury, as that form of injury is the type most often encountered in Commission cases, and in many instances may cause as much serious injury as that arising from health, safety, or environmental threats.

#### Part C—Request for Comments

Members of the public are invited to comment on any issues or concerns that they believe are relevant or appropriate to the policies described above. The Commission requests that factual data upon which the comments are based be submitted with the comments. In this section, the Commission identifies specific issues on which it solicits public comments. The identification of issues is designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

#### Questions

(1) Should the Commission revise in any way the policies that it has adopted to assist small businesses and other small entities? If so, please provide specific suggestions.

(2) How would the revisions affect the benefits provided by the current policies?

(3) Are any of the criteria or means of guidance that the Commission has used in establishing small business compliance assistance and civil penalty leniency policies for small businesses and other small entities inappropriate? If so, please explain.

(4) Are there any other criteria or economical means of guidance that the

Commission should use? If so, please elaborate.

**Authority:** Secs. 213 and 223, Pub. L. 104-121, 110 Stat. 847.

By direction of the Commission.

**Donald S. Clark,**

Secretary.

[FR Doc. 97-8941 Filed 4-7-97; 8:45 am]

BILLING CODE 6750-01-P

#### FEDERAL TRADE COMMISSION

[File No. 971-0049]

#### Autodesk, Inc.; Softdesk, Inc.; Analysis to Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, Autodesk—a San Rafael, California-based developer and marketer of computer-aided design (CAD) software which intends to acquire Softdesk, Inc.—from reacquiring the “IntelliCADD” CAD engine that Softdesk recently sold to Boomerang Technology, Inc. The complaint accompanying the consent agreement alleged that Autodesk’s \$90 million acquisition of Softdesk, as originally proposed, would have substantially lessened competition in the development and sale of CAD software engines.

**DATES:** Comments must be received on or before June 9, 1997.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pennsylvania Ave., NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Howard Morse, Federal Trade Commission, S-3627, 6th St. and Pennsylvania Ave., NW., Washington, DC 20580. (202) 326-2949.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, and § 2.34 of the Commission’s rules of practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent

agreement, and the allegations in the accompanying complaint. An electronic copy of the full text of the consent agreement package can be obtained from the Commission Actions section of the FTC Home Page (for March 31, 1997), on the World Wide Web, at “http://www.ftc.gov/os/actions/htm.” A paper copy can be obtained from the FTC Public Reference Room, Room H-130, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission’s rules of practice (16 CFR 4.9(b)(6)(ii)).

#### Analysis to Aid Public Comment on the Provisionally Accepted Consent Order

The Federal Trade Commission (“the Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Agreement”) from Autodesk, Inc. (“Autodesk”) and Softdesk, Inc. (“Softdesk”).

The proposed Order has been placed on the public record for sixty (60) days for reception of comments from interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement’s proposed Order.

The Commission’s investigation of this matter concerns a proposed acquisition by Autodesk of Softdesk. In December 1996, Autodesk and Softdesk entered into an Agreement and Plan of Reorganization whereby Autodesk will acquire 100% of the voting securities of Softdesk in exchange for share of Autodesk common stock with a value of \$90 million (the “Acquisition”).

The Agreement Containing Consent Order would, if finally accepted by the Commission, settle charges that the Autodesk acquisition of Softdesk as originally proposed may have substantially lessened competition in the development and sale of computer aided design (“CAD”) engines for Windows-based personal computers in the United States or in North America. The Commission has reason to believe that Autodesk’s original proposal to acquire Softdesk violates Section 5 of the Federal Trade Commission Act and that the acquisition, if consummated, would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, unless an

<sup>15</sup> In addition, the Commission often works with the State Attorneys General and other federal agencies, such as the United States Post Office, to investigate conduct that may violate laws enforced by the Commission. In cases where we work with certain agencies, the Commission must often enter conduct Orders to ensure that the violative behavior is prohibited nationwide.